

3-2013

An American Tragedy: E-Books, Licenses, and the End of Public Lending Libraries?

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Recommended Citation

Matthew Chiarizio, *An American Tragedy: E-Books, Licenses, and the End of Public Lending Libraries?*, 66 *Vanderbilt Law Review* 615 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol66/iss2/4>

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I. *CATCH-22*¹: INTRODUCTION

A Wired magazine blog declared e-books² “killed by DRM” in April 2007.³ In May 2011, Amazon announced that e-book sales had overtaken physical-book sales on their retail website.⁴ Digital rights management (“DRM”) notwithstanding, trends show that the e-book revolution is underway, and adoption and use of this technology is only increasing.⁵

The ascent of e-books raises many copyright issues both old and new, and the role of libraries in e-book lending is an important one for many librarians and readers. Libraries are an important part of a democratic society, and changes to the publishing and copyright landscape invariably affect the functions and use of libraries. Libraries have traditionally relied on the doctrine of first sale to lend physical books.⁶ The first sale doctrine allows the owner of a copyrighted work to sell, lend, or otherwise dispose of the owned copy of that work without authorization of the copyright holder.⁷ Libraries own physical copies of books and lend them without violating U.S. copyright law. However, the limitations of the first sale doctrine

1. The Note title and major section headings each include a relevant title from the Modern Library’s 100 Best Novels list. *100 Best Novels*, MODERN LIBRARY, <http://www.modernlibrary.com/top-100/100-best-novels/> (last visited Aug. 6, 2012).

2. There is not yet consensus on the proper abbreviation of “electronic books”. I will use “e-book” throughout, but will defer to the original author’s preference in quotations and citations. For further discussion of this question, see Maeve Maddox, *Ebook, eBook, ebook or e-book?*, DAILY WRITING TIPS, <http://www.dailywritingtips.com/ebook-ebook-ebook-or-e-book/> (last visited Aug. 6, 2012).

3. Rob Beschizza, *Killed by DRM: e-Books*, WIRED (Apr. 26, 2007, 12:00 AM), http://www.wired.com/gadgetlab/2007/04/killed_by_drm_e/. DRM or “digital rights management” are access control technologies that restrict certain uses of e-books and other digital media files, such as prohibiting copying, transferring to other devices, or limiting use to a limited period of time.

4. Claire Cain Miller & Julie Bosman, *E-Books Outsell Print Books at Amazon*, N.Y. TIMES (May 19, 2011), <http://www.nytimes.com/2011/05/20/technology/20amazon.html> (“Since April 1, [2011,] Amazon sold 105 books for its Kindle e-reader for every 100 hardcover and paperback books, including books without Kindle versions and excluding free e-books.”).

5. See, e.g., Bob Minzesheimer, *E-book Sale Surge Continues on the Book List*, USATODAY (Jan. 12, 2012), <http://books.usatoday.com/bookbuzz/post/2012-01-12/e-book-sale-surge-continues-on-the-book-list/601520/1> (noting that in the week of January 2 to January 8, e-book versions outsold print versions for thirty-five of the top fifty best-selling books and for the week prior that was true for forty-two of the top fifty titles).

6. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (stating that under first sale doctrine “a library may lend an authorized copy of a book that it lawfully owns without violating copyright laws”).

7. 17 U.S.C. § 109(a) (2006).

require ownership,⁸ and as contractual license agreements between publishers, distributors, and customers replace ownership as the dominant distribution model in the e-book realm,⁹ the continued viability of the first sale model for libraries—and therefore public lending libraries themselves—could be in jeopardy. This Note addresses how public lending libraries can retain their traditional role in a literary world dominated by e-books.

Legal and library scholars as well as lawyers and librarians have proposed several possible solutions to the problem of applying the first sale doctrine to e-books. Libraries do not exist in a vacuum and must rely on other entities in order to fulfill their societal role. Interested parties include authors, publishers, distributors, consumers, and government. Many inherently look to the source of copyright to answer how to apply the first sale doctrine to e-books. In the United States, modern copyright is almost entirely a creation of federal statute, with courts playing an important role in interpreting the statute. Because of this, many proposed solutions rely on intervention from Congress, the courts, or the regulatory system. Proposals that have been made include congressional amendment of copyright law to allow library e-book lending by eliminating copyright- or contract-based restrictions, library exemptions from what would otherwise be copyright infringement through regulatory rulemaking, and the intervention of courts through rulings that interpret copyright law in a manner more favorable to library e-book lending.

Unfortunately, these proposals are flawed and either fail to fully address the problem of library e-book lending or threaten to shift the balance of copyright too far toward libraries and consumers at the expense of authors and publishers. Such a shift could result in disincentivizing authors and publishers, thus chilling the creation and publication of new books and other creative works. Fortunately, the market has begun to provide a solution, and library e-book lending is already occurring in the United States. Although the slow start of the current market solution continues to frustrate many librarians and

8. *Id.* § 109(d) (“The privileges prescribed by subsections (a) and (c) [first sale doctrine] do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.”); *Apple, Inc. v. Psystar Corp.*, 658 F.3d 1150, 1155 (9th Cir. 2011) (“[T]he first sale doctrine does not apply to a licensee.”); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010) (“The first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as a licensee.”).

9. Ali M. Stoepelwerth, *Antitrust Issues Associated with the Sale of E-books and Other Digital Content*, ANTITRUST, Spring 2011, at 69, 70 (“Although many consumers may think they are ‘buying’ an e-book when they obtain a title from the iBookstore or Kindle site, what they are really getting is a license.”).

members of the public, this Note argues that the publishers, distributors, libraries, and public are making progress toward a solution that meets the needs of all involved parties and does not require government intervention. The long-term viability and success of library e-book lending remains to be seen, but as it currently stands, government interference would do more harm than good to this young but burgeoning market.

Part II.A of this Note explores the history of the first sale doctrine and describes how it is currently used by libraries with relation to physical books. Part II.B explains the history of e-books and explores how courts have handled some of the issues specific to this technology. Part III then discusses why the first sale doctrine does not apply to lending libraries in the case of e-books and analyzes some of the problems that libraries must deal with because of that. Part IV looks at some of the solutions that have been proposed, including legislative, regulatory, and judicial proposals, and explains why none of these proposed solutions will actually solve the issues facing libraries. Finally, Part V will show that the best solution is to allow the market to find an approach that will work for the various actors involved, including authors, publishers, and libraries.

II. *THE AGE OF INNOCENCE*: BACKGROUND ON LIBRARIES, FIRST SALE, AND E-BOOKS

A. The Heart of the Matter: *First Sale as the Basis for Library Lending*

Copyright law is the means to “balance between the artist’s right to control the work . . . and the public’s need for access to creative works.”¹⁰ The Framers recognized the importance of this balancing when they granted Congress the power to create federal copyright law in the U.S. Constitution.¹¹ Congress has worked to create the proper balance by granting certain exclusive rights to authors, but also imposing limitations on those rights.¹² The first sale

10. *Stewart v. Abend*, 495 U.S. 207, 228 (1990).

11. 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.”). For a more detailed history of the inclusion of the Copyright Clause, see 1 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 22–25, 121–23 (1994).

12. Federal copyright law lists six exclusive rights of copyright owners in 17 U.S.C. § 106; §§ 107–22 prescribe many of the limitations.

doctrine is one such limitation¹³ and is the limitation on copyright that libraries rely on to lend physical books to patrons.

1. The First Sale Doctrine as a Limit on Copyright

At the end of the semester, students line up at the bookstore to sell back their used textbooks. Avid readers leave the public library everyday with borrowed copies of the latest best-selling novels. Mailboxes all over the country receive the trademark red Netflix envelope containing rented DVDs. A teenager buys a new hit CD at Wal-Mart and gives it to her best friend as a birthday present.¹⁴ U.S. copyright law provides that “the owner of copyright . . . has the exclusive right to . . . distribute copies . . . of the copyrighted work,”¹⁵ and under a literal reading of “distribute,” any of these activities could be a copyright violation. The Supreme Court first definitively recognized a legal exception to such prohibitions in its 1908 ruling in *Bobbs-Merrill Co. v. Strauss*.¹⁶ The Bobbs-Merrill Company, the copyright holder of the novel *The Castaway*, required retail dealers to sell the book for one dollar and included a statement to that effect below the copyright notice inside the book.¹⁷ R.H. Macy & Company, owned by the Strauss brothers, offered the book for retail sale at a price of eighty-nine cents.¹⁸ True to the notice, Bobbs-Merrill sued for copyright infringement, alleging that the defendants violated the “sole right to vend” as granted to the copyright owner under the law.¹⁹ The

13. 17 U.S.C. § 109.

14. For a brief discussion suggesting that giving a copy of a work even as a gift may constitute infringing distribution, see John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 11 n.26 (2004).

15. 17 U.S.C. § 106 (“[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . .”).

16. 210 U.S. 339, 350–51 (1908).

17. *Id.* at 341. The notice read: “The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.” *Id.* In the current attempt of publishers to set retail prices of books, publishers currently hold the upper hand by requiring the agency model of e-book sales. Motoko Rich, *Publishers Win a Bout in E-Book Price Fight*, N.Y. TIMES (Feb. 8, 2010), <http://www.nytimes.com/2010/02/09/books/09google.html>. Publishers have imposed the agency model on e-book retailers such as Amazon, Apple, and Google, making publishers the true seller of the book, and thus able to set the retail price, while the retailer is simply an agent for the publisher. *Id.*

18. *Bobbs-Merrill*, 210 U.S. at 342.

19. *Id.* at 349. The copyright law at the time granted the copyright owner the “sole right and liberty of printing, reprinting, publishing, and vending” the work. Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436.

Court disagreed with *Bobbs-Merill's* argument and held that the sole right to vend did not give the copyright owner the right to restrict future sales, or to otherwise qualify a future owner's property rights in a physical copy of the book.²⁰

Congress codified the holding of *Bobbs-Merrill* in the 1909 Copyright Act, noting the distinction between the copyright and the material object containing the copyrighted work:

The 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 title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.²¹

After receiving both the support of the U.S. Supreme Court and legislative approval, the first sale doctrine became an important aspect of U.S. copyright law. The 1976 Copyright Act ("1976 Act"), a complete revision of U.S. copyright law under Title 17 of the U. S. Code, retained the first sale doctrine but rejected the 1909 language that emphasized the distinction between rights in copyright and rights in material copies of copyrighted works. The 1976 Act codified the first sale doctrine in § 109(a): "[T]he owner of a particular copy or phonorecord . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."²²

2. Library Use of the First Sale Doctrine to Provide "Free" Lending

One benefit of the first sale doctrine is that it allows libraries to obtain a physical copy of a book and to lend that copy out to patrons on the library's own terms and without requiring the authorization of the copyright holder. The legislative history of the 1976 Act provides evidence that library lending was one factor Congress considered in deciding to retain the first sale doctrine.²³ In fact, libraries may not have needed the first sale doctrine to legally permit lending prior to

20. *Bobbs-Merrill*, 210 U.S. at 350–51. The Court did note that this holding did not necessarily extend to contract limitations or license agreements that may control subsequent sale. *Id.* at 350.

21. 17 U.S.C. § 27 (1909) (repealed 1978).

22. 17 U.S.C. § 109(a) (2006).

23. H.R. REP. NO. 94-1476, § 109, at 79 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693 ("A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.").

the 1976 Act.²⁴ Prior to the 1976 Act, copyright owners held the exclusive right to *vend* copies of their work, which probably would not have implicated library lending.²⁵ The 1976 Act replaced the exclusive right to vend with the exclusive right to *distribute* copies,²⁶ which almost certainly does implicate library lending.²⁷ Today, lending libraries rely on the first sale doctrine to make physical copies of protected works available to consumers who are either unwilling or unable to pay the otherwise-required purchase price or rental fee for the work.

Although support for library lending without compensation under the first sale doctrine has enjoyed a long tenure in the United States, the concept of noncompensated lending is far from universal. As of 2012, twenty-eight countries had implemented public lending rights, systems which compensate copyright owners for public use of their works in libraries.²⁸ Depending on how the public lending right is implemented, a copyright owner receives payment based either on the number of copies of the work held in libraries or on the circulation volume of the work.²⁹ In order to increase uniformity, impede the growing threat of piracy, and provide adequate income to authors and performers, the European Union issued a directive in 1992 requiring all member states either to allow authors the option of prohibiting the lending of copies of their copyrighted works or to provide remuneration for public lending.³⁰ Between 1979 and 1989, a movement led by the Authors Guild attempted to establish a public lending right in the United States, but failed to gain significant support.³¹ One likely reason for the failure of that effort was the high value placed on the first sale doctrine in the United States.³² In the brave new world of digital media, however, the United States may

24. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 590 n.44 (2003).

25. *Id.*

26. *Id.*

27. See *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997) (holding that a library distributes a published work by placing the work in the library collection and making it available to the public).

28. *Frequently Asked Questions*, PLR INT'L, <http://www.plrinternational.com/faqs/faqs.htm> (last visited Aug. 6, 2012).

29. *Id.*

30. Council Directive 2006/115/EC, 2006 O.J. (L 376) 28–30.

31. Richard LeComte, *Writers Blocked: The Debate over Public Lending Right in the United States During the 1980s*, 44 LIBR. & CULTURAL REC. 395, 395 (2009).

32. *Id.* at 412.

need to reconsider a public lending right, or, more likely, an updated system for digital media.³³

B. Brave New World: *The Rise of E-Books*

1. History of E-Books and E-Readers

The e-book had an unassuming start on July 4, 1971, when University of Illinois freshman Michael Hart keyed the text of the Declaration of Independence into a mainframe computer on campus and sent a message making it available for download to other users on ARPAnet (a precursor to today's internet).³⁴ That first e-book was the beginning of what would later become Project Gutenberg, the largest single collection of free e-books.³⁵ Innovative companies took steps toward commercial e-books in the late 1980s and early 1990s, when CD-ROM drives first entered the consumer market, by distributing reference books stored on CD-ROM discs.³⁶ In the days before widespread internet access, a *New York Times* article declared the bundled CD-ROM books as the "true value" of bringing optical-drive technology to the consumer level because it provided "a shelf's worth of . . . reference books" on just a few CDs, including the twenty-one-volume New Grolier Encyclopedia, the American Heritage Dictionary, Roget's Thesaurus, the World Almanac, Bartlett's Familiar Quotations, and a national telephone and address directory.³⁷ There were efforts to expand this practice from reference works to popular fiction and literature in the early 1990s,³⁸ including the idea of

33. See, e.g., Joshua H. Foley, Comment, *Enter the Library: Creating a Digital Lending Right*, 16 CONN. J. INT'L L. 369, 370 (2001) (arguing that a digital lending right is an appropriate solution to the threat to first sale and fair use in the world of digital media).

34. *Michael Hart, Inventor of the eBook and Pioneer of Electronic Literacy, Has Died*, HUFFINGTON POST (Sept. 8, 2011), http://www.huffingtonpost.com/2011/09/08/ebook-inventor_n_954684.html. Six people downloaded the text. *Id.*

35. *About*, PROJECT GUTENBERG, <http://www.gutenberg.org/wiki/Gutenberg>About> (last modified Dec. 21, 2011). As of 2012, Project Gutenberg offered over 40,000 free e-books directly for download and over 100,000 through partners, affiliates, and resources. *Free eBooks by Project Gutenberg*, PROJECT GUTENBERG, <http://www.gutenberg.org> (last modified July 20, 2012). For more on the history of Project Gutenberg, see MARIE LEBERT, PROJECT GUTENBERG (1971 – 2008) (2008), available at <http://www.gutenberg.org/ebooks/27045>.

36. See Peter H. Lewis, *Personal Computers; CD-ROM for the Common Man*, N.Y. TIMES (Nov. 28, 1989), <http://www.nytimes.com/1989/11/28/science/personal-computers-cd-rom-for-the-common-man.html>.

37. *Id.*

38. The Voyager Company offered about fifty titles in 1993 including Michael Crichton's "Jurassic Park," John Grisham's "The Pelican Brief," and the complete works of Jane Austen. David Kipen, *Electronic Books: We Have Seen the Future, and It Beeps*, L.A. TIMES (Aug. 29, 1993), http://articles.latimes.com/1993-08-29/books/bk-28910_1_current-electronic-books.

“extending” the traditional novel in new and interesting ways. For example, the Voyager Company developed a computer-based version of Michael Crichton’s *Jurassic Park* that could display pictures of dinosaurs and play recreations of dinosaur sounds when clicking on the dinosaur names in the text.³⁹ Largely, these efforts were ahead of their time. As one early adopter of reference works on CD-ROM noted: “[I]t was much more expensive and more difficult to use than the book, but it more than made up for it by being significantly slower.”⁴⁰ Clearly e-books had a long way to go, but these early efforts provided examples of market successes and failures that would guide later implementations.

With the rise of the Internet and World Wide Web, e-books had new reach. One early online success was Stephen King’s novella *Riding the Bullet*, which was released exclusively online in March 2000 and sold over 400,000 copies in the first twenty-four hours.⁴¹ However, King’s second attempt at electronic-only delivery, a serialized novel, failed later that same year when too many downloaders did not make a voluntary one dollar payment, leaving publishers further confused as to the future of e-books.⁴² The future of e-books looked bleak in 2003 when Barnes & Noble, then the largest book retailer in the United States, discontinued e-book sales on Barnes&Noble.com, citing lack of consumer interest.⁴³ It would take the world’s largest online retailer to truly ignite the struggling e-book industry.

Although manufacturers had marketed e-book readers as early as 1991,⁴⁴ the convergence of groundbreaking hardware and e-book

39. Mark Potts, *Exploring Voyager’s Software*, WASH. POST, June 7, 1993, at F19.

40. Stephen Manes, *Surfing and Stealing: An Author’s Perspective the 1999 Horace S. Manges Lecture*, 23 COLUM.-VLA J.L. & ARTS 127, 127 (1999).

41. Doreen Carvajal, *Long Line Online for Stephen King E-Novella*, N.Y. TIMES (Mar. 16, 2000), <http://www.nytimes.com/2000/03/16/books/long-line-online-for-stephen-king-e-novella.html>. Some booksellers gave the book away as a loss leader; others charged \$2.50 per download. *Id.*

42. David D. Kirkpatrick, *A Stephen King Online Horror Tale Turns into a Mini-Disaster*, N.Y. TIMES (Nov. 29, 2000), <http://www.nytimes.com/2000/11/29/business/a-stephen-king-online-horror-tale-turns-into-a-mini-disaster.html>.

43. Jeffrey A. Trachtenberg, *Barnes & Noble’s Online Arm Pulls Plug on E-Books*, WALL ST. J., Sept. 10, 2003, at B4 (“The product isn’t user friendly, or price friendly.”). Ironically, Barnes & Noble killed its e-book distribution just months after the launch of Apple’s iTunes Music Store; while the digital audio market was flourishing, the digital book market was almost nonexistent. See Press Release, Apple, Apple Launches the iTunes Music Store (Apr. 28, 2003), available at <http://www.apple.com/pr/library/2003/04/28Apple-Launches-the-iTunes-Music-Store.html>.

44. Jennifer Lawinski, *Two Decades of e-Reader Evolution*, CNNMONEY (Oct. 26, 2010), http://money.cnn.com/galleries/2010/technology/1010/gallery.ereader_history/index.html; see also Gregory K. Laughlin, *Digitization and Democracy: The Conflict Between the Amazon Kindle*

distribution was the catalyst that made e-books mainstream. Amazon announced the Kindle in November 2007 and changed the market.⁴⁵ What ultimately may have stirred consumer interest in e-books was that Amazon simultaneously introduced impressive hardware and an online e-book store boasting 90,000 titles, including 101 of the top 112 *New York Times* best sellers.⁴⁶ Amazon sold out of the first batch of Kindles in five and a half hours.⁴⁷ In addition to a large catalog of titles, Amazon's Kindle was a dramatic improvement over earlier e-reader devices. It used an electronic ink ("e-ink") display rather than the traditional eye-straining and glare-prone LCD.⁴⁸ The original Kindle weighed only ten ounces, and Amazon claimed the battery could last for "a week or more."⁴⁹ The feature that transformed e-book distribution was the inclusion of a cellular modem, which allowed users to connect to the Amazon e-book store for free from almost anywhere in the United States to purchase and download e-books and other content instantly.⁵⁰

Despite technology visionary Steve Jobs's early dismissal of the Kindle, famously scoffing that "people don't read anymore,"⁵¹ the Kindle was only the first of many popular and mainstream e-readers and e-bookstores, including Barnes & Noble's Nook series, Sony's continuing line of Readers, and, ironically, Apple's own iPad device and iBooks application. There is now an endless array of digital titles

License Agreement and the Role of Libraries in a Free Society, 40 U. BALT. L. REV. 3, 9 (2010) (describing some other early entrants into the e-reader market).

45. As Larry Kirshbaum, a longtime book industry insider, stated about earlier e-book attempts, including his own efforts, "The world just wasn't ready for it. We didn't have the Kindle." Brad Stone, *Amazon's Hit Man*, BLOOMBERG BUSINESSWEEK (Jan. 25, 2012, 11:35 p.m.), <http://www.businessweek.com/magazine/amazons-hit-man-01252012.html>.

46. David Pogue, *An E-Book Reader That Just May Catch On*, N.Y. TIMES (Nov. 22, 2007), <http://www.nytimes.com/2007/11/22/technology/personaltech/22pogue.html> (comparing Kindle's library to the 20,000 titles offered on a similar Sony device).

47. Nilay Patel, *Kindle Sells Out in 5.5 Hours*, ENGADGET (Nov. 21, 2007, 1:01 PM), <http://www.engadget.com/2007/11/21/kindle-sells-out-in-two-days/>.

48. Pogue, *supra* note 46. Sony released the first e-ink reader, the Librie, in Japan in 2004. See Phred Dvorak, *Electronic Readers, Now on Sale in Japan, Still Don't Beat Paper*, WALL ST. J., July 15, 2004, at B1 (reviewing the Sony Librie). Sony also released two versions of its e-reader in the United States before the Kindle, but the devices failed to gain popularity. Wilson Rothman, *Sony Reader, New and Improved?*, GIZMODO (Sept. 11, 2007, 8:33 AM), <http://gizmodo.com/298505/sony-reader-new-and-improved>.

49. *Kindle: Amazon's Original Wireless Reading Device (1st Generation)*, AMAZON.COM, <http://www.amazon.com/Kindle-Amazon-Original-Wireless-generation/dp/B000FI73MA/> (last visited Aug. 6, 2012).

50. Pogue, *supra* note 46 ("[T]he part that will really rock your world is the Kindle's free wireless cellular broadband service.").

51. John Markoff, *The Passion of Steve Jobs*, N.Y. TIMES (Jan. 15, 2008, 7:37 PM), <http://bits.blogs.nytimes.com/2008/01/15/the-passion-of-steve-jobs/>.

available from several online bookstores and providers.⁵² In addition to stand-alone e-readers, there are programs or apps available to read several e-book formats for iPhones, iPods, iPad tablets, Android smartphones and tablets, Windows Phone smartphones, BlackBerries, and Apple and PC computers.⁵³ Despite being one of the last popular media formats to go digital (lagging well behind the music, movie, and television industries), the age of the e-book has undeniably arrived.

2. Legal Interpretations of E-Books

So far, courts have rarely been called on to weigh in on e-books. In the small number of cases that have dealt with e-books, courts have displayed increasing understanding of the technology and legal issues involved. As recently as 2002, the Second Circuit was unsure of exactly how to handle e-books and denied a preliminary injunction that would have barred the sale of unauthorized electronic copies of copyrighted works, citing the need for further “fact-finding regarding . . . the evolving technical processes and uses of an ebook.”⁵⁴ That same year, more extensive fact finding was beneficial to the U.S. District Court for the Northern District of California in the first criminal trial to test the anticircumvention portions of the 1998 Digital Millennium Copyright Act.⁵⁵ In an opinion denying the defendant’s motion to dismiss the case, the court gave a detailed description of then-current e-book technology, an Adobe DRM licensing system used at the time, and the defendant’s software, which

52. See, e.g., *How Books on Google Play Work*, GOOGLE PLAY, <http://support.google.com/googleplay/bin/answer.py?hl=en&answer=179839> (last visited Dec. 19, 2012) (touting “over 4 million books to choose from in every imaginable category”); *iBooks*, APPLE.COM, <http://www.apple.com/ipad/built-in-apps/ibooks.html> (last visited Oct. 10, 2012) (offering “over 1.5 million books and counting”); *Kindle*, AMAZON.COM, <http://www.amazon.com/gp/product/B0051QVESA> (last visited Oct. 10, 2012) (claiming a “massive selection” of “millions of books, newspapers, and magazines”); *nook*, BARNES&NOBLE.COM, <http://www.barnesandnoble.com/u/nook/379003208> (last visited Dec. 19, 2012) (offering a “massive selection” of “over 3 million books, magazine, videos, apps, catalogs & more”).

53. See, e.g., *Read Anywhere with Our Free Reading Apps*, AMAZON.COM, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000493771> (last visited Oct. 10, 2012); *Nook Mobile Apps*, BARNES&NOBLE.COM, <http://www.barnesandnoble.com/u/nook-mobile-apps/379003593> (last visited Dec. 19, 2012).

54. *Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490, 491 (2d Cir. 2002) (internal quotation marks omitted).

55. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1117–19 (N.D. Cal. 2002); Matt Richtel, *Technology; Russian Company Cleared of Illegal Software Sales*, N.Y. TIMES (Dec. 18, 2002), <http://www.nytimes.com/2002/12/18/business/technology-russian-company-cleared-of-illegal-software-sales.html>.

subverted the DRM protection.⁵⁶ Although the court did not directly reach the question, it did suggest that “[m]aking a back-up copy of an ebook, for personal noncommercial use would likely be upheld as a non-infringing fair use.”⁵⁷ With the vast growth in the e-book market, it is not surprising that in October 2011, the U.S. District Court for the District of Nevada recognized the potential for piracy in the context of e-books, noting that the digital versions can be “easily, literally, and quickly reproduced in [their] entirety.”⁵⁸ As a result, the court granted a motion to seal certain exhibits in a case, including a copy of the script of the musical play *Jersey Boys: The Story of Frankie Valli and the Four Seasons*, to prevent making digital copies of the script publicly available through the court’s electronic filing systems.⁵⁹ Although examples of courts dealing with e-book technology are quite limited as of this writing, the expanding use of e-books will undoubtedly create new issues that will require the increased attention of the courts.

III. PARADE’S END: APPLYING THE FIRST SALE DOCTRINE TO E-BOOK LENDING

When considering the lending of e-books by public libraries, one issue looms large: the existing model, relying on the first sale doctrine to lend physical books and media, does not apply to e-books. In order to “lend” an e-book to a library patron, the library must reproduce the files that constitute the e-book. At the time of lending, a copy would exist on both the library’s system and the user’s system. This production of new copies is an action that infringes the exclusive right to reproduce the copyrighted work under 17 U.S.C. § 106. The first sale provision of § 109 is “no defense to infringements of the reproduction right.”⁶⁰ In the first Supreme Court case to recognize the first sale doctrine, *Bobbs-Merrill*, the Court made a clear distinction between the right to reproduce a copyrighted work and the right to vend, applying the first sale exception to the right to vend as long as it

56. *Elcom*, 203 F. Supp. 2d at 1117–19. The defendant, a Russian software company, was later acquitted by a jury of violating the DMCA’s anticircumvention provisions. Richtel, *supra* note 55.

57. *Elcom*, 203 F. Supp. 2d at 1135.

58. *Corbello v. DeVito*, No. 2:08-cv-867-RCJ-PAL, 2011 U.S. Dist. LEXIS 124774, at *6 (D. Nev. Oct. 27, 2011).

59. *Id.* at *5–7.

60. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT: A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO §104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 80 (2001) [hereinafter SECTION 104 REPORT], available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

did not infringe the reproduction right.⁶¹ Further complicating the application of the first sale doctrine to e-books is the fact that e-books are almost never bought or sold. Despite outward appearances and marketing that might indicate otherwise,⁶² e-books are almost universally licensed,⁶³ and licensees do not meet the “ownership” requirement of 17 U.S.C. § 109(a).

The distinction between ownership and licensing has become bewildering since different courts have taken different approaches.⁶⁴ One very frequently cited example is *Vernor v. Autodesk, Inc.*, which declined to apply the first sale doctrine to licensed software.⁶⁵ Timothy Vernor purchased authentic, used copies of Autodesk software, including the physical media and activation codes, from an Autodesk customer.⁶⁶ Vernor then sold the software, with physical media and activation codes, on eBay.⁶⁷ The Ninth Circuit pointed to the legislative history of § 109 to demonstrate that the first sale doctrine applied only to an “outright sale” and did not “apply to someone who merely possesses a copy or phonorecord without having acquired ownership of it.”⁶⁸ The court held that “a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies

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

62. For a general overview of how an end-user might typically experience “buying” books for the Kindle, see Michael Seringhaus, *E-Book Transactions: Amazon “Kindles” the Copy Ownership Debate*, 12 *YALE J.L. & TECH.* 147, 169–72 (2009).

63. See, e.g., *Amazon Kindle Store Terms of Use*, AMAZON.COM (Sept. 6, 2012), http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib?ie=UTF8&nodeId=201014950 (“Kindle Content is licensed, not sold, to you by the Content Provider.”); *Barnes & Noble.com Terms and Conditions of Use*, BARNES & NOBLE, http://www.barnesandnoble.com/include/terms_of_use.asp (last visited Aug. 6, 2012) (“Barnes & Noble.com grants you a limited, nonexclusive, revocable license to access and make personal, non-commercial use of the Digital Content in accordance with these Terms of Use.”); *Terms of Service*, GOOGLE BOOKS, <http://books.google.com/intl/en/googlebooks/tos.html> (last visited Aug. 6, 2012) (“Google gives you the non-exclusive right to download, subject to the restrictions set forth herein, copies of the applicable Digital Content to your Devices, and to view, use, and display such Digital Content . . .”). See generally *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1118 n.1 (N.D. Cal. 2002) (“[E-book] purchases are frequently accompanied by an End User License Agreement which may contain contractual language limiting the user’s rights to use the ebook, including rights to sell or transfer the ebook or to copy or distribute the content of the ebook without the publisher’s permission.”).

64. See, e.g., Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 *BERKELEY TECH. L.J.* 1887, 1898–925 (2010) (examining several recent cases from various jurisdictions and providing one framework for examining the issue of ownership versus licensing).

65. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1103–04 (9th Cir. 2010).

66. *Id.* at 1105.

67. *Id.* at 1105–06.

68. *Id.* at 1112 (quoting H.R. REP. NO. 94-1476, at 79 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693).

that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions."⁶⁹ Although this case applied to software sales and included physical media, clear parallels can be drawn to the licensing models currently used by publishers and e-book distributors, and a court bound by or influenced by the *Vernor* decision would very likely hold that the first sale doctrine does not apply when a library licenses e-books, possibly leading to liability for copyright infringement.⁷⁰

There is ample evidence that the first sale doctrine is of critical importance to libraries and librarians. As early as 2001, the U.S. Copyright Office recognized that concerns about the first sale doctrine in the digital world were "particularly acute in the context of the potential impact on library operations."⁷¹ Without the first sale doctrine, libraries "would be unable to lend books, CDs, videos, or other materials to patrons."⁷² In *Vernor*, the American Library Association ("ALA")⁷³ filed an amicus brief supporting *Vernor* and arguing that the first sale doctrine promotes "access to knowledge, preservation of culture, and resistance to censorship."⁷⁴ The ALA, along with other library associations, also filed amicus briefs on *Vernor*'s subsequent filings, stressing the importance of the first sale doctrine in promoting democratic values and preservation of creative works.⁷⁵ Commenting on another recent first-sale-doctrine case, Charles Lowry, executive director of the Association of Research Libraries, noted that the Supreme Court's interpretation of the first sale doctrine "could determine the extent to which libraries can

69. *Id.* at 1111.

70. Since *Vernor* did apply to physical media, some have argued that the decision in *Vernor* could have significant impact on the world of physical copies of copyrighted works, imperiling all lending, reselling, and renting by allowing owners to license all works rather than selling them. Brief of Amici Curiae American Library Association et al. in Support of Plaintiff and Affirmance at 21, *Vernor*, 621 F.3d 1102 (No. 09-35969), 2010 WL 894740. Further discussion of this point is outside the scope of this Note.

71. SECTION 104 REPORT, *supra* note 60, at 96–97.

72. CARRIE RUSSELL, COMPLETE COPYRIGHT: AN EVERYDAY GUIDE FOR LIBRARIANS 43 (2004).

73. The American Library Association (ALA) bills itself as the "oldest and largest library association in the world" and promulgates that its mission is "to provide leadership for the development, promotion and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all." *Frequently Asked Questions*, AM. LIBRARY ASS'N, <http://www.ala.org/Template.cfm?Section=alafaq&template=/cfapps/faq/faq.cfm> (last visited Aug. 6, 2012).

74. Brief of Amici Curiae American Library Association et al. in Support of Plaintiff and Affirmance, *supra* note 70, at 5.

75. Brief of Amici Curiae Electronic Frontier Foundation et al. in Support of Plaintiff-Appellee's Petition for Rehearing En Banc at 15–16, *Vernor*, 621 F.3d 1102 (No. 09-35969), 2010 WL 4199708.

continue to perform their historic function.”⁷⁶ Writing for *The Library Quarterly*, library scholar Suliman Hawamdeh and library administrator Shona Koehn maintained that the issue of licensing versus ownership is “[p]erhaps the biggest area of concern for most libraries.”⁷⁷ An article on digital lending in *American Libraries*, the official magazine of the ALA, expressed, “[T]he right of first sale under the copyright law is of greatest concern.”⁷⁸ Finally, a librarian blogger may have best summed up the collective concern and frustration among librarians: “We pay lots of money each year for access to tens of thousands of books but we don’t own anything. We cancel our subscription and those books are gone.”⁷⁹ Moving forward in the digital world, where it is very likely that some publishers and distributors will release certain books or works only in digital formats and not at all in physical form, the inability to rely on the first sale doctrine could be catastrophic to lending by public libraries.

IV. *THE SOUND AND THE FURY*: PROPOSED SOLUTIONS

There have been several proposed solutions to help facilitate library e-book lending. Many of these solutions call on Congress, the Library of Congress, or courts to change the law in some way. Examining these proposals more closely, however, reveals that the plans put forward would not actually solve the problem of e-book lending and could disrupt the balance of copyright law, causing unintended—and possibly detrimental—consequences for American authors and readers.

A. *Animal Farm: Digital First Sale Legislation*

Several legislative solutions to the question of how the first sale doctrine applies to digital works have been proposed in the last two decades. A report by a presidential task force considered the effect of the first sale doctrine on the digital distribution of copyrighted

76. Katherine A. Chamberlain, “Lawfully Made Under This Title”: *The Implications of Costco v. Omega and the First Sale Doctrine on Library Lending*, 37 J. ACAD. LIBRARIANSHIP 291, 293 (2011).

77. Shona L. Koehn & Suliman Hawamdeh, *The Acquisition and Management of Electronic Resources: Can Use Justify Cost?*, 80 LIBR. Q. 161, 164 (2010).

78. Carrie Russell, *Threats to Digital Lending*, AM. LIBR. (Jan. 12, 2012, 1:19 PM), <http://americanlibrariesmagazine.org/features/01122012/threats-digital-lending>.

79. Meredith Farkas, *Ebooks and Libraries: A Stream of Concerns*, INFO. WANTS TO BE FREE (Jan. 18, 2011), <http://meredith.wolfwater.com/wordpress/2011/01/18/ebooks-and-libraries-a-stream-of-concerns/>.

works in 1995.⁸⁰ Focusing on the technological requirement to create new copies during a digital transmission, which would violate the reproduction right and would not be protected by the first sale doctrine, the report concluded that § 109 does not apply to digital transmissions.⁸¹

An early congressional reaction to this report was the introduction of the Digital Era Copyright Enhancement Act in 1997.⁸² This bill proposed amending § 109 to include a new subsection (f), which would have allowed “the owner of a particular copy or phonorecord in a digital format” to distribute the work to a single recipient, provided that the original owner destroyed or erased his original copy at “substantially the same time.”⁸³ The proposed subsection (f) also specifically permitted the otherwise-infringing reproduction necessary for such transmissions.⁸⁴ Addressing the problem of ownership versus licensing, another provision in this legislation would have made unenforceable any nonnegotiable licenses attached to the distribution of works.⁸⁵ Whether this would allow nominal licensees to be considered owners under proposed subsection (f) is not clear. Enactment of this bill may have helped solve the problem of library lending of e-books early in the history of the technology. While the bill gained fifty-three cosponsors,⁸⁶ the problems inherent in such a legislative scheme ultimately doomed the bill. Congressman Coble, Chairman of the House Subcommittee on Courts and Intellectual Property, explained that there are significant problems with extending the first sale doctrine to the digital realm, primarily due to the differences in alienability of tangible property and digital retransmission.⁸⁷ His argument against the bill emphasized both the difficulty in policing the required destruction of the original copy upon transmission and the lack of wear and tear on

80. INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 92 (1995).

81. *Id.* The report made two interesting arguments that are still under debate today. It discounted what are now called “forward and delete” systems (where the original owner transmits a copy of the work and then deletes all existing copies he has) as irrelevant since there would still be a violation of reproduction. *Id.* at 93–94. The report also suggested it would be permissible under first sale to transfer the physical hard drive containing the files making up the protected work, even if the initial receipt was via digital transmission. *Id.* at 93.

82. The Digital Era Copyright Enhancement Act, H.R. 3048, 105th Cong. (1997).

83. *Id.* § 4.

84. *Id.*

85. *Id.*

86. *Bill Summary & Status, 105th Congress (1997 – 1998), H.R. 3048*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:h.r.03048>: (last visited Aug. 6, 2012).

87. 144 CONG. REC. H7096, H7098 (1998).

“used” digital copies that acts as one limit to reselling tangible goods.⁸⁸ Congressman Coble also criticized preemption of standard-form licenses for restricting the freedom to contract and for preventing authors and producers of works from tailoring their sales models to the circumstances of the marketplace.⁸⁹ In place of the Digital Era Copyright Enhancement Act, Congress passed the Digital Millennium Copyright Act of 1998 (“DMCA”),⁹⁰ legislation that left the first sale provision of § 109 unchanged.

As mandated by the DMCA, the U.S. Copyright Office prepared a report to Congress in 2001 that evaluated the effects of the law, especially as related to the first sale provision of § 109.⁹¹ The report gave a detailed evaluation of the current state of the first sale doctrine and noted that many legitimate concerns existed and were “particularly acute in the context of the potential impact on library operations.”⁹² While promising to work with libraries and publishers to preserve critical library functions,⁹³ the Copyright Office decided that analogies between digital and physical distribution of copyrighted works were misplaced and recommended no change to § 109 at that time.⁹⁴

Two years later, some members of Congress felt the time for change had come and introduced the Benefiting Authors Without Limiting Advancement of Net Consumer Expectations (“BALANCE”) Act in the House of Representatives.⁹⁵ Proponents declared a need to address the threat to “rights and expectations of legitimate consumers” and “to restore the traditional balance between copyright holders and society.”⁹⁶ Similar to the proposed 1997 Digital Era Copyright Enhancement Act, the BALANCE Act sought to add a digital first sale provision to § 109, which would have allowed the owner of a copy of a work in digital format to sell or otherwise dispose of the work to a single recipient as long as the owner did not retain the copy in any retrievable form.⁹⁷ In addition, as in the earlier plan, the

88. *Id.*

89. *Id.*

90. John Schwartz, *House Passes Copyright Bill; Clinton Says He'll Sign Measure Addressing Online Issues*, WASH. POST, Oct. 13, 1998, at C03.

91. SECTION 104 REPORT, *supra* note 60, at 1–2.

92. *Id.* at 96–97.

93. *Id.* at xxi.

94. *Id.*

95. *Bill Summary & Status, 108th Congress (2003 – 2004), H.R. 1066*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:H.R.1066>: (last visited Aug. 6, 2012).

96. *Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003*, H.R. 1066, 108th Cong. § 2 (2003).

97. *Id.* § 4.

2003 bill proposed making unenforceable any nonnegotiable licenses attached to digital works.⁹⁸ Finally, the BALANCE Act would also have amended the anticircumvention provisions of the DMCA to allow circumvention of technological protection measures as necessary to make noninfringing use of a work.⁹⁹ While its proponents saw the need for secondary markets in digital works and a shift in the balance of copyright toward the consumer, the BALANCE Act attracted only six cosponsors in the 108th Congress and never made it out of committee.¹⁰⁰

Although previous efforts have failed, that has not stopped the demand for a digital first sale provision. One author notes that an increase in legally obtained digital media, a successful litigation campaign against piracy by the recording industry, and changes in public perception of digital media are evidence that the time has come for another legislative attempt.¹⁰¹ Another author argues that legislation allowing “forward and delete” DRM systems—systems in which a user could transfer the files containing a work as long as the original files on his computer were deleted—could help consumers while also curbing e-book piracy.¹⁰² Legislative solutions are an idea that will not die.

Since the previous legislative attempts seemed targeted primarily at consumers, legislation similar to the BALANCE Act of 2003 would probably do little good for libraries. Such legislation would have made nonnegotiable licensing agreements unenforceable,¹⁰³ which may have solved one part of the current problem if it meant that libraries owned rather than licensed e-books. However, under legislation similar to that previously proposed, libraries would be allowed to “dispose[] of the work by means of a transmission to a single recipient” only if the library did not “retain the copy or

98. *Id.* § 3(b).

99. *Id.* § 5.

100. LIBR. CONGRESS, *supra* note 95. Another attempt in the 109th Congress fared even worse, managing to gain only two cosponsors. *Bill Summary & Status, 109th Congress (2005 – 2006), H.R. 4536*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.04536>: (last visited Aug. 6, 2012).

101. Henry Sprott Long III, Commentary, *Reconsidering the “Balance” of the “Digital First Sale” Debate: Re-Examining the Case for a Statutory Digital First Sale Doctrine to Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183, 1200 (2008).

102. Joseph Gratz, *Digital Book Distribution: The End of the First-Sale Doctrine?*, LANDSLIDE, May–June 2011, at 8, 10–11.

103. Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, H.R. 1066, 108th Cong. § 3(b) (2003).

phonorecord in a retrievable form.”¹⁰⁴ While this form of digital lending is technically possible, it raises plenty of administrative problems. For example, patrons will inevitably “lose” the digital copy on loan (through deletion, hardware failure, etc.), and libraries may then be required to buy a replacement copy. Libraries will also have a very difficult time policing patrons to be sure that all patron copies are deleted upon return. Besides administrative quandaries, publishers will notice that lack of wear and tear on digital books is resulting in decreased sales to libraries. Prices of e-books will have to increase in order to compensate for the decrease in replacement purchasing. One librarian agrees, “[T]here is the real possibility that [digital first sale] legislation would end up being worse for libraries rather than better.”¹⁰⁵ Although five major library associations¹⁰⁶ championed an update to the codification of the first sale doctrine in order to protect the role of libraries in their August 2000 comments on the Copyright Office’s § 104 Report,¹⁰⁷ that no longer seems to be a consensus opinion.

The biggest concern with this type of legislation is not the possible negative outcomes, but the very real concern that passage of such legislation is exceedingly improbable in the foreseeable future. An article in the ALA’s *American Libraries* magazine conceded: “[I]t is highly unlikely that Congress will act, especially given the current political environment. If legislators did take up the issue, it is unlikely that the stakeholders would come to a consensus that everyone could live with.”¹⁰⁸ Another industry insider points out that “Digital First Sale scares the media industry to death.”¹⁰⁹ If implemented, he predicts a pricing “race to the bottom,”¹¹⁰ which could create an environment no longer suitable to “promote the Progress of Science and useful Arts.”¹¹¹ Thus, the true problem with the very broad changes contemplated in the BALANCE Act and similar proposals is

104. *Id.* § 4 (in addition, the work must be “sold or otherwise disposed of in its original format”).

105. Russell, *supra* note 78.

106. The five associations involved were the American Library Association, the American Association of Law Libraries, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association.

107. AM. LIBRARY ASS’N ET AL., INQUIRY REGARDING SECTIONS 109 AND 117: REPLY COMMENTS OF THE LIBRARY ASSOCIATIONS, DOCKET NO. 000522150-0150-01 (2000), available at <http://www.copyright.gov/reports/studies/dmca/reply/Reply008.pdf>.

108. Russell, *supra* note 78.

109. Bill Rosenblatt, *ReDigi Gets RIAA Nastygram*, COPYRIGHT & TECH. (Nov. 15, 2011), <http://copyrightandtechnology.com/2011/11/15/redigi-gets-riaa-nastygram/>.

110. *Id.*

111. U.S. CONST. art. I, § 8, cl. 8.

not necessarily library e-book lending, but the potential fallout in other contexts.

B. The Good Soldier: The Librarian of Congress and DMCA Anticircumvention Rulemaking

A second proposed solution relies not on Congress, but on the regulatory power of the Librarian of Congress and the Copyright Office. Under the DMCA, the Librarian of Congress, working with the Copyright Office, has the authority and duty to create exceptions to the statutory prohibition on circumvention of technological protection measures every three years for users of copyrighted works who are adversely affected by that prohibition.¹¹² The Librarian has used this authority five times since the 1998 DMCA implementation and has granted exceptions for several circumventions.¹¹³ Most recently, in 2012, the Librarian exercised this authority to grant exceptions for: (1) use of screen readers and other assistive technologies for blind and other disabled readers of electronically distributed literary works, (2) unlocking or “jailbreaking” of smartphones, (3) decrypting DVDs or videos distributed by online services for a very limited set of purposes, such as noncommercial commentary or criticism or educational use, and (4) decrypting DVDs or videos distributed through online services in order to research adding features for disabled users to DVD players.¹¹⁴ Although expanding the scope of rights for library lending using this rulemaking authority has not been comprehensively discussed, the idea has been suggested.¹¹⁵

This proposal suggests that the Copyright Office, through the Librarian, grant libraries an exemption to the anticircumvention rules of § 1201, allowing a library to remove DRM from e-book files it has lawfully purchased.¹¹⁶ Libraries would be required to repackage e-

112. 17 U.S.C. § 1201(a)(1)(C) (2006).

113. *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/1201/> (last updated Feb. 14, 2013).

114. *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 77 Fed. Reg. 65,260, 65,278 (Oct. 26, 2012) (to be codified at 37 C.F.R. § 201.40(b)). An exception for unlocking cellular phones from service-provider networks was also included, but only applied to phones acquired within ninety days of the effective date of these regulations. *Id.*

115. Bill Rosenblatt, *E-Book Lending: The Serpent in the Garden of Eden*, COPYRIGHT & TECH. (Mar. 3, 2011), <http://copyrightandtechnology.com/2011/03/03/e-book-lending-the-serpent-in-the-garden-of-eden/>.

116. *Id.*

books in their own DRM systems to prevent patron abuse.¹¹⁷ One advantage of this system for libraries is that it would take the power to control library lending of e-books away from the publishers and give it to the libraries, where it has traditionally been in the context of tangible books.

While the simplicity of such a plan may be attractive at first glance, there are many disadvantages to such a proposal. Any anticircumvention exemption granted expires at the end of three years and requires new authorization by the Copyright Office at the next rulemaking.¹¹⁸ This makes any investment made in reliance on such an exemption a risky proposition for libraries, since a Copyright Office failure to renew the exemption after three years could render an expensive system obsolete and possibly worthless. Shifting the burden of protecting copyrighted works to libraries could end up costing more for libraries than other possible solutions, especially before industry-wide standards and systems are agreed to and implemented.¹¹⁹

Additionally, the practical likelihood of getting such an exemption from the Copyright Office is small under current circumstances. As even the author who made this suggestion pointed out: "This would be a more elaborate exception than any that the Copyright Office has granted" thus far.¹²⁰ The Copyright Office is to consider five criteria in granting exemptions:

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.¹²¹

The discussion of previous final rules issued by the Librarian of Congress show that the bar for showing the need for an exemption is high. The burden of proving a diminished ability to make noninfringing use of a work is placed on the proponents of the

117. *Id.*

118. Copyright Office; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, 62,012 (Oct. 31, 2003).

119. Rosenblatt, *supra* note 115.

120. *Id.*

121. 17 U.S.C. § 1201(a)(1)(C) (2006).

exemption and must be shown by a preponderance of the evidence.¹²² Mere inconvenience is not enough.¹²³ Based on the systems libraries are currently using to lawfully allow e-book lending, it seems very unlikely that the Copyright Office would grant an exemption under its rulemaking authority.

Another problem with a rulemaking solution is that it does not—and cannot—address the issue of licensing. Since publishers and distributors almost universally license rather than sell commercial e-books,¹²⁴ it is possible that even if the Copyright Office adopted the proposed rule, it would have little actual effect for library e-book lending. Libraries could set up a system to lend e-books with their own DRM wrappers, but would still be violating their license agreements with the publishers and distributors in most cases. This could result in a revocation of the license, lack of continued access to the work, or other breach of contract remedies. This solution is therefore not likely to solve the problem of library e-book lending.

C. All the King's Men: *Proposed Judicial Solutions*

In addition to congressional amendment of copyright law and rulemaking by the Copyright Office and Librarian of Congress, some interested parties have suggested possible judicial solutions under the existing statute and regulations. Most of these proposals focus on courts changing the interpretation of the often nonnegotiable licenses attached to digital goods. One of the most recent suggestions focuses on common law doctrines of copyright exhaustion.

1. Judicial License Preemption

Courts have exercised the prerogative to interpret transactions between vendors and customers to determine what labels, and therefore what legal rights, apply to the transaction. Several recent cases that attempt to discern whether a transaction is a sale or a license involved both computer software and transactions that included physical media, such as CDs or CD-ROMs. Although there are strong analogies to purely digital e-books, these distinctions only further frustrate predictions of how these prior decisions would apply in the case of digitally delivered e-books.

122. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,826 (July 27, 2010).

123. *Id.*

124. *See supra* Part II.A.

The Ninth Circuit has been the most active in setting the boundary between licenses and transfers of title in recent years. In the 2010 case *Vernor v. Autodesk*, the Ninth Circuit established its current three-part test for sale-versus-license questions: (1) whether the transaction is identified as a license, (2) whether the seller limits transferability and alienability, and (3) whether substantial use restrictions are imposed.¹²⁵ Although there were earlier lower court decisions in the circuit that saw the issue differently,¹²⁶ the Ninth Circuit has revisited the issue three times since *Vernor* and has not wavered. First, in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, the court applied the *Vernor* test and found that Blizzard (the copyright owner) reserved title in the software, that it granted players a nonexclusive, limited license, and that it imposed transfer restrictions on purchasers.¹²⁷ This led the court to find that purchasers of *World of Warcraft* were licensees and not owners of the software.¹²⁸ Second, the Ninth Circuit went beyond simply labeling a transaction a license in *Apple v. Psystar Corp.* and suggested, without reservation, that the first sale doctrine was responsible for the prevalence of licensing in the software market as owners sought more control over their copyrighted material.¹²⁹ Third, applying the *Vernor* test in *UMG Recordings, Inc. v. Augusto*, the court came to a different conclusion concerning promotional CDs.¹³⁰ UMG Recordings sent out unsolicited promotional CDs, some of which the defendant later sold on eBay.¹³¹ Deciding that a restrictive statement printed on the unsolicited discs was not enough to create a binding license agreement or to restrict alienation or disposal of the promotional CDs, the court held that UMG's distribution of the CDs also transferred title to the physical media.¹³² If a court applied the *Vernor* test to the prevailing license agreements used by e-book retailers today, it would almost certainly find that e-books are licensed and that there is no transfer of title.

While *Vernor* and its progeny are binding in the Ninth Circuit, no other circuit has such a clear precedent, and the Supreme Court has yet to weigh in on the issue. Other circuits could establish their

125. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1110–11 (9th Cir. 2010); *supra* Part III.

126. *See Vernor v. Autodesk, Inc.*, 555 F. Supp. 2d 1164, 1169–74 (W.D. Wash. 2008) (attempting to reconcile disparate precedent within the Ninth Circuit and holding that Autodesk sold software rather than licensing it).

127. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 938 (9th Cir. 2010).

128. *Id.*

129. *Apple, Inc. v. Psystar Corp.*, 658 F.3d 1150, 1155–56 (9th Cir. 2011).

130. *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1180 (9th Cir. 2011).

131. *Id.* at 1177–78.

132. *Id.* at 1180.

own tests that favor ownership over licensing, and a Supreme Court decision in that direction could usher in a paradigm shift in the entire copyright industry. Further, e-books are not software, and, due to the unique nature of libraries in the copyright context, there are arguments that library e-books should be treated differently than software. Although legally owned software is covered by the first sale provision of § 109, software also has a special section in § 117 of the Copyright Code, which demonstrates that Congress saw the need for some special provisions for software that did not apply to other works.¹³³ Similarly, libraries have several special exceptions to what would otherwise be infringing conduct under § 108. Although these exceptions deal mainly with reproduction by libraries rather than lending, they still show congressional recognition of the importance of libraries in our society. A court could incorporate these examples to distinguish e-books in the library context from the software cases such as *Vernor*. However, even a judicial holding that classified libraries as owners of e-books and exempted them from the enforcement of licensing agreements would not necessarily solve the problem of lending e-books. As noted in the Copyright Office's 2001 § 104 Report, first sale "is conditioned on *both* ownership (as opposed to mere possession) and the requirement that such ownership be of a particular physical copy."¹³⁴ Courts may have some say in the question of ownership versus mere possession, but it would be quite a stretch for a court to turn e-book files into physical copies. A judicial opinion favoring ownership over licensing also fails to solve another problem raised by the § 104 Report: a digital transmission would still require infringing reproductions of the e-book files, and the first sale doctrine would remain an invalid defense to reproduction infringements.¹³⁵ Although a judicial solution that would make license agreements unenforceable against libraries purchasing and lending e-books may be attractive, it would still fail to solve the legal problems that libraries currently face.

2. Copyright Exhaustion in the Digital Age

Some legal scholars have advanced another method for the courts to solve the first sale problem without the need for legislative or administrative action. This proposal relies on the principle of

133. 17 U.S.C. § 117 (2006).

134. SECTION 104 REPORT, *supra* note 60, at 89.

135. *Id.* at 79–80.

copyright exhaustion.¹³⁶ Exhaustion generally refers to certain rights of the copyright owner being “exhausted” through some specific event or after a certain time period. The argument for this solution asserts that first sale is only the primary part of a broader exhaustion doctrine that courts developed before *Bobbs-Merrill* and that has continued to evolve under subsequent legislation and judicial activity.¹³⁷ Under this theory, copyright exhaustion not only exhausts the copyright holder’s exclusive right to vend or distribute, but also provides additional rights for the owner of a copy of a work, including: (1) the right to repair and renew a copy, even if the repair or renewal requires some alteration or copying; (2) the right to adapt and modify, such as creating a new work or volume using the lawfully obtained copy of protected work; and (3) the right to publicly display the copy.¹³⁸ Courts retain a large degree of control over copyright cases based on the long history of common law’s role in copyright, both pre- and post-codification of many copyright doctrines.¹³⁹ Since courts retain much of the power to interpret copyright statutes from their traditional common law role in copyright, they can apply the principle of copyright exhaustion to solve the challenges facing users of digital media,¹⁴⁰ such as libraries attempting to lend e-books. Under the assumptions of copyright exhaustion, libraries could obtain legitimate copies of e-books and lend them out digitally on a one-user-per-copy basis without infringing.¹⁴¹ Unfortunately, this suggestion is not a complete solution for libraries struggling with the question of how to lend e-books.

First, the exhaustion principle still relies on ownership of a copy.¹⁴² Based on current precedent, this is far from a settled question,¹⁴³ and without assurance that current purchases are of title to an e-book, and not merely licenses, librarians would be taking quite a risk to invest in such a theory. Second, assuming libraries can obtain true ownership, proponents argue that courts could require a forward-and-delete system, placing the burden on the seller to prove that all

136. See Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 892 (2011) (calling for courts to reinvigorate and enforce the judicial doctrine of copyright exhaustion).

137. *Id.* at 912.

138. *Id.* at 913–22.

139. *Id.* at 926–32.

140. *Id.* at 936–37.

141. See *id.* at 938 n.272 (suggesting that temporary copies could be used to assist libraries in the lending of digital media).

142. *Id.* at 938 (“Once the court addresses the threshold issue of ownership . . .”).

143. See *supra* Part III.

remaining copies are deleted upon resale, rather than requiring technological protection measures.¹⁴⁴ In the library context, this translates to a one-copy-per-user system—a library may only lend an e-book simultaneously to the number of patrons equal to the number of “copies” of the e-book it has purchased. As in the private resale context, this policy raises many issues of policing, which left unresolved could quickly result in congressional override of any judicial allowance of copyright exhaustion. Absent a requirement for technological protection measures, it becomes very difficult to police a library lending system for deleted files, especially on the patron end. Also, without technological protections, there would be no way to stop a patron from keeping, or distributing, copies of every e-book he borrows. This is far from a new problem. As long as library patrons have had access to copyrighted works, they have been able to copy them, whether by copying an entire book by hand, photocopying books or documents, ripping MP3s from an audio CD, or copying the files of an e-book on a computer. However, copyright owners are not likely to be satisfied with any system that does not address this glaring issue, and Congress would be hard pressed to ignore it.

V. *DELIVERANCE*: ALLOWING THE PARTIES TO SUCCEED

Having considered and rejected possible solutions to the problem of library e-book lending from the legislative, regulatory, and judicial realms, it may seem that such lending is doomed. However, with no obvious progress being made on any of these proposed solutions, library e-book lending is already happening and has been since at least 2009.¹⁴⁵ Despite the calls by libraries for governmental intervention,¹⁴⁶ library e-book lending is already quite popular among library patrons.¹⁴⁷ According to one survey, eighty-two percent of

144. Perzanowski & Schultz, *supra* note 136, at 938–39.

145. Press Release, OverDrive, Inc., Cleveland Public Library First to Offer EPUB eBook Downloads (Jan. 14, 2009), *available at* <http://www.overdrive.com/News/getarticle.aspx?newsArticleID=20090115>.

146. *See, e.g.*, Brief of Amici Curiae American Library Association et al. in Support of Plaintiff and Affirmance, *supra* note 70, at 3 (urging that ownership analysis focus on economic realities and emphasizing the importance of first sale to libraries and others); AM. LIBRARY ASSOC. ET AL., EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES: COMMENTS OF THE LIBRARY ASSOCIATIONS, No. RM 99-7A, at 2 (2005), *available at* <http://www.copyright.gov/1201/comments/162.pdf> (petitioning the Copyright Office and Librarian of Congress for very broad DMCA anticircumvention exemptions).

147. Christian Davenport, *As Demand for E-books Soars, Libraries Struggle to Stock Their Virtual Shelves*, WASH. POST (Jan. 14, 2012), <http://www.washingtonpost.com/local/as-demand->

public libraries in the United States offered e-books as of October 2011.¹⁴⁸ This shows that despite complaints from librarians and patrons, e-book lending by public libraries is working and improving. The best solution is for the government to allow the actors—authors, publishers, distributors, libraries, and readers—a chance to find a solution within the existing legal framework.

OverDrive, a company that manages e-book lending for public libraries, is the current dominant system for library e-book lending.¹⁴⁹ OverDrive and its competitors act as intermediaries between publishers and libraries and provide the content for library e-books, as well as downloadable audiobooks, music, and videos. A library that collaborates with a service such as OverDrive gains access to that distributor's e-book catalog and can license e-books from the catalog that the library can in turn temporarily license to patrons.¹⁵⁰ Once a library has started its digital collection, library patrons can access the e-book catalog through the library website. Library patrons, who typically log in with their library card number, may then download DRM-protected e-book files that can be read using a PC or Mac computer, a wide variety of mobile devices and smartphones, and a large selection of e-book readers, including popular Sony models, Barnes & Noble's Nook, and Amazon's Kindle.¹⁵¹

One industry blogger has labeled the current digital lending system "Pretend It's Print."¹⁵² A library licenses a certain number of "copies" of each book to add to its e-book collection, much like it would buy a specific number of copies of a physical book. Just like a physical book, each copy of an e-book can be checked out to only one patron at a time. When a copy of an e-book is checked out, no other patron is

for-e-books-soars-libraries-struggle-to-stock-their-virtual-shelves/2012/01/13/gIQAkIOXzP_story.html.

148. Rebecca Miller, *Dramatic Growth: LJ's Second Annual Ebook Survey*, THE DIGITAL SHIFT (Oct. 12, 2011), <http://www.thedigitalshift.com/2011/10/ebooks/dramatic-growth-ljs-second-annual-ebook-survey/>. Another survey disagreed, finding that thirty-nine percent of U.S. libraries did not offer downloadable media to patrons as of December 2011. Press Release, Chief Officers of State Library Agencies, *Survey of State Libraries Finds that 39% of US Libraries Lag Behind in Providing Ebooks* (Dec. 7, 2011), available at http://www.cosla.org/documents/Press_Release_on_Downloadable_Media_Survey261.pdf.

149. DAVID R. O'BRIEN, URS GASSER & JOHN PALFREY, *E-BOOKS IN LIBRARIES* 8 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111396 (showing that OverDrive was used in ninety-two percent of libraries that offered e-book lending).

150. Rosenblatt, *supra* note 115.

151. Julie Bosman, *Kindle Connects to Library E-Books*, N.Y. TIMES (Sept. 21, 2011), <http://www.nytimes.com/2011/09/22/books/amazons-kindle-to-make-library-e-books-available.html>; *Device Resource Center*, OVERDRIVE.COM (Dec. 17, 2012), <http://www.overdrive.com/resources/drc/> (listing devices that are supported by OverDrive e-book lending).

152. Eric Hellman, *Lots of Markets, Lots of Business Models*, GO TO HELLMAN (Dec. 7, 2010), <http://go-to-hellman.blogspot.com/2010/12/lots-of-markets-lots-of-business-models.html>.

allowed to check out and download that copy until the current user “returns” the title or it expires, which triggers an automatic return.¹⁵³ The DRM attached to e-book files, as well as the license agreements attached to their use, prevents users from keeping e-books past the due date by rendering them unusable after that date. On a computer, smartphone, or e-reader, the user may no longer open or view the e-book, but may only delete it. DRM can also prevent printing, saving, and other copying. Most libraries also use a hold system, which allows patrons to get in line for the next available copy of a book.

The current system is certainly not without its flaws. Publishers have mixed feelings over making their books available for e-book lending. Although the landscape is changing rapidly, as of July 2012, the six largest U.S. publishers were split on how each would allow e-books to be licensed to libraries.¹⁵⁴ Random House was the only publisher that allowed unrestricted e-book lending.¹⁵⁵ Hachette and Penguin did not license new releases but did allow for lending of books after a waiting period.¹⁵⁶ Macmillan and Simon & Schuster refused to license e-books to libraries at all.¹⁵⁷ Finally, HarperCollins prompted the ire of librarians in February 2011, when the publisher took the “Pretend It’s Print” model even more literally and instituted a policy allowing each copy of an e-book to be checked out only twenty-six times before the library’s license to that copy expired and would have to be repurchased.¹⁵⁸ This restriction is meant to mirror wear and tear that occurs to physical copies of books in libraries. The move prompted some to call for a boycott of HarperCollins books in e-book form as well as in print.¹⁵⁹

For patrons, the wait to get the most popular books available can be long. As pointed out in a January 2012 *Washington Post* article, in the Fairfax County Public Library system, 288 patrons were waiting for one of forty-three copies of the latest John Grisham novel, and 268 patrons were in line for one of forty-seven copies of *The Girl With the Dragon Tattoo*.¹⁶⁰ Patrons at the bottom of the list could have to wait up to four months to borrow those titles. However, this is no

153. Rosenblatt, *supra* note 115.

154. O'BRIEN, GASSER & PALFREY *supra* note 149, at 9.

155. *Id.*

156. *Id.*

157. *Id.*

158. Benedict Page, *Fury Over 'Stupid' Restrictions to Library Ebook Loans*, GUARDIAN (Mar. 1, 2011), <http://www.guardian.co.uk/books/2011/mar/01/restrictions-library-ebook-loans>.

159. *Id.*

160. Davenport, *supra* note 147. As of February 2012, personal research found 314 patrons waiting on fifty-three copies of the Grisham novel.

different from waiting for physical copies of books to become available at the library. Informal internet research indicated that in February 2012, 662 patrons were waiting for one of the Fairfax County Public Library's 218 physical copies of the same Grisham novel. Any difference in wait time for a patron between the e-book and the physical copy is based on the library's choice in how it allocates its resources between print and digital, not on any technological or legal limitations.

The system is far from perfect, but the market participants are working within the existing legal framework to make it better. The entire e-book industry is still in its infancy and is currently experiencing some of the growing pains that the music and movie industries have already undergone and in some cases are still experiencing.¹⁶¹ As the industry grows, the participants are working together to improve the system. In January 2012, ALA representatives met with executives from the largest publishers to begin a dialog about including more titles in library lending.¹⁶² The ALA president reported that she was "happy with the progress made on multiple fronts" after the meetings.¹⁶³

Another example of progress is that Kindle e-readers, left out of library e-book lending initially, were recently brought on board through the cooperation of Amazon and OverDrive. OverDrive currently has a virtual lock on the library lending market mainly because it was the first major player; however, 3M recently introduced its own Cloud Library service, and Baker & Taylor launched Axis 360 to offer libraries and publishers additional options.¹⁶⁴ This increased competition should improve what publishers are willing to offer to libraries. Unconstrained by a binding legal framework, alternative pricing models are a readily available option. Publishers might create short-term licenses for libraries at a different cost in order to help with the initial demand of new best sellers. New licensing models could provide remuneration based on circulation without the current limits of "Pretend It's Print." As it currently stands, any government

161. See Priti Trivedi, Note, *Writing the Wrong: What the E-book Industry Can Learn From Digital Music's Mistakes With DRM*, 18 J.L. & POL'Y 925 (2010), for one take on some lessons to be learned from history.

162. Michael Kelley, *ALA Midwinter 2012: ALA to Meet with Top Executives of Macmillan, Simon & Schuster, and Penguin on Ebook Lending*, LIBRARYJOURNAL.COM (Jan. 22, 2012), <http://lj.libraryjournal.com/2012/01/publishing/ala-to-meet-with-top-executives-of-macmillan-simon-schuster-and-penguin-on-ebook-lending/>.

163. Molly Raphael, *Ebook Talks: The Details*, AM. LIBR. (Feb. 8, 2012, 1:10 PM), <http://americanlibrariesmagazine.org/e-content/ebook-talks-details>.

164. Michael Kelley et al., *The Ebook Opportunity: Libraries of All Types Are Innovating with This New Format, with an Eye on the Future*, LIBR. J., Nov. 15, 2011, at 36.

interference would be premature and could have the unintended consequence of doing more harm than good for library e-book lending.

VI. *FROM HERE TO ETERNITY*: CONCLUSION

Absent government interference, systems and methods of library lending of e-books are limited only by the imaginations of the parties involved. The technology required by almost any conceivable business model either already exists or probably could be developed quickly. This leaves publishers, authors, distributors, and libraries free to find the model that works best for each on an individual basis rather than having to conform to a one-size-fits-all solution imposed by Congress, the Copyright Office and Librarian of Congress, or the federal courts.

Public libraries have played a critical part in the tradition of the United States and remain a critical part of the democratic infrastructure by making materials available to everyone regardless of income or status. As e-books replace physical books, it is important to consider the role that libraries will play going forward. Although many analogize digital copies to print copies and seek government intervention to preserve the status quo, that solution is unimaginative and overly restrictive. Digital media is inherently different from physical media, and the industry needs to embrace those differences and use them for the benefit of those involved—authors, publishers, libraries, and the public. Amendments to copyright law, exemptions from anticircumvention laws, and court decisions that emphasize and entrench old models will only do all parties a disservice and suppress the creativity necessary to build new markets and new models that will continue to uphold the lofty goals of copyright—to promote the creation of valuable new material while preserving public access to it.

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* Doctor of Jurisprudence, May 2013, Vanderbilt University Law School. I am very appreciative of the outstanding work by the Vanderbilt Law Review editorial board to improve this Note. I would also especially like to thank my family, Jessica, Lily Ann, and Michaela, and my parents for their constant support.