

**DIGITIZATION AND DEMOCRACY:  
THE CONFLICT BETWEEN THE AMAZON KINDLE  
LICENSE AGREEMENT  
AND THE ROLE OF LIBRARIES IN A FREE SOCIETY**

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I. INTRODUCTION

The mission of libraries is to ensure access . . . . The nature of copyright is to restrict access. There's a real tension there.<sup>1</sup>

[T]he [Copyright] Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works."<sup>2</sup>

E-books have become one of the hot topics of consumer technology over the past couple of years.<sup>3</sup> While Amazon and Sony are the leading sellers of e-readers and e-books,<sup>4</sup> several other companies

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1. LEE ANN TORRANS, LAW AND LIBRARIES: THE PUBLIC LIBRARY 61 (2004).
2. *Stewart v. Abend*, 495 U.S. 207, 228 (1990); *see also* Elizabeth I. Winston, *Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property*, 14 GEO. MASON L. REV. 93, 94-95 (2006) (“[A] balance must be struck between protecting intellectual property owners’ right to contract and protecting the public’s interest in the promotion of the progress of science and the useful arts.”).
3. *See infra* Part II.
4. Sara Dunn, *What is an E-Reader?*, EZINE ARTICLES, <http://ezinearticles.com/?What-is-an-E-Reader?&id=1230198> (last visited Nov. 16, 2010). E-reader refers to the physical device on which e-books are stored and read. E-book refers to the content stored and read on an e-reader. E-readers consist of both hardware and software. *See id.* With dedicated e-readers, this distinction may not seem of much importance, but as other devices become increasingly used as e-readers, this distinction’s importance becomes clearer. For example, the author uses his iPhone as an e-reader. One of author’s daughters owns an iPod Touch, which she uses for that purpose, and another daughter has an iPad, which can also be used as an e-reader. In addition to Apple’s iBooks software, which came pre-installed on each of those devices, they have installed other e-reading software apps, including Nook, Kobo, Stanza, and Kindle. Thus, even should Apple’s “i” devices become the dominant e-reader hardware devices, Kindle could still have significant market share in e-reader software and e-book sales. Already, the author has purchased e-books from Amazon that are

have entered the market.<sup>5</sup> The number of e-book titles available has shot up from a few tens of thousands just a few years ago to more than two million,<sup>6</sup> and sales have exploded from less than \$8 million a year to well more than \$160 million a year in less than a decade.<sup>7</sup> Not surprising, librarians have seen e-books as yet another means of meeting the information needs of their patrons.<sup>8</sup> Their doing so, however, raises a number of legal issues. For example, unlike printed books, the contents of e-books are commonly transferred by the vendor to the purchaser without a physical container.<sup>9</sup> This raises the issue of whether libraries may copy the content to different e-readers that it owns without violating the copyright owners' exclusive right of reproduction.<sup>10</sup> Another issue, which is the topic of this article, is whether libraries may lend e-books to patrons without violating the copyright owners' exclusive right of distribution.<sup>11</sup> With printed books, the first sale doctrine, as codified in 17 U.S.C. § 109, provides a clear answer.<sup>12</sup> Owners of copies may sell, lend, rent, or otherwise

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available as e-books only in Kindle versions through Amazon; thus, they are available as an e-book subject to Amazon's license agreement. *See Kindle Wireless Reading Device, Wi-Fi, 6" Display, Graphite - Latest Generation*, AMAZON.COM, <http://amazon.com> (follow "The All New Kindle" hyperlink) (last visited Nov. 7, 2010) (promoting the article *Buy Once, Read Everywhere*: "Our Whispersync technology synchronizes your Kindle library and last page read across your devices, so you can read a few pages on your phone or computer and pick up right where you left off when you return to your Kindle," and shows its Kindle e-reader software being used on a personal computer, on Android, Blackberry and iPhone smartphones, on an iPad, and on a Mac computer). Barnes & Noble also has an app for its Nook e-reader available for the iPhone, iPad, Android, Blackberry, PC, and Mac. Harry McCracken, *Barnes & Noble Doubles Down on the Nook*, PCWORLD (July 31, 2010, 1:34 PM), [http://www.pcworld.com/article/202306/barnes\\_and\\_noble\\_doubles\\_down\\_on\\_the\\_nook.html](http://www.pcworld.com/article/202306/barnes_and_noble_doubles_down_on_the_nook.html).

5. *See infra* notes 56–58 and accompanying text.

6. *See infra* notes 60–63 and accompanying text.

7. *See infra* notes 64–67 and accompanying text.

8. *See infra* notes 71–85 and accompanying text.

9. For example, the e-books that Amazon offers are commonly transferred wirelessly to a Kindle. *See Kindle: Wireless Reading Device*, AMAZON.COM, [http://www.amazon.com/gp/product/B0015T963C/ref=sv\\_kinh\\_0](http://www.amazon.com/gp/product/B0015T963C/ref=sv_kinh_0) (last visited Nov. 16, 2010).

The Sony e-books are commonly downloaded to a computer and then transferred to the Reader or by wireless. *See How it Works*, READER STORE, <http://ebookstore.sony.com/howitworks/> (last visited Nov. 16, 2010); *Reader Daily Edition*, SONY, <http://www.sonystyle.com/webapp/wcs/stores/servlet/ProductDisplay?catalogId=10551&storeId=10151&langId=-1&productId=8198552921666064650> (last visited Nov. 16, 2010). In both cases, the content is transferred free of a physical medium.

10. *See* 17 U.S.C. § 106 (2006).

11. *See id.*

12. *See infra* notes 117–36 and accompanying text.

distribute the copy they own to third parties without regard to the exclusive right of distribution.<sup>13</sup> Many undoubtedly assume that the first sale doctrine applies to redistribution of e-books just as it does to printed books.<sup>14</sup> Indeed, that is the case if the transferee of an e-book owns the book.<sup>15</sup> But Section 109 explicitly applies only to owners of copies.<sup>16</sup> Amazon, in the license agreement to which a purchaser of a Kindle e-book must assent prior to downloading the e-book, retains ownership of the “Digital Content” (i.e., the e-book)<sup>17</sup> and imposes a number of restrictions that are inconsistent with transfer of ownership to the purchaser, including prohibiting redistribution.<sup>18</sup> If libraries are not owners of the Kindle e-books they acquire, then by the explicit terms of the Amazon license agreement,<sup>19</sup> as well as Section 106 of the Copyright Act,<sup>20</sup> they may not lend the e-books to their patrons.

Libraries play a vital role in our democracy, enabling all citizens, no matter their economic means, to have access to the information that they need in order to fully participate in society and to effectively exercise their rights and responsibilities as citizens.<sup>21</sup> Libraries were established in the United States soon after the colonization of British

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13. 17 U.S.C. § 109(a) (2006).

14. See Michael Seringhaus, *E-Book Transactions: Amazon “Kindles” the Copy Ownership Debate*, 12 YALE J.L. & TECH. 147, 193–94 (2009).

15. See *infra* notes 109–10 and accompanying text.

16. 17 U.S.C. § 109(a).

17. Upon your payment of the applicable fees set by Amazon, Amazon grants you the non-exclusive right to keep a permanent copy of the applicable Digital Content and to view, use, and display such Digital Content an unlimited number of times, solely on the Device or as authorized by Amazon as part of the Service and solely for your personal, non-commercial use. Digital Content will be deemed licensed to you by Amazon under this Agreement unless otherwise expressly provided by Amazon.

*Amazon Kindle: License Agreement and Terms of Use*, AMAZON.COM, ¶ 3, <http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=200144530> (last updated Feb. 9, 2009). Digital Content is defined as “digitized electronic content, such as books, subscriptions to magazines, newspapers, journals and other periodicals, blogs, RSS feeds, and other digital content, as determined by Amazon from time to time.” *Id.*

18. See *infra* notes 171–86 and accompanying text.

19. “Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any rights to the Digital Content or any portion of it to any third party . . . .” *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 3.

20. 17 U.S.C. § 106 (2006).

21. See *infra* Part V.

North America,<sup>22</sup> and public libraries have existed since before the Civil War.<sup>23</sup> To date, there has never been any serious legal impediment to libraries lending books to their patrons;<sup>24</sup> however, restrictions that prohibit librarians from lending e-books raise serious public policy concerns.<sup>25</sup>

In light of the Amazon Kindle license agreement and the public policies that favor libraries' and archives' legal right to lend books, whether printed or digital, this article will address two questions: (1) Are the license terms prohibiting the lending of e-books (and other digital content) enforceable under existing law? (2) If so, should the Copyright Act be amended to provide libraries with an inalienable right to lend e-books that is equivalent to their current right to lend printed books?<sup>27</sup>

## II. THE CONTEXT

Two years ago, none of us expected what has happened so far. [Kindle] is [our] No. 1 bestselling product. It's the No. 1 most-wished-for product as measured by people putting it on their wish list. It's the No. 1 most-gifted item on Amazon. And I'm not just talking in electronics—that's true across all product categories . . . . The business is growing very quickly. This is not just a business for us. There is missionary zeal. We feel like Kindle is bigger than we are.<sup>28</sup>

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22. See *infra* notes 218–19 and accompanying text.

23. See *infra* note 226–27 and accompanying text.

24. See *infra* notes 123–26 and accompanying text.

25. See *infra* notes 228–68 and accompanying text.

26. While the article refers mostly to libraries, the same concerns and the policy arguments apply to archives. Copyright law generally extends the same exceptions to both. See, e.g., 17 U.S.C. § 108 (2006).

27. This article will only consider in passing the larger issue of whether private individuals and institutions other than libraries and archives should have the rights granted to owners of copies of works protected by copyright in 17 U.S.C. § 109. The focus of this article is limited to copies acquired by libraries and archives. Another question, which the article will only consider in passing, is whether license agreements could also be used for the transfer of possession of physical books. If not, the question arises why such agreements should be valid as to e-books but not printed books.

28. Daniel Lyons, *Jeff Bezos: Since Founding Amazon in 1994, He Has Revolutionized Retailing. Now He's Out to Transform How We Read*, NEWSWEEK, Dec. 28, 2009/Jan. 4, 2010, at 85, 85.

The Kindle has been purchased already by 6% of the internet<sup>29</sup> users polled with another 14% poised to buy in the next quarter.<sup>30</sup> “These devices have the potential to be incredibly disruptive to the way consumers currently access digital content.”<sup>31</sup> As an academic law-library director, part of my job is to keep up-to-date on new titles that might be of interest and use to our library’s patrons. Recently, for example, I reviewed information on a newly published book that pertains to my own area of research, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP*, co-authored by Cornell Law School Professor Eduardo Moises Penalver and Fordham Law School Professor Sonia K. Katyal.<sup>32</sup> As is becoming more common, there are two choices for the format in which the law library may order this new work: we can order a traditional print copy of the book or we can order a digital copy or e-book, specifically a copy formatted for Amazon’s Kindle e-reader.<sup>33</sup> Both options have their advantages and disadvantages. One advantage of the digital version is the price. Amazon advertises the print version (in paperback) for \$40.50, while offering the Kindle version for \$32.40.<sup>34</sup> Were price the only factor, the Kindle version would be the obvious choice. Of course, price is not the only factor.<sup>35</sup> Patron preference is a factor; so are the logistics involved in

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29. The capitalization of the word “internet” is an on going debate; however, the author is of the opinion that the internet has reached a level of maturity that warrants the abandonment of the capitalization of the internet.
30. Steve Smith, *comScore: iPad and E-Readers Poised to Be ‘Incredibly Disruptive’ Tech*, MINONLINE (Mar. 23, 2010), <http://www.minonline.com/news/13808.html>.
31. *Id.* (quoting Serge Matta, evp, comScore, Inc.).
32. *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership [Kindle Edition]*, AMAZON.COM, <http://www.amazon.com/Property-Outlaws-Squatters-Protesters-Ownership/dp/0300122950> (follow “Formats: Kindle Edition” hyperlink) (last visited Oct. 16, 2010) (advertising for sale EDUARDO MOISES PENALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (Kindle ed. 2010)).
33. *See, e.g., id.*
34. *Id.*
35. In addition to the cost of the paperback book, many libraries would incur an additional cost in having the book bound for preservation purposes. One would also have to factor in other costs, such as shipping and handling, processing upon receipt (including cataloging and affixing a call number and any security tagging), and the cost of the space used to shelve the physical book. Of course, there are also costs in cataloging and making accessible e-books. Determining which is more economical for a library, a physical copy of a book or a digital copy of an e-book, involves a great deal more than simply comparing the selling price. *See* Carol Hansen Montgomery & Donald W. King, *Comparing Library and User Related Costs of Print and Electronic*

making the two versions available to patrons. Our library has well over a century's experience making printed books available to patrons. We are neophytes at making e-books available.<sup>36</sup> And then there is the question of what methods of making the book available to our patrons are legally permissible. This article addresses that question.

E-readers and e-books have been available for several years. Probably the best date to use for the birth of e-books is 1971, when Michael Hart started Project Gutenberg.<sup>37</sup>

[G]iven an operator's account with \$100,000,000 of computer time in it by the operators of the Xerox Sigma V mainframe at the Materials Research Lab at the University of Illinois . . . . Michael decided there was nothing he could do, in the way of "normal computing," that would repay the huge value of the computer time he had been given . . . so he had to create \$100,000,000 worth of value in some other manner. An hour and [forty-seven] minutes later, he announced that the greatest value created by computers would not be computing, but would be the storage, retrieval, and searching of what was stored in our libraries.<sup>38</sup>

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*Journal Collections: A First Step Towards a Comprehensive Analysis*, D-LIB MAG. (Oct. 2002), <http://www.dlib.org/dlib/october02/montgomery/10montgomery.html>.

36. There are services available to help libraries handle the logistics of making e-books and other digital content available to library patrons. See, e.g., OVERDRIVE, <http://www.overdrive.com> (last visited Nov. 16, 2010).
37. *Gutenberg: About*, PROJECT GUTENBERG, <http://www.gutenberg.org/wiki/Gutenberg:About> (last modified Nov. 3, 2008); see also *Gutenberg: The History and Philosophy of Project Gutenberg by Michael Hart*, PROJECT GUTENBERG (Aug. 1992), [http://www.gutenberg.org/wiki/Gutenberg:The\\_History\\_and\\_Philosophy\\_of\\_Project\\_Gutenberg\\_by\\_Michael\\_Hart](http://www.gutenberg.org/wiki/Gutenberg:The_History_and_Philosophy_of_Project_Gutenberg_by_Michael_Hart) [hereinafter *Gutenberg: The History*]. Similar projects came about later, such as the Perseus Digital Library, which was created in 1985 with the original goal of "creat[ing] a critical mass of information—textual, archaeological, and artistic—about the ancient Greek world" and was later expanded to "creating a digital library for the humanities as a whole." *Research Background*, PERSEUS DIGITAL LIBR., <http://www.perseus.tufts.edu/hopper/research/background> (last visited Nov. 16, 2010). Another such project is the Christian Classics Ethereal Library, which is "build[ing] up the church by making classic Christian writings available and promoting their use." CHRISTIAN CLASSICS ETHEREAL LIBR., <http://www.ccel.org/> (last visited Nov. 16, 2010). For a history of the Christian Classics Ethereal Library, see *The CCEL Story*, CHRISTIAN CLASSICS ETHEREAL LIBR., <http://www.ccel.org/info/ccel-story.html> (last updated Sept. 23, 2003).
38. *Gutenberg: The History*, *supra* note 37.

Acting on this vision, Hart keyed in the “Declaration of Independence,”<sup>39</sup> making America’s founding document the first e-book, at least as some writers now define that term.<sup>40</sup> “The mission of Project Gutenberg is simple: To encourage the creation and distribution of eBooks.”<sup>41</sup> As of March 2010, more than 30,000 e-books were available for use on e-readers through Project Gutenberg.<sup>42</sup>

E-readers (as contrasted with computers and monitors used for reading e-books) first emerged in the 1990s, with Apple’s Newton Message Pad perhaps claiming the honors of being the first e-reader.<sup>43</sup> The Newton, however, was not a dedicated e-reader.<sup>44</sup> The two earliest dedicated e-readers appeared in the late 1990s: the Cybook and the Franklin eBookMan.<sup>45</sup> Despite their promise, however, it was not until the last half of the first decade of the 21st century that e-readers began to develop a mass appeal.<sup>46</sup> While the e-book has been in existence for nearly forty years and e-readers have been available for well over a decade, it has only been in the last few years that e-readers and e-books have become popular.<sup>47</sup> Sales of e-readers and e-books skyrocketed with the introduction of the Kindle 2

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39. *See id.*

40. *See id.*; *see also infra* note 169 and accompanying text (characterizing an e-book, i.e., “Digital Content,” in *Amazon Kindle, License Agreement and Terms of Use* to include a variety of written works).

41. *Gutenberg: Project Gutenberg Mission Statement by Michael Hart*, PROJECT GUTENBERG, [http://www.gutenberg.org/wiki/Gutenberg:Project\\_Gutenberg\\_Mission\\_Statement\\_by\\_Michael\\_Hart](http://www.gutenberg.org/wiki/Gutenberg:Project_Gutenberg_Mission_Statement_by_Michael_Hart) (last modified Dec. 26, 2007).

42. *Project Gutenberg: Main Page*, PROJECT GUTENBERG, [http://www.gutenberg.org/wiki/Main\\_Page](http://www.gutenberg.org/wiki/Main_Page) (last visited Nov. 16, 2010).

43. *See* Tom Hormby, *The Story Behind Apple's Newton*, TOM HORMBY'S ORCHARD, <http://lowendmac.com/orchard/06/john-sculley-newton-origin.html> (last updated Feb. 7, 2006); *see also* Dana Wollman, *eReaders: Are They Redefining the Future of Reading?*, LAPTOP (Mar. 24, 2010), <http://blog.laptopmag.com/ereaders-are-they-redefining-the-future-of-reading>. Another possible claimant to the honor of being the first e-reader is Sony’s Data Discman, which was introduced in September 1991. *See* Jennifer Lawinski, *Two Decades of E-reader Evolution*, CNNMONEY.COM (Oct. 26, 2010), [http://money.cnn.com/galleries/2010/technology/1010/gallery.ereader\\_history/index.html](http://money.cnn.com/galleries/2010/technology/1010/gallery.ereader_history/index.html).

44. *See* Hormby, *supra* note 43.

45. *See Comparison of e-Book Readers*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_e-book\\_readers](http://en.wikipedia.org/wiki/List_of_e-book_readers) (last modified Aug. 23, 2010).

46. *See infra* notes 47–67 and accompanying text.

47. *See* Karen Holt, *E-book Sales Statistics from BISG Survey*, PUB. PERSP. (May 27, 2010), <http://publishingperspectives.com/?p=16286> (describing the recent spike in e-book popularity based on a survey conducted by the Book Industry Study Group).

and Kindle DX e-readers by Amazon.<sup>48</sup> In April 2009, an analyst projected Kindle sales of \$1 billion by 2010.<sup>49</sup> For the fourth quarter of 2009, Amazon surprised analysts, announcing a 71% increase in profits.<sup>50</sup> Yet, it remained tight lipped on exactly how many Kindle e-readers it sold.<sup>51</sup> While analysts estimated that Amazon sold as many as 2 million of the devices in 2009,<sup>52</sup> Amazon.com founder and CEO Jeff Bezos would only disclose that “[m]illions of people now own Kindles.”<sup>53</sup> While Amazon may have gained the most attention, it is not alone in selling e-readers. Sony has also introduced a highly successful e-reader.<sup>54</sup> In 2008, Sony disclosed that it had sold 300,000 units of its Reader Digital Book between the e-reader’s introduction in October 2006 and May 2008.<sup>55</sup> While a few other e-readers were already in the market place at the beginning of 2009, the sudden consumer interest spurred many others to enter into this market throughout 2009 and continuing into 2010.<sup>56</sup> In addition to

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48. See Lyons, *supra* note 28, at 85.

49. Amy Martinez, *Amazon Says Kindle Sales Top its ‘Most Optimistic’ Projections*, SEATTLE TIMES (Apr. 17, 2010), [http://seattletimes.nwsources.com/html/business/technology/2009076969\\_webamazon18.html](http://seattletimes.nwsources.com/html/business/technology/2009076969_webamazon18.html).

50. *Amazon.com Announces Fourth Quarter Sales up 42% to \$9.5 Billion*, DBUSINESSNEWS (Jan. 28, 2010), <http://seattle.dbusinessnews.com/viewnews.php?article=bwire/20100128006703r1.xml>.

51. Dan Gallagher, *Amazon Earnings Surge in Fourth Quarter on Holiday Sales: First-Quarter Forecast Comes in Ahead of Estimates; \$2 Billion Buyback*, MARKETWATCH (Jan. 28, 2010), <http://www.marketwatch.com/story/amazon-earnings-surge-in-fourth-quarter-2010-01-28>.

52. *Id.*

53. *Amazon.com Announces Fourth Quarter Sales up 42% to \$9.5 Billion*, *supra* note 49.

54. See Aharon Etengoff, *Report: Apple iPad Could Threaten e-Reader Market*, TG DAILY (Mar. 5, 2010), <http://www.tgdaily.com/mobility-features/48731-report-apple-ipad-could-threaten-e-reader-market> (“[T]he Amazon Kindle . . . towers over its closest rival, the Sony Reader”).

55. Katie Coyne, *Sony Divulges Reader Sales*, THEBOOKSELLER.COM (May 12, 2008), <http://www.thebookseller.com/news/72179-sony-divulges-reader-sales.html>.

56. In February 2009, Hearst Company, struggling to make money selling printed newspapers and magazines, announced that it would introduce an e-reader for such content later that year. Michael V. Copeland, *Hearst to Launch a Wireless e-Reader*, CNNMONEY.COM (Feb. 27, 2009), [http://money.cnn.com/2009/02/27/technology/copeland\\_hearst.fortune/index.htm](http://money.cnn.com/2009/02/27/technology/copeland_hearst.fortune/index.htm). Plastic Logic promised a similar product, with an 8.5 x 11 inch screen, to begin shipping in early 2010. Peter Ha, *AT&T to Power Plastic Logic’s e-Book Reader*, CRUNCHGEAR (July 22, 2009), <http://www.crunchgear.com/2009/07/22/att-to-power-plastic-logics-ebook-reader/>; see also PLASTIC LOGIC, <http://www.plasticlogic.com/> (last visited Oct. 16, 2010). However, Plastic Logic has since announced that its product will not be available until the summer of 2010. Brad Stone, *Plastic Logic Delays Its Que Tablet*, N.Y. TIMES (Mar. 12, 2010, 12:55 PM), <http://bits.blogs.nytimes.com/2010/03/12/plastic-logic-delays-its-que-tablet/>. These are just two of a plethora of products already available



dedicated e-readers, Apple's iPad, among many other tasks, can be used to read e-books.<sup>57</sup> As 2009 progressed, it became more and more difficult to keep up with all the new e-readers that were announced. Indeed, by January 2010, commentators were beginning to question whether the market was oversaturated.<sup>58</sup> Despite this

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or which have been announced, including: Barnes & Noble's Nook, *Nook*, BARNES & NOBLE, <http://www.barnesandnoble.com/nook/> (last visited Nov. 16, 2010); Borders' *Elonex*, ELONEX, <http://www.elonex.com> (last visited Nov. 7, 2010); Adam Hartley, *Elonex and Borders Launch New eBook*, TECHRADER.COM (July 2, 2009), <http://www.techradar.com/news/portable-devices/portable-media/elonex-and-border-launch-new-ebook-613352>; Priya Ganapati, *E-Book Reader Roundup: Samsung's Papyrus Joins the Crowd*, WIRED (Mar. 25, 2009, 2:57 PM), <http://www.wired.com/gadgetlab/2009/03/samsungs-new-e/>; *Fujitsu Data Book*, FUJITSU, 40 (Oct. 2009), <http://www.fujitsu.com/downloads/TEL/fnc/downloads/FujitsuDataBook.pdf>; *eSlick Reader*, FOXIT, <http://www.foxitsoftware.com/ebook/> (last visited Nov. 16, 2010); *Bookeen Cybook Opus*, BOOKEEN, <http://www.bookeen.com/ebook/ebook-reading-device.aspx> (last visited Nov. 16, 2010); *iRiver Story*, IRIVER, <http://www.iriver.com/> (last visited Nov. 16, 2010); *Cool-er*, COOLREADERS, <http://www.coolereader.com> (last visited Nov. 16, 2010); *Bebook*, BEBOOK, <http://www.bebook.net.au> (last visited Nov. 16, 2010); *the Boox 60*, ONYX, <http://www.onyx-international.com/index.php> (last visited Nov. 16, 2010).

57. See Yukari Iwatani Kane & Ethan Smith, *Apple Sees New Money in Old Media*, WALL ST. J., Jan. 22, 2010, at B1, available at [http://online.wsj.com/article/SB10001424052748703405704575015362653644260.html?mod=WSJ\\_hpp\\_LEFTTo pStories](http://online.wsj.com/article/SB10001424052748703405704575015362653644260.html?mod=WSJ_hpp_LEFTTo pStories). The author uses his iPhone as an e-reader. His children have used their iPod Touch, iPad, and DSi as e-readers. See *supra* note 4.

58. See, e.g., *CES-E-Reader Makers Seek Bestseller but May End Up Duds*, REUTERS (Jan. 8, 2010), <http://www.reuters.com/article/idUSN0823772120100109>; Nicholas Kolakowski, *CES E-Readers Suggest Oversaturated Market*, EWEEK.COM (Jan. 12, 2010), <http://www.eweek.com/c/a/Desktops-and-Notebooks/CES-Ereaders-Suggest-Oversaturated-Market-246099/>. This prediction appears to be proven accurate. During the summer of 2010, the major players in the e-reader market began to cut the sales prices for their devices dramatically. See, e.g., Brad Stone, *In Price War, E-Readers Go Below \$200*, N.Y. TIMES, Jun. 22, 2010, at B1. Stone reported:

[E]ven as the market grows, several smaller players have encountered problems. IRex Technologies, based in the Netherlands, recently sought bankruptcy protection from creditors, citing problems with its division in the United States.

This month, the Skiff e-reading platform, developed by Hearst, was acquired by the News Corporation, casting doubts on the planned introduction of a Skiff reading device.

Plastic Logic, the 10-year-old offspring of Cambridge University, has been delaying its \$800 professional document- and book-reading device, the Que. It planned to have the reader on the market in April, but keeps pushing back a release date.

plethora of products, in early 2010 *PCWorld* reported that Amazon held a 60% market share for e-reader sales in the United States during 2009, while Sony was second with a 35% market share,<sup>59</sup> leaving only 5% for all other companies.

This sudden consumer interest in e-readers has been accompanied by a tremendous increase in available content. In July 2010, Amazon boasted that more than 620,000 books were currently available for the Kindle.<sup>60</sup> This does not include more than 1.8 million public domain works, which may be read on a Kindle.<sup>61</sup> Meanwhile, Amazon's then biggest competitor in the e-reader market, Sony, was claiming to have more than 1 million e-books available for its readers as of March 2010,<sup>62</sup> including more than half-a-million public

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*Id.* Indeed, Sony, which was one of the market leaders when this article was first being drafted, appears to be losing significant ground to Amazon and the Nook, Barnes & Noble's e-reader. *Id.* William J. Lynch, chief executive of Barnes & Noble, observed, "I don't see more than two, or maybe three dedicated reading companies in the market for selling e-books. . . . I think you are starting to see a shake-out now." *Id.* As Amazon appears to be one of those leaders, its licensing restrictions should become an even greater concern to librarians.

In late July, Amazon continued this trend by introducing its "Latest Generation" Kindle starting at \$139. *See supra* note 4. Some analysts predict that prices will soon fall below \$100. *See, e.g.,* Julianne Pepitone, *Is Kindle 3 a Game-ENDER for e-Reader Wars?*, CNNMONEY.COM (July 29, 2010), [http://money.cnn.com/2010/07/29/technology/kindle\\_3/index.htm](http://money.cnn.com/2010/07/29/technology/kindle_3/index.htm).

59. Dan Nystedt, *E-reader Sales Will Double Again This Year, CEA Says*, PCWORLD (Jan. 5, 2010), [http://www.pcworld.com/article/185983/ereader\\_sales\\_will\\_double\\_again\\_this\\_year\\_cea\\_says.html](http://www.pcworld.com/article/185983/ereader_sales_will_double_again_this_year_cea_says.html). Given the influx of devices that are either marketed as dedicated e-readers or as multiple-use devices well-suited as an e-reader, the relative market shares are almost certainly in flux. One survey from late winter 2010 reported that the Apple iPad was poised to become the new leader for e-reading, with a 40% preference, with the Amazon Kindle coming in second at 28%, the Barnes & Noble Nook at third with 6%, the Sony Reader falling to fourth place at 1%. *See* Etengoff, *supra* note 54. Since then, even more options have either entered the market or been announced. The market for e-readers is so fluid at the time of the writing and editing of this article, and reliable information as to sales volume so scarce, that any assertion of relative market shares will be hopeless outdated by the time this article is published.

60. *Kindle: Amazon's Wireless Reading Device*, *supra* note 9.

61. *Id.* The availability of a large number of public domain works available for reading on e-readers would make these devices of great value even were no copyright protected works available for use on them. In fact, reading public domain and often out-of-print books is the primary use that the author makes of his e-reader.

62. *All Reader Digital Books*, SONY, <http://www.sonystyle.com/> (follow "Shop" hyperlink; then follow "Reader Digital Books" hyperlink; then follow "All Reader Digital Books") (last visited Nov. 16, 2010).

domain titles available for free in a partnership with Google.<sup>63</sup> Naturally, this increase in available titles has resulted in a significant increase in sales.<sup>64</sup> In 2002, the Association of American Publishers reported total e-book sales of \$7,337,000.<sup>65</sup> By 2008, e-book sales had increased to \$113,220,000.<sup>66</sup> In 2009, e-books sales reached \$169.5 million.<sup>67</sup> E-reading has arrived.<sup>68</sup>

### III. THE PROBLEM

What are the rules that will govern culture for the next hundred years? Are we building an ecology to access that demands a lawyer at every turn of the page? Or . . . will we create instead an ecology of access that assures copyright owners the incentive they need, while also guaranteeing culture a future?<sup>69</sup>

Already, several legal issues have surfaced regarding e-readers. As one article in the *Wall Street Journal* put it, “Amazon still hasn’t said how many of its Kindle e-book readers have sold. But here’s one true sign of the gadget’s growing popularity: people are protesting it

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63. Brad Stone, *Sony Reaches Deal to Share in Google’s E-Book Library*, N.Y. TIMES, Mar. 19, 2009, at B6, available at <http://www.nytimes.com/2009/03/19/technology/19sony.html>.
  64. Claire Cain Miller, *E-Books Top Hardcover at Amazon*, N.Y. TIMES, July 20, 2010, at B1, available at <http://www.nytimes.com/2010/07/20/technology/20kindle.html>.
  65. *2008 S1 Report: Estimated Book Publishing Industry Net Sales 2002-2008*, ASS’N AM. PUBLISHERS, <http://www.publishers.org/documents/S12008Final.pdf> (last visited Nov. 16, 2010).
  66. *Id.*
  67. Press Release, Association of American Publishers, AAP Reports Publishing Sales up 4.1% in 2009: Year End E-Book Sales Reach \$169.5 Million (Feb. 19, 2010), [http://www.publishers.org/main/PressCenter/Archives/2010\\_February/SalesUp4.1in2009Release.htm](http://www.publishers.org/main/PressCenter/Archives/2010_February/SalesUp4.1in2009Release.htm).
  68. Along with the flood of e-reader options and the sudden availability of titles, there has also developed a large number of competing e-book formats. Wikipedia listed twenty-seven different formats as of August 20, 2010. *Comparison of e-Book Formats*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Comparison\\_of\\_e-book\\_formats](http://en.wikipedia.org/wiki/Comparison_of_e-book_formats) (last modified Aug. 28, 2010). Even before the recent popularity of e-readers and e-books, one commentator referred to the proliferation of formats as “the Tower of e-Babel.” David H. Rothman, *Razing the Tower of e-Babel: The Reason e-Books Haven’t Caught on is Simple: They’re Too Complicated*, PUBLISHERS WKLY., Aug. 28, 2006, at 62, 62, available at [http://www.publishersweekly.com/article/399868-Razing\\_The\\_Tower\\_Of\\_e\\_Babel.php](http://www.publishersweekly.com/article/399868-Razing_The_Tower_Of_e_Babel.php).
  69. Lawrence Lessig, *For the Love of Culture*, THE NEW REPUBLIC, Feb. 4, 2010, at 24, 26, available at <http://www.tnr.com/article/the-love-culture>.

on several fronts.”<sup>70</sup> The issue addressed in this article is how the Amazon license agreement prohibits the redistribution or transfer of the e-books themselves, providing, in part, as follows: “Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any rights to the Digital Content or any portion of it to any third party . . . .”<sup>71</sup> By its explicit terms, Amazon’s license agreement, then, prohibits licensees, including presumably, libraries, from lending e-books, though at least one of the company’s spokesmen has indicated that libraries may lend the e-readers.<sup>72</sup> This restriction conflicts with the long established practice of libraries’ lending books to patrons.<sup>73</sup> Whether Amazon intends to actually enforce these licensing terms in a manner which would prohibit libraries from lending Kindle e-books is not at all clear. However, in a report aired on America Public Media’s *Marketplace*, it was reported that “Amazon confirmed that library books can’t be downloaded onto the Kindle.”<sup>74</sup> The *Library Journal*, the official publication of the American Library Association, has reported on this question on more than one occasion.<sup>75</sup> In an article in early 2008, Norman Oder asked the question which gave rise to this article, *Is It OK for a Library To Lend a Kindle?*<sup>76</sup> Oder wrote:

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70. Geoffrey A. Fowler, *Amazon Learns It Isn't Easy Being the Kindle's Keeper*, WALL ST. J. DIGITS BLOG (Apr. 8, 2009, 3:39 PM), <http://blogs.wsj.com/digits/2009/04/08/amazon-learns-it-isnt-easy-being-the-kindles-keeper/>. Most notably has been a legal dispute between the Authors' Guild and Amazon regarding a built-in system that turns any text into audio. *Id.* The Authors Guild has claimed that this feature constitutes a derivative work and is, therefore, an infringement of authors' exclusive rights under Section 106 of the Copyright Act. 17 U.S.C. § 106 (2006); see also *E-Book Rights Alert: Amazon's Kindle 2 Adds "Text to Speech" Function*, THE AUTHORS GUILD (Feb. 12, 2009), <http://www.authorsguild.org/advocacy/articles/e-book-rights-alert-amazons-kindle-2.html>.
  71. *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 3.
  72. Norman Oder, *Is It OK to Lend a Kindle?*, LIBR. J. (Mar. 1, 2008), <http://www.libraryjournal.com/article/CA6533052.html>.
  73. If the libraries are owners of the e-books, it also conflicts with the first sale doctrine, as codified at 17 U.S.C. § 109 (2006), which is explored below. See *infra* Part IV. The first sale doctrine is the most fundamental and important provision of the Copyright Act as regards libraries in that it is the provision upon which the lending rights of libraries is based. See *infra* notes 123–28 and accompanying text.
  74. *iPad and Kindle Users Can't Borrow from e-Book Libraries*, AM. PUB. MEDIA (Oct. 12, 2010), <http://marketplace.publicradio.org/display/web/2010/10/12/pm-ipad-and-kindle-users-cant-borrow-from-ebook-libraries/>.
  75. Oder, *supra* note 72; Norman Oder, *Mixed Answers to "Is It OK for a Library To Lend a Kindle?"*, LIBR. J. (Apr. 7, 2009), <http://www.libraryjournal.com/article/CA6649814.html>; Francine Fialkoff, Editorial, *To Kindle or Not*, LIBR. J. (Mar. 1, 2008) at 8, 8, available at <http://www.libraryjournal.com/article/CA6533029.html>.
  76. Oder, *supra* note 72.

Our report that the Sparta Public Library (SPL), NJ, had begun to lend Amazon.com's Kindle ebook reading device has inspired some other librarians to consider Kindles—and to discover that the Terms of Service bar a user who wishes to “sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any rights to the Digital Content or any portion of it to any third party.”<sup>77</sup>

He went on to report that an Amazon spokesman told him that lending a Kindle void of content is permissible, but that lending a Kindle “loaded with content ‘with a wide group of people would not be in line with the terms of use.’”<sup>78</sup>

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77. *Id.*

78. *Id.* (citing Rochelle Hartman, *Loaning Kindle to Patrons a No-No for Libraries?*, TINFOIL + RACCOON (Jan. 28, 2008, 11:56 AM), <http://rochellejustrochelle.typepad.com/copilot/2008/01/loaning-kindle.html> (last modified Feb. 2009). *Oder* cites *Loaning Kindle to Patrons a No-No for Libraries?*, a post by librarian Rochelle Hartman on her Tinfoil + Raccoon blog, in which Ms. Hartman reported some contradictory information she received from Amazon.com when seeking to clarify what a library may and may not do with Kindle e-books. Rochelle Hartman, *Loaning Kindle to Patrons a No-No for Libraries?*, TINFOIL + RACCOON (Jan. 28, 2008, 11:56 AM), <http://rochellejustrochelle.typepad.com/copilot/2008/01/loaning-kindle.html> (last modified Feb. 2009).. She reported that she had called Amazon.com regarding the terms of service that prohibit the “sell[ing], rent[ing], leas[ing], distribut[ing], . . . or otherwise assign[ing] any rights to the Digital Content or any portion of it to any third party.” *Id.* (citing *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17). She was told that libraries that loaned Kindles loaded with content were in fact in violation of the terms of service. *Id.* She continued:

The questions I really wanted to ask, and which probably would not have received straight answers are: How hardcore will Amazon be about [Terms of Service] violators? Will public libraries be getting cease and desist letters? Or is it more of a don't ask/don't tell deal? It's kind of hard to fly under the radar when you are applauded for innovation in Library Journal.

*Id.* (emphasis removed). Ms. Hartman initially concluded, “The Kindle has no application for public libraries.” *Id.* She later amended that conclusion, declaring, “Jury [sic] is out on whether Kindle can be circulated by libraries.” *Id.* A review of the comments to Ms. Hartman's blog post shows differing opinions on this issue. *Id.*

In a subsequent post, Ms. Hartman reported:

On Feb 20, 2009, I received a conflicting reply from Kindle support rep Forrest B that said: “Thank you for asking about using kindles in libraries. As stated in the terms of service, a library issuing loaded or unloaded kindles to individuals is against the [Terms of Service].” I have emails out to a couple people who are working directly with Amazon and who have been told that it's a-ok for libraries to check out Kindles. Stay tuned!

Mr. Oder followed up his first article on this issue with a second one published in April 2009, reporting that an Amazon.com representative had, upon inquiry, told the Howe Library, Hanover, New Hampshire, that lending a Kindle (presumably loaded with content) was permissible.<sup>79</sup> On the other hand, he also reported that library-blogger Rochelle Hartman had reported that she had been told by an Amazon.com staffer that lending Kindle content did indeed violate the terms of service.<sup>80</sup> The director of the Howe Library reportedly noted when interviewed on the subject that “[m]aybe Amazon didn’t contemplate library lending.”<sup>81</sup> Then in June 2009, Oder reported that the confusion over this legal issue had led two university libraries to two different conclusions. Brigham Young University began and then suspended a pilot project using Kindles for interlibrary loans, concluding that it needed written permission from Amazon.com before it would resume the project.<sup>82</sup> At the same time, Oder reported that the University of Nebraska-Omaha had been lending Kindles since March 2008 and intended to continue doing

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Rochelle Hartman, *Kindle News for Libraries to Chew on*, TINFOIL + RACoon (Feb. 20, 2009, 4:59 PM), <http://rochellejustrochelle.typepad.com/copilot/2009/02/kindle-news-for-libraries-to-chew-on.html>.

79. *Mixed Answers to "Is It OK for a Library To Lend a Kindle?"*, *supra* note 75. Oder reported the following:

Mary White, director of the Howe Library, told *LJ* that she and a colleague called Amazon Kindle support last August 29 to explain what they wanted to do with the three Kindles that were to be purchased with donated funds. Among the questions: how to deactivate the library’s account so patrons couldn’t add titles to the device. The library was not told its plan was not permitted.

White pointed to the Terms of Service. “I am not an attorney,” she acknowledged, “but it seems to me we are doing none of those things,” suggesting that “distribution” of an ebook is not the same as lending one item to one person—the same as buying a printed book.

(In fact, the Amazon rep told the library could load its 13 titles, which cost \$10 each, on each of the three devices, for a total cost of \$130, not the expected \$390. Hartman points out that this policy does not seem to be on the Kindle 2 page.)

*Id.*

80. *Id.*

81. *Id.*

82. Norman Oder, *At BYU, Kindle Program on Hold, but University of Nebraska-Omaha’s Program Going Strong*, *LIBR. J.* (June 17, 2009), <http://www.libraryjournal.com/article/CA6666004.html?q=Kindle>.

so.<sup>83</sup> All of this confusion has not dissuaded other academic libraries moving ahead with plans to utilize the Kindle.<sup>84</sup> Other observers are not so sure that this is a good idea.<sup>85</sup>

At present, prudence dictates that librarians consider this issue when deciding whether to purchase a print copy of a book or a digital copy.<sup>86</sup> However, the day may soon come when no such option will be available and the only version of a desired work available for purchase by the librarian will be the digital version. Indeed, Jeff Bezos believes that is exactly what will happen. In an interview for *Newsweek*, Bezos gave the following answer when asked: “Do you think that the ink-on-paper book will eventually go away?”

I do. I don't know how long it will take. You know, we love stories and we love narrative; we love to get lost in an author's world. That's not going to go away; that's going to thrive. But the physical book really has had a 500-year run. It's probably the most successful technology ever. It's hard to come up with things that have had a longer run. If Gutenberg were alive today, he would recognize the physical book and know how to operate it immediately.

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83. *Id.* Oder reported:

We do not see a violation of the terms of service agreement,” Joyce Neujahr, director of patron services, told *LJ*, after discussing the issue with library dean Stephen Shorb, who initially proposed that the library lend the device. “We have purchased the content on the Kindle, and loan the Kindle just like we loan a hardcover, print book. The difference is where that purchased book resides. Whether it is on a shelf, or on a Kindle, we have still purchased the title.

*Id.*

84. *See, e.g.*, Steven Bell, *When Every Student Has a Kindle*, *LIBR. J.* (Sept. 3, 2009) <http://www.libraryjournal.com/article/CA6687288.html?q=Kindle>.

85. *See, e.g.*, Peter Hirtle, *May a Library Lend e-Book Readers?*, *LIBRARYLAW BLOG* (June 20, 2010), <http://blog.librarylaw.com/librarylaw/2010/06/may-a-library-lend-e-book-readers.html>; Fialkoff, *supra* note 75, at 8.. Similar concerns may be the reason that other libraries which offer e-book lending do not support the Amazon Kindle. *See, e.g.*, Herón Márquez Estrada & Hannah Gruber, *Check It Out: eBooks at Hennepin County Library*, *MINNEAPOLIS STAR-TRIBUNE* (July 2, 2010), [http://www.startribune.com/local/west/97634399.html?elr=KArks7PYDiaK7DUdcOy\\_nc:DKUiD3aPc:\\_Yyc:aU](http://www.startribune.com/local/west/97634399.html?elr=KArks7PYDiaK7DUdcOy_nc:DKUiD3aPc:_Yyc:aU).

86. *See Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17 (stating automatic termination without notice and subsequent automatic revocation of access to Digital Content for failure to comply with the Agreement, including the transfer restrictions); *see also Mixed Answers to “Is It OK for a Library To Lend a Kindle?”*, *supra* note 75. *See generally* Hirtle, *supra* note 85.

Given how much change there has been everywhere else, what's remarkable is how stable the book has been for so long. But no technology, not even one as elegant as the book, lasts forever.<sup>87</sup>

Should that day come, it will have a profound impact on libraries.<sup>88</sup> The question will no longer be whether, after weighing all factors, the librarian should purchase a print copy or a digital copy of a book,<sup>89</sup> but whether the library will be able to purchase a copy of the book in any format which it will be legally permitted to lend to its patrons. Amazon could amend its license agreement to permit lending, but to date it has given no indication that it will do so.<sup>90</sup> And even if it did amend its license agreement in such a manner, there is no legal reason why it could not revert to the present language at a later date.<sup>91</sup> Nor is there any reason why other vendors of e-books could not distribute them with similar license restrictions.<sup>92</sup> As it is, libraries

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87. Lyons, *supra* note 28, at 86. By July 2010, Amazon reported that its e-book sales had surpassed its hardcover sales, with 180 Kindle e-books selling for every 100 hardcover books sold by Amazon. Geoffrey A. Fowler & Jeffrey A. Trachtenberg, *E-Books Elbowing Hardbacks Aside*, WALL ST. J., July 20, 2010, at B1.

88. See *supra* notes 31–36 and accompanying text.

89. See *supra* notes 31–36 and accompanying text. In October 2010, Amazon announced that it would “be introducing lending for Kindle, a new feature that lets you loan your Kindle books to other Kindle device or Kindle app users. Each book can be lent once for a loan period of 14-days and the lender cannot read the book during the loan period. Additionally, not all e-books will be lendable—this is solely up to the publisher or rights holder, who determines which titles are enabled for lending.” *Announcement: Coming Soon for Kindle*, Post to *Kindle Community*, AMAZON.COM (Oct. 22, 2010, 8:33 AM), [http://www.amazon.com/tag/kindle/forum/ref=cm\\_cd\\_tfp\\_ef\\_tft\\_tp?\\_encoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdThread=Tx1G2UIO9PJO50V&displayType=tagsDetail](http://www.amazon.com/tag/kindle/forum/ref=cm_cd_tfp_ef_tft_tp?_encoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdThread=Tx1G2UIO9PJO50V&displayType=tagsDetail).

90. See *supra* notes 76–79 and accompanying text.

91. Of course, any books sold under a more permissive license agreement would be unaffected by any reversion in the licensing terms. See *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 3.

92. At present, Amazon's primary competitors in the e-book business, Sony, Barnes & Noble, and Apple, have a partnership with OverDrive to facilitate library patrons' downloading e-books to their devices. See *Digital Library Reserve: The Global Leader in Library Downloads*, OVERDRIVE, <http://www.overdrive.com/products/dlr/> (last visited Nov. 16, 2010) (reporting support for iPod, Zune, Sony Reader, “and thousands of other mobile devices”); *Sony/OverDrive Deal, Library Access Indirect*, LIBR. J. (Josh Hadro ed. Sept. 15, 2009), <http://www.libraryjournal.com/article/CA6695135.html>. “LJ Digital Libraries blogger Roy Tennant called the recent announcements from Sony a move toward a more open ebook ecology, along with Sony's increasing embrace of the similarly open .epub XML standard.” *Id.* As of March 2010, OverDrive was making this service available for 9,000 libraries



are left with a great deal of uncertainty whether they may soon face the prospect of books being available only pursuant to licensing agreements that prohibit their lending to library patrons. At best, the existing Copyright Act and case law are ambiguous, offering no certain answer.<sup>93</sup> As will be explored in more detail below, current case law gives little reason for librarians to believe that they would be successful in court should the matter be litigated.<sup>94</sup>

While the context of the questions addressed in this article may be new, in a real sense, the question underlying each of them goes all the way back to the creation of the copyright law. Then, as now, one of the fundamental, and indeed foundational, questions of copyright law is whose rights are ultimately being protected and whose interests are ultimately being promoted.<sup>95</sup> As one writer has put it, “Is copyright an author’s right or a user’s right?”<sup>96</sup> It is a question that has become more urgent in recent years as copyright owners have sought greater restrictions at the expense of users as a means of combating piracy.<sup>97</sup> Some of these restrictions threaten the very foundation upon which our copyright laws have been built. The issues addressed here are not limited to e-books. They apply to a variety of content protected by our copyright law.<sup>98</sup> We are not merely at a potential tipping point as to how we read but also in the laws that apply to how we read.<sup>99</sup> As Lawrence Lessig has noted:

Books—physical books, and the copyrighted work that gets carried in them—are an extraordinarily robust cultural artifact. We have access to practically every book ever published anywhere. You do not need to be a Harvard professor to enter the rare book room at the law library. You do not need to touch rare books to read the work those books hold. Older works—before 1923, in the United

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worldwide, including the New York Public Library. *Digital Library Reserve: The Global Leader in Library Downloads*, *supra*.

93. John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 48–49 (2004).

94. *See infra* notes 181-90 and accompanying text.

95. *See supra* notes 1-2 and accompanying text.

96. PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT, § 1.13.2. (3d ed. Supp. 2006).

97. *See, e.g.*, Lessig, *supra* note 69.

98. *See, e.g., id.* While the issues raised are not limited to e-books, this article only addresses those issues as they relate to e-books and then only as they relate to the legal right of libraries to lend e-books to their patrons. The author may address the broader questions in later articles.

99. *See infra* text accompanying note 217.

States—are in the public domain, which means that anyone, including any publisher, can copy and reprint that work without any permission from anyone else. There is no Shakespeare estate that reviews requests for new editions of *Hamlet*. The same is true for every nineteenth-century author in America. These works are freely and widely available, because no law restricts access to these works.

And just about the same is effectively true for any book still under copyright. No doubt, publishers are not free to take the latest Grisham novel and print a knockoff. But through the extraordinary efforts of libraries (and they are Herculean, no doubt) and used bookstores, you can get access to basically anything, and for practically nothing. Your library can get it, and share it with you almost for free. Your used bookstore can find it and sell it to you for less than the cost of a night at the movies.<sup>100</sup>

The question raised by the advent of e-books and the licensing provisions under which possession of them is conveyed to readers is whether the same will be true in the not-too-distant future. Are we heading toward a world in which physical libraries will be replaced not by digital libraries, but by digital bookstores?<sup>101</sup> Are we headed for a world where libraries will no longer be able to collect recently published books and make them available to readers to take home for short periods of time? Will lawyers drafting license agreements succeed at what the courts have prevented the state from doing—censoring access to books?<sup>102</sup> Before the e-book revolution goes much further—before Jeff Bezos' vision of a world in which physical books are only artifacts of the past and digital books are not sold, but licensed—perhaps we should consider what books are and what they

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100. Lessig, *supra* note 69, at 26. Lessig is concerned about the impact of the settlement Google reached with the Authors Guild of America (Authors Guild) and the Association of American Publishers (AAP) so that it could proceed with its project to digitize 18 million books and to grant various levels of access to those books through the internet. His concern, at least in the article cited, was not the settlement agreement *per se*, but the legal environment that it reinforces: an environment in which access to and use of works protected by copyright are fenced in not so much by inalienable statutory right as by license agreements that severely limit access and use, well beyond the access and use traditionally granted to the public to physical books. *Id.* at 26–28.

101. *Id.* at 27. Or as Professor Lessig puts it, “We create not digital libraries, but digital bookstores: a Barnes & Noble without the Starbucks.” *Id.*

102. *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Schneider v. New Jersey*, 308 U.S. 147 (1939).

have enabled and the role that lending libraries have played in the dissemination of information and in the growth and spread of democracy. If, as Jeff Bezos believes is inevitable,<sup>103</sup> e-books will not merely be an alternative medium to printed books for the written word but will supplant them—just as papyrus supplanted clay tablets, the codex supplanted scrolls, and the printing press supplanted the scribe—we would be foolish not to now, at their advent, begin to think through how access to information will be assured as this new medium replaces the old one.<sup>104</sup> Before simply allowing the judicial and legislative mechanism of the first sale doctrine<sup>105</sup> to be supplanted, along with the medium for which it was originally created, we need to explore why such a mechanism was created and what benefits it has given to us.<sup>106</sup> If the first sale doctrine was the legal foundation upon which libraries have been built over the past century, and if libraries are essential to a functioning democracy (which extends the franchise, the right to petition, and the right to advocate to all and not merely those who have resources sufficient to pay for access to information),<sup>107</sup> then it is imperative that we not simply through neglect allow this essential exception to copyright owners' exclusive right to follow the medium for which it was created into the history books (or e-books).<sup>108</sup> The next section of this article explores the first sale doctrine and the role it plays in assuring access to information to all in our society.

#### IV. LEGAL ANALYSIS

[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord . . . .<sup>109</sup>

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103. See Lyons, *supra* note 28, at 86; see also *supra* note 84 and accompanying text.

104. This question addressed in this article merely deals with one of several issues surrounding access to the information contained in e-books. Among the other daunting challenges are issues of format obsolescence, citation, and piracy.

105. See *infra* notes 109–36 and accompanying text.

106. See *infra* notes 117–35 and accompanying text.

107. See *infra* Part V.

108. See *infra* Part V.

109. 17 U.S.C. § 109 (2006).

Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any rights to the Digital Content or any portion of it to any third party . . . .<sup>110</sup>

Copyright law has a simple design. First, it establishes the requirements for gaining copyright protection of a work.<sup>111</sup> Copyright protection only applies to “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>112</sup> Second, the Copyright Act grants to the owners of such works certain exclusive rights, five of which apply to literary works: the right of reproduction; the right to prepare derivative works; the right to distribute copies by sale, rental, lease, or lending; the right to perform the work publicly; and the right to display the work publicly.<sup>113</sup> Third, exceptions to those exclusive rights are granted under a variety of circumstances.<sup>114</sup> While the exclusive rights of copyright owners are limited in a variety of ways, which benefit libraries and their patrons,<sup>115</sup> the most fundamental of these limitations is the first sale doctrine.<sup>116</sup>

The first sale doctrine (sometimes also known as the “first sale rule”)<sup>117</sup> is so named because its effect is to limit a copyright owner’s exclusive right of distribution to any given copy of a protected work to the first sale of that copy.<sup>118</sup> That is, once ownership of a copy is transferred to a third party, that party may redistribute that copy without violating the copyright owner’s exclusive right of

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110. *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 3.

111. 17 U.S.C. § 102(a) (2006).

112. *Id.*

113. *Id.* § 106.

114. *Id.* §§ 107–22.

115. *See, e.g., id.* § 108 (granting libraries the right to make copies of works under a number of circumstances and to distribute such copies). Indeed, subsection (h) of this section provides that “during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research” under specified conditions. *Id.* § 108(h). Section 108(d) permits libraries to allow patrons to make a copy of protected works provided certain conditions are met. *Id.* § 108(d).

116. *Id.* § 109(a); *see also* *Sebastian Int’l, Inc. v. Consumer Contracts (PTY) Ltd.*, 847 F.2d 1093, 1095–96 (3d Cir. 1988).

117. *See Sebastian Int’l, Inc.*, 847 F.2d at 1095–96.

118. 17 U.S.C. § 109(a) (2006).

distribution.<sup>119</sup> Thus, for example, the purchaser of a book may sell that book to a third party.<sup>120</sup> This, of course, is taken advantage of not only by individuals, but entire industries and enterprises are built upon the first sale rights.<sup>121</sup> Indeed, one of the internet's most prominent businesses, eBay, relies on this provision when it permits users to sell copyrighted protected works through its site.<sup>122</sup> Even before the first sale doctrine was judicially recognized, there was no serious question that libraries were permitted to lend to patrons copies of printed books that they acquired.<sup>123</sup> If there was any doubt about this prior to the twentieth century, that doubt was dispelled by the Supreme Court's ruling in *Bobbs-Merrill Co. v. Straus*,<sup>124</sup> and by the Copyright Act of 1909 that codified that ruling,<sup>125</sup> which are generally recognized as the judicial and legislative origins of the first sale doctrine.<sup>126</sup> In *Bobbs-Merrill*, the Court was asked to decide the

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119. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908).

120. *See id.*

121. *See* R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 580–91 (2003); *see also* Robert H. Rotstein, Emily F. Evitt & Matthew Williams, *The First Sale Doctrine in the Digital Age*, INTELL. PROP. & TECH. L.J., Mar. 2010, at 24.

122. As described by Elizabeth I. Winston, eBay makes a distinction between those who own a physical copy of a work and those who own only a digital copy that is not attached to a physical container. The former may sell their physical copy (i.e., the contents and the container as a unit). The latter may sell their digital copy on eBay only if they own the copyright to the work and not just a copy. *See* Winston, *supra* note 2, at 97–98.

123. *See, e.g.*, Laura N. Gasaway, *Libraries and Copyright at the Dawn of the Twentieth Century: The 1909 Copyright Act*, 11 N.C. J.L. & TECH. (SPECIAL ISSUE) 419, 425 (2010).

124. 210 U.S. 339 (1908).

125. Copyright Act of Mar. 4, 1909, ch. 320 § 41, 35 Stat. 1075, 1084 (codified at 17 U.S.C. § 27) [hereinafter Copyright Act of 1909 § 41].

126. While *Bobbs-Merrill* is generally held to be the case in which the first sale doctrine was established, its origins can be traced back further. In 1894, the Second Circuit held that a purchaser of a book had “the ordinary incidents of ownership in personal property, among which is the right of alienation.” *Harrison v. Maynard, Merrill & Co.*, 61 F. 689, 691 (2d Cir. 1894).

[T]he right to restrain the sale of a particular copy of the book by virtue of the copyright statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes . . . the copy having been absolutely sold to [a purchaser], the ordinary incidents of

enforceability of a notice in a book that purported to restrict the price at which the owner of any copy could sell that copy.<sup>127</sup> The Court looked to the extant Copyright Act to answer that question, finding that while the statute protected “the owner of the copyright in his right to multiply and sell his production, [it did] not create the right to impose, by notice . . . a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract.”<sup>128</sup> Particularly relevant to the issue addressed in this article, the Court noted, “it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.”<sup>129</sup> After examining the statutory language, the Court concluded:

To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.<sup>130</sup>

As noted above, Congress codified this ruling the following year when it enacted the Copyright Act of 1909.<sup>131</sup> Specifically, the Act provided:

[T]he copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid,

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ownership in personal property, among which is the right of alienation, attach to it.

*Id.* Eight years earlier, a federal court in Ohio reached a similar conclusion. *Henry Bill Publ'g Co. v. Smythe*, 27 F. 914, 925 (Ohio C.C.S.D. 1886).

127. *Bobbs-Merrill*, 210 U.S. at 350.

128. *Id.*

129. *Id.*

130. *Id.* at 351.

131. *See supra* text accompanying note 125.

prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.<sup>132</sup>

It may be noted that the 1909 Act permitted subsequent transfers of copies of protected works by those who lawfully obtained possession of such copies.<sup>133</sup> As quoted above, the current Copyright Act explicitly limits that right to owners of a copy.<sup>134</sup> Therefore, if the copyright owner retains ownership of a copy, the possessor of that copy may not rely on Section 109 to convey title or possession to anyone else.<sup>135</sup> Copyright owners of software have long asserted that they are not transferring ownership of copies of their software to “purchasers” but are, instead, merely conveying a license for the use of such copies to such “purchasers.”<sup>136</sup>

The first sale doctrine is not the only exception to a copyright owner’s exclusive rights which requires ownership of a copy of a protected work. Section 117, which provides for the making of additional copies and adaptations of computer programs, only grants

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132. Copyright Act of 1909 § 41. It is important for readers to keep in mind the distinction between rights in a work (e.g., ownership of the copyright in the contents of a book) and rights in a copy of the work (e.g., a physical book). Some commentators contend that conflating these two has resulted in some of the decisions that have limited the applicability of the first sale doctrine in recent decades. *See, e.g.*, Rothchild, *supra* note 93, at 48–49. Similar language to that used in § 41 of the 1909 Copyright Act still exists in the current 17 U.S.C. § 202:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (2006).

133. Copyright Act of 1909 § 41.

134. 17 U.S.C. § 109(a) (2006).

135. *See infra* notes 140–52 and accompanying text.

136. Indeed, one commentator has observed that the use of such software license agreements arose because of the lack of explicit copyright protection in software that existed prior to the amendment of the Copyright Act in 1980. Rothchild, *supra* note 93, at 49 n.175. Rothchild notes license agreements used a combination of contract and trade secret law to protect the software publishers’ intellectual property. *Id.* Thus, the use of license agreements by the owners of the copyright in software can be seen as a historical anomaly, but one which provided certain advantages to the owners of the software that they were unwilling to part with when the 1980 amendments to the Copyright Act made explicit the protection of software. *See id.*

such rights to “owner[s] of a copy of a computer program.”<sup>137</sup> As with the first sale doctrine, owners of copyright in software have used license agreements to prevent Section 117 from applying to those to whom it has transferred possession of a copy of protected works.<sup>138</sup> As will be explored below, however, both commentators and courts have held that the mere fact that one obtains possession of a copy under a license agreement does not, by itself, prevent him or her from also being an owner of that copy.<sup>139</sup> The question then becomes under what circumstances a transfer of possession of a copy to a protected work makes the transferee its owner. Unfortunately, this is not as easy a question to answer as the casual observer might believe. The Copyright Act does not define the term “owner.”<sup>140</sup> Nor does the legislative history of the Copyright Act offer any help in resolving this question, though it is clear that Congress intended to recognize a distinction in the rights afforded owners of a copy as opposed to possessors of a copy who are not owners.<sup>141</sup> Indeed, it is interesting to note how the sections of the Copyright Act through the years that set forth the first sale rule are worded in this regard. In both the 1909

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137. 17 U.S.C. § 117 (2006).

138. *See, e.g.*, *DSC Commc’n Corp. v. Pulse Commc’n*, 170 F.3d 1354 (Fed. Cir. 1999) (holding that Section 117 did not give telephone companies the right to make copies of DSC’s software sold by Pulse because telephone companies were licensees, not owners of the DSC software); *MAI Sys. Corp. v. Peak Computer, Inc.* 991 F.2d 511 (9th Cir. 1993) (Section 117 is inapplicable to a licensee of software).

139. *See DSC*, 170 F.3d at 1360 (citing 2 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT ¶ 8.08[B][1], at 8-119 to 1-121 (3d ed. 1997)).

140. *Id.*

141. *Id.* In *DSC*, the court noted:

The National Commission on New Technological Uses of Copyrighted Works (“CONTU”) was created by Congress to recommend changes in the Copyright Act to accommodate advances in computer technology. In its final report, CONTU proposed a version of section 117 that is identical to the one that was ultimately enacted, except for a single change. The proposed CONTU version provided that “it is not an infringement for the rightful possessor of a copy of a computer program to make or authorize the making of another copy or adaptation of that program . . . .” Congress, however, substituted the words “owner of a copy” in place of the words “rightful possessor of a copy.” The legislative history does not explain the reason for the change, *see* H.R. Rep. No. 96-1307, 96th Cong., 2d Sess., pt. 1, at 23 (1980), but it is clear from the fact of the substitution of the term “owner” for “rightful possessor” that Congress must have meant to require more than “rightful possession” to trigger the section 117 defense.

*Id.* (citations omitted).



and 1947 versions, the term “owner” is not used to describe the person who can take advantage of it.<sup>142</sup> But the 1976 version does use precisely that term.<sup>143</sup> Absent an explicit statutory definition of the term “owner” or helpful legislative history, we must turn elsewhere to find our definition of the term.

Professor John A. Rothchild treats this subject rather thoroughly in his article on how owners of copyright in software use license agreements to attempt to defeat the first sale rights of those to whom they convey possession of copies of such works.<sup>144</sup> Citing *Miss. Band of Choctaw Indians v. Holyfield*,<sup>145</sup> Professor Rothchild “assume[s] that Congress intended the ordinary meaning of the term, taking account of the context and purposes of the statute.”<sup>146</sup> With this in mind, he begins by noting that “[t]he mere existence of a limitation on the use that one may make of a copy of a copyrighted work . . . does not entail the conclusion that the possessor of that copy is not its owner for purposes of section 109(a).”<sup>147</sup> As Professor Rothchild observes, “[t]he law imposes numerous limitations on the uses” a property owner may make of his or her property, be it real or personal.<sup>148</sup> Indeed, the exclusive rights of a copyright owner are limitations on what an owner of a copy may do.<sup>149</sup> For example, absent an exception,<sup>150</sup> one may not make a reproduction of the copy he or she owns.<sup>151</sup> As Professor Rothchild notes, even a limitation on how the possessor of a copy may dispose of it is not, in and of itself, determinative of whether the possessor of that copy is an owner.<sup>152</sup>

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142. Copyright Act of 1909 § 41; *see also supra* note 132 and accompanying text.

143. *See* 17 U.S.C. app. § 109(a) (1976).

144. Rothchild, *supra* note 93, at 16–21.

145. 490 U.S. 30, 47 (1989).

146. Rothchild, *supra* note 93, at 17.

147. *Id.* at 16.

148. *Id.*

149. 17 U.S.C. § 106 (2006).

150. *Id.* §§ 107–22. Several explicit exceptions to the exclusive right to reproduce are provided for in the Copyright Act. For example, Section 117 permits archival copies to be made of software; Section 108 permits libraries to make a copy of a protected work to a new medium where the existing medium is becoming obsolete; and Section 121 permits copies to be made in order to make a work accessible to the blind. In addition, copies may be made of computer code in order to permit decompiling for purposes of reverse engineering. *See Sega Enter. v. Accolade, Inc.*, 977 F.2d 1510, 1520–29 (9th Cir. 1993) (concluding that decompiling is legal to gain access to ideas and functional elements of copyrighted materials).

151. 17 U.S.C. § 106. Indeed, this is yet another issue that arises with libraries loaning e-books.

152. *See* Rothchild, *supra* note 93, at 3–5.

This is, in effect, the implicit holding in *Bobb-Merrill*, where, as noted above, the copyright owner attempted to place limitations on the price at resale of a book.<sup>153</sup> Yet, limitations on what the transferee of a copy may do with it will, at some point, lead to the conclusion that he or she is not the owner.<sup>154</sup> Professor Rothchild notes that a continuum exists between an unrestricted transfer of ownership and a mere transfer of possession without the transferor relinquishing ownership.<sup>155</sup> For example, if the transferee is required to return possession to the transferor at some future date, then almost certainly he or she did not become owner of the copy.<sup>156</sup> The question is at what point do restrictions placed on what may be done with a copy rise to a level that leads to the conclusion that ownership of that copy was retained by the transferor. Thus, the mere use of a license agreement in and of itself is not dispositive of the question. While the court in *MAI Sys. Corp. v. Peak Computer Inc.*<sup>157</sup> noted otherwise,<sup>158</sup> that determination has been widely criticized.<sup>159</sup> Noting this criticism, the court in *DSC Commc'ns Corp. v. Pulse Commc'ns*<sup>160</sup> concluded, "Plainly, a party who purchases copies of software from the copyright owner can hold a license under a copyright while still being an 'owner' of a copy. . . ."<sup>161</sup>

Recognizing, however, that the license agreement in question in the *MAI* case "imposed more severe restrictions on Peak's rights . . . than would be imposed" on an owner of a copy under the Copyright Act itself, the court examined the terms under which the transferees (Regional Bell Operating Companies or RBOCs) obtained possession of the copies in question in the case before it.<sup>162</sup> First, the license agreement in *DSC* explicitly provided that "[a]ll rights, title and interest in the Software are and shall remain with the seller."<sup>163</sup> Second, it provided that the RBOCs, each of whom was termed a "Buyer," were given merely "a license . . . to use the Software."<sup>164</sup>

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153. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350–51 (1908).

154. *See* Rothchild, *supra* note 93, at 18.

155. *See id.*

156. *Id.* at 19.

157. 991 F.2d 511 (9th Cir. 1993).

158. *Id.* at 519, n.5.

159. *See, e.g., DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999).

160. *Id.*

161. *Id.* At issue in *DSC* was the applicability of Section 117, which, like Section 109, gives an exception only to owners of a copy. *Id.*

162. *Id.* at 1360–61.

163. *Id.* at 1361.

164. *Id.*

Third, the license agreement restricted such use to equipment also provided by DSC.<sup>165</sup> Fourth, ownership of all the material except for the software was transferred to the RBOCs.<sup>166</sup> The court held that it was clear that the retention of ownership in the software clearly referred to the copies and not the copyright.<sup>167</sup> Fifth, a number of restrictions applied to how the RBOCs could use the software that the court found to be inconsistent with their owning the copies, including restrictions on not only transfer of copies, but also on disclosing it or making it “available to any person except [their] employees on a ‘need to know’ basis without the prior written consent of” DSC.<sup>168</sup> In holding that the RBOCs were not owners, the court rejected the argument that their making a single payment and having possession “for an unlimited period of time” were sufficient to reach a contrary conclusion.<sup>169</sup> Indeed, the court noted that other courts had rejected similar arguments and termed the argument as “simplistic.”<sup>170</sup>

At this point, a more detailed examination of the license agreement used by Amazon and its comparison to the one at issue in *DSC* is in order. That agreement, as pertains to the e-books (i.e., the “Digital Content”) begins as follows:

The Kindle Store enables you to download, display and use on your Device a variety of digitized electronic content, such as books, subscriptions to magazines, newspapers, journals and other periodicals, blogs, RSS feeds, and other digital content, as determined by Amazon from time to time (individually and collectively, “Digital Content”).<sup>171</sup>

“Device” is defined earlier in the license agreement as follows: “The Kindle Device (the ‘Device’) is a portable electronic reading device that utilizes wireless connectivity to enable users to shop for, download, browse, and read books, newspapers, magazines, blogs, and other materials, all subject to the terms and conditions of this Agreement.”<sup>172</sup> Thus, as with the license agreement in *DSC*, Amazon

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165. *See id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1362.

170. *Id.*

171. *Amazon Kindle, License Agreement and Terms of Use, supra* note 17, ¶ 3.

172. *Id.* ¶ 1.

restricts the use of the Digital Content to the hardware that it sells to the owner of the copy.<sup>173</sup> The agreement further provides:

Upon your payment of the applicable fees set by Amazon, Amazon grants you the non-exclusive right to keep a permanent copy of the applicable Digital Content and to view, use, and display such Digital Content an unlimited number of times, solely on the Device or as authorized by Amazon as part of the Service and solely for your personal, non-commercial use. Digital Content will be deemed licensed to you by Amazon under this Agreement unless otherwise expressly provided by Amazon.<sup>174</sup>

Again, like *DSC*, Amazon retains ownership of the copy, only granting to the transferee “the non-exclusive right to keep a . . . copy” in perpetuity.<sup>175</sup>

At first glance, this right to keep a copy permanently might be seen as favoring a finding of transfer of ownership. But this “permanent” grant, it turns out, is not absolute. In July 2009, Amazon angered its customers when it deleted from their Kindles copies of George Orwell’s *1984* and *Animal Farm*.<sup>176</sup> The deletions were done remotely and, apparently, without prior notice.<sup>177</sup> Amazon performed the deletion after learning that the e-books had been added to the Kindle Store by a company that lacked the rights to do so.<sup>178</sup> An Amazon spokesman said in an email that “[w]e are changing our systems so that in the future we will not remove books from customers’ devices in these circumstances.”<sup>179</sup> Reading that statement, one could reasonably conclude, however, that Amazon might remove books from its customers’ devices under other circumstances. One affected customer complained, “I never imagined that Amazon actually had the right, the authority or even the ability to delete something that I had already purchased.”<sup>180</sup> According to the *New York Times*, these deletions were not isolated; other books had also been deleted from customers’ Kindles by

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173. *See id.* ¶ 3.

174. *Id.*

175. *Id.*

176. Brad Stone, *Amazon Erases Two Classics from Kindle (One is ‘1984.’)*, N.Y. TIMES, July 18, 2009, at B1.

177. *Id.*

178. *Id.*

179. *Id.* As the article will discuss below, Amazon explicitly retains the right to do just that in its license agreement. *See infra* text accompanying notes 185–86.

180. Stone, *supra* note 176, at B1.

Amazon.<sup>181</sup> In its article on the incident, the *New York Times* reported:

Amazon's published terms of service agreement for the Kindle does not appear to give the company the right to delete purchases after they have been made. It says Amazon grants customers the right to keep a "permanent copy of the applicable digital content."

Retailers of physical goods cannot, of course, force their way into a customer's home to take back a purchase, no matter how bootlegged it turns out to be. Yet Amazon appears to maintain a unique tether to the digital content it sells for the Kindle.

"It illustrates how few rights you have when you buy an e-book from Amazon," said Bruce Schneier, chief security technology officer for British Telecom and an expert on computer security and commerce. "As a Kindle owner, I'm frustrated. I can't lend people books and I can't sell books that I've already read, and now it turns out that I can't even count on still having my books tomorrow."<sup>182</sup>

Amazon's action in deleting digital content from its customers' Kindle is further evidence that it retains ownership of such content and does not transfer ownership rights to its licensees. Continuing, we come to the licensing terms on which this article is focused:

Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any rights to the Digital Content or any portion of it to any third party, and you may not remove any proprietary notices or labels on the Digital Content. In addition, you may not, and you will not encourage, assist or authorize any other person to, bypass, modify, defeat or circumvent security features that protect the Digital Content.<sup>183</sup>

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181. *Id.*

182. *Id.*

183. *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 3.

Again, this language echoes similar language used in the DSC license agreement.<sup>184</sup>

Finally, the license agreement provides:

Your rights under this Agreement will automatically terminate without notice from Amazon if you fail to comply with any term of this Agreement. In case of such termination, you must cease all use of the Software and Amazon may immediately revoke your access to the Service or to Digital Content without notice to you and without refund of any fees. Amazon's failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of its rights.<sup>185</sup>

This final clause gives further proof that the non-exclusive right to keep a permanent copy is, in fact, not an absolute grant. Here, Amazon explicitly reserves the right to revoke possession.<sup>186</sup>

Taken together, the Amazon license agreement is at least as restrictive as that used by *DSC*.<sup>187</sup> If a court were to follow the approach of the court in *DSC*, it seems reasonable to conclude that "purchasers" of e-books from Amazon are not the owners of that content and, therefore, cannot rely on Section 109 of the Copyright Act to convey ownership or even possession of such content to a third party without Amazon's consent.<sup>188</sup> Following a similar approach to the Federal Circuit in *DSC*, the Second Circuit in *Krause v. Titleserv, Inc.*<sup>189</sup> found that the transferee of a copy of software did own that copy.<sup>190</sup> There were several factors that not only distinguish the facts in that case from *DSC* but also from a transferee of an e-book under the Amazon license agreement. In *Krause*, the transferee paid to the transferor "substantial consideration to develop the programs for its sole benefit."<sup>191</sup> The transferor also "customized the software to serve [the transferee's] operations."<sup>192</sup> In addition, the copies were stored on a server owned by the transferee and the transferor did not reserve a right to repossess the software, and the parties agreed that

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184. See *supra* text accompanying notes 163–75.

185. *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 5.

186. *Id.*

187. See *supra* text accompanying notes 163–75.

188. See 17 U.S.C. § 109(a) (2006); see also *DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354, 1361–62 (Fed. Cir.), *cert. denied*, 528 U.S. 923 (1999).

189. 402 F.3d 119 (2d Cir. 2005).

190. *Id.* at 124.

191. *Id.*

192. *Id.*

the transferee had the right to retain possession in perpetuity.<sup>193</sup> Finally, the transferee had the unrestricted right to discard or destroy the copies.<sup>194</sup>

Despite these rather detailed restrictions on what the transferee may do with a Kindle e-book and the explicit reservation of ownership, when one actually orders an e-book through Amazon.com, he could readily conclude that he is acquiring ownership.<sup>195</sup> If one finds a book on Amazon.com that he or she wishes to order that is available in a Kindle format, he or she will be given the opportunity to “[b]uy now with 1-Click®.”<sup>196</sup> Under the “Product Details” section, the Amazon.com shopper will find who is selling the e-book.<sup>197</sup> If the e-book is in one’s “Wish List,” he or she will see a button labeled “See buying options.”<sup>198</sup> All of this might lead the average consumer to believe he or she is acquiring ownership. Whether such a consumer could convince a court of this, however, is a different matter. Perhaps he or she could convince the court that the license agreement is a contract of adhesion and that the repeated references to buying and selling the e-book create an ambiguity which should be resolved in the customer’s favor.<sup>199</sup> Be that as it may, a professional librarian is hardly in the position of an ordinary member of the public when it comes to acquiring information assets. One would expect courts to hold professional librarians to a higher level of sophistication and not permit them to claim that the “buy” and “sell” language on the site represented a change in ownership when the license agreement itself gives ample evidence to the contrary.<sup>200</sup> Professor Rothchild offers another approach to resolving this issue, which recognizes that there are actually two transfers taking place when one acquires software:

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193. *Id.*

194. *Id.*

195. *See, e.g., Free Culture: The Nature and Future of Creativity [Kindle Edition]*, AMAZON.COM, [http://www.amazon.com/Free-Culture-ebook/dp/B000oCXHM2/ref=tmm\\_kin\\_title\\_0?ie=UTF8&m=AG56TWVU5XWC2](http://www.amazon.com/Free-Culture-ebook/dp/B000oCXHM2/ref=tmm_kin_title_0?ie=UTF8&m=AG56TWVU5XWC2) (last visited Nov. 16, 2010) (advertising for sale LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* (Kindle ed. 2010) and using terms such as buying options, seller, sold by, bought, and buy to describe the proposed transaction).

196. *Id.* (allowing visitors to purchase an e-book with one click).

197. *Id.*

198. The author has verified this on his own Amazon wish list.

199. *See, e.g., Telxon Corp. v. Hoffman*, 720 F. Supp. 657, 662-63, 667 n.10 (N.D. Ill. 1989) (holding unenforceable a contract of adhesion with “all or nothing” terms and construing ambiguous language in the agreement against the drafter).

200. *See Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 3; *see also Fialkoff*, *supra* note 75, at 8; *Hirtle*, *supra* note 85.

the transfer of a license to use content protected by copyright and a transfer of the physical medium that contains the protected content.<sup>201</sup> He argues that whatever the license agreement may say, the transferee is the owner of the physical medium containing the content and may transfer that copy pursuant to Section 109 of the Copyright Act.<sup>202</sup> Whatever merit this argument may have (and I will not explore that in any detail), it does not generally apply to e-books acquired through Amazon.com or Sony; in both cases, the content is downloaded from the sellers' servers to the customers' e-reader or computer.<sup>203</sup> Thus, the transferee never obtains a physical container to which he or she could assert ownership. He or she simply acquires the content without a physical container.<sup>204</sup>

Still another defense that a transferee of an e-book could raise in an effort to defeat the abrogation of Section 109 is to assert that the rights granted under that section are inalienable (i.e., cannot be contracted away). A library, for example, could argue that Section 109 is designed specifically to serve a very important role in the overall scheme of the Copyright Act by which Congress has balanced

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201. See Rothchild, *supra* note 93, at 31.

202. *Id.* at 30–33.

203. See *supra* note 9 and accompanying text.

204. This raises another issue that I will not explore in great detail in this article. As content is increasingly being sold for delivery by downloading from the internet, libraries must make a copy of that content to a device which can then display or play it in order to make it available to patrons. This would seem to violate the copyright owners' exclusive right of reproduction under Section 106 of the Copyright Act. See 17 U.S.C. § 106 (2006). Libraries may make these necessary copies only if permitted to do so by either an expressed or implied license. See *id.* (giving copyright owners the exclusive right to *authorize* copying as well). The Copyright Act offers no exception for making reproductions simply because one owns a copy. See *id.* As more content becomes available either exclusively or, at least preferably, by downloading it from online sources divorced from a physical container, this presents a real problem for libraries. Historically, libraries could rely on the first sale doctrine to circulate an information item without ever having to make a reproduction. See *id.* § 109(a). One way around this problem would be for a library to download the content directly to a specific e-reader and then never remove it from that e-reader, circulating the content with the e-reader to which it was originally downloaded. That would seem to avoid any problem with infringing the right of reproduction. It would also, however, defeat one of the huge benefits that the use of e-readers and e-books gives to libraries: the ability to buy thousands of e-books and significantly fewer e-readers to which the requested content could be loaded depending on what the patron seeking to borrow an e-book wanted. This problem also needs to be addressed soon. Of course, it could be covered in a license agreement, but like the issue addressed in this article, it is a matter that would be much better addressed in the Copyright Act itself and for many of the same reasons.



the competing interests of copyright owners and the general public.<sup>205</sup> To allow the copyright owner to remove this protection would create an imbalance in the scheme. In essence, the transferee would argue that permitting this single right to be contracted away would be akin to pulling a single thread from a piece of cloth, resulting in the entire garment coming unraveled. In essence, the question becomes: Is the exception to the exclusive right of distribution created in Section 109 an inalienable right or merely a default rule that applies only in the absence of a contract between the parties? To answer this question, the origins of the first sale doctrine, as delineated in the Supreme Court case *Bobbs-Merrill Co. v. Straus*,<sup>206</sup> are instructive. In *Bobbs-Merrill*, the copyright owner attempted, by notice, to restrict the price at which a purchaser of a book might resell it.<sup>207</sup> As discussed above,<sup>208</sup> the Supreme Court held that this effort was not supported in the explicit terms of the then existing Copyright Act, which gave to the copyright owner the exclusive right to vend.<sup>209</sup> As a result, the Court held that the copyright owner's exclusive right to vend applied only to the first sale of a copy, and that thereafter the owner of the sold copy could sell it without further restriction.<sup>210</sup> As noted earlier, however, the Court explained why it limited itself to the language of the statute, observing: "[I]t is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation, nor *license agreement* controlling the subsequent sales of the book."<sup>211</sup> This observation deals directly with our question, for Amazon.com does transfer possession of copies of e-books pursuant to "license agreement[s] controlling the subsequent sales [and other methods of transfer] of the book."<sup>212</sup> As to the effect such license agreements might have, this sentence is dicta.<sup>213</sup> The Court did not declare that it would have reached a different conclusion had such a license agreement existed and, even if it had, that was not an issue before it.<sup>214</sup> It simply noted the absence of a

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205. See *supra* note 2 and accompanying text.

206. 210 U.S. 339 (1908).

207. *Id.* at 341.

208. See *supra* text accompanying notes 129–30.

209. *Bobbs-Merrill*, 210 U.S. at 350–51.

210. *Id.* at 350.

211. *Id.* (emphasis added).

212. *Id.*; see also Amazon Kindle license restrictions cited *supra* note 19.

213. See *Bobbs-Merrill*, 210 U.S. at 350 (mentioning license agreements but not discussing the effect one would have on subsequent sales).

214. See *id.* ("There is no claim in this case of . . . [a] license agreement controlling the subsequent sales of the book.").

license agreement in explaining why it decided the matter exclusively by reference to the statute.<sup>215</sup> Nonetheless, this single sentence does open the possibility that the presence of a license agreement would have changed the result. In short, as early as 1908, the Court recognized that if a license agreement existed, the analysis would, at least potentially, be different.<sup>216</sup>

## V. THE IMPORTANCE OF LIBRARIES

An informed public constitutes the very foundation of a democracy. Libraries are the cornerstone of democracy in our communities because they assist the public in locating a diversity of resources and in developing the information literacy skills necessary to become responsible, informed citizens who can participate in our democracy.”<sup>217</sup>

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215. *Id.*

216. *See id.*

217. William R. Gordon, *Advocacy for Democracy: The Role of Library Associations*, IFLA, <http://archive.ifla.org/IV/ifla66/papers/119-122e.htm> (last updated May 7, 2000), (citation omitted in original) (quoting American Library Association President Nancy Kranich). The topic of this article is part of a wider debate regarding the use of license agreements by copyright owners to expand the restrictions on the use of their property beyond restrictions found in the Copyright Act and to, consequently, restrict the uses of licensees of a copy of an intellectual work more than an owner of such a copy would face under the Copyright Act. *See, e.g.*, LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 136 (2004) [hereinafter *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL*]. That is certainly an important debate and one on which the author of this article is also concerned. However, this article is not targeted at this wider issue and addresses the wider issue only to the extent necessary to deal with the more narrow issue of this article: the conflict between restrictions contained in license agreements and the role of libraries in a democratic republic. In this section, however, the author will explore uses of license agreements in the wider context to establish the environment in which the narrower issues under consideration in this article arise. Also, Franklin Delano Roosevelt observed, during World War II:

Libraries are directly and immediately involved in the conflict which divides our world, and for two reasons: first, because they are essential to the functioning of a democratic society; second, because the contemporary conflict touches the integrity of scholarship, the freedom of the mind, and even the survival of culture, and libraries are the great tools of scholarship, the great repositories of culture, and the great symbols of the freedom of the mind.

SIDNEY H. DITZION, *ARSENALS OF A DEMOCRATIC CULTURE* v (1947). President of the Foundation to Read, Gordon M. Conable, similarly stated:

If licensing agreements, such as those that apply to Kindle e-books, are enforceable under current law, that gives rise to the second issue explored in this article: Should the law be changed to provide libraries with an inalienable right to lend content, which they acquire through downloading, which are equivalent to their current right to lend content contained in and attached to a physical medium (*e.g.*, printed books)? In essence, the issue becomes whether libraries should be permitted to contract away rights, which are granted

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American democracy is dependent upon a belief that the people are capable of self-government. To secure our basic rights, we believe that “governments are instituted among men deriving their just powers from the consent of the governed.” In this country, we have taken this to mean “informed consent.”

The concept of informed consent only has meaning if the full range of human ideas is accessible to the people. The proponents of the various points of view must be able to make their cases fully and openly, however popular or unpopular they may be, before the individual and collective judgment of their fellow citizens.

This principle is embodied in the First Amendment to the Constitution, which protects the free expression of ideas: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

By providing the information and resources necessary for open, free, and unrestricted dialogue on all issues of concern, the public library preserves these freedoms.

It is the genius of the American system that we base our liberty on the broadest protection of each individual’s rights to free expression and on the corollary right to access the expression of others. It is the genius of the American public library to be an institution dedicated to promoting the exercise of these rights.

American public libraries flourish out of a commitment to the principle that knowledge and access to information empower the individual. Libraries embody the firm belief that information must not be the exclusive province of a privileged few and that it should be widely and freely available to all.

Gordon M. Conable, *Public Libraries and Intellectual Freedom*, AM. LIBR. ASS’N, <http://www.ala.org/ala/aboutala/offices/oif/iftoolkits/ifmanual/fifthedition/publiclibraries.cfm> (last visited Nov. 16, 2010).

ultimately not for their benefit, but for the benefit of the public at large. To answer this question, one must understand the history of libraries and their place in the dissemination of information in our society. What has been their role? Why have our laws favored their being able to lend to patrons books still under copyright protections, when, but for such lending, at least some such patrons might have purchased these books? How will the licensing restrictions on e-books and other information content distributed in methods divorced from a physical container impact that role? Does permitting such restrictions run counter to the public policies that have historically favored lending libraries? And, if so, what precisely should the law provide to allow libraries to continue in this role while protecting the legitimate interests of copyright owners?

The first libraries were established in what is now the United States during the early years of European colonization.<sup>218</sup> These earliest libraries were established to serve the religious needs of the colonists.<sup>219</sup> In 1665, the citizens of Dorchester approved the use of public funds to pay for “the new impression of Mr. Mather[']s Catechismes [sic].”<sup>220</sup> This is the earliest record of public funds being used to support a library.<sup>221</sup> Benjamin Franklin spearheaded the founding of a library company in Philadelphia in 1731.<sup>222</sup> As the eighteenth century progressed, circulating or rental libraries were established.<sup>223</sup> Later, mercantile and mechanic’s libraries were organized.<sup>224</sup> Then, as public schools were being founded, community libraries, intended for the adults, were often housed in the school buildings, administered by the school districts and supported through taxes.<sup>225</sup> Eventually, these developments led to the establishment of standalone public libraries, the first of which were founded in the mid-nineteenth century.<sup>226</sup> The earliest such libraries

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218. Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to internet Pornography in Public Libraries*, 51 *DRAKE L. REV.* 213, 219 (2003) (citing BUREAU OF EDUC., U.S. DEP’T OF THE INTERIOR, *PUBLIC LIBRARIES IN THE UNITED STATES OF AMERICA: THEIR HISTORY, CONDITION, AND MANAGEMENT*, SPECIAL REPORT 1–37 (1876)).

219. *Id.* (citing EVELYN GELLER, *FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876–1939: A STUDY IN CULTURAL CHANGE* 3 (1984)).

220. *Id.* at 220 n.36 (citing C. SEYMOUR THOMPSON, *EVOLUTION OF THE AMERICAN PUBLIC LIBRARY 1653–1876*, at 17–18 (1952)).

221. *Id.*

222. *Id.* (citing GELLER, *supra* note 219, at 4).

223. *Id.*

224. *Id.* (citing GELLER, *supra* note 219, at 6).

225. *Id.* (citing GELLER, *supra* note 219, at 8).

226. *Id.* (citing THOMPSON, *supra* note 220, at 158–86).

were established in Boston, Wayland, in New Bedford, Massachusetts, and in Exeter, New Hampshire.<sup>227</sup>

Today, it is hard to imagine a world without libraries. The American Library Association estimates that there are 122,101 libraries of all kinds in the United States.<sup>228</sup> Of these, there are 9221 public libraries, housed in 16,671 buildings, 3827 academic libraries, 99,180 school libraries, 8476 special libraries, 284 armed forces libraries, and 1113 government libraries.<sup>229</sup> Libraries serve a public that by all appearances are voracious readers. In 2007, publishers shipped more than 3.1 billion books (net after returns).<sup>230</sup> Similar annual net shipments of books have been projected for 2008 through 2010.<sup>231</sup> Of course, many of these books were purchased by private individuals or by institutions other than libraries.<sup>232</sup> Nonetheless, all available statistics support the conclusion that Americans are heavy users of their libraries. In June 2009, the Institute of Museum and Library Services reported that public libraries alone had estimated total annual circulation in 2007 of 2,166,787,000 items.<sup>233</sup> That represents a total of more than seven items per American.<sup>234</sup> The American Library Association (ALA) reported that public libraries

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227. *Id.* at 220–21 (citing THOMPSON, *supra* note 220, at 186–87). While Thompson dates the establishment of the Boston Public Library to 1852, the library itself dates its establishment to 1848. *See id.* at 220 n.43; *see also Boston Public Library: A Brief History and Description*, BOSTON PUB. LIBR., <http://www.bpl.org/general/history.htm> (last visited Nov. 16, 2010) (“Founded in 1848, by an act of the Great and General Court of Massachusetts, the Boston Public Library (BPL) was the first large free municipal library in the United States. The Boston Public Library’s first building of its own was a former schoolhouse located on Mason Street that was opened to the public on March 20, 1854.”).

228. *Number of Libraries in the United States: ALA Library Fact Sheet 1*, AM. LIBR. ASS’N, <http://www.ala.org/ala/professionalresources/libfactsheets/alalibraryfactsheet01.cfm> (last updated Aug. 2010).

229. *Id.*

230. U.S. CENSUS BUREAU, NET BOOK PUBLISHERS’ SHIPMENTS: 2007 TO 2010, THE 2010 STATISTICAL ABSTRACT: INFORMATION & COMMUNICATIONS tbl.1100 (2010) (citing BOOK INDUSTRY STUDY GROUP, INC., BOOK INDUSTRY TRENDS (2009)), *available at* <http://www.census.gov/compendia/statab/2010/tables/10s1100.pdf>.

231. *Id.*

232. *Id.*

233. *Public Library Use, ALA Library Fact Sheet 6*, AM. LIBR. ASS’N, <http://www.ala.org/ala/professionalresources/libfactsheets/alalibraryfactsheet06.cfm> (last updated June 2010) (citing INST. OF MUSEUM & LIBR. SERVS., PUBLIC LIBRARIES SURVEY FISCAL YEAR 2007, at 60 (June 2009), [http://harvester.census.gov/imls/pubs/Publications/fy2007\\_pls\\_report.pdf](http://harvester.census.gov/imls/pubs/Publications/fy2007_pls_report.pdf)).

234. *Id.*

had a total of 1,433,734,000 visitors, representing an average of nearly five visits per American.<sup>235</sup> A Harris poll conducted in September 2008 showed that 68% of Americans had a library card and 76% had visited a library during the past year.<sup>236</sup> Indeed, in September 2008, the ALA reported that library card registration had reached a historic high.<sup>237</sup> Not only do Americans use their libraries in large numbers, a large percentage also sees them as an important educational resource (92%) and as pillars of the community (70%).<sup>238</sup> The total aggregate size of library collections is almost unimaginable. In July 2010, the ALA published a list of the 100 largest libraries in the United States based on the number of volumes held.<sup>239</sup> Not surprisingly, the largest library is the Library of Congress, which held 32,818,014 volumes at the time of the survey.<sup>240</sup> The next largest, at less than three-quarters the size of the Library of Congress, was the largest public library, Boston Public Library, with 23,595,895 volumes, which was followed closely by Harvard University, which held 16,250,117 volumes.<sup>241</sup> Combined, the 100 largest libraries in America held more than 567 million volumes.<sup>242</sup> While no reliable statistics are available to accurately estimate the total volumes held in aggregate in America's more than 122,000 libraries, it is clear that America has made an enormous investment in its libraries.<sup>243</sup> Numbers alone, however, cannot convey the importance of libraries to a nation. Lawrence Lessig has observed:

In real libraries, in real space, access is not metered at the level of the page (or the image on the page). Access is metered at the level of books (or magazines, or CDs, or DVDs). You get to browse through the whole of the library, for free. You get to check out the books you want to read, for free. The real-space library is a den protected from the metering of the market. It is of course created within a

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235. *Id.* (citing INST. OF MUSEUM & LIBR. SERVICES, *supra* note 233, at 60).

236. *Id.*

237. Press Release, American Library Association, *New National Poll Shows Library Card Registration Reaches Historic High* (Sept. 23, 2008), <http://www.ala.org/ala/newspresscenter/news/pressreleases2008/September2008/ORSharris.cfm>.

238. *Id.*

239. *The Nation's Largest Libraries: A Listing By Volumes Held, ALA Library Fact Sheet Number 22*, AM. LIBR. ASS'N, <http://www.ala.org/ala/professionalresources/libfact/sheets/alalibraryfactsheet22.cfm> (last updated July 2010).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Number of Libraries in the United States: ALA Library Fact Sheet 1*, *supra* note 228.

market; but like kids in a playroom, we let the life inside the library ignore the market outside.

This freedom gave us something real. It gave us the freedom to research, regardless of our wealth; the freedom to read, widely and technically, beyond our means. It was a way to assure that all of our culture was available and reachable—not just that part that happens to be profitable to stock. It is a guarantee that we have the opportunity to learn about our past, even if we lack the will to do so. The architecture of access that we have in real space created an important and valuable balance between the part of culture that is effectively and meaningfully regulated by copyright and the part of culture that is not. The world of our real-space past was a world in which copyright intruded only rarely, and when it did, its relationship to the objectives of copyright was relatively clear.<sup>244</sup>

Professor Lessig treats the broader concerns that are raised by the narrower issue addressed in this article in his 2004 book, *Free Culture*.<sup>245</sup> Specifically, Lessig writes about how information technology is transforming our culture from a “free culture” to a “permission culture.”<sup>246</sup> As he takes pains to point out, the title of his book does not use the word “‘free’ as in ‘free beer’ . . . but ‘free’ as in ‘free speech,’ ‘free markets,’ ‘free trade,’ ‘free enterprise,’ ‘free will,’ and ‘free elections.’”<sup>247</sup> Libraries play a vital role in making and keeping our culture “free” in the latter sense of the word. Libraries are one of the places where we store away our history, a history waiting for rediscovery by researchers, sometimes generations after the events took place.<sup>248</sup> But they are also the place where anyone, without regard to wealth or station in life, can access information vital to exercising his or her rights to petition, to speech and to vote.<sup>249</sup> The importance of readily available information to the functioning of a democracy is not a new idea. It is as old as the

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244. Lessig, *supra* note 69, at 27.

245. FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY, *supra* note 217, at xiii–xvi, 19.

246. *Id.* at xiv.

247. *Id.*

248. *See id.* at 109.

249. *See Library Bill of Rights*, AM. LIBR. ASS’N, <http://www.ala.org/ala/issuesadvocacy/intfreedom/librarybill/index.cfm> (last modified Jan. 23, 1996).

republic itself. Indeed, the Father of the Constitution recognized this need when he wrote, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”<sup>250</sup>

As described above, libraries were created to meet that need in America since colonial days, well more than a century before James Madison penned the words quoted above.<sup>251</sup> Public libraries, open to all, have met that need for most of our nation’s history, since before the Civil War.<sup>252</sup> Decades before the Supreme Court decided *Bobbs-Merrill*, and Congress codified its holding in the Copyright Act of 1909,<sup>253</sup> libraries were lending books to patrons who were using them to learn and to make their own contributions to building and maintaining a “free culture.”<sup>254</sup> For more than a hundred years, libraries could cite *Bobbs-Merrill* and the various iterations of the Copyright Act to demonstrate a legal basis for their practice of lending books.<sup>255</sup> Quoting James Madison, the Supreme Court has recognized the important role of libraries in our culture and politics.<sup>256</sup> In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,<sup>257</sup> the Court heard a case involving the removal of books from a school library.<sup>258</sup> The Court held that the school board violated the free speech clause of the First Amendment when it removed books to which it objected because of the political and social messages that they conveyed.<sup>259</sup> In doing so, the Court recognized that the rights secured in the free speech clause included not only the right to express one’s self, but the right to receive such expression.<sup>260</sup> The Court wrote:

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250. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 Writings of James Madison 103 (Gaillard Hunt ed. 1910), cited in *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).

251. See *supra* notes 218–27 and accompanying text.

252. See *supra* notes 218–27 and accompanying text.

253. See *supra* notes 124–25 and accompanying text.

254. FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL, *supra* note 217, at 172–73; see also *supra* notes 218–19.

255. See *supra* notes 124–25 and accompanying text.

256. See *supra* note 250 and accompanying text.

257. 457 U.S. 853 (1982).

258. *Id.* at 855–56.

259. *Id.* at 871–72.

260. *Id.* at 866–67.



This right [to receive speech] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's First Amendment* right to send them: “The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.” “The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”

More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.<sup>261</sup>

In addition to quoting James Madison on this point, the Court also quoted Alexander Meiklejohn, “Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good.”<sup>262</sup>

In *Pico*, the Court was addressing a matter of state action, namely a public school board that removed books from the school library that it deemed offensive.<sup>263</sup> There is no state action involved in licensing agreements between a copyright owner and one to whom it transfers possession of a copy of an e-book.<sup>264</sup> Yet, the principals that make the Free Speech Clause of the First Amendment an important part of our freedoms are at stake. If the future of books is as Jeff Bezos envisions it, one in which printed books cease to be published and books are available only in digital formats, will the public have the same access to books and the information that they contain and convey as they have enjoyed up to this time? And if they do not, what will that do to our culture and to our democracy? Suddenly,

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261. *Id.* at 867 (citations omitted).

262. *Id.* at 868 (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948)).

263. *Id.* at 855–56.

264. A “state action” is defined as “[a]nything done by a government; esp., in constitutional law, an intrusion on a person’s rights (esp. civil rights) either by a governmental entity or by a private requirement that can be enforced only by governmental action . . . .” *BLACK’S LAW DICTIONARY* 1538 (9th ed. 2009).

millennia after the advent of writing, paper, the codex and libraries and a century and a half or more after the establishment of the first true public libraries in the United States, the digital revolution, which all hailed as setting information free, is in fact threatening to be the context in which authors and publishers seek to put it in a cage. If allowed to do so, copyright owners may use the information revolution to take us from a “free culture” to a “permission culture.”<sup>265</sup> Now, if the terms of the license agreement offered by Amazon are to be taken literally, some may no longer have a ready and affordable means of acquiring “popular information.”<sup>266</sup> If Amazon’s license agreement is valid and enforceable (as I argue above),<sup>267</sup> then Congress needs to act to invalidate and render unenforceable those provisions that would prevent libraries from acquiring and distributing such information. Its failure to do so now, while the e-book revolution is still underway, may well lead to a day that our democratic government becomes “a Prologue to a Farce or a Tragedy.”<sup>268</sup>

#### VI. WHY E-BOOK VENDORS MIGHT OBJECT TO LIBRARY LENDING

Amazon has not, to the knowledge of the author, given any reason as to why it would want to prohibit lending of e-books by libraries. Perhaps, as one librarian has observed, it simply did not contemplate library lending when it drafted its license agreement.<sup>269</sup> If that is the case, it is hard to understand why, when confronted with the problems the explicit terms of the license agreement pose for libraries,<sup>270</sup> Amazon did not simply amend the agreement to give libraries an exception to the prohibition against lending.<sup>271</sup> Because it failed to do so and has not given a clear and consistent answer as to whether libraries may lend e-books, one can only speculate as to why it has such a restriction and has not made such a modification. The most obvious reason would be fear of piracy. Piracy is, in fact, already a significant problem for copyright owners whose works are

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265. See FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL, *supra* note 217, at xiv, 173.

266. See *supra* notes 17–21 and accompanying text.

267. See *supra* text accompanying notes 171–94.

268. Letter from James Madison to W.T. Barry, *supra* note 249; see also *supra* notes 248–50 and accompanying text.

269. See *Mixed Answers to “Is It Ok for a Library to Lend a Kindle?”*, *supra* note 75.

270. See *supra* notes 75–81 and accompanying text.

271. See *supra* notes 78–90 and accompanying text.

made available as e-books.<sup>272</sup> One example is Dan Brown's *The Lost Symbol*. *The Lost Symbol* became available to bookstores in September 2009.<sup>273</sup> CNN.com reported that more digital copies of the book sold than the hardback edition.<sup>274</sup> But, in addition to the digital copies sold by Amazon, more than 100,000 pirated copies were downloaded within twenty-four hours of its release.<sup>275</sup> In January 2010, Contributor Corporation released the results of a study it undertook of e-book piracy.<sup>276</sup> It concluded that copyright owners were losing between \$2.75 and \$3 billion in potential sales due to piracy of e-books and that nearly 10,000 copies of each of the 913 books reviewed were available for unauthorized downloading.<sup>277</sup> This represents approximately 10% of total book sales in the United States.<sup>278</sup>

Naturally, copyright owners and e-book vendors are concerned about this problem and are taking steps to combat it. As with other digital media, one of the primary means of protection is the use of digital rights management technology (DRM).<sup>279</sup> Obviously, DRMs have not been successful in preventing piracy.<sup>280</sup> Amazon reportedly deals almost exclusively with DRM-protected works.<sup>281</sup>

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272. Matt Frisch, *Digital Piracy Hits the E-Book Industry*, CNN.COM (Jan. 1, 2010, 9:52 AM), <http://www.cnn.com/2010/TECH/01/01/ebook.piracy/index.html>.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Online Book Piracy Costs U.S. Publishers Nearly \$3 Billion*, ATTRIBUTOR BLOG (Jan. 14, 2010, 8:51 AM), <http://www.contributor.com/blog/book-piracy-costs-study/>.

277. *Id.*

278. *Id.*; see also *U.S. Book Anti-Piracy Research Findings*, ATTRIBUTOR (Jan. 14, 2010), [http://www.contributor.com/docs/Contributor\\_Book\\_AntiPiracy\\_Research\\_Findings.pdf](http://www.contributor.com/docs/Contributor_Book_AntiPiracy_Research_Findings.pdf). And the problem appears to be getting worse. In May 2010, *Torrentfreak*, a popular Bit Torrent site, disclosed that in the first few weeks after Apple's iPad hit the market, the downloading of pirated e-books increased by 78%. Michael, *Is the Apple iPad Creating a Surge in eBook Piracy?*, GOOD EREADER BLOG (May 19, 2010), <http://goodereader.com/blog/electronic-readers/is-the-apple-ipad-creating-a-surge-in-ebook-piracy/>.

279. Laura Sydell, *Will E-Book Anti-Piracy Technology Hurt Readers?*, NPR (Mar. 25, 2009), <http://www.npr.org/templates/story/story.php?storyId=102330373>.

280. See *supra* notes 271–77 and accompanying text.

281. Sydell, *supra* note 279. Amazon claims that this has not been a problem for its customers. Ian Fried, the vice president of Amazon Kindle, declared that [w]e've had very few if any customer responses that the choice we made with DRM was a problem"; some readers feel otherwise. *Id.* A huge concern for libraries, individual readers, and preservationists is what happens if (almost certainly when) the technology to read those e-books becomes obsolete. See *id.*

Yet, there is not, to the knowledge of the author, any evidence that library patrons have been a source, significant or otherwise, of the piracy problem. There is no reason to believe that patrons who borrow e-books would be any more likely than individual purchasers to circumvent the DRMs (which would be a violation of the Digital Millennium Copyright Act (DMCA)).<sup>282</sup> The DMCA's prohibition against trafficking in circumvention services would bar librarians from knowingly assisting a patron in circumventing any DRM that a copyright owner might utilize.<sup>283</sup> Library lending, then, would provide no more exposure to piracy than the selling of e-books to individuals. Absent evidence to the contrary, therefore, the threat of piracy by library patrons offers no justification for restricting library lending of e-books. Of course, just as with print copies, library lending has the potential to meet the demands of some readers who, but for the availability to borrow, might purchase a copy.<sup>284</sup> This is, of course, no more a justification for permitting restrictions on lending e-books than it is to permit restrictions on lending printed ones.

## VII. THE PROPOSAL

[W]e cannot rely upon special favors granted by private companies (and quasi-monopoly collecting societies) to define our access to culture, even if the favors are generous, at least at the start. Instead our focus should be on the underlying quandary that gives rise to the need for this elaborate scheme to regulate access to culture. However clever the settlement, however elegant the technology, we should keep Peter Drucker's words clear in our head: "There is nothing so useless as doing efficiently that which should not be done at all."

The problem that we are confronting is the result of a law that has been rendered hopelessly out-of-date by new technologies. The solution is a re-crafting of that law to

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282. 17 U.S.C. § 1201 (2006).

283. *Id.*

284. See Eric Hellman, *Offline Book "Lending" Costs U.S. Publishers Nearly \$1 Trillion*, GO TO HELLMAN (Jan. 15, 2010, 1:32 PM), <http://go-to-hellman.blogspot.com/2010/01/offline-book-lending-costs-us.html> (providing a satirical treatment of library lending).

achieve its estimable objective—incentives to authors—without becoming a wholly destructive burden to culture.<sup>285</sup>

Libraries, which provide a crucial role in assuring an informed citizenry, are left with no certainty as to whether they may lend e-books under Amazon's current license agreement. By its explicit terms, the Amazon Kindle license agreement prohibits their doing so.<sup>286</sup> If Amazon does not understand its license agreement to so limit libraries, it has not made that clear to date. If it so intends, the proper mechanism for doing so would be to amend the license agreement to remove all doubt. Yet, even if Amazon were to amend its license agreement, there is nothing in current law that would prevent it reverting to the current language at a later date nor is there anything to prevent other e-book vendors from adopting equally restrictive license agreements.<sup>287</sup>

If libraries are not “owners” of the e-books they purchase for purposes of the first sale provision of Section 109 of the Copyright Act, then license agreements restricting lending would be enforceable.<sup>288</sup> The restrictions on use contained in the Amazon Kindle license agreement are at least as restrictive as those contained in the *DSC* license and arguably more so.<sup>289</sup> It seems likely that courts examining the Amazon Kindle license agreement would conclude that the licensees are not “owners.”<sup>290</sup> Such a result is unacceptable, at least as to libraries, as against public policy. Such a result would prevent libraries from performing their crucial role in enabling citizens to fully exercise their constitutional rights to vote, to speak, and to petition their government.<sup>291</sup> It is vital that the same level of access to information that Americans have historically enjoyed through libraries be maintained. For more than a century and a half, tax payers have funded public libraries specifically for this purpose.<sup>292</sup> The Father of the Constitution, James Madison, recognized that without access to information, our democracy is a farce.<sup>293</sup> The Supreme Court has recognized the vital role which

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285. Lessig, *supra* note 69, at 28–29.

286. *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 3.

287. *See id.* ¶ 5.

288. 17 U.S.C. § 109 (2006).

289. *See supra* notes 160–75 and accompanying text.

290. *See DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999); *see also supra* notes 140–41 and accompanying text.

291. *See supra* note 261 and accompanying text.

292. *See supra* note 225 and accompanying text.

293. *See supra* text accompanying note 250.

libraries play in assuring such access.<sup>294</sup> The e-book revolution now leaves in doubt whether that same level of access will be enjoyed by citizens in the near future.

The only way to guarantee that libraries will be permitted to lend e-books to their patrons is for Congress to amend the Copyright Act to explicitly provide such a right and to make it inalienable (that is, one which cannot be contracted away). There are two approaches that Congress could take in this regard. It could amend the Copyright Act to explicitly provide that any transfer of a copy of an e-book to a library shall be deemed a transfer of ownership. This would have the effect of making the other provisions of Section 109 applicable to libraries, providing them with the statutory exception to the copyright owners' exclusive right of distribution.<sup>295</sup> Alternatively, Congress could amend Section 109 to explicitly provide that libraries have an inalienable right to distribute copies of e-books for which it has lawful possession.<sup>296</sup> Under the second approach, libraries would have the right to lend e-books whether they owned the copies or held them under a license pursuant to which they did not own the copies. Of course, copyright owners might wish to use license agreements for other purposes than prohibiting lending by libraries, but, as was discussed above, license agreements may be utilized even when ownership of a copy is transferred.<sup>297</sup> Therefore, under either approach, copyright owners could use license agreements for purposes other than prohibiting lending.

One question that Congress would need to consider in amending the Copyright Act to guarantee libraries the right to lend e-books is whether it would, at the same time, extend to libraries the right to distribute the copies in other ways, for example, by selling copies or renting them. In this respect, it does matter which approach Congress uses. If it adopted the first approach of declaring library transferees to be owners of the copies, then libraries would have all the rights of distribution granted under the current Section 109. If it adopted the second approach, Congress could explicitly so provide or could limit the right to distribute to lending only. One advantage of the first approach is that libraries would also have all the rights guaranteed in Section 117, which permits owners to make archival copies and

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294. See *supra* notes 256–62 and accompanying text.

295. Cf. 17 U.S.C. § 109(a) (2006) (delineating the general limitation on exclusive rights of copyright owners).

296. Cf. *id.* § 109.

297. See *supra* text accompanying note 166.

adaptations.<sup>298</sup> As libraries have perhaps an even greater need to make archival copies and adaptations than individual owners or mere possessors of e-books,<sup>299</sup> this would make the first approach preferable. Another reason to prefer an amendment that would make libraries owners of the copies of e-books they obtain is that it would guarantee that they could possess those copies permanently. As noted above, in one section of its license agreement, Amazon purports to convey permanent possession of e-books.<sup>300</sup> Yet, in a later section, it reserves the right to revoke possession should it terminate the license and has, in fact, removed e-books from Kindles.<sup>301</sup> While this action caused a great deal of consternation among those whose e-books were deleted, libraries have a role in preserving information resources in addition to making them available to the public.<sup>302</sup> In order to fulfill that role, their right to permanently retain copies of works they acquire is essential.

#### VIII. CONCLUSION

E-readers and e-books have in a very few years grown from a small niche market to mass appeal. They have become and are likely to remain an important medium for the dissemination and distribution of resources. Indeed, the head of Amazon (the company whose license agreement and lack of participation in the OverDrive project raise the greatest concerns) believes that they will ultimately displace the printed codex after 500 years of dominance as the primary medium by which the written word is conveyed.<sup>303</sup> Libraries cannot ignore the e-book but must embrace it if they are to fulfill their function as information centers accessible to all in our society, and it is essential that libraries be able to lend e-books to patrons to take to their homes and offices, to read, to study, and to contemplate. If license agreements such as the one used by Amazon are enforceable, libraries will not be able to fulfill their important mission in this regard. While Amazon may modify its license agreement as to

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298. Cf. 17 U.S.C. § 117(a)(2) (stating that notwithstanding § 106, it is not an infringement for the owner of a copy of a computer program to make another copy provided that the copy is for archival purposes only).

299. See Lessig, *supra* note 69, at 26–27 (discussing the valuable role of libraries in preserving written work and in providing all access to information).

300. See *Amazon Kindle: License Agreement and Terms of Use*, *supra* note 17, ¶ 3.

301. See *id.* ¶ 5; Stone, *supra* note 176 (discussing Amazon's removal of e-books from users' Kindles without prior notice).

302. See *supra* note 217 and accompanying text.

303. See *supra* note 87 and accompanying text.

libraries or simply not enforce its provisions, libraries and the public they serve should not be subject to either the self-interest or the generosity of copyright owners. The question is whether libraries will retain the legal ability to do what they have done since colonial times, lend books to patrons, or will this advance in information technology cause information to be more difficult to access instead of easier. The time to give a definitive answer is now. The party who should answer the question is Congress. Before device manufacturers and content owners become too deeply committed to relying on licensing as a means of addressing the issue of redistribution, Congress should lay out the rules that all must follow. The right of libraries to lend e-books to their patrons should be inalienable. Any licensing agreements or other contractual terms to the contrary should be made unenforceable. There is still time for society as a whole to establish definitively what rights a library has to lend e-books that it acquires. Congress should guarantee that the interests of the reading public are protected; and it should do so in a way that guarantees the same freedom of access to e-books that the public has enjoyed with physical books for well over a century.<sup>304</sup>

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304. Some may argue that the market is the best mechanism to resolve this issue. Such an argument ignores the fact that by granting copyright protection in the first place, the government has already interfered in the market. Copyright is a government granted monopoly. Government interference in the market in this instance is rational and warranted. Intellectual creations are not subject to the same sorts of practical protections naturally available for physical property. Multiple people cannot possess a unique copy of a book simultaneously, but they can possess the contents of the same book simultaneously. The Constitution authorizes copyright laws precisely to enable Congress to encourage the creation of “writings” and the framers were wise to do so. *See* U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”). The purpose of granting those rights, however, is not to recognize some moral right inherent in authors to own their creations, but to encourage creation for the benefit of society as a whole. *See* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991). Congress is only authorized to give protection to authors in order to benefit society. As Lawrence Lessig has observed:

But why should copyright owners not be permitted to agree to whatever complicated system of access they want? It’s their property, isn’t it? Here we come back to Property 101. The law has always set limits on the freedom of property owners to allocate their property as they want. Families in Britain wanted to control how estates passed down the family line. At a certain point, their wants became way too complicated. The response was rules—such as the Rule Against Perpetuities—designed to enhance the efficiency of the market by limiting the freedom of property owners to place conditions on their property, thus



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making it possible for property to move more simply. That is precisely the impulse I wish to recommend here: that we limit the freedom of lawyers to craft infinitely complicated agreements governing culture, so that access to our culture can be preserved.

Lessig, *supra* note 69, at 29–30.

