A BOOK BY ANY OTHER NAME: E-BOOKS AND THE FIRST SALE DOCTRINE

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Introduction

After witnessing the successes of digital music sales and entertainment streaming platforms like Netflix and Hulu, e-books,[1] a relative latecomer to the digital medium, are finally taking off. The Association of American Publishers (AAP) has estimated that e-book sales have grown by 202.3% in less than a year.[2] For the first time ever, e-book sales are also beginning to outpace traditional hardcover and paperback books.[3] Publishing houses are hailing e-books as a savior for an industry that many believed might be left behind in the digital era.[4] And, as such, e-book publishers and retailers are going to great lengths to ensure that e-books do not suffer from the same piracy problems that have plagued the music and film industry.[5]

Unlike their paper-bound counterparts, most e-books cannot be re-sold, transferred or lent for a prolonged period of time.[6] This is because e-books are typically sold under restrictive licensing agreements and embedded with digital rights management (DRM) technology that prevents purchasers from re-selling, lending, or otherwise transferring an e-book after it is purchased. Purportedly, these restrictions are necessary to prevent the online piracy, but there is mounting evidence that DRM may actually do little to inhibit online piracy.[7] These restrictions, however, have serious implications for Copyright Law as it adapts to the digital era. Copyright's "first sale doctrine," articulated in §109(a) of the Copyright Act, allows rightful purchasers of a copy of a copyrighted work the right to re-sell, lend, or otherwise dispose of the copy as they

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* J.D. Candidate, Brooklyn Law School, 2013; B.A., New York University, 2008. First off, a huge thank you to the editorial board of the Chicago-Kent Journal of Intellectual Property Law for all of their hard work and valuable input on this article. This article would also not have been possible without the thoughtful guidance and direction from Professor Samuel Murumba of Brooklyn Law School. Lastly, I want to thank my wonderful friends and family for their constant positivity and support.

[1] The term e-book refers to "a book composed in or converted to digital format for display on a computer screen or handheld device." "e-book" Merriam-Webster Online Dictionary (2012), *available at* http://www.merriam-webster.com/dictionary/e-book.

[2] In a February 2011 sales report, the AAP contends that sales of e-books had grown by 202.3% compared to the previous February. Andi Sporkin, *Popularity of Books in Digital Platforms Continues to Grow, According to AAP Publishers February 2011 Sales Report*, ASSOCIATION OF AMERICAN PUBLISHERS (April 14, 2011), *available at* http://www.publishers.org/press/30/ (hereinafter AAP Sales Report).

[3] *Id.*

[4] *See e.g.* Megan Wasson, *E-books Cause Publishing Industry Growth*, THE CHRISTIAN SCIENCE MONITOR (Aug. 9, 2011), http://www.csmonitor.com/Books/chapter-and-verse/2011/0809/E-books-cause-publishing-industry-growth.

[5] For an overview of the music industry's use and eventual abandonment of DRM technology, *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, 938-947 (2010).

[6] It should be noted that some e-book retailers do allow lending under certain circumstances. Amazon, for example, will allow a user to "lend" an e-book to another Kindle user for a maximum period of two weeks. *See Lending Kindle Books*, AMAZON.COM (2012), http://www.amazon.com/gp/help/customer/display.html?nodeId=200549320 (last accessed March 26, 2012).

[7] *See* Tim Anderson, *How Apple is Changing DRM*, THE GUARDIAN, May 14, 2008, http://www.guardian.co.uk/technology/2008/may/15/drm.apple (noting that implementing DRM restrictions in the music industry had "no effect" on piracy).

wish after the original, first sale from the copyright owner to the consumer.[8] This provision is important, as it serves the dual policy goals of copyright law by balancing the public benefit against the rights of creators, who obtain value for their works through the purchase price in the initial sale.[9]

E-retailers have attempted to skirt this restriction by maintaining that e-books are distributed by "license,"[10] rather than a traditional sale to which the first sale doctrine would apply.[11] This paper argues that this is improper for two primary reasons. First, allowing these types of restraints on alienability subverts the rationale for limited copyright protection and sets a precedent that copyright owners can ensure that purchasers of digital content do not "own" any material—and thus maintain post-sale rights guaranteed under §109(a)—so long as rights holders contract accordingly. This licensing tactic represents a legal fiction that is not supported by Copyright jurisprudence. For this reason, courts should not enforce boilerplate terms seeking to bind legitimate purchasers by "license." Second, the lack of ownership and transferability of e-books would have significant social implications for education and literacy by inhibiting access and transferability of written resources as we transition to a digital age. Limiting the transferability of e-book files, particularly as more and more consumers opt to purchase digital content over traditional mediums, would strangle second-hand markets that offer used resources at a fraction of the market price and pose an undue burden on library lending in the digital age.[12]

Part I of this article discusses the origins of the first sale doctrine and offers a brief overview of copyright law. While copyright law is intended to protect copyright owners against unauthorized copies, the law also reflects an intent to limit a copyright owner's ability to control downstream sales. This notion is reflected in the first sale doctrine, which allows rightful purchasers of copyrighted materials a right to resell, lend, or otherwise dispose of the work after their purchase. The next section, Part II, discusses the rise of DRM technology and browsewrap licenses as they pertain to the current e-book sales model and concludes that these mechanisms are ineffective in limiting online piracy. Part III analyzes the notion that e-books may be licensed, rather than "sold" in the traditional sense. After looking to similar cases in the software industry—which has historically been treated quite differently from other copyrightable works—it concludes that these type of agreements are not within the exclusive rights granted under the Copyright Act and that these licenses serve as a legal fiction designed to evade the first sale doctrine. Lastly, Part IV concludes the e-book industry's use of DRM and restrictive licensing agreements are incompatible with the first sale doctrine and would eliminate important purchaser rights in the digital era if such agreements were deemed enforceable. Furthermore, allowing these practices to continue would be detrimental to important secondary markets and libraries by inhibiting an important channel of access to books and educational resources.

I. Copyright Law and the First Sale Doctrine

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[8] 17 U.S.C. §109(a).

[9] *See* Melissa Goldberg, Note, *A Textbook Dilemma: Should The First Sale Doctrine Provide A Valid Defense For Foreign-Made Goods?*, 80 FORDHAM L. REV. 3057, 3063-4 (2012).

[10] *See generally* Michael Seringhaus, *E-Book Transactions: Amazon "Kindles" The Copy Ownership Debate*, 12 YALE J. L. & TECH. 147 (2009-2010).

[11] *Id*. at 149-50.

[12] Although publishers have worked with the libraries to allow digital rentals of e-books, they impose significant restraints, including caps limiting the amount of times a book may be lent out before a library is required to destroy it.

The Copyright Act grants authors of original works a specified set of rights designed to protect and control unauthorized copies of their works.[13] Within this bundle of rights is the author's right to prepare derivative works, reproduce, make and distribute copies, and to perform or publically display the work.[14] To qualify for copyright protection, the author's work must be sufficiently original and fixed in a tangible medium.[15] Any violation of the rights listed in §106 of the Copyright Act, such as an unauthorized reproduction or display of a copyrighted work, constitutes infringement of the owner's copyright.[16] However, the Copyright Act does not allow for completely unlimited control of a work, particularly after the author's "first sale" of a copy to a customer. Under the first sale doctrine, rightful purchasers of a copyrighted work may sell or otherwise dispose of that copy without the authorization of the copyright owner.[17] Thus, the author's distribution rights "apply only to the first sale of a particular copy."[18]

The first sale doctrine was first articulated in *Bobbs-Merrill Co. v. Straus*, a 1908 Supreme Court case in which the publisher and copyright owner of a book had sought to limit subsequent sales of the book beyond the first sale by inserting a notice after the title page reading, "The price of this book at retail is $1 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."[19] The defendant sold the book for 84 cents, spurring the publisher to file a lawsuit claiming infringement of its right to "vend" copies of its copyrighted work.[20] The court found that it was not within a copyright owner's "right to vend" to set restrictions on future sales of copies past the initial first sale.[21] It further held that the primary intent of the copyright statute is to give authors an exclusive right "to multiply and sell his production" and prevent unauthorized copying, rather than to grant copyright owners broad monopolistic control over downstream sales.[22] The

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[13] 17 U.S.C. §106 (2002) ("the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(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;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.".

[14] *Id.*

[15] The statute grants copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."17 U.S.C. §102 (2002).

[16] 17 U.S.C. §501 (2002).

[17] 17 U.S.C. §109(a) (2002).

[18] John Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 9-10 (2004).

[19] *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 341 (1908).

[20] *Id.*

[21] *Id.* at 350-351.

[22] "To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." *Bobbs-Merrill*, 210 U.S. at 351.

decision "reflects a policy judgment that copyright owners' rights did not extend beyond a need to prohibit unauthorized reproductions."[23]

Following *Bobbs-Merrill*, Congress codified a broad version of the first sale doctrine in the Copyright Act of 1909.[24] The statute forbade restraining further trade or sale on copyrighted works once the purchaser has lawfully obtained them.[25] Under the Current Copyright Act, the first sale doctrine is set forth in Section §106(a) as follows:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.[26]

However, the first sale doctrine is not without its limitations. In 1984, Congress amended §109 to forbid owners of phonorecords from renting, leasing, or lending phonorecords for commercial purposes.[27] The amendment was enacted due to the wave of record rental stores that allowed customers to rent records for brief periods of time, presumably to make unauthorized copies of the records onto their own cassette tapes.[28] Congress enacted a similar provision in 1990 to limit first sale rights of owners of copies of copyrighted software.[29] As with the 1984 amendment, the Computer Software Rental Amendment Act prohibits possessors of copies of computer programs from renting, leasing, or lending the software for commercial purposes.[30]

The first sale doctrine is rooted in the notion that ownership of the material object in which the copyrighted work is embodied (such as a CD, DVD, or book) is wholly distinct from ownership of the copyrighted work.[31] When an individual buys a paperback book, for example, he or she owns that particular copy of the book but does not have any ownership interest in the copyrighted arrangement of words that comprise the copyrighted work.[32] However, once a purchaser has lawful possession of a copy of a copyrighted work, under the first sale doctrine, they may re-sell, give away or otherwise do with the copy as they wish so long as it does not otherwise impede the rights of the original copyright owner.[33] After the first sale, the policy concerns for granting authors a limited monopoly for their works "give way to the policy opposing restraints of trade and restraints on alienation."[34] The doctrine is thus essential in balancing between the copyright owner's right to receive a reward for their work and the public's interest in free alienation of goods.[35]

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[23] 4 William F. Patry, PATRY ON COPYRIGHT § 13:18 (2012).
[24] "[N]othing in this Act 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." Act of Mar. 4, 1909, ch. 320, § 41, 35 Stat. 1075, 1084 (formerly codified at 17 U.S.C. §27).
[25] *Id.*
[26] 17 U.S.C. §109(a).
[27] Rothchild, *supra* note 18, at 13-14.
[28] *Id.*
[29] Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, §802, 104 Stat. 5134 (codified at 17 U.S.C. §109(b)(1)(A)).
[30] *Id.*
[31] *See* Patry, *supra* note 23 at § 13:15.
[32] *Id.*
[33] Unless subject to the software or phonograph amendments to section 109(a) discussed above.
[34] 2 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 8.12[A] (2010).
[35] *See* Goldberg, *supra* note 8, at 3065-66.

Furthermore, first sale rights reflect common law principles against restraints on the alienation of tangible property. Currently, §109 of the Copyright Act does not differentiate between digital and analog formats of copyrighted works.[36] Digital copies, such as e-books or an MP3 file of a song, are treated the same as a hardcover novel or compact disc (CD) under copyright law so long as they are lawfully made copies obtained through a lawful digital distribution.[37] Nevertheless, there has been considerable debate as to whether the first sale doctrine applies to digital files.[38]

Although Congress has not codified any such distinctions, a 2001 report by the Copyright Office accompanying the Digital Millennium Copyright Act noted that a "lawfully made tangible copy of a digitally downloaded work" is protected under §109(a).[39] However, it also hinted that transmissions of digital files might not be protected by §109 when the original owner does not delete the file from his computer before sharing it.[40] Because the purchaser of a digital file such as an MP3 or e-book retains the file and is unlikely to delete it when passing it on to re-sell or share with a friend, the Office found that digital distributions would result in unauthorized copying, in violation of the copyright owner's rights.[41] However, this conclusion—indeed it is now more than a decade old—ignores the possible technical innovations that can enable file-tracking or simultaneous use restrictions that would prevent a digital copy from being used on more than one device at any time. It is worth noting that the Copyright Office did not recommend amending §109 to address digital sales, stating that it had not heard "convincing evidence of present-day problems."[42] Thus far, no restriction has been codified limiting the first sale doctrine from applying to digital copies.

II. The Rise of E-Books, DRM, and Licensing

Although there was early trepidation about whether readers would embrace books in a digital medium,[43] e-books have quickly become a multimillion-dollar industry.[44] These digital editions, which are typically downloaded online and read on portable "e-reader" devices such as an Amazon Kindle or Barnes & Noble Nook, have already begun to outsell hardback and paperback editions.[45]

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[36] *See* Patry, *supra* note 23 at § 13:23.
[37] *Id.*
[38] *See generally* R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577 (2003).
[39] A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act xviii-xxi, 19-40, 78-105 (August 2001). (hereinafter Copyright Office DMCA Report).
[40] *Id.*
[41] *Id.* at 78-91.
[42] *Id*. at 96.
[43] The sentiment was well encapsulated by novelist Jonathan Franzen: "Maybe nobody will care about printed books 50 years from now, but I do. When I read a book, I'm handling a specific object in a specific time and place. The fact that when I take the book off the shelf it still says the same thing – that's reassuring." Alison Flood, *Jonathan Franzen Warns e-books are Corroding Values,* THE GUARDIAN (Jan. 30, 2012), http://www.guardian.co.uk/books/2012/jan/30/jonathan-franzen-ebooks-values?CMP=twt_fd.
[44] *See* AAP Sales Report, *supra* note 2. *See also* Wasson, *supra* note 4.
[45] *Id.* (noting that e-books ranked as the "the #1 format among all categories of Trade publishing (Adult Hardcover, Adult Paperback, Adult Mass Market, Children's/Young Adult Hardcover, Children's/Young Adult Paperback)").

At their inception, e-readers were costly and far less accessible to many consumers.[46] However, e-reader prices have decreased dramatically as a result of competitive pricing between e-reader manufactures, making the devices far more affordable for many consumers.[47] Amazon's most basic Kindle edition now retails for $79 and is more accessible to a larger range of customers.[48] In addition, the rise in smartphones and tablets, such as Apple's iPad, that can display e-books have contributed to the e-book's popularity.[49] However, e-book publishers, fearing the massive file-sharing epidemic that besieged the music and film industries, have imposed a number of restrictions on e-book sales through the use of DRM and browsewrap licensing agreements that e-book retailers claim govern e-book purchases.[50] The approach of e-book publishers is thus two-fold. Most e-book files are embedded with technological restrictions known as DRM to prevent unauthorized copying, sharing, or lending of the file and are also sold under a restrictive licensing agreement.[51] Part A of this section offers a brief history of DRM technology and argues that it should not be employed to limit post-sale uses of e-books. Part B analyzes the validity of the Terms of Use Agreements and "license" restrictions utilized by e-book retailers.

A. The Use of DRM to Limit e-books

The push for DRM-technologies began in the early 2000s following the rise of Napster and the explosion of online file sharing that ensued.[52] Copyright holders—and even some scholars—proposed the use of DRM as a means to protect against piracy of copyrighted content.[53] Generally, DRM refers to the class of technologies that enable rights holders to control use of digital content and impose restrictions on how a digital file may be used.[54] DRM technologies differ by device, retailer, and the type of digital file being used, but typically prevent unauthorized copying, modification of the files, and may even include restrictions on how many devices or computers the file can be installed on.[55] DRM enabled rights holders to offer goods into the stream of online commerce and, at least in theory, a means to prevent unlawful copying and distribution.[56]

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[46] *See* Rory Maher, *The Kindle (And Wannabes) Are Still Too Expensive*, BUSINESS INSIDER (Sept. 3, 2009), http://articles.businessinsider.com/2009-09-03/tech/30009935_1_e-readers-amazon-s-kindle-kindle-device (noting a studying finding that most consumers were unwilling to pay hundreds of dollars for an e-reader). *See also* Mike Luttrell, *How the Kindle went from luxury item to impulse buy*, TG DAILY (July 30, 2010), http://www.tgdaily.com/consumer-electronics-brief/50887-how-the-kindle-went-from-luxury-item-to-impulse-buy.

[47] Mike Luttrell, *How the Kindle went from luxury item to impulse buy*, TG DAILY (July 30, 2010), http://www.tgdaily.com/consumer-electronics-brief/50887-how-the-kindle-went-from-luxury-item-to-impulse-buy.

[48] Adrian Kingsley-Hughes, *Will a $79 Kindle from Amazon tempt you?*, ZDNET (Sept. 28, 2011), http://www.zdnet.com/blog/hardware/will-a-79-kindle-from-amazon-tempt-you/15053.

[49] *E-book Consumers Drive More Sales and More Dollars through Apps and Online Retailers, says BISG Study*, Book Industry Study Group (Feb. 28, 2012), http://www.bisg.org/news-5-737-press-releasee-book-consumers-drive-more-sales-and-more-dollars-through-apps-and-online-retailers-says-bisg-study.php.

[50] *See* Seringhaus, *supra* note 9.

[51] *See* Trivedi, *supra* note 5, at 950-51 (noting that all of the major e-reader manufacturers use some form of DRM to protect e-book files).

[52] *See generally* Seth Ericsson, *The Recorded Music Industry and The Emergence Of Online Music Distribution: Innovation in the Absence Of Copyright (Reform)*, 79 GEO. WASH. L. REV. 1783 (2011).

[53] *See* Trivedi, *supra* note 5, at 931-935.

[54] *Id*. at 931.

[55] *Id*.

[56] *Id*.

However, the latter proved generally to be wishful thinking. Consumers largely resented DRM, and as DRM protections grew in popularity, a multitude of websites offered easily accessible software and instructions for removing DRM from files.[57] One did not even need to be particularly technologically savvy to crack DRM encryption, as there existed hosts of websites offering free technology to break DRM restrictions for virtually any type of file.[58] Although in 1998 Congress criminalized the manufacture and dissemination of technological measures aimed at circumventing DRM protections in the Digital Millennium Copyright Act,[59] it is still quite easy for consumers to find DRM hacking instructions or software online.[60] Eventually, it become apparent that DRM protections had had a minimal effect on piracy.[61] As a result, and despite the music industry's initial embrace of these technologies, most digital music is now sold without any DRM protection at all.[62] Even Apple, which embedded music sold through its popular iTunes store with FairPlay DRM that prevented purchasers from sharing songs among more than a handful of devices, opted to remove DRM encryption from its digital files in 2009.[63] All of the "big four" record labels have now abandoned DRM efforts and are instead embracing alternative revenue models, such as streaming and fixed-fee services like Pandora, Rhapsody, and Spotify, which allow users to listen to unlimited music through ad-supported streaming services and allow users to upgrade to ad-free versions for a flat monthly fee.[64]

Although the music industry's experiment with DRM is generally regarded to be a failure, [65] e-book publishers and retailers are aggressively pursuing DRM. Almost all e-books from major publishing houses are protected by DRM that prevents or limits a purchaser's ability to re-sell, lend, or otherwise transfer ownership of e-books.[66] Although the practice varies by retailer, typically an e-book is sold in DRM-encrypted form so it can be read only on authorized

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[57] *See e.g.* Nate Anderson, *Hacking Digital Rights Management*, ARS TECHNICA (July 18, 2006), http://arstechnica.com/apple/news/2006/07/drmhacks.ars (describing how quickly DRM hacks arose for several online technology market leaders).

[58] Steve Jobs, *Thoughts on Music* (Feb. 6, 2007), http://www.apple.com/fr/hotnews/thoughtsonmusic/ (explaining that "The problem, of course, is that there are many smart people in the world, some with a lot of time on their hands, who love to discover [ways to break DRM] and publish a way for everyone to get free (and stolen) music. They are often successful in doing just that, so any company trying to protect content using a DRM must frequently update it with new and harder to discover secrets.").

[59] 17 U.S.C. § 1201 (1998).

[60] A search conducted on Google on March 30, 2012, for example, boasted 15.6 million results for "DRM hack" and 5.5 million results for "how to hack Kindle DRM," with the top results of each query boasting detailed instructions for stripping DRM from a specified type of file (Google.com, search conducted March 30, 2012).

[61] *See* Tim Anderson, *How Apple is Changing DRM*, THE GUARDIAN (May 14, 2008), http://www.guardian.co.uk/technology/2008/may/15/drm.apple (stating that implementing DRM restrictions in the music industry had "no effect" on piracy).

[62] *Id. See also* Fred von Lohmann, *Last Major Label Gives Up DRM*, ELECTRONIC FRONTIER FOUNDATION (Jan. 4, 2008), https://www.eff.org/deeplinks/2008/01/last-major-label-gives-drm.

[63] Brad Stone, *Apple Drops Anticopying Measures in iTunes*, THE NEW YORK TIMES (Jan. 6, 2009), http://www.nytimes.com/2009/01/07/technology/companies/07apple.html.

[64] Spotify, for example, offers a free streaming version supported by periodic advertisements as well as a $5 per month ad-free subscription plan and a plan, priced at $10 per month, which allows users to stream and cache music on smartphones and other portable devices. *See* Stephen Levy, Facebook, Spotify, and the Future of Music, WIRED (Oct. 21, 2011), http://www.wired.com/magazine/2011/10/ff_music/all/1.

[65] Patrcik Jarenwattanon, *Industry FAIL: Four Musical Mistakes Of The Decade*, NPR (Nov. 19, 2009), http://www.npr.org/blogs/monitormix/2009/11/industry_fail_4_musical_mistak.html. ("Limiting the usage of music files with Digital Rights Management proved to be a FAIL at large for the industry — iTunes, for one, is entirely free of protected music now.")

[66] *See* Seringhaus, *supra* note 9.

devices.[67] Although most e-readers can also process unencrypted books, generally an e-book is sold in a format compatible with a single brand of e-reader and with technological restrictions preventing re-sale or lending.[68] Thus, an e-book purchased for a Barnes & Noble Nook device cannot be read on an Amazon Kindle and e-books purchased from the Amazon store can only be read on a Kindle or one of Amazon's related Kindle apps for smartphones and tablets.[69] E-book retailers and publishers insist on DRM because they believe it will help prevent e-book piracy and frustrate efforts to disseminate e-books online.[70] However, these attempts are misguided and fail to address the realities of the Internet and online piracy. There is no legitimate reason for e-books to be singularly compatible with certain devices and incapable of being read or shared to other e-readers, other than to increase profits. Doing so merely restricts the rightful purchaser's ability to transfer and use their e-book copy as they wish and may end up alienating consumers in the same manner that DRM did for the music industry.[71] This restriction also fails to account for the likelihood that technologies and devices will evolve in the future and the likelihood that certain e-reader devices could eventually go out of business,[72] which could potentially leave consumers with libraries of useless e-books.

Likewise, the need for DRM to protect e-books from piracy may be somewhat exaggerated. Online destinations for illegal downloading are shrinking as file-sharing services continue to be shut down through the courts, which can also make it more burdensome for users to find and acquire pirated content.[73] Because e-books arrived to the internet later than digital music and movies, the avenues for rampant infringement may be less prevalent than those faced by the film, television, and music industries in the early 2000s.

E-books also possess an innate limit on consumption that is not present in other pirated files, since reading a book typically takes far longer to enjoy than a song or movie. Reading requires a mental focus and time commitment that is not demanded by movies, television shows, and music, which can be enjoyed simultaneously with other activities and generally do not take as much time to consume. These built in limits on consumption may make it less likely that piracy is as large a problem as e-retailers claim.

In addition, some authors have found that DRM-free books, even when pirated, actually increased publicity of their works and drew in new customers that were willing to pay the full purchase price for works by the author.[74] Journalist David Pogue found that releasing one of his

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[67] Peter Svensson, *Harry Potter Breaks E-book Lockdown*, Associated Press (March 27, 2012), http://news.yahoo.com/harry-potter-breaks-e-book-lockdown-205343680.html.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Eric Lai, *DRM Holding Back E-book Growth*, PCWorld (Feb. 19, 2009), http://www.pcworld.com/article/159821/drm_holding_back_ebook_growth.html (noting that proprietary formatting could hurt e-book retailers in the same way that Apple's FairPlay DRM ended up alienating its iTunes customers).
[72] Barnes & Noble, for example, has reportedly contemplated scaling back its e-book investments after losses in its Nook division, largely caused by competition with Amazon and similar devices. *See* Leslie Kaufman, *Barnes & Noble Weighs Its E-Reader Investment*, THE NEW YORK TIMES (Feb. 24, 2013), http://www.nytimes.com/2013/02/25/business/media/barnes-noble-weighs-its-nook-losses.html?_r=0.
[73] *See e.g.* Nicole Perlroth, *Shuttering of Megaupload Sends File-Sharing Sites Packing*, THE NEW YORK TIMES (Jan. 23, 2012), http://bits.blogs.nytimes.com/2012/01/23/shuttered-megaupload-site-sends-file-sharing-sites-packing/?scp=1&sq=file-sharing&st=Search.
[74] *See e.g.* David Pogue, *Should e-Books be Copy Protected?*, NYTIMES (Dec. 12, 2009), http://www.nytimes.com/2009/12/17/technology/personaltech/17pogue-email.html.

e-books without DRM protection actually increased overall sales of the book in-question despite being "pirated to the skies" and "all over the Web […] ridiculously easy to download without paying."[75] While there will always be some degree of online piracy, the e-publishing industry should draw from the music industry's experience and focus on attracting customers with inexpensive, legal, and DRM-free downloads rather than shackling e-book files with restrictions.

B. License to Read: E-Book Licensing Practices

Although most e-book retailers treat e-books the same as any other sale in practice, their websites' Terms of Service paint a different picture. Despite urging consumers to "buy" an e-book and add it to an online shopping cart—just as they would for any other tangible item—Amazon's Terms of Service assert that digital content "is licensed, not sold, to you by the Content Provider."[76] It further provides that a purchaser of an e-book "may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Digital Content or any portion of it to any third party."[77] Amazon and other e-retailers claim users are bound by these browsewrap agreements and accept the terms merely by using the website.[78] These agreements are particularly troubling since there are no plain indications to an e-book customer that the "Kindle Edition" is not "sold" in the same manner as any other book.

For a consumer seeking to purchase the digital Kindle version of Vladimir Nabokov's classic *Lolita,* for example, the e-book is priced at $11.99[79] and is easily purchased by clicking a button labeled "Buy now with 1-click®".[80] There is no notice on the sales page that the transaction constitutes a "license" rather than a "sale" and the rhetoric of the sales page uses typical sales vernacular.[81] Nor does any notice concerning the limitations on the use of the file appear anywhere on the sales page.[82] Indeed, a consumer must do significant searching to even find the Kindle Terms of Use. A consumer must first locate the "Conditions of Use" link, which appears in small print at the bottom of Amazon.com's homepage.[83] After clicking that link, a customer must then navigate to a separate Kindle Help page.[84] Once on the Kindle Help page, the consumer must scroll to the bottom of the page and click a link to "Amazon Kindle Terms,

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[75] *Id.*

[76] *Amazon.com Kindle License Agreement and Terms of Use*, AMAZON.COM (2012), http://www.amazon.com/gp/help/customer/display.html?nodeId=200506200&#content (last accessed March 20, 2012) [hereinafter Amazon Terms of Use]. In the terms of service for its Nook e-reader Barnes & Noble similarly prohibits users from the "copy, transfer, sublicense, assign, rent, lease, lend, resell or in any way transfer [of] any rights to all or any portion of the Digital Content to any third party, except in connection with the normal use of the lending feature available through the Service." *NOOK Tablet™ TERMS OF SERVICE*, Barnes & Noble (2012), *http://www.barnesandnoble.com/u/Terms-of-Service-NOOK-Tablet/379003280/* (last accessed March 30, 2012)

[77] *Id.*

[78] *See* Seringhaus, *supra* note 9, at 171-75. "Unlike 'clickwrap' agreements, which require users specifically to assent to terms by checking a box or clicking 'I agree,' 'browsewrap' agreements exist in the background, and purport to bind users simply by virtue of their visiting a Web site." *Id.*

[79] Ironically, this costs a dollar more than a new paperback version on the same website.

[80] Amazon.com: Lolita e-Book: Vladimir Nabokov: Kindle Store, AMAZON, HTTP://WWW.AMAZON.COM/LOLITA-EBOOK/DP/B003WUYRB8/REF=TMM_KIN_TITLE_0?IE=UTF8&M=AG56TWVU5XWC2&QID=1330642308&SR=1-1 (last accessed on Mar. 1, 2012) (Even the link labeled "How buying works" below the "Buy now" button uses the terms "click to buy" and "your purchase," omitting any reference to a "license.").

[81] *Id.*

[82] *Id.*

[83] AMAZON.COM, http://www.amazon.com (last accessed March 26, 2012).

[84] *Conditions of Use*, AMAZON.COM (2012), http://www.amazon.com/gp/help/customer/display.html?nodeId=508088 (last accessed March 26, 2012).

Warranties, and Notices," and then select "Kindle License Agreement and Terms of Use" from a list of links on that page.[85] A consumer must go through no less than four webpages to even find the Terms of Use that purport to govern the transaction.

Courts have been inconsistent in determining whether digital "licenses" such as the Terms of Service offered by Amazon.com can constitute a sale.[86] Some scholars have argued that courts should favor the freedom to contract over the non-negotiable boilerplate language consumers unwittingly agree to when they purchase an e-book.[87] It seems unlikely that most consumers comprehend the difference between "licensing" and "buying" an e-book, especially since the Terms of Use are usually buried deep within a website and out of view during the purchasing process. Thus far it is unclear whether courts will uphold these browsewrap agreements, and so far there have been mixed rulings in cases involving browsewrap and similar "licenses" for digital content.

In *Specht v. Netscape Commc'ns*, the Second Circuit ruled that Netscape could not enforce an arbitration clause contained in Terms of Service for a free download because the terms were out of view from the download page.[88] The court found that "a reasonably prudent offeree in plaintiffs' position would not have known or learned, prior to acting on the invitation to download, of the reference to [the software]'s license terms hidden below the 'Download' button on the next screen."[89] In *Specht*, the location within the website of the Terms of Service proved important, and e-book retailers should take notice since most licensing terms are not readily apparent when a consumer purchases an e-book. *Specht* seems to indicate that hidden Terms of Service could be unenforceable if consumers do not have sufficient notice of the terms.

In addition to whether purchasers had sufficient notice of the terms, courts will likely be required to parse through e-retailers' Terms of Service to determine whether e-books are sold under sale or license. Some courts have relied on the vendor's characterization of a transaction as a license to be sufficient to preclude it from being a "sale."[90] In *DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, the Federal Circuit determined that despite a software purchaser's single payment and perpetual right of possession, it did not own copies of the software.[91] Instead, the *DSC* court focused on the numerous restrictions contained in the agreement and found that the substantial limitations it placed on the purchaser's use were inconsistent with ownership of a copy.[92] This analysis is particularly problematic because copyright owners can essentially contract away a purchaser's first sale rights by including enough restrictive language to render it a "license" rather than a sale. This logic decimates the first sale doctrine by giving rights holders the ability to draft Terms of Use and sales agreements that completely foreclose the rights afforded to legitimates purchasers under §109(a) of the Copyright Act.

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[85] *Amazon Kindle Terms, Notices and Warranties*, AMAZON.COM (2012), http://www.amazon.com/gp/help/customer/display.html/ref=hp_krec_legal?nodeId=200144520 (last accessed March 12, 2012).
[86] *See* Seringhaus, *supra* note 9, at 181-193.
[87] *See* Brian Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887, 1888 (2010).
[88] Specht v. Netscape Commc'ns Corp., 306 F.3d 17 (2d Cir. 2002).
[89] *Id.* at 35. The court further concluded that "where consumers are urged to download […] software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms." *Id.* at 32.
[90] *See* MAI Sys. Corp. v. Peak Computer Inc., 991 F. 2d 511 (9th Cir. 1993).
[91] 170 F.3d 1354 (Fed. Cir. 1999).
[92] *Id.*

The Ninth Circuit again chipped away at the first sale doctrine in *Vernor v. Autodesk Inc.*[93] It held that software users were licensees, rather than the owners of copies of software, and thus did not have the freedom to re-sell the software under the first sale doctrine.[94] The court outlined three factors for determining whether a software user is a licensee or owner of the copy.[95] First, it "consider[s] whether the copyright owner specifies that a user is granted a license."[96] The second factor looks to "whether the copyright owner significantly restricts the user's ability to transfer the software." Lastly, the court considers "whether the copyright owner imposes notable use restrictions."[97] This analysis suffers from the same shortcomings as *DSC*, in that it relies on the copyright owner's construction of the agreement to determine whether the agreement is a license or sale.[98] It is particularly problematic since a copyright owner will almost always seek to assert that an agreement is a license since it would afford broader post-sale control than a "sale." However, because *Vernor* and similar software cases may reflect judicial deference to the Congressional intent articulated in the Computer Software Rental Amendment Act (CSRA),[99] it is unclear whether their holdings will be applicable to e-book Terms of Use agreements. For one matter, software has often been treated differently from other copyrightable works, and software users' first sale rights are significantly restricted by the CSRA.[100] Second, the licensing agreements for software typically accompany the installation disk in writing or are presented via clickwrap upon download.[101] Therefore, these holdings seem inapplicable to e-book transactions and we should not extend the "questionable" reasoning in these cases to other digital copies.[102]

III. Licensing Rhetoric as a Limit on the First Sale Doctrine

By maintaining that e-books are governed by restrictive licensing agreements, e-retailers evade the first sale doctrine and can offer publishers the DRM protections they require to do business. However, legal scholars have considered e-retailer's assertions that digital content is licensed, rather than sold, to be "logically incoherent" and inconsistent with the tenets of Copyright law.[103] Allowing such agreements gives copyright holders a mechanism for controlling downstream sale in the same manner that *Bobs-Merrill* expressly forbid. While the medium of the copyrighted content is in a digital rather than tangible paper format, the policy

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[93] *See* 621 F.3d 1102 (9th Cir. 2011), cert. denied 132 S.Ct. 105 (2011).
[94] *Id*.
[95] *Id*. at 110-111.
[96] *Id*. at 110.
[97] *Id*.
[98] On appeal to the Supreme Court, amici curiae for Vernor argued that under the Court's ruling "Autodesk may do exactly what Bobbs-Merrill could not, as long as it calls the text a 'license' and restricts usage and transfer. *See* Brief of Amici Curiae American Library Association et al. at *19-20, Vernor v. Autodesk Inc., 2011 WL 2472742 (U.S.) (No. 10-1421).
[99] *See*, Computer Software Rental Amendments Act of 1990, *supra* note 29. ("unless authorized by […] the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), […] [no] person in possession of a particular copy of a computer program […] may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession […] [the] computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending").
[100] The CSRA amendment reflects a clear intent to treat software differently.
[101] "Clickwrap" agreements differ from "browsewrap" in that they require an affirmative action from the purchaser/downloader, such as by checking a box or clicking "I agree," to bind them to the terms. *See* Seringhaus, *supra* note 9 at 174.
[102] *See*, Nimmer, *supra* note 33, s. 8.12[III].
[103] *See* Carver, *supra* note 86, at 1888; Rothchild, *supra* note 18.

motivations articulated in *Bobbs-Merrill* still hold true. Allowing copyright owners to dictate post-sale restrictions sales is not within the scope of their exclusive rights, and, as one court noted, this "degree of unchecked power to control the market deserves to be the object of careful scrutiny."[104]

Aside from the manner in which it is presented, an e-book does not differ from its printed counterparts.[105] The content is the same, and it is only the medium in which the copy of the copyrighted work is presented that differs. It would be inconsistent with the spirit of the Copyright Act to strip e-books and other digital content of post-sale rights granted to rightful purchasers under §109(a). Instead of serving the dual policy goals of enabling rights holders to receive compensation for their work and maintaining the public interest in alienability of goods, e-book licensing grants copyright owners overbroad protections and strips the public of the benefits of ownership.

Professor Brian Carver argues that licensing—meaning "transferring perpetual possession of a copy but retaining title to the copy"—is an "invented notion" that "is both incoherent and not found in the Copyright Act."[106] The ability to grant such broad, controlled licenses is not among the distribution rights enumerated in §106(3) of the Copyright Act.[107] He argues that licensed copies cannot constitute a "sale" in the sense of the Act since the purchaser does not retain an ownership interest in the copyrighted work under the license.[108] Neither can an e-book transaction constitute a rental or lease, since both categories involve "a limited period of possession in exchange for consideration."[109] Lastly, an e-book sale cannot also be said to constitute "lending," which typically connotes a payment-free, limited-in-time possession of the work.[110] Carver blames much of the confusion on licensing rhetoric perpetuated by the entertainment and software industry, and explains that industry use of the term licensing "refer[s] to a wholly unique…nonsensical form of permanently transferring a tangible good while retaining title to it."[111]

In the attempt to shield themselves from the perils of online file sharing distributors and developers have thus invented a new, unenumerated copyright.[112] This all-encompassing right extends well beyond the first sale and is not within the exclusive rights distinguished in the

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[104] *See* Nimmer, *supra* note 33, at s. 8.12 (quoting Softman Prods. Co., LLC v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1091 (C.D. Cal. 2001)).

[105] Indeed, most cited e-book lament is the lack of binding, crispness, and that "*je ne sais quois*" of leafing through a traditional book. *See* Dwight Garner, *The Way We Read Now*, NEW YORK TIMES (March 17, 2012), http://www.nytimes.com/2012/03/18/sunday-review/the-way-we-read-now.html?pagewanted=2&sq=ebooks&st=cse&scp=9 ("You can't read an e-book in the tub. You can't fling one across the room, aiming, as Mark Twain liked to do, at a cat. And e-books will not furnish a room.")

[106] *See* Carver, *supra* note 86.

[107] The Copyright Act gives the copyright owner the exclusive right 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."17 U.S.C. §106(3) (2002).

[108] *See* Carver, *supra* note 86, at 1945.

[109] *Id*. at 1946.

[110] *Id.*

[111] *Id*. at 1933-36.

[112] *Id.*

Copyright Act.[113] Furthermore, it is exactly this class of restrictions aimed at controlling downstream sales that the Supreme Court sought to foreclose in *Bobbs-Merill.*[114]

IV. If It Reads Like a Book, It is a Book: Why Courts Should Reject E-Book "Licenses"

As more and more media moves into the digital realm, we cannot allow adhesion contracts to control ownership of valid property interests. Allowing these licenses to stand would be incredibly detrimental. First, these practices are incompatible with existing copyright doctrine and eliminate any right of alienability for digital content, a right that has long been considered crucial in the copyright system's balance between the public's interests and those of rights holders. In addition, limiting post-sale rights for digital content would destroy valuable second-hand markets and inhibit important channels of access to books and educational resources for future generations.

Although Amazon refers to its e-books as a "Kindle Edition" and holds e-books to be functionally equivalent to hardback, paperback, and audiobooks, it seeks to restrain the rights of e-book purchasers.[115] Amazon could hardly argue that its Terms of Use would be enforceable to restrict post-sale lending or re-sale of paper book sales, and we should not allow it to do so merely because a book is embodied in digital form. Particularly as digital formats grow in popularity, we must provide a means for consumers to have ownership rights and alienability of digital copies. It is not hard to imagine a future where many people own more MP3s than traditional records and consume primarily digital content and the law must be flexible to adapt to new technologies.

Without first sale protection for digital files, we lose a crucial balance in the copyright system that enables rights holders to obtain compensation for their work and the public to enjoy and transfer those works. Forgoing the latter part of that balance would support an already intensely pro-copyright owner system and allow copyright owners to maintain strict monopolies over their works—even after the first sale. This conflicts with traditional expectations of ownership in American society and flies against economic and democratic values long cherished in our legal system, particularly longstanding principles property law disfavoring restraints of trade and alienation.[116]

The first sale doctrine also ensures a robust "'second life' for copyrighted works in libraries, archives, used bookstores, online auctions, and hand-to-hand exchanges."[117] Eliminating it in the digital context would diminish support for secondary markets that often

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[113] *Id.*

[114] "To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." *Bobbs-Merrill*, 210 U.S. at 351.

[115] *See e.g.* Amazon.com: Lolita e-Book, *supra* note 78 (The "Kindle Edition" is featured on a "Formats" table detailing prices for Paperback, Hardcover, Mass Market Paperback, and Audiobook editions of the book.).

[116] *See* Brief of Amici Curiae American Library Association et al. at *10-11, Vernor v. Autodesk Inc., 2011 WL 2472742 (U.S.) (No. 10-1421).

[117] Brief of Amici Curiae American Library Association et al. at *3, Vernor v. Autodesk Inc., 2011 WL 2472742 (U.S.) (No. 10-1421).

provide lower-priced items to consumers.[118] Allowing these licenses to govern sales could displace libraries, second-hand stores, and other marketplaces for used goods as we move into the digital era. Current e-retailer practices also ignore the long history and common practice of lending, sharing, and re-selling old books and does not provide a comparable mechanism for sharing in the digital world.[119]

Libraries and second-hand markets serve as crucial, low-cost sources of knowledge for many underprivileged or undereducated individuals, and we should not justify a policy that would inhibit their growth in the digital age. A study by the National Center For Education Statistics noting low literacy rates among adult Americans decreed that, "we as a nation must respond to the literacy challenge, not only to preserve our economic vitality but also to ensure that every individual has a full range of opportunities for personal fulfillment."[120] Rather than restricting access to legitimately purchased books, we should encourage the transmission of knowledge by allowing lending and re-sale of digital copies. Copyright owners have a financial interest in consumers renting or purchasing books, rather than obtaining them through a library, and e-book publishers have already sought to restrict the abilities of libraries to lend digital copies of books by imposing arbitrary restrictions on the amount of times an e-book may be lent.[121]

E-books possess immense potential to change the spread of knowledge and education. The public interest in the right to educational and written materials should supersede any attempt by copyright owners to expand their rights beyond the first sale. Courts should not lose sight of the fact that the original purpose of copyright was to "To promote the Progress of Science and useful Arts."[122] Allowing lawful lending and transfer of ownership after the first sale encourages learning and educational progress and without it we risk losing a longstanding channel of written resources for the poor and undereducated.

Enforcing licensing agreements could also have important censorship implications since many licensing agreements include provisions allowing for the removal or termination of digital content at the retailer's discretion.[123] The American Library Association, writing as amici curiae in *Vernor v. Autodesk*, noted the importance of the first sale doctrine in decentralizing control over copies of works:

> With copies scattered among libraries, second-hand stores, and personal collections, citizens and researchers are able to access works without revealing their reading and viewing choices to copyright owners or other central authorities. […] Moreover, this

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[118] *Id*.
[119] *Id*.
[120] *Adult Literacy In America: A First Look at the Findings of the National Adult Literacy Survey*, U.S. Department of Education (2002), *available at* http://nces.ed.gov/pubs93/93275.pdf.
[121] The publisher HarperCollins, for example, only allows an e-book to be rented 26 times before it "expires" and can no longer be used. Jay Greene, *Penguin Halts Libraries' E-book Lending, Citing Security Fears*, CNET (Nov. 21, 2011, 10:48AM PST), http://news.cnet.com/8301-1023_3-57329709-93/penguin-halts-libraries-e-book-lending-citing-security-fears/.
[122] U.S. CONST. art. I § 8, cl. 8.
[123] Brief of Amici Curiae American Library Association et al. at *16, Vernor v. Autodesk Inc., 2011 WL 2472742 (U.S.) (No. 10-1421).

> decentralization makes it much more difficult for a copyright owner to censor or suppress particular works after their commercial release.[124]

The amount of control that rights holders and e-retailers maintain over e-books is immense. As an example, in July 2009, when Amazon discovered that copies of George Orwell's "1984" and "Animal Farm" were added to its Kindle catalog by a company that did not actually own the rights to the books, it remotely deleted the copies from users' devices.[125] While Amazon apologized for its actions after public outcry and refunded customers, it demonstrates the power that e-retailers maintain over digital content even after it is sold.[126]

Instead of adopting a knee-jerk reaction to piracy, rights holders should embrace the same technologies that have allowed them to profit from e-books. Rather than restricting alienability, e-book publishers could employ technology to their advantage and allow post-sale rights consistent with the first sale doctrine. One way of achieving this is to use DRM in a different manner, coding files so that they may only be open on one device at any given time. This would protect against unauthorized file sharing while allowing rightful purchasers a means to share or lend books.

E-retailers could also assign digital copies unique identifiers or activation codes and require that purchasers input an individualized code in order to be able to read the e-book. Such a technology could also help detect the sources of illegal file sharing or be used to limit simultaneous use, so that an e-book functions more like a tangible good. Allowing for the re-sale of e-books could also provide an additional revenue stream for online retailers. Amazon and other retailers could charge nominal fees, as they currently do for other used items, for the transfer of title of an e-book. In order to prevent multiple copies, secondary retailers for used e-books could assign used copies a new activation code and render the original purchaser's code void so that he or she is no longer able to access the book.

However, perhaps a more practical course of action for the e-publishing industry would be to follow the music industry's current model and simply abandon DRM altogether.[127] Even the best DRM can be hacked, and consumers may find less reason to resort to piracy if they can use a purchased e-book as they wish.[128] Authors and retailers do not balk at the prospect of customers lending copies of their favorite books to friends and acquaintances, and allowing DRM-free e-books would support the existing "book culture" of lending and sharing. Indeed, it

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[124] *Id.*

[125] *See* Brad Stone, *Amazon Erases Orwell Books From Kindle Devices*, NEW YORK TIMES (July 17, 2009), http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html.

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

[127] Though piracy is still an issue for the recording industry, sales of digital music are set to outpace sales of physical CDs, and iTunes is expected to make $2.8 billion in 2012. Michelle Catillo, *Just One More Year Until Digital Music Beats Physical CD Sales*, TIME (March 31, 2011) http://techland.time.com/2011/03/31/just-one-more-year-until-digital-music-beats-physical-cd-sales/#ixzz1quBTEARS.

[128] *See* Dinah A. Vernik et al. *Music Downloads and the Flip Side of Digital Rights Management*, MARKETING SCIENCE 1, 13, *available at* http://static.arstechnica.net/2011/10/11/mksc.1110.0668-1.pdf (finding that when DRM costs are "too onerous," consumers are more likely to seek a pirated version of the file. But, when the costs are not too restrictive, consumers move away from piracy).

is these practices that often spread "buzz" about a particular book, and allows readers to "try" an author revered by friends or critics without a financial commitment. What e-retailers have failed to recognize is that e-book lending and transferability has enormous potential as a marketing tool. Readers often discover new authors and subjects through sharing with people in their community, and e-book retailers that can facilitate this behavior are likely to survive longer than those who do not.[129]

Offering DRM-free and non-licensed downloads that are easily accessible and reasonably priced also lowers consumers' search costs and may help draw consumers away from pirated content.[130] DRM-free downloads further benefit downstream competition since they can better compete with tangible goods, such as books and CDs, and consumers will not feel shortchanged by purchasing media with abrogated rights.[131] Although there will always be a market of pirated copies, many consumers will still purchase e-books, particularly for authors and subjects they treasure.[132] Even now, there is an endless array of websites offering pirated e-books and instructions for how to strip the files of DRM protection,[133] and yet e-book sales continue to rise exponentially.[134]

Conclusion

Just like their hardbound, audiobook, and paperback counterparts, e-books merely serve as a vessel for the underlying copyrighted work. Courts should recognize this distinction, understanding that the terms embodied in the Terms of Use for Amazon and other e-book retailers demonstrate an invented notion of ownership that does not exist in the Copyright Act. Upholding these agreements as licenses, rather than a sale to which the first sale doctrine applies, would have disastrous consequences as we enter an age where copyrighted content is increasingly offered in digital form. Digital licenses and the accompanying DRM protections are

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[129] Comic book author Neil Gaimon illustrated this point in an interview with the Open Rights Group: "When I do a big talk now on these kinds of subjects […] I star[t] [by] asking the audience to raise their hands for one question – 'Do you have a favorite author?' And they say 'yes' […] [Then I ask] for everybody who discovered their favorite author by being lent a book put up [their] hand. Then [I ask] anybody who discovered their favorite author by walking into a book store and buying a book [to raise their hand]. […] Very few of them bought the book. They were lent it. They were given it. They did not pay for it. That's how they found their favorite author."
See Brian Childs, *Neil Gaiman On Internet Piracy: "It's People Lending Books"*
Comics Alliance (Feb. 10, 2011), http://www.comicsalliance.com/2011/02/10/neil-gaiman-piracy-lending-books/#ixzz2MEy9mBwt.

[130] *Id.* (finding that "in certain instances eliminating DRM restrictions can lead to an increase in sales of legal downloads, a decrease in sales of traditional CDs, and a decrease in piracy.").

[131] "Because DRM-free music is a stronger competitor for traditional CDs, it forces the prices of CDs to move down, which in turn lowers the legal download price. This competition between the traditional and download formats lowers prices such that some consumers move from stealing music to buying legal downloads." *Id.*

[132] "The reality is that any readers who care to can get any books they want without paying, if they choose to. There will always be someone out there technologically adept enough to break any DRM scheme." Cory Doctorow, *With A Little Help: Digital Lysenkoism*, PUBLISHERS WEEKLY (Jan. 27, 2012), http://www.publishersweekly.com/pw/by-topic/columns-and-blogs/cory-doctorow/article/50413-with-a-little-help-digital-lysenkoism.html.

[133] Even mainstream publications such as *Wired*, have authored guides to hacking e-book DRM protections. *See e.g.* Charlie Sorrel, *How to Strip DRM From Kindle E-books and Others*, WIRED (Jan. 16, 2011, 7:06AM), http://www.wired.com/gadgetlab/2011/01/how-to-strip-drm-from-kindle-e-books-and-others/.

[134] *See* AAP Sales Report, *supra* note 2.

incompatible with the first sale doctrine, and the e-publishing industry would be better served by exploring less severe technological alternatives to its existing DRM restrictions or offering DRM-free platforms that do not extinguish rights of alienability, thus ensuring that digital property is treated in accord with our nation's longstanding property rights regime.