

THE TALE OF THE E-BOOK: LIBRARY LENDING'S NEWEST EDITION

Marysia Wlazlo[†]

CONTENTS

INTRODUCTION: A NOT SO SIMPLE STORY	273
I. CHARACTER DEVELOPMENT OF THE E-BOOK	275
II. A CONVERGING PLOTLINE—THE PUBLIC LIBRARY	277
III. THE LEGISLATIVE SETTING.....	278
A. 1909 Copyright Act	279
B. 1976 Copyright Act	280
C. Digital Millennium Copyright Act.....	280
IV. THE PLOT THICKENS	281
A. Plot Element One: Licensing Agreements.....	282
B. Plot Element Two: First Sale Doctrine	283
V. CONFLICTING NARRATIVES	284
A. The Publisher's Tale	285
B. The Library's Tale.....	286
VI. ON THE SAME PAGE	288
VII. READING BETWEEN THE LINES OF THE DIGITAL FIRST SALE DOCTRINE	290
A. <i>Contrasting Copy—Copyright: Alliteration for Digital First Sale</i>	290
B. <i>Licensees Lack Legality: Alliteration Against Digital First Sale</i>	292
VIII. BRAINSTORMING THE FINAL CHAPTER	293
CONCLUSION.....	294

INTRODUCTION: A NOT SO SIMPLE STORY

Imagine the scene. As the last moments of sunlight filter through the partially drawn shade, a comfy armchair beckons while the winter's fire sets the mood, its warm glow illuminating Wait a minute! That glow is not coming from the fire. It's coming from an iPad loaded with the most recent *New York Times* bestseller! Wait, what? That doesn't seem right. Let's try that again. Picture this. A dimly lit library hall, shelves lined with leather bound books, the smell of rich

[†] Syracuse University College of Law, J.D. Candidate, 2013; Boston College, B.A., *summa cum laude*, 2008. Thank you to Professor Laura Lape, my faculty advisor, for encouraging me with her passion for law and language. A special thank you to “Momma Wlazlo,” my indefatigable editor in chief, without whom I would not be able to use “without whom.”

mahogany fills the air, and the Kindle Fire powers on, its screen displaying the latest Stephenie Meyer chicklit Hold up just one minute. What's going on here? When did the trendy and cool realm of the techies' hottest picks invade the tried and true world of the bespectacled bookworm? Have the techno-gadget advancements introduced by innovators like Apple's Steve Jobs and Amazon's CEO Jeff Bezos roused an otherwise sleepy publishing industry? With e-book sales skyrocketing throughout the consumer market, the answer would seem to be an enthusiastic "Yes!" If that is the case, what is to come of the most traditional public face of the book industry, the public library, in this electronically driven world?

"[N]othing would do more extensive good at small expense than the establishment of a small circulating library in every county, to consist of a few well-chosen books, to be lent to the people of the county under regulations that would secure their safe return in due time."¹ In the 200 years since Thomas Jefferson wrote these words, even the most forward thinking of American pioneers could not have envisioned the vast potential of this "small circulating library."² Forget two centuries. Just a few short years ago, the technology that may serve to launch the American library into a leading pop cultural position was disparaged as "going nowhere fast."³ This potential springboard is none other than the e-book, of course. This modern book format has not only reinvigorated an outdated publishing industry,⁴ it has also provoked a tidal wave in the tranquil waters of an otherwise predictable library system.⁵

Virtual library branches have become routine. They enable library patrons to forego that trek to the local library, in exchange for an online e-book checkout complete with all the comfort and ease afforded by a home computer.⁶ The combination of free lending and a dynamic e-

1. Brief for American Library Association et al. as Amici Curiae Supporting Petitioners, *Golan v. Holder*, 131 S.Ct. 1600 (2011) (No. 10-545), 2011 WL 2533007 (quoting Letter from Thomas Jefferson to John Wyche (May 19, 1809), in THOMAS JEFFERSON: A CHRONOLOGY OF HIS THOUGHTS, 223 (Jerry Holmes ed., 2002)).

2. THOMAS JEFFERSON: A CHRONOLOGY OF HIS THOUGHTS, 223 (Jerry Holmes ed., 2002).

3. Claire Elizabeth Craig, *Lending Institutions: The Impact of the E-Book on the American Library System*, 2003 U. ILL. L. REV. 1087, 1095 (2003).

4. See, e.g., Michael Kelley, *New Statistics Model for Book Industry Shows Trade Ebook Sales Grew Over 1,000 Percent*, LIBR. J. (Aug. 9, 2011), http://www.libraryjournal.com/lj/home/891561-264/new_statistics_model_for_book.html.csp.

5. See Bruce Judson, *eBook Universe: What Role Will Libraries Play?*, FOREWORD (Oct. 2010), reprinted in <http://www.ilovelibraries.org/articles/featuredstories/ebook>.

6. See *Download Services for Public Libraries*, OVERDRIVE, INC.,

book format is a novel phenomenon which has catapulted an unsuspecting public library system into the front lines of e-book battles between major players like publishing houses, authors, agents, and techno-manufacturers. These battles have revived discussions over the Copyright Act.⁷ As library lending makes its most dramatic change in over 200 years with its sudden capacity to lend to patrons absent a visit to the premises, the effect on both the prominence of the public library and the e-book market will be systemic.⁸ The balance between the interests at stake may come down to which weighs more, the traditional hardcover embodied in and protected by the old style business model of publisher and author, or the e-reader as embraced by the unlikely ally of the public library. This ongoing plot will surely be played out in the next best page-turner.

This Note will narrate the story of the e-book and the public library system. It will position the evolution of these characters within their historical and legislative contexts, examine the legal doctrines that customarily structure this relationship, and address reasons for the ineffectiveness of these doctrines in the digital environment. After comparing the competing interests of the two sides and identifying the parties' current practices, this Note will analyze the appropriateness of creating a Digital First Sale Doctrine and suggest a solution to the current conflict between libraries and publishers.

I. CHARACTER DEVELOPMENT OF THE E-BOOK

In 1971, the Gutenberg Project espoused a valiant Mission Statement for its time: “[t]o encourage the creation and distribution of eBooks.”⁹ It wasn't until the 1990s, however, that the first e-readers hit the general reading public in the form of Apple's Newton Message Pad, the Cybook, and the Franklin eBookMan.¹⁰ Not surprisingly, such devices are unfamiliar to today's reader, as they were met by an unenthusiastic audience and soon skulked quietly away.¹¹ These early trendsetters should not feel bad, though, for even as late as 2003, the future of e-books was nothing but gloomy. Book readers largely

<http://www.overdrive.com/files/DLR.pdf> (last visited Sept. 28, 2012).

7. See Craig, *supra* note 3, at 1092-93.

8. See *id.* at 1088.

9. About: Mission Statement, PROJECT GUTENBERG, <http://www.gutenberg.org/wiki/Gutenberg:About> (last modified Dec. 21, 2011).

10. See Gregory K. Laughlin, *Digitization and Democracy: The Conflict Between the Amazon Kindle License Agreement and the Role of Libraries in A Free Society*, 40 U. BALT. L. REV. 3, 9 (2010).

11. See *id.*

disregarded e-reading devices, as evidenced by poor sales figures, and publishers remained unconvinced that this new format would have a noteworthy effect on the print industry.¹² Even the CD-ROM, which had been popular in other contexts, and the Sony eReader, an e-reading device manufactured by a prominent electronics company, had failed to grab the attention of the general public.¹³ To those involved, it seemed incomprehensible that a reader would spend \$399 on a black and white text device when a paperback sold for just \$9.99.¹⁴ Little did they know

The climax of this yet unfinished story came in 2007 when the Amazon Kindle shot a spark through the publishing industry, immediately exploding e-book sales figures.¹⁵ In the years immediately following the launch of the Kindle, national e-book sales multiplied more than five times from \$22 million in 2006¹⁶ to over \$113 million in 2008.¹⁷ In February 2011, e-books were the number one selling format among all consumer trade books in the United States¹⁸ and accounted for an unexpected 20% of net revenue for the major publishers.¹⁹ Following the 2011 holiday season, Amazon recorded a 177% increase in sales of Kindles, including the Kindle Fire and its previous versions.²⁰ No other innovation has had such a profound impact on the book industry since Gutenberg's printing press,²¹ and there is no reason to suspect that this growth will end any time soon. Remaining competitive means that techno-companies must regularly release new editions, resulting in endless possibilities for e-book designs and digital

12. See Craig, *supra* note 3, at 1094-95.

13. Andrea Fleck-Nisbet, *A Publisher's Perspective on Ebooks*, AM. LIBR. MAG. (Jan. 12, 2012, 5:31 PM), <http://americanlibrariesmagazine.org/features/01122012/publisher-s-perspective=ebooks>.

14. *Id.*

15. *Id.*

16. Brian R. Hook, *Are the E-book 'Barbarians at the Gate'?*, BOOK BUS. (Feb. 2007), <http://www.bookbusinessmag.com/article/e-book-sales-continue-grow-some-industry-anticipate-e-book-era-near-45785/1>.

17. Laughlin, *supra* note 10, at 13.

18. Andi Sporkin, *Popularity of Books in Digital Platforms Continues to Grow, According to AAP Publishers February 2011 Sales Report*, ASS'N OF AM. PUBLISHERS (April 14, 2011), <http://www.infodocket.com/2011/04/16/aap-publishers-february-2011-sales-report-popularity-of-books-in-digital-platforms-continues-to-grow/>.

19. Fleck-Nisbet, *supra* note 13.

20. Julie Bosman, *The Bookstore's Last Stand*, N.Y. TIMES, Jan. 29, 2012, at BU1, available at http://www.nytimes.com/2012/01/29/business/barnes-noble-taking-on-amazon-in-the-fight-of-its-life.html?pagewanted=1&_r=2&nl=todaysheadlines&emc=tha25.

21. See Laughlin, *supra* note 10, at 17-18.

enhancements.²² As recognized by the American Association of Publishers, e-books have become permanent additions to a reader's repertoire.²³

II. A CONVERGING PLOTLINE—THE PUBLIC LIBRARY

The American public library system has never boasted the same storied surge as the e-book. Despite its less dramatic entrance, however, public libraries have evolved substantially since first serving patrons in 1833.²⁴ With 188 libraries established in just forty years,²⁵ these locations soon became popular social and cultural institutions.²⁶ The growth of free book lending continued steadily, and the most recent statistics show there are currently 16,698 public library locations throughout the United States.²⁷

Just as e-books have altered the course of the publishing industry, the public library has not been immune to a similar detour. As e-books and e-reading devices become an increasingly acceptable means of enjoying that favorite book, local libraries are responding by providing patrons with access to “virtual branches” from which to browse and checkout e-books.²⁸ Not surprisingly, e-book library lending has subsequently boomed.²⁹ OverDrive, the leading virtual branch service provider, began its operations in 2002³⁰ and now offers services to over

22. Fleck-Nisbet, *supra* note 13. Apple's 2010 edition of the iPad was the first color e-reader, and in early 2012, Barnes & Noble was working on what will be its fifth edition of the Nook. Bosman, *supra* note 20.

23. Laughlin, *supra* note 10, at 13.

24. Laura Gasaway, *Libraries and Copyright at the Dawn of the Twentieth Century: The 1909 Copyright Act*, 11 N.C. J. L. & TECH. 419, 431 (2010). Opened in 1854, the Boston Public Library is usually credited as being the first public library, even though the first public library was “accidentally” founded in Peterborough, New Hampshire in 1833. *Id.*

25. *Id.*

26. *Id.* at 131.

27. Miller, K. et al., *Public Libraries Survey: Fiscal Year 2009*, INST. MUSEUM & LIBR. SERVS. 49 (Oct. 2011), <https://harvester.census.gov/imls/pubs/Publications/pls2009.pdf>. There are 9,225 public library administrative entities in the United States, which are the agencies established under state or federal law. However, some of these entities have multiple branches, which increases the total number of library locations to 16,698. *Id.* at 39-40 n.1, 49-50 n.2.

28. *See Best Service, OVERDRIVE, INC.*, <http://www.overdrive.com/Solutions/Libraries/Public/BestService.aspx> (last visited Sept. 14, 2012).

29. *See* Roger Yu, *Libraries Make e-Lending Push; Patrons Getting More Ways to Go Mobile*, USA TODAY, Nov. 15, 2011, at 1B.

30. *About, OVERDRIVE, INC.*, <http://www.overdrive.com/About> (last visited Sept. 14, 2012).

11,000 libraries throughout the United States.³¹

OverDrive and similar service providers contract with libraries in establishing virtual branches.³² The service provider creates a library's virtual branch website, integrates that branch site into the library's management and lending systems, and operates the virtual branch site to ensure its continued synchronization with the library's catalog.³³ This occurs while maintaining the appearance to the user of browsing from the local library's website.³⁴ Such home checkouts are touted as being as simple as "1-2-3."³⁵ To those who have embraced this new technology, the ease of access afforded by e-book lending makes e-books the preferred medium in comparison with a physical copy. Library lending is now available around the clock, with no trip to the library and no late fees.

E-book lending ensures the viability of libraries as major players in the digital world³⁶ at a time when the need for such institutions was called into question in light of the limitless access to information made possible by the internet.

III. THE LEGISLATIVE SETTING

Copyright protection is authorized by the Constitution,³⁷ and modern laws strive to achieve the balance intended by the Framers between incentivizing authors to produce new works and fostering public access to those works.³⁸ Libraries are lauded as the public institution most representative of the democratic ideal of equal opportunity and as such are expected to protect society's right of free access.³⁹ Consequently, library growth has been aided by legislation freeing libraries from certain restrictions of copyright law.⁴⁰ This has

31. Press Release, OverDrive, Inc., OverDrive and Amazon Launch Kindle Compatibility with Library eBooks (Sept. 21, 2011), available at <http://www.overdrive.com/News/OverDrive-and-Amazon-launch-Kindle-compatibility-with-Library-eBooks>.

32. See *Best Service*, supra note 28.

33. See *id.*

34. *Best User Experience*, OVERDRIVE, INC., <http://www.overdrive.com/Solutions/Libraries/Public/BestUserExperience.aspx> (last visited Sept. 14, 2012).

35. See *Download Services for Public Libraries*, supra note 6.

36. See Judson, supra note 5.

37. U.S. CONST. art. I, § 8, cl. 8.

38. See Carol Simpson, *An Ill Wind: Libraries and Interlibrary Loan of Audiovisuals*, 11 SMU SCI. & TECH. L. REV. 163, 169-70 (2007).

39. See H.R. REP. NO. 2222, at 7 (1909).

40. See Kristen M. Cichocki, *Unlocking the Future of Public Libraries: Digital*

occurred with a Congressional eye on the effects library lending and technological advancement have on the market for copyrighted works.⁴¹ What follows is a synopsis of the major milestones in American copyright legislation reflective of the dynamic interplay among public libraries, emerging technologies, and book publishers.

A. 1909 Copyright Act

Telephones and wireless radios were some of the “new” technologies on the scene that influenced the passage of the 1909 Copyright Act (“1909 Act”).⁴² The debates surrounding its passage illustrate the malleable relationship between public libraries and book publishers that continues to this day. At that time, publishers depended on libraries as consumers of large quantities of books, and libraries, in turn, enjoyed a discounted price for such purchases.⁴³ This mutually beneficial relationship, however, could not easily prevail over the incompatible goals of these two industries that plagued the passage of the 1909 Act and continues to permeate copyright discussions to this day. The conflict remains that book publishing is a business with publishers seeking to protect the interests of their authors and sell their books at a profit whereas libraries aim to provide free access to those very books.⁴⁴

At issue in the 1909 Act was a special library exemption instituted in an 1891 copyright law.⁴⁵ This exemption permitted libraries to import domestically copyrighted works from abroad without paying an import tax.⁴⁶ Even then, publishing leaders, most noteworthy of whom was Charles Scribner, expressed concern for the growing popularity of libraries and the negative effect of free lending on publishers’ sales.⁴⁷ A compromise was ultimately reached,⁴⁸ but this debate illustrates the enduring dispute over library lending’s influence on the consumer book market.

Licensing that Preserves Access, 16 U. BALT. INTELL. PROP. L.J. 29, 32-33 (2009).

41. *See id.* at 31-33.

42. Gasaway, *supra* note 24, at 419 (citing Gerald J. Sophar, *Nature of the Problem*, in *REPROGRAPHY AND COPYRIGHT LAW 3* (Lowell H. Hattery & George P. Bush, eds., 1964)).

43. Gasaway, *supra* note 24, at 420.

44. *Id.* at 420-21.

45. *Id.* at 421.

46. *Id.*

47. *Id.* at 439.

48. Gasaway, *supra* note 24, at 449. The library exemption was retained, but its application was restricted to importing one such book per invoice versus the two that had been allowed previously. *Id.*

B. 1976 Copyright Act

The 1976 Copyright Act (“Copyright Act”) and its subsequent amendments govern most of today’s copyright questions.⁴⁹ In the House Report accompanying its passage, Congress explained the need for updated legislation by pointing to the technological advances that had occurred since 1909 and which “generated new industries and new methods for the reproduction and dissemination of copyrighted works.”⁵⁰ Aside from innovations in communication satellites and laser capabilities, the new technology that created the largest question regarding the rights of libraries was photocopying.⁵¹

Section 106 of the Copyright Act establishes the exclusive rights of copyright owners,⁵² and in contrast, § 108 limits the application of those rights with regard to libraries.⁵³ In short, § 108 addresses specific circumstances under which a library may reproduce and distribute copyrighted works for archival and interlibrary loan purposes, reproductions and distributions that would otherwise violate § 106.⁵⁴ Congress instituted these limitations in direct response to the substantial technological advances that had affected the library landscape since the passage of the 1909 Act, namely, photocopying.⁵⁵

C. Digital Millennium Copyright Act

Adoption of the Digital Millennium Copyright Act (“DMCA”) in 1998 demonstrates Congress’s attempt to “keep pace with emerging technology,” as is made clear by the Senate Report which states that the objective of the DMCA was to guarantee that the emerging online marketplace and “digital networks” be “safe places to disseminate and exploit copyrighted materials.”⁵⁶ To ensure the protection of copyrighted works on contemporary media platforms, the age old concerns of the Framers to secure exclusive rights to authors were carried into the same market being created and dominated by major

49. See generally Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2006).

50. H.R. REP. NO. 94-1476, at 47 (1976).

51. See *id.*; see also Cichocki, *supra* note 40, at 33.

52. See 17 U.S.C. § 106. Section 106 grants copyright owners the following exclusive rights with regard to the copyrighted work: (1) reproduction, (2) preparation of derivatives, (3) distribution of copies, (4) public performance of certain categories of works, (5) public display of certain categories of works, and (6) public performance of sound recordings by means of digital audio transmission. See *id.*

53. See *id.* § 108.

54. See *id.*

55. See H.R. REP. NO. 94-1476, at 47; see also Cichocki, *supra* note 40, at 33.

56. S. REP. NO. 105-190, at 1 (1998).

2013]

E-books

281

digital leaders like Apple and Amazon.

As promised, the DMCA adapted many provisions of the Copyright Act in response to the changes initiated by digitization. One of the chief aspects of the DMCA is its Digital Rights Management (“DRM”) sections which, in an effort to defend against digital piracy, enable copyright owners to designate how a work can be utilized, thus limiting a user’s ability to modify or share the work in certain ways.⁵⁷ The DMCA makes it a violation to alter or falsify DRM or to circumvent technological measures used to protect a copyrighted work.⁵⁸

As applied to libraries specifically, the DMCA increased the number of copies libraries may produce for archival purposes from one to three in order to permit the effective conservation of library collections.⁵⁹

IV. THE PLOT THICKENS

The e-book is rewriting the relationship between libraries and publishers.⁶⁰ In 2010, library e-book lending increased 200% from the previous year with 15 million e-books borrowed by library patrons.⁶¹ At public libraries in Seattle and Chicago, for example, e-book circulation increased 92% in 2010 and 380% in 2011, respectively.⁶² Continued exponential growth is anticipated, and libraries are responding accordingly. The New York Public Library has steadily expanded its e-book budget such that its current investment is four times that of 2009, and it plans to add an additional \$1 million to that amount.⁶³ Some librarians predict e-books will account for half their circulation within the next five years,⁶⁴ essentially pushing the traditional hardcover to the back of the shelf.

While libraries prepare for what they will write as a revolution in free lending, publishers arm themselves for a coup against the establishment. As is often the case, the current conflict stems from the

57. Cichocki, *supra* note 40, at 43.

58. 17 U.S.C. §§ 1201(a), 1202.

59. *Id.* § 108(b)-(c).

60. Craig, *supra* note 3, at 1088.

61. Press Release, OverDrive, eBook Checkouts at Libraries Up 200 Percent in 2010 (Jan. 6, 2011), *available at* <http://www.overdrive.com/News/getArticle.aspx?newsArticleID=20110106>.

62. Yu, *supra* note 29.

63. *Id.*

64. Christian Davenport, *E-reader Revolution Creates Demand Libraries Can't Meet*, WASH. POST, Jan. 15, 2012, at A01.

tensions that arise as traditional disagreements are reincarnated on a modern stage.

A. Plot Element One: Licensing Agreements

Despite the appearance of a purchase, consumers actually license e-books from e-book vendors.⁶⁵ Under the Amazon Kindle “Terms of Service,” for example, when an e-book is paid for, the customer is merely granted the right to “keep a permanent copy” of the e-book to “view, use, and display.”⁶⁶ In reality, that particular copy is not being sold.⁶⁷

Although it is the longstanding practice of publishers to grant libraries discounted prices for book purchases, a practice that continues for the sale of physical copies of a book, libraries face a similar scenario to general consumers when “purchasing” e-books.⁶⁸ Contract terms between libraries and e-book vendors, which are largely dictated by publishers’ motivations, stipulate that libraries do not purchase e-books but, instead, only license the right to use the e-books.⁶⁹ A typical contract between a public library and OverDrive, for example, explicitly states that the “Digital Products [e-books] are licensed to [the l]ibrary and not sold.”⁷⁰ Other contract clauses can be attributed to the licensed nature of these e-books as well. For instance, should the contract be terminated, the library must get permission from individual copyright owners in order to transfer the “Digital Products” obtained from OverDrive to a different service provider.⁷¹ Had the library owned the e-books, subsequent transfers would not require permission from the copyright owners by virtue of the First Sale Doctrine.⁷² This termination clause has proven burdensome for libraries attempting to change virtual branch service providers as they may face the daunting

65. Michael Seringhaus, *E-Book Transactions: Amazon “Kindles” the Copy Ownership Debate*, 12 YALE J. L. & TECH. 147, 149 (2010).

66. *Id.* at 172.

67. *Id.*

68. Cichocki, *supra* note 40, at 38.

69. *Id.*

70. Contract between OverDrive and Sumter County Public Library System, cl. 3.3, available at http://www.sumtercountyfl.gov/Files/AgendaCenter/Items/162/Overdrive%20aggreement%20for%20e-Books_201112281332490128.pdf (last visited Feb. 29, 2012) [hereinafter Contract].

71. *Newsmaker: Joanne Budler; Interview*, AM. LIBR. MAG. (Jan. 1, 2012), <http://americanlibrariesmagazine.org/columns/newsmaker/joanne-budler>; see also Contract, *supra* note 70, cl. 11.4.

72. Carrie Russell, *Threats to Digital Lending*, AM. LIBR. MAG. (Jan. 12, 2012), <http://americanlibrariesmagazine.org/features/01122012/threats-digital-lending>.

task of contacting potentially hundreds of publishers and individual authors to obtain the necessary permission.⁷³

This licensing model helps publishers protect the copyright integrity of their e-books, but not without restricting libraries' ability to develop sustainable business and lending strategies consistent with a guaranteed right to later lend that e-book.⁷⁴

B. Plot Element Two: First Sale Doctrine

Section 108 of the Copyright Act, which provides libraries with certain copyright exemptions, does not address ordinary library lending practices.⁷⁵ Therefore, libraries rely on the First Sale Doctrine of § 109 to lend books.⁷⁶ The First Sale Doctrine limits a copyright owner's control to the "first sale" of a copyrighted work, and not to subsequent sales or distributions of that work.⁷⁷ Thus, a copyright owner's exclusive right to control the distribution of a particular copy of a work granted in § 106 ceases once that copy has been legally sold, thereby permitting the purchaser to sell or otherwise dispose of the copy at will.⁷⁸

Fittingly, the Supreme Court case that first articulated the First Sale Doctrine addressed an author's right to control the future sale of his book. In *Bobbs-Merrill Co. v. Strauss* the author sold his book stamped with a notice prohibiting future retailers from selling copies below a particular price point, a mere \$1, less they be liable for copyright infringement.⁷⁹ The Court rejected the author's price point stipulation, holding that his copyright protection did not extend so far as a right to dictate subsequent sales of the work.⁸⁰ The copyright owner's right to distribute ended with the first sale of a particular copy.⁸¹

It follows that under traditional circumstances, when a library purchases a physical copy of a book, the library acquires ownership of that copy and is, therefore, entitled to lend at will and to stipulate the

73. *Newsmaker: Joanne Budler; Interview, supra note 71.* A Kansas librarian featured at the 2012 American Library Association's Midwinter Meeting attempted to contact 165 publishers to obtain this permission. *Id.*

74. Cichocki, *supra note 40*, at 38-39.

75. *See generally* 17 U.S.C. § 108 (2006).

76. Cichocki, *supra note 40*, at 37; 17 U.S.C. § 109 (2006).

77. 17 U.S.C. § 109(a).

78. Cichocki, *supra note 40*, at 37.

79. 210 U.S. 339, 341 (1908).

80. *Id.* at 350.

81. *Id.* at 351.

conditions under which that copy will be lent.⁸²

The rules change, however, when an e-book is being lent. Section 109 explicitly extends the First Sale Doctrine only to the “owner of a particular copy.”⁸³ A licensee is not an owner. Further, libraries are not permitted to claim immunity from licensing agreements, for even though § 108 affords libraries certain protections, such protections do not supersede contractual obligations under which libraries may be bound.⁸⁴ In *Bobbs-Merrill Co.*, the Court emphasized that its holding that a copyright owner’s right to distribute ended with the first sale of a particular copy applied exclusively to copyright owners that distributed their works absent licensing agreements, as consistent with the facts in that case.⁸⁵

The climax of this story punctuates the question, if libraries are mere licensees of the e-books they acquire, do the explicit terms of their licensing agreements, coupled with the inapplicability of the First Sale Doctrine, have the effect of curtailing library e-book lending?⁸⁶

V. CONFLICTING NARRATIVES

With the apparent inapplicability of the First Sale Doctrine to library e-book lending, libraries and publishers are at a stalemate. Some libraries are opting to leave OverDrive in anticipation of more favorable contractual terms elsewhere,⁸⁷ but are soon likely to learn that such stipulations are unavoidable. Major publishers are limiting library access to e-books while awaiting an industry-wide solution.⁸⁸ As of January 2012, e-books from Hachette, Simon & Schuster, and MacMillan were not available for library lending.⁸⁹ Penguin once again provided a limited e-book offering, having halted availability entirely in late 2011 citing piracy concerns.⁹⁰ HarperCollins restricted library e-

82. BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW: A PRACTITIONER’S GUIDE § 4:1.3[A] (2001).

83. 17 U.S.C. § 109(a) (2006).

84. H.R. REP. 94-1476, at 77 (1976). The report explicitly states that § 108 “does not override any contractual arrangements assumed by a library or archives when it obtained a work for its collections.” *Id.*

85. 210 U.S. 339, 350 (1908). The Court explicitly stated that there was no “contract limitation, nor license agreement controlling the subsequent sales of the book.” *Id.*

86. See Laughlin, *supra* note 10, at 5.

87. Russell, *supra* note 72.

88. Randall Stross, *Publishers vs. Libraries: An E-Book Tug of War*, N.Y. TIMES, Dec. 24, 2011, at BU 3, available at http://www.nytimes.com/2011/12/25/business/for-libraries-and-publishers-an-e-book-tug-of-war.html?_r=1&ref=librariesandlibrarians.

89. *Id.*; Lorien Crow, *E-Book Lending Lures Readers Back to Libraries*, MOBELMEDIA (Dec. 20, 2011), <http://www.mobiledia.com/news/121523.html/>.

90. Crow, *supra* note 89.

book offerings to a numerical lending limit,⁹¹ leaving Random House as the only one of the “Big 6” to provide complete access to their e-book collections for library lending purposes.⁹²

There are, undoubtedly, two sides to every story

A. *The Publisher’s Tale*

The publishing industry’s lukewarm acceptance of the e-book can be attributed, in part, to an initially cool reception from consumers and to a fear over how to protect copyrighted works carried into the digital realm.⁹³ Consumers are now clearly enamored of e-books, but copyright protection remains a concern. Although the DMCA makes it a punishable violation to alter or falsify DRM or to circumvent technological copy controls, which are encoded in every e-book on the market, digital piracy remains a very real problem.⁹⁴ Once copy controls are circumvented, digital works can be duplicated more perfectly and distributed more quickly than has ever been possible with physical editions.⁹⁵ Consequently, publishers seek reassurance regarding the integrity of e-book databases. If top government agency websites equipped with state of the art security measures are susceptible to hackers, then certainly local library databases are not immune.⁹⁶ Concern over piracy will become a less viable justification for restricting library e-book access, however, as technological security measures become more sophisticated, and as publishers accept the unfortunate reality of the inevitability of digital piracy.

More persuasive rationales for limiting library e-book availability stem from the very essence of e-books and from the effect that library e-book lending has on a publisher’s e-book market. Primarily, it’s a simple equation. Free e-books from libraries equal lost e-book sales for publishers.⁹⁷ With e-books occupying first place as the fastest growing segment of the publishing business, this fear is merited. Once upon a time, the inconvenience of a trek to the library to borrow a book, perhaps one to renew it, and yet another to return it made purchasing the

91. *Id.*

92. See Julie Bosman, *Publisher Limits Shelf Life for Library E-Books*, N.Y. TIMES, Mar. 14, 2011, at A1, available at http://www.nytimes.com/2011/03/15/business/media/15libraries.html?_r=1&scp=16&sq=e-book&st=cse [hereinafter Bosman, *Publisher Limits*].

93. Davenport, *supra* note 64.

94. Laughlin, *supra* note 10, at 46.

95. Eurie Hayes Smith IV, *Digital First Sale: Friend or Foe?*, 22 CARDOZA ARTS & ENT. L.J. 853, 854-55 (2005).

96. Davenport, *supra* note 64.

97. See Stross, *supra* note 88.

book a favorable alternative. Now that only a few clicks of the mouse differentiate a potential purchaser from a potential patron, the possibility of lost sales is palpable.⁹⁸

Consumer sales lost to e-book borrowing call into question the continued viability of the market for e-books, a concern that is further compounded by lost library sales. Selling a single copy of an e-book to a library that can then lend that one copy eternally is not a sustainable business model.⁹⁹ In contrast to physical books that wear out over time, e-books are immune from physical deterioration. E-books never wear out, can be circulated perpetually, and are incapable of being lost or stolen.¹⁰⁰ Unlike physical books that need to be replaced frequently, e-books require no such re-investment.¹⁰¹ The Copyright Office has recognized this predicament, previously voiced solely by publishers.¹⁰² In a Congressional report, the Copyright Office reiterated the distinction between the susceptibility of physical works to degrade over time versus the durability of digital formats to preserve their value.¹⁰³ If libraries do not need to make replacement purchases to sustain e-book collections, publishers will lose another reliable segment of their business.

The vulnerability of the e-book market must be considered in the context of an already weakened retail book trade. In the last ten years, over 500 independent bookstores closed their doors.¹⁰⁴ But the small “mom and pops” are not the only endangered parties. Borders went out of business in 2011, taking several hundred retail locations with it, leaving Barnes & Noble as the sole-survivor of the bookstore battles.¹⁰⁵ Despite Barnes & Noble’s market domination, the company projected lost sales for 2012, and Wall Street responded unsympathetically.¹⁰⁶

B. The Library’s Tale

Libraries invoke the obligation of their social and legislative mandate to provide public access to copyrighted works when formulating their arguments to endorse e-book lending.¹⁰⁷ Because of

98. *Id.*

99. *Id.*

100. Crow, *supra* note 89.

101. *Id.*

102. Smith, *supra* note 95, at 854-55.

103. *Id.*

104. Bosman, *supra* note 20.

105. *Id.*

106. *Id.*

107. *See* Judson, *supra* note 5.

their less prominent position, however, libraries are primarily on the defensive in response to publishers' demands for restrictions.

A library's accountability with regard to digital piracy and security breaches is limited to the level of responsibility stipulated by its virtual branch service provider.¹⁰⁸ A library must ensure the continued integrity of its e-book databases to remain in compliance with its service provider contract.¹⁰⁹ If a library's security measures are not adequately maintained, its contract may be terminated and its virtual branch shut down.¹¹⁰ Beyond this initial obligation, however, the primary responsibility for protecting e-books lies with the service providers who are closely monitored by publishers.¹¹¹ General matters of digital piracy cannot reasonably be placed on the shoulders of libraries. Libraries merely seek to participate in the pre-existing digital landscape and dutifully adhere to what is required of them.

Time and again, libraries theorize that free lending does not adversely impact the consumer book market; to the contrary, making a book available for loan actually increases sales of that same book.¹¹² In support of this proposition, libraries cite statistics that indicate book borrowing encourages readers to buy more books.¹¹³ Pointing to a similar trend that has been glimpsed for e-books, libraries argue concern over the viability of the e-book market is misplaced.¹¹⁴ When Amazon launched an e-book lending library exclusively for Kindle owners in late 2011, sales of those e-books offered grew on the Amazon site.¹¹⁵

Unsurprisingly, there is little agreement that book lending actually increases book sales. Publishers consistently present evidence to the contrary, and there is insufficient documentation to confidently purport a similar correlation as to e-books.¹¹⁶ Evaluation of this theory in the e-book context compels consideration of a reader's personal attachment to

108. See generally Contract, *supra* note 70.

109. See *id.* ¶ 5.

110. *Id.* ¶¶ 6.6, 11.4, -11.5.

111. *Id.* ¶ 3.1.

112. Russell, *supra* note 72.

113. *Id.* (citing Memorandum from Regina Corso, Director, The Harris Poll, to Denise Davis, Director, ALA Office for Research and Statistics (June 26, 2007), available at http://www.ala.org/research/sites/ala.org.research/files/content/librystats/public/purchasing_after_use_omni_6_20.pdf).

114. Russell, *supra* note 72 (citing OverDrive, *How eBook Catalogs at Public Libraries Drive Publishers' Book Sales and Profits* 6 (2010), <http://www.overdrive.com/files/PubWhitePaper.pdf>).

115. Joel Hruska, *Amazon Touts Lending Library Growth, Claims It Boosts Sales*, HOT HARDWARE (Jan. 17, 2012), <http://hothardware.com/News/Amazon-Touts-Lending-Library-Growth-Claims-It-Boosts-Sales/>.

116. See Russell, *supra* note 72.

physical books. Not to be underestimated is the feeling of gratification that comes when a completed novel is proudly displayed amid a reader's book collection, a moment that does not translate to an e-book whose destiny is not the glory of a bookshelf but the eternal confines of an electronic device. Readers grown accustomed to the glow of an Ipad 3 do not have the same emotional attachment to their devices and are likely to be just as satisfied with a borrowed e-book as a purchased one, thus undermining the theory that e-book lending will ultimately result in an increase in e-book sales.

Another point furthered by libraries and often overlooked in this discussion is the frequent unavailability of an e-book even though a library carries that e-book in its virtual branch. If a library has only one copy, then that title is available to only one patron at a time.¹¹⁷ This routinely results in e-book waitlists with excessive wait times for certain popular titles.¹¹⁸ Many patrons are averse to waiting and opt instead for an e-book purchase that is just a few easy clicks away.¹¹⁹

VI. ON THE SAME PAGE

Libraries and publishers remain committed to weaving this new electronic character into their narrative. To preserve a relationship characterized by 200 years of mutual cooperation, both sides have attempted compromises that aim to promote e-book lending while also sustaining the e-book market.¹²⁰ With most of the "Big 6" either completely restricting or drastically limiting e-book availability, and with libraries across the country denouncing the current situation, it is evident that the espoused solutions are inadequate.¹²¹ Only a more permanent resolution will write the final chapter, but the current drafts merit a closer look.

The universality of typical e-book access is being arbitrarily circumscribed in favor of an abridged reading. In theory, an e-book has no access limitations. Countless library patrons could checkout the same copy of an e-book simultaneously.¹²² This characteristic alone makes the e-book a more cost effective and convenient alternative for both libraries and their patrons.¹²³ Nevertheless, the shackles inherent in physical books are artificially injected into e-book lending.

117. See Davenport, *supra* note 64.

118. *Id.*

119. *Id.*

120. *Id.*

121. *See id.*

122. Bosman, *Publisher Limits*, *supra* note 92.

123. *Id.*

Restrictions such as the one e-book, one lend at a time rule guarantee that libraries make multiple e-book purchases of the same work.¹²⁴

Similarly, geographic constraints are placed on libraries' virtual branches. In February 2011, OverDrive announced that any library it served could lend e-books to patrons only within the library's traditional geographic radius.¹²⁵ In other words, a patron must establish a close geographic relationship to a particular library to be able to access that library's e-book collection.¹²⁶ This proximity may be established through proof of residency, employment, or enrollment in a school within the library's geographic service area.¹²⁷ Violating the patron proximity requirement is grounds for OverDrive to terminate the library's virtual branch services.¹²⁸ This stipulation again imposes physical restraints upon a technical device that would otherwise be unlimited. Limiting library patrons to the e-book collection of their geographically local library is considered by publishers to be a solution to the problem of patrons' perusing countless library websites and an opportunity to turn borrowers into purchasers.¹²⁹

Although regarded by libraries as a far cry from a compromise, a newly initiated practice is to impose e-book "checkout limits." This plan works by delineating a specific number of times a particular copy of an e-book may be lent, and then erasing that e-book file once that lending limit is reached.¹³⁰ Notwithstanding heated protest, HarperCollins was the first publisher to introduce this e-book lending method in late 2011.¹³¹ HarperCollins set its lending limit at twenty-six, meaning that once a library lends a particular copy of a HarperCollins e-book twenty-six times, the library's copy will automatically expire, forcing the library to repurchase a new copy or forego keeping that title in its e-book collection.¹³² Libraries vehemently oppose this practice, but it may be an effective means to compensate for the durable nature of e-books and to ensure that publishers will continue to provide libraries with access to the most desired titles by guaranteeing future library e-

124. *Id.*; Stross, *supra* note 88.

125. Letter from Steve Potash, C.E.O., OverDrive, to OverDrive Library Partners 2-3 (Feb. 24, 2011), *available at* <http://librarianbyday.net/localwp-content/uploads/2011/02/OverDrive-Library-Partner-Update-from-Steve-Potash-2-24-2011.pdf> [hereinafter Potash Letter].

126. *Id.*

127. *Id.*

128. *See* Contract, *supra* note 70, ¶¶ 11.4, 11.5.

129. Bosman, *Publisher Limits*, *supra* note 92.

130. *Id.*; Potash Letter, *supra* note 125, at 2.

131. Bosman, *Publisher Limits*, *supra* note 92.

132. *Id.*

book purchases.¹³³

Despite continued efforts to navigate this previously uncharted territory, neither side embraces the current state of affairs. Libraries argue lending restraints unnecessarily impair their ability to widely promote e-books by increasing their expenses while publishers contemplate the necessity of even more compromise to ensure the future of library e-book lending. The final chapter has yet to be written.

VII. READING BETWEEN THE LINES OF THE DIGITAL FIRST SALE DOCTRINE

Realization that the Copyright Act does not adequately address the current digital landscape is far from novel. The DMCA was an early attempt at rectifying pervasive problems handicapping numerous industries.¹³⁴ Following passage of the DMCA, Congress commissioned the Section 108 Study Group (“Study Group”) to explore possible amendments to § 108 in light of new problems stemming from its implementation.¹³⁵ More than two decades later, the Study Group continues to lament § 108’s inability to handle copyright concerns unique to digital media.¹³⁶ Perhaps discouraged by legislative inaction regarding § 108, libraries have focused their efforts on other provisions of the Copyright Act. Echoing the calls of free music downloaders in the early ‘90s, libraries petition for revision of § 109 of the Copyright Act to institute a “Digital” First Sale Doctrine.¹³⁷ Both proponents and opponents of this digital right cite the significance of § 109’s “ownership” requirement in articulating their positions.

A. *Contrasting Copy—Copyright: Alliteration for Digital First Sale*

Libraries are prohibited from lending e-books under § 109’s First Sale Doctrine because they are not “owners” of these books, but mere licensees.¹³⁸ This upsets the longstanding balance between authors and publishers as copyright holders and libraries as owners of a particular

133. *Id.*

134. *See* S. REP. NO. 105-190, at 1-2 (1998).

135. Simpson, *supra* note 38, at 190, n.189.

136. *About the Section 108 Study Group*, SECTION 108 STUDY GROUP, <http://www.section108.gov/study.html> (last visited Sept. 22, 2012).

137. Russell, *supra* note 72.

138. Cichocki, *supra* note 40, at 38; *see* 17 U.S.C. § 109(a) (2006) (“[T]he owner of a particular copy or phonorecord . . . is entitled . . . to sell or otherwise dispose of the possession of that copy or phonorecord.”) (emphasis added).

copy.¹³⁹ What was customarily considered sufficient library ownership to trigger application of the First Sale Doctrine is no longer adequate in the digital realm.¹⁴⁰ But the rationale behind the First Sale Doctrine has not changed, even though the book format has. If a physical copy of a book is entitled to the benefits of the First Sale Doctrine, a reason for denying those rights to an e-book is wanting. The basis of the First Sale Doctrine is found in § 202 of the Copyright Act, which identifies the distinction between a copyrighted work and the copy that embodies it.¹⁴¹ The author's choices in making the work are granted copyright protection, not the tangible form of the book itself.¹⁴² Since the transition from physical book to e-book has not effectuated a fundamental change in copyright versus copy, a library's copy ownership should also remain unchanged, making the practice of granting different legal rights to physical books versus e-books unjustified.

Advocates of extending the First Sale Doctrine to the licensing of digital works espouse a functional definition of ownership for § 109. In *Krause v. Titleserv, Inc.*, the Second Circuit applied this functional definition in finding the defendant had sufficient rights in its copy of a computer software program to favor ownership over license.¹⁴³ The court held that “[t]he presence or absence of formal title may of course be a factor in this inquiry, but the absence of formal title may be outweighed by evidence that the possessor of the copy enjoys sufficiently broad rights over it to be sensibly considered its owner.”¹⁴⁴ The court's focus was not on who secured title to the program, but on who exercised ownership-like rights over the program.¹⁴⁵

As libraries exert principal control over their e-book collections, an application of *Krause's* formulation of the functional definition of ownership to library e-books would satisfy the requirements of § 109 and prompt application of the First Sale Doctrine. In essence, this would create a Digital First Sale Doctrine under which libraries could lend e-books absent legislative intervention.

139. See Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 891-92 (2011).

140. See *id.* at 901-02.

141. 17 U.S.C. § 202 (2006).

142. See *id.*; Perzanowski & Schultz, *supra* note 139, at 909-10.

143. 402 F.3d 119, 124, n.3 (2d Cir. 2005).

144. *Id.* at 124.

145. *Id.*

B. Licensees Lack Legality: Alliteration Against Digital First Sale

Recurring debates about a Digital First Sale Doctrine have yet to generate concrete movement. Deliberations by the Copyright Office over the DMCA included an explicit recommendation not to extend § 109 to the licensing of digital works.¹⁴⁶ Publishers and other copyright holders of works in digital formats vividly recall the \$8 billion revenue lost by the music industry at the turn of the century, a loss that transpired even without legislative creation of a Digital First Sale Doctrine.¹⁴⁷ These opponents cite the well-recognized legal distinction between owner and licensee in support of their argument. In the case of a bona fide sale, the purchaser becomes an owner possessing all the concomitant rights, including operation of § 109.¹⁴⁸ But when parties license rather than buy, the licensor holding the copyright retains the exclusive right to distribute afforded in § 106, effectively making the First Sale Doctrine inapplicable.¹⁴⁹

The Ninth Circuit recently reaffirmed this owner-licensee distinction in *Vernor v. Autodesk, Inc.*, in which the court was called upon to decide whether computer software was sold or licensed.¹⁵⁰ In contrast to the Second Circuit's decision in *Krause*, the Ninth Circuit found the existence of a license.¹⁵¹ The court defined a licensor-licensee relationship as one in which “the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions.”¹⁵²

Application of the *Vernor* factors to the e-book context suggests a licensor-licensee relationship. The contract between libraries and OverDrive, for example, explicitly designates that libraries are being granted a license.¹⁵³ Although libraries are ultimately permitted to transfer e-books via lending, notable use restrictions—how loans are made, the number of loans permitted, and geographic barriers to lending—are imposed.¹⁵⁴ Adherence to the Ninth Circuit's strict owner-

146. U.S. COPYRIGHT OFFICE, DMCA: SECTION 104 REPORT, A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT XX (2011), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

147. Smith, *supra* note 95, at 857.

148. KELLER & CUNARD, *supra* note 82, § 4:1.3[A].

149. *Id.* § 4:1.3[B].

150. 621 F.3d 1102, 1108 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 105 (2011).

151. *Id.* at 1116.

152. *Id.* at 1111.

153. Contract, *supra* note 70, ¶ 3.3.

154. See *supra* Part VI.

licensee delineation forecloses the possibility of extending § 109 to digital formats absent explicit legislation that has yet to come to fruition.

VIII. BRAINSTORMING THE FINAL CHAPTER

The combined history of library and publisher has been defined by a pattern of negotiated compromise supplemented by legislative intervention that has assured their mutual success. To guarantee their continued survival in the digital world, these sometime adversaries must once again reach a compromise. When the *Vernor* court disavowed the possibility of granting licensees ownership rights in digital content, its decision was inescapable in light of existing legislation.¹⁵⁵ The court advised disappointed parties, including the American Library Association, that further legislative intervention was the only route to a different outcome.¹⁵⁶ The solution, however, will not be found in a legislative expansion of § 108 or § 109 of the Copyright Act. A more appropriate denouement will be borne of mutual agreement between library and publisher. No parties are better equipped to confront the problem than those directly invested in it. Although e-books and e-readers have drastically transformed how books are accessed and enjoyed, the heart of the library-publisher relationship has remained fundamentally unchanged. Hence, the final resolution ought to be written by the interested parties and replicate the exemplar of the physical book, a story that has been perfected over the course of 200 years.

The outline for this new edition is to be found in the “checkout limit” model originally promulgated by HarperCollins. Despite libraries’ initial protest and features in need of modification, this approach provides a solid foundation from which future e-book lending may progress. However, to achieve an arrangement accurately reflective of a library book’s lending life, weight must be given not only to the number of loans made but also to the length of each loan.

The initial edit to the checkout limit model should be to the number of loans permitted. HarperCollins representatives reasoned that twenty-six was an appropriate lending limit because that would normally permit an e-book lending life of one year.¹⁵⁷ This approach,

155. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1115 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 105 (2011).

156. *Id.*

157. Josh Marwell, *Open Letter to Librarians*, HARPERCOLLINS LIBR. LOVE FEST (Mar. 1, 2011, 12:23 PM), http://harperlibrary.typepad.com/my_weblog/2011/03/open-letter-to-librarians.html.

however, is flawed. Adherence to a twenty-six lend limit curtails the life of an e-book lent for two week periods to one year, when a physical book's shelf life is actually much longer.¹⁵⁸ Studies indicate that the life of a research book may be as long as fifty years.¹⁵⁹ Of course, a novel at a public library will be lent with more regularity than a research book, resulting in a shortened shelf life, but it is common for typical library books to be lent hundreds of times before requiring replacement.¹⁶⁰ Such a book would have been arbitrarily replaced numerous times were its lending limit fixed at twenty-six.

Instead, a flexible approach reflective of the length of time the e-book has been lent, not the number of loans, must be written. The story should go something like this. An initial minimum time limit would be established, and replacement purchases would never occur until that initial period had expired, irrespective of the number of times the e-book had been lent during that period. As a result, the checkout limit would be more of a "lending limit," as it would reflect how long the e-book had been lent, not how many loans occurred. This would follow the pattern of physical books whose deterioration corresponds to how long, not how many times, they have been lent. Lending a book for one day does not expose it to the same level of wear as lending a book for two weeks. Only after the permitted length of time had been reached would a replacement copy be required. Additionally, the replacement purchase would be allowed at a discounted price.

An edited version of HarperCollins's checkout limit, focused on the length of lending instead of on the number of loans, would respond to the expectations and necessities of both libraries and publishers. Such a solution is best when endorsed by those involved rather than forced upon them by a detached legislature.

CONCLUSION

The e-book is the newest "edition" in the book publishing industry. Given that in the 550 years since the advent of Gutenberg's printing press, the e-book is the only technological innovation to have a similarly substantial impact on the industry, those involved can rest assured that the e-book is here to stay.

158. See Stephen R. Lawrence, et. al., *Life Cycle Costs of Library Collections: Creation of Effective Performance and Cost Metrics for Library Resources*, 62 C. & RES. LIBR. 541, 547 (2001), available at <http://crl.acrl.org/content/62/6/541.full.pdf>.

159. *Id.*

160. See generally Patrick Kingsley, *Ebooks on Borrowed Time*, GUARDIAN (March 7, 2011), available at <http://www.guardian.co.uk/books/2011/mar/06/ebooks-on-borrowed-time>.

2013]

E-books

295

When the e-book made its grand entrance four years ago, industries and institutions that had been conducting business as usual were forced to adjust quickly, lest they sit idly by while Silicon Valley up-starts stole the reins, leaving the age-old players in their dust. But publishers and libraries responded effectively, each adapting to the reading revolution in its own way. Publishers embraced e-books as the key to their future growth, and libraries seized an opportunity to give patrons the technology they craved. Their independent reinventions, however, have yet to harmonize.

A balance between the two sides should not be achieved through new legislation, a response often too rigid to adequately adapt to the unique needs of each party. Rather, a joint effort by both players modeled within the context of current copyright legislation and inclusive of existing practices that have effectively guided their relationship for 200 years will best serve the interests of both publishers and libraries. Only a consensus between the characters will ensure the continued glow of the latest e-reader, be it next to a crackling fireside or illuminating a dusty library hall.