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A “License to Read”:

ABSTRACT

E-books are rapidly displacing sales of books and transforming the way the American public understands and accesses information. Yet as e-books grow in popularity, the threat of piracy grows alongside them. Thousands of people search for pirated books online every day, and more are likely to follow as e-books become the norm rather than the exception. To displace this threat, publishers convinced Congress to abandon the first sale doctrine in favor of a market theory that allowed publishers to license, rather than sell, their copyrighted works.

Yet a decade later, Congress’ decision has not only failed to ensure publishers’ continued role as gatekeepers of literary content, but also stripped libraries of their ability to operate effectively in the digital age. As Congress sits back and watches, and the Supreme Court turns its back, libraries, the antithesis of a market entity, are at the mercy of market forces they can neither compete with nor control. Congressional action is needed to preserve the application of the first sale doctrine to publisher-library transactions and guarantee the preservation of unfettered public access in the digital age.
INTRODUCTION

"[L]ibraries are the great tools of scholarship, the great repositories of culture, and the great symbols of the freedom of the mind."

—Franklin Delano Roosevelt

MR. WALKER: According to this bill as you understand it, would it be competent for an author to print under his copyright notice a reservation prohibiting people from doing anything with that book except reading it themselves? . . .

MR. STEUART: Yes, sir . . . Under the absolute right of the author, he could make any reservation he pleased. In other words, this so-called sale would be nothing but a license to read.

—Statement of Arthur Steuart Before the House Committee on Patents, 1906

While publishers and libraries both exist to provide access to information, they operate from two irreconcilable perspectives. Publishers exist to make money off the access they


provide; libraries exist to provide that access for free.\(^4\) Naturally, publishers are less than thrilled that libraries lend their books for free on a regular basis,\(^5\) yet despite their irreconcilable differences, publishers and libraries have managed to exist throughout history in a state of uneasy compromise.\(^6\) This compromise was due in large part to copyright law’s first sale doctrine, which ensured that once a copyright owner sold his or her work, a library had the legal right to lend that book to its patrons.\(^7\) Unfortunately, the advent of e-books has destabilized this tenuous relationship.\(^8\)

E-books are rapidly turning the printed book into an antiquated commodity and gaining popularity with consumers.\(^9\) “By making the printed page electronically available, e-books channel low-tech manuscripts into the modern, connected world.”\(^10\) These e-books offer readers several advantages. An e-reader is “about the size of a slim paperback, yet [] can store over one thousand e-books in memory.”\(^11\) Content can be downloaded and accessed immediately via a wireless connection, and readers can comment alongside text, bookmark passages, and even have

\(^4\) *Id.*

\(^5\) *Id.*

\(^6\) See infra Part I.C.

\(^7\) See Gasaway, *supra* note 3, at 121.

\(^8\) See infra Part II.D.


\(^10\) *Id.* at 152.

\(^11\) *Id.* at 153.
their e-books read aloud.\textsuperscript{12} E-reader owners purchase up to 2.7 times as many books as they did prior to owning the device.\textsuperscript{13} While these numbers may seem promising for publishers, in reality the surge in e-book popularity has left them shuddering in fear.\textsuperscript{14}

In “a high-tech world of high-speed, interconnected networks,” pirating an e-book is as simple as the click of a mouse, and practically impossible for publishers to control; an entire library of 2,500 e-books can be illegally downloaded, and distributed, in a matter of hours.\textsuperscript{15} To counteract this threat of piracy and preserve their “foothold as traditional arbiters of content,” publishers “feel the need to assert more control” through license agreements that restrict the use of their content.\textsuperscript{16} These license agreements have become industry standards, permanently altering and shaping the nature of commerce in the digital era.\textsuperscript{17} Unfortunately, they have also undermined the application of the first sale doctrine, and raise profound implications for libraries.\textsuperscript{18} Without the traditional benefits and security afforded by this doctrine, libraries are at a distinct disadvantage when it comes to providing access to digital information.\textsuperscript{19}

\textsuperscript{12} Id.

\textsuperscript{13} Id.


\textsuperscript{16} Id.

\textsuperscript{17} See id. at 39 (“[D]igital formats and licensing negotiations have altered the terms of how information is exchanged and made available.”).

\textsuperscript{18} See infra Part II.D.
Part I of this Article begins by exploring the creation of the first sale doctrine and the policy objectives it was intended to fulfill. It then discusses the role of the first sale doctrine in library lending before digital media, and the inherent limitations that moderated the effect of library lending on publishers’ profits. Part II shifts to consider the role of the first sale doctrine after the popularization of digital media and the doctrine’s subsequent erosion through digital licensing. It then argues that these digital licensing models, if continued, will have disastrous consequences for libraries. Finally, this Article argues that to ensure the future of libraries and unfettered public access to information, Congress must act to preserve the application of the first sale doctrine to publisher-library transactions of digital content. Such action would restore the balance enjoyed in the tangible realms of the past while reaffirming the public policies underlying both libraries and the Copyright Act.

I. THE GOOD OLD DAYS

Before the rise of the digital age, the first sale doctrine was considered necessary to preserve the doctrinal balance underlying all of copyright law: the proprietary interest of copyright owners and public access to knowledge.\(^\text{19}\) Part A of this section traces the events that led to the creation and codification of the first sale doctrine. Part B then explores how the first sale doctrine has preserved “public access by facilitating the existence of . . . public libraries” over the course of the last century.\(^\text{20}\) Finally, Part C explores the limitations inherent in tangible

\(^{19}\) See Cichoki, supra note 15, at 41.


\(^{21}\) Id.
library lending, and how those limitations allowed publishers and libraries to peacefully coexist under the first sale doctrine.

A. The Creation and Codification of the First Sale Doctrine

When Congress enacted the first United States Copyright Act in 1790, it granted copyright owners “the sole right and liberty of printing, reprinting, publishing and vending [their works] . . . for the term of fourteen years.”22 The framers understood the vending right as giving copyright owners nothing more than the right to control the manner in which their works were first put on the market.23 Yet the scope of the right became the subject of controversy after a group of publishers “put out a little notice on one of the inside leaves of their books” stating the book was copyrighted and could “not be resold at retail” for less than the stated price.24 When one retailer refused to sell the books at the designated price, the publishers sued, claiming the retailer’s failure to comply with their price restrictions violated their exclusive vending rights granted under Copyright law.25

Thus, at issue in Bobbs-Merrill was whether “the sole right to vend . . . [did in fact grant] the owner of [a] copyright the right, after a sale of the book to a purchaser, to restrict future sales


23 Copyright Hearings, supra note 2.


25 Id.
of the book at retail.”

After noting that the publishers offered no proof “of contract limitation, nor license agreement controlling the subsequent sales of the book,” the Court held that the right to vend was limited to a work’s initial sale. Copyright law did not allow an author “to control the retail sales of his work [to] purchasers with whom he had no privity of contract . . .”

“Absent an appropriate contractual provision, there could be no restriction on resales.”

The Court’s holding in *Bobbs-Merrill* sparked intense debate within the Copyright Subcommittee on whether copyright law should allow authors to limit the ways in which consumers later resold or transferred their works. Representative Robert Parkinson took the

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26 *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908). While Bobbs-Merrill marked the first explicit statement of the first sale doctrine, some courts had previously suggested such limitations might exist within the vending right. *See, e.g.*, Henry Bill Publishing Co. v. Smythe, 27 F. 914, 925 (S.D. Ohio 1886) (“The owner of the copyright may not be able to transfer the entire property in one of his copies, and retain for himself an incidental power to authorize a sale of that copy . . .”).


29 *Id*.

30 *See, e.g.*, *Common-Law Rights as Applied to Copyright*, supra note 24, at 16 (statement of Rep. William A. Jenner, H. Comm. on Patents) (discussing how it had long been the “ambition” of New York book dealers to control “the prices at which they [could] resell each other’s books at retail”).

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floor in favor of the first sale doctrine and the holding in *Bobbs-Merrill*. In a dramatic speech, Parkinson warned the Subcommittee that a failure to preserve the first-sale doctrine would place a “weapon” in the hands of publishers:

Effectuate this, and . . . it means that [publishers] can fix any condition— it may be a condition of price; it may be a condition of who shall sell at all; it may be a condition that nobody shall sell unless he comes in and subscribes to a code that may determine a man’s business and affect his continuance in business, and compel him to surrender his business entirely to their control.31

Congress, persuaded by Parkinson’s argument, codified the first sale doctrine in § 27 of the Copyright Act of 1909.32 By enacting § 27, Congress intended to “balance a copyright-owner’s right to control distribution of his work with the public’s interest in alienating copies of the work.”33 While publishers viewed the result in *Bobbs-Merrill* with fear and disbelief,34 libraries


32 *Long,* supra note 28, at 1186. The Act states:

The copyright is distinct from property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not 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.


33 Calaba, *supra* note 32.

34 *Publishers Aghast at Copyright Ruling*, NY Times, June 3, 1909, available at http://query.nytimes.com/mem/archive-free/pdf?res=9D04E3D7143EE233A25750C0A9609C946997D6CF (noting publishers’ were in
viewed the first sale doctrine as a long-awaited\textsuperscript{35} confirmation that copyright owners could not “stay the free flow of the world’s thought” to satiate their private greed.\textsuperscript{36}

In 1976, Congress dropped the right to sell and vend from the Copyright Act and instead gave copyright owners the right to “distribute copies . . . to the public by sale or other transfer of ownership, or by rental, lease, or lending.”\textsuperscript{37} Though a copyright owner had the statutory right to disseminate his work by rental, lease, or lending, this right was still limited by the first sale doctrine, which Congress codified in § 109(a) of the Copyright Act.\textsuperscript{38} Section 109(a) causes the agreement “that if [\textit{Bobbs-Merrill}] turns out to be as sweeping as now appears to be the case, it will be a terrible blow to the books sellers of the country and to the publishers and the public”).

\textsuperscript{35} Notably, libraries at the dawn of the twentieth century did not realize the profound implications that \textit{Bobbs-Merrill} would have just a century later because “there was no serious question that libraries were permitted to lend to patrons copies of printed books that they acquired.” Gregory K. Laughlin, \textit{Digitization and Democracy: The Conflict Between the Amazon Kindle License Agreement and the Role of Libraries in a Free Society}, 40 U. Balt. L. Rev. 3, 23 (2010). They merely saw the decision as an assurance that the prices in the secondary markets they depended upon would continue without interference. Raney, \textit{infra} note 36.


\textsuperscript{37} Long, \textit{supra} note 28, at 1187.

\textsuperscript{38} Mary Beth Peters, U.S. Copyright Office, \textit{General Guide to the Copyright Act of 1976} at 7:1–7:2 (1977), \textit{available at} http://www.copyright.gov/history/index.html. That section states: “Notwithstanding the provisions of § 106(3), the owners of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled,
distribution right to “cease[] with respect to a particular copy or phonorecord once [the copyright owner] has parted with ownership of it.” In describing the parameters of § 109, the House Report made specific reference to libraries:

A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright.

While a copyright owner could place restrictions upon the resale of his works through traditional contract law, copyright granted authors control over nothing but the work’s initial publication.

§ 109(a)’s first sale exemption establishes a statutory two-prong test: (1) ownership, and (2) legality of the copy. If either prong is not satisfied, a defendant will be held liable for copyright infringement. The first prong requires that a defendant have full ownership of the copy of the work in question to invoke the first sale defense. Mere possession is insufficient to

without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” Long, supra note 28, at 1187.

39 Id. at 1187-88.


41 Calaba, supra note 32.

42 Id.

43 Id.

44 Id. Such ownership is established by “sale, gift, bequest, or other transfer of title” to the copyrighted work. Id.
trigger the first sale exemption. The second prong requires the defendant to prove the copy in question was lawfully made. Illegal copies of copyrighted works do not receive the benefit of the first sale doctrine, even if the defendant obtained the illegal copy through lawful means.

The rationale behind the two-prong test in § 109(a) rests in the belief that once a “copyright holder [consents] to public distribution of his work [he] has realized the full value of that work.” Thus in 1976, as in 1909, Congress chose a public policy that avoided restraints on free trade rather than one that would create a monopoly in the copyrighted work. Implicit in

45 Id.
46 Id.
47 Id.
48 Long, supra note 28, at 1188.
49 Id. This is not to say that the first sale doctrine is without limits. A consumer who purchases a copyrighted work does not receive the exclusive rights of the copyright holder. Matthew Friedman, Nine Years and Still Waiting: While Congress Continues to Hold Off on Amending Copyright Law for the Digital Age, Commercial Industry has Largely Moved On, 17 VILL. SPORTS & ENT. L.J. 637, 646 (2010). Unless the use falls under another copyright doctrine, fair use, the owner of the copy cannot use it to produce derivative works without the copyright holder’s consent, or make copies of the work and distribute those copies to others. Id. Further, § 109(b) provides an exception to the first sale doctrine for those copyright owners who wish to “prevent the unauthorized commercial rental of computer programs and sound recordings” through rentals, leases, or lending. Id. In doing so, Congress intended to offer copyright owners the opportunity to protect their reproduction right by “disallowing subsequent purchasers to ‘rent’ copies that can be easily copied because of their digital form.” Id. at 647.
such a decision was the recognition that used markets play a critical role in bringing copyrighted works to audiences. Congress noted that libraries in particular “spread the cost of acquiring . . . a large number and variety of works over a large population,” and ensure that copyrighted works “remain accessible to the public even if the copyright holder ceases production or distribution of the work.”

B. Library Lending Under the First Sale Doctrine

Libraries are considered vital to a democracy because they offer the public access to resources so that they can develop “the information literacy skills necessary to become responsible, informed citizens.” Because libraries operate as intermediaries between copyright owners and the American public, their ability to fulfill their social function is necessarily shaped

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50 “Used markets” refers primarily to libraries but also includes secondhand bookstores and acquisitions through gift or donation.

51 Long, supra note 28, at 1193.

52 Id. See also Molly Shaffer Van Houweling, Author Autonomy and Atomism in Copyright Law, 96 V.A. L. REV. 549, 603 (2010) (insisting that “some rights are always unified with possession of the tangible object that embodies a copyrighted work”).

53 Hinkes, supra note 49, at 689.

54 GORDON, supra note 1 (quoting Nancy Kranich, then President of the American Library Association).
by the ability of copyright law to balance the competing interests of these two groups.\textsuperscript{55}

Historically, the first sale doctrine has been a key means of achieving this balance.\textsuperscript{56} Since its inception at the beginning of the twentieth century, the doctrine has shaped modern library practices in three fundamental ways.

First, and most important, the first sale doctrine gave libraries ownership of the copyrighted works they lent; this ownership is the legal justification for all library-lending practices.\textsuperscript{57} Without it, library lending would violate the distribution right of copyright owners,


\textsuperscript{56} See Comments of the Library Associations Before the Library of Congress, the United States Copyright Office and the Department of Commerce, National Telecommunications and Information Administration, Docket No. 000522150-0150-01, at 3 (2000), available at http://www.copyright.gov/reports/studies/dmca/comments/Init018.pdf (discussing how the first sale doctrine balances the “public benefit derived from the alienability of creative works” with the “increased incentive to create that would stem from granting authors perpetual control over copies of a work”).

\textsuperscript{57} See Joshua H. Foley, \textit{Enter the Library: Creating a Digital Lending Right}, 16 CONN. J. INT’L L. 369, 384 (2001) (“[W]ith the demise of ownership, the first sale doctrine becomes meaningless for digital works. The repercussions of this for public libraries could be profound. With no actual ‘sale’—only a per use lease—there can be no subsequent usage, such as lending.”).
and libraries would commit copyright infringement every time they lent a book.\footnote{See Reese, \textit{supra} note 20, at 590 (noting the first sale doctrine “allow libraries to lend the copies they own without the need to obtain a distribution license from the copyright owner”).} Libraries would be forced to seek permission to lend books, and the loans would be subject to any restrictions the copyright owner might impose.\footnote{See \textit{Comments of the Library Associations, supra} note 56, at 6 (“Digital publishers now have the ability to manage the kind of day-to-day operational decisions that were previously within the discretion of libraries. Previously, as owner of a particular copy of a book, a library was entitled to set the terms of patron access to that copy; as licensee of a digital work subject to technological measures, the library may be denied such right.”).} With the first sale doctrine in place, however, libraries have been free to lend books to the public without such restrictions.\footnote{See \textit{id.} (“When works are owned outright and are subject to the first sale doctrine, a library is able to exercise managerial discretion over the lending and use of its materials.”).} This freedom has given libraries the managerial discretion to uniformly alter their lending practices in response to changes in the law and the needs of their patrons.\footnote{See \textit{id.} at 8 (highlighting problems that arise when libraries are unable to set uniform lending practices, and noting such problems lead to diminished access).}


\footnote{\textit{Id.}}
could be purchased once and then, under the first sale doctrine, loaned out to hundreds of people for an infinite number of times.\textsuperscript{64} While an individual consumer might get just one or two uses from every book he or she purchases, a library could get hundreds yet pay the same price.\textsuperscript{65} Further, because libraries are semi-permanent institutions, the first sale doctrine allowed them to build their collections over time and “coast” on previous purchases when they faced economic hardship.\textsuperscript{66} While budget cuts might prevent libraries from purchasing new books, the size of a library’s current collection would stay the same.\textsuperscript{67} Even when libraries lack the funds to add to their collections, the first sale doctrine ensured they could still access materials through programs such as interlibrary loan (ILL).\textsuperscript{68}

Third, the first sale doctrine ensured the existence of secondary markets; patrons could donate, lend, lease, or resell copyrighted works they had lawfully purchased to libraries.\textsuperscript{69} If a library could not pay the retail price for a copyrighted work, it could always purchase a used copy from a secondhand bookseller or put out a request for donations.\textsuperscript{70} Further, these secondary markets made it extremely difficult for publishers to engage in price discrimination against

\begin{footnotesize}
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\item[64] Id.
\item[65] Id.
\item[66] Id.
\item[67] Id.
\item[68] See Gasaway, supra note 3, at 146–47 (discussing the importance of ILL to libraries and noting that, as prices rise, libraries are increasingly relying on ILLs to provide access to materials for their patrons).
\item[69] Spalding, supra note 62.
\item[70] Id.
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libraries. While publishers would have loved to charge libraries higher prices and capitalize on the added value libraries received from each purchase, the existence of secondary markets has historically made this impossible. If publishers tried to charge libraries higher prices, they would simply purchase used copies directly from the secondary markets. Thus, by preserving secondary markets and preventing price discrimination, the first sale doctrine has ensured that libraries can operate free from price constraints.

C. Publishers and Libraries Under the First Sale Doctrine: An Uneasy Compromise

The values of publishers and libraries naturally conflict; “[l]ibrarians tend to view information as a necessary public good . . . that should be made available at a reasonable cost . . . [while publishers] view their works as private property that can be commercialized.” This dichotomy of values creates a tension that underlies the operation of the first sale doctrine and library lending. Historically however, the physical constraints surrounding the operation of the

71 Id.

72 Comments of the Library Associations, supra note 56, at 10–11 (noting that since the advent of digital licensing publishers have implemented a “price and market discrimination business model”).

73 Id. “[A] price and market discrimination business model . . . forces libraries to choose between second-class, but affordable products and more expensive digital versions.” Id.


75 Gasaway, supra note 3, at 115–16.

76 See id. at 121 (noting that library practices “may conflict with publishers’ goals”).
first sale doctrine eased this tension\textsuperscript{77} and limited the effect of library lending on publishers’ bottom lines.\textsuperscript{78}

These physical limitations worked to limit the scope of library practices in four ways. First, the physical nature of library lending ensured access was limited.\textsuperscript{79} While a single book could be lent multiple times, it could be read by only one patron at a time.\textsuperscript{80} Often, the inconvenience caused by waiting gave readers an incentive to purchase the book themselves.\textsuperscript{81}

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\textsuperscript{79} Hellman, \textit{supra} note 78 (“In the past, getting a book from a library has had a tremendous amount of friction.”) (quoting Macmillan CEO John Sargent).

\textsuperscript{80} Id.

Second, libraries were geographically tied to the communities they served.\(^{82}\) To check out a library book, patrons had to drive to the library, locate the book, wait in line, and then return the book to the library before their time ran up.\(^{83}\) Thus, borrowing a book from a library could be a cumbersome process, and few patrons were consistently willing to endure it just to access a book for free.\(^{84}\) Third, the risk that library books would be pirated was limited by the hassles associated with copying.\(^{85}\) Even after the development of the photocopier, copying an entire book demanded a significant amount of time that few were willing to spend.\(^{86}\) Finally, the pain caused by library lending was mitigated because libraries provided publishers a cost-effective

\(^{82}\) Hellman, supra note 78 (citing going to the library as an example of the “friction” historically associated with library lending) (quoting Macmillan CEO John Sargent).

\(^{83}\) Id.

\(^{84}\) See Reese, supra note 20, at 588 n.42 (“[A] library patron faces nonmonetary costs in borrowing the copy [from a library], such as waiting for the library to acquire a copy, waiting for the library’s copy to be available if it has been borrowed by another patron, being able to retain the copy only for a limited time, and possessing the copy subject to a recall by the library.”).


\(^{86}\) Id. While photocopying still takes time, its development sparked serious concern for copyright owners and was eventually addressed by legislation. Friedman, supra note 49, at 637 n.4.
way to spread, publicize, and preserve their books for posterity. 87 Though publishers and authors would rather see their books purchased than borrowed, they understood that the word-of-mouth recommendations facilitated by library lending brought market benefits that could boost their sales. 88

Thus for the majority of the last century, libraries and publishers have enjoyed a tenuous but reconcilable relationship under the first sale doctrine precisely because it was physically constrained. While the first sale doctrine ensured libraries could provide free and economical access to copyrighted works, publishers rested easy knowing library lending’s appeal was limited by the transaction costs that accompanied it. 89 Unfortunately, the opportunities presented by digital technology and the internet threaten to destroy the tangible foundation of this uneasy compromise. 90

II. CHALLENGESPOSED BY E-BOOKSTO PUBLISHERS, LIBRARIES, AND THE FIRST SALE DOCTRINE

Though publishers and libraries could coexist in the tangible world under the first sale doctrine, the rise of the internet and digital technology raised new problems that lacked easy

87 See OVERDRIVE, THOUGHT LEADERSHIP WHITE PAPER: HOW eBOOK CATALOGS AT PUBLIC LIBRARIES DRIVE PUBLISHERS’ BOOK SALES AND PROFITS 4–6 (2010) (highlighting libraries as important sources of marketing power through word of mouth recommendations).

88 Id.

89 See Hellman, supra note 78 (noting publishers views of library lending have been unsettled by ebooks).

90 Friedman, supra note 49, at 638.
solutions and threatened to disrupt the tenuous balance achieved in the last century.\textsuperscript{91} Part A of this section discusses Congress’ decision to adopt a “wait and see” approach regarding the role of the first sale doctrine in the digital era. Part B then examines the threats e-books pose to traditional publishing houses, and how these threats have led publishers to license, rather than sell, their e-books. Part C then discusses the current judicial support for such licensing. Finally, Part D explores the disastrous implications of current e-book licensing models on library lending.

A. \textit{The DMCA: Copyright Versus Market Theory}

The Digital Millennium Copyright Act (DMCA) was passed in response to growing concerns about the rise of digital media in the 1990s.\textsuperscript{92} The internet age suddenly made the “quick, easy, and far reaching dissemination of large quantities of copyrighted works” possible at the click of a mouse.\textsuperscript{93} While everyone agreed digital technologies offered exciting opportunities, they raised serious problems as well.\textsuperscript{94} The ability to rapidly spread information

\textsuperscript{91} Calaba, \textit{supra} note 32, at 7 (“While modern technology presents innumerable benefits . . . it poses considerable challenges to traditional copyright law.”).

\textsuperscript{92} \textit{Id.} at 18.

\textsuperscript{93} Friedman, \textit{supra} note 49, at 638.

\textsuperscript{94} \textit{Id.} \textit{See also Digital Millennium Copyright Act (DMCA) Section 104 Report: Hearing Before the H. Subcomm. On Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary, 107\textsuperscript{th} Cong. (2001) (statement of Marybeth Peters, Register of Copyrights), available at http://www.copyright.gov/docs/regstat121201.html (“Digital communications technology enables authors and publishers to develop new business models, with a more flexible array of products that can be tailored and priced to meet the needs of different consumers.”).
through the internet made the piracy of copyrighted works almost effortless.\textsuperscript{95} To address this concern, Congress passed the DMCA, which allowed copyright owners to impose digital restrictions\textsuperscript{96} on copies of their work and made the removal of those restrictions a criminal offense.\textsuperscript{97} While the DMCA arguably allowed copyright owners to secure their works from piracy, it significantly limited the application of the first sale doctrine in the digital age.\textsuperscript{98} Thus, when Congress ordered a Joint Committee to examine the effects of the DMCA on the first sale doctrine, heated debates surrounded whether Congress should expand the doctrine to include “the digital transmission of [lawfully purchased] works.”\textsuperscript{99}

\footnote{95}Friedman, \textit{supra} note 49, at 638.

\footnote{96}These technical copy-restrictions are generally known as digital rights management (DRM) software. Seringhaus, \textit{supra} note 9, at 166.

\footnote{97}U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY, 2 (1998), \textit{available at} http://www.copyright.gov/legislation/dmca.pdf. \textit{See also} Seringhaus, \textit{supra} note 9 (“The Act renders it illegal to bypass any technological measure that controls access to a protected work, or to distribute technology designed for this purpose. Thus, the DMCA prohibits cracking the copy protection on a software program, bypassing DRM on a digital music file, or reformatting Kindle e-book files to function in a platform-independent manner. Perpetrators face a variety of civil and criminal remedies.”) (footnotes omitted).

\footnote{98}See Friedman, \textit{supra} note 49, at 647 (noting arguments that the greatest limitation on the first sale doctrine in the digital age is the anti-circumvention provision of the DMCA).

Libraries strongly advocated for a digital first sale doctrine.\textsuperscript{100} They argued that the doctrine could be preserved in the digital age if the transmitted work “was subsequently deleted from the sender’s computer,” because then the act would be “the digital equivalent of giving, lending, or selling a book.”\textsuperscript{101} The doctrine was necessary, they argued, to preserve the ‘ownership’ that had traditionally allowed libraries to lend books without violating the public distribution right.\textsuperscript{102} Without a first sale doctrine in the digital age, libraries predicted that copyright owners would enjoy unlimited control of their copyrighted works, even after a sale occurred.\textsuperscript{103}

Further, libraries noted that even with a digital first sale doctrine, copyright owners could avoid the doctrine’s application by writing it out of the license agreements to their digital works.\textsuperscript{104} Thus far, copyright owners of academic journals had shown little willingness to ‘sell’ digital copies to libraries.\textsuperscript{105} Instead, they increasingly relied on licensing agreements to distribute their works.\textsuperscript{106} Without a first sale doctrine that could preempt these contractual agreements, libraries feared that all copyright owners would implement a “pay-per-use” system

\textsuperscript{100} See id. at xxi (addressing the concerns of the library community).

\textsuperscript{101} Digital Millennium Copyright Act (DMCA) Section 104 Report, supra note 94.

\textsuperscript{102} See Comments of the Library Associations, supra note 56, at 23.

\textsuperscript{103} Id. at 4.

\textsuperscript{104} Id. at 10.

\textsuperscript{105} See Gasaway, supra note 3, at 148 (discussing library license agreements with academic journals).

\textsuperscript{106} Id.
where unrestricted ownership and access were nonexistent\textsuperscript{107}.

In contrast, copyright owners argued that the application of the first sale doctrine in the digital era should be limited.\textsuperscript{108} In their view, the only reason the first sale doctrine worked in the past was because it was constrained by physical limitations.\textsuperscript{109} “The absence of such limitations,” they argued, “would have an adverse effect on the market for digital works”\textsuperscript{110} and “require [copyright owners] to subsidize the reading public.”\textsuperscript{111} Instead, publishers advanced a new market theory, which argued the first sale doctrine should be replaced in digital commerce by more efficient, private commercial transactions.\textsuperscript{112} In the digital age, where copyright protection would be thin or unavailable, allowing copyright owners to disseminate their works through contract could be “the decisive factor in ensuring that a work is produced and placed on the market.”\textsuperscript{113} While copyright law imposes inefficient transaction costs that both prevent access and raise prices, a “usage rights” regime would not only ensure the production of copyrighted works but also increase access and reduce costs through price discrimination.\textsuperscript{114} As the market would ensure balanced access to copyrighted works, any legislative efforts to

\textsuperscript{107} Foley, \textit{supra} note 57, at 383–84.

\textsuperscript{108} \textit{Digital Millennium Copyright Act (DMCA) Section 104 Report, supra} note 94.

\textsuperscript{109} \textit{Id}.

\textsuperscript{110} \textit{Id}.


\textsuperscript{112} \textit{Id} at 475.

\textsuperscript{113} \textit{Id}.

\textsuperscript{114} \textit{Id}.
preserve the first sale doctrine were unnecessary.\textsuperscript{115}

Backed by market theory, copyright owners claimed congressional action was premature and that, given time, the markets would resolve the first sale problem.\textsuperscript{116} As a result, the Joint Committee rejected the libraries’ arguments, pointing to the undeveloped nature of e-commerce as the basis of their rejection:

[While] the library community has raised concerns about how the current marketing of works in digital form affects libraries . . . most of these issues arise . . . from existing business models and are therefore subject to market forces. We are in the early stages of electronic commerce. We hope and expect that the marketplace will respond to the various concerns of customers in the library community.\textsuperscript{117}

Rather than proactively address the ‘issues’ facing libraries, Congress chose to adopt the Joint Committee’s ‘wait and see’ approach and let the ‘market’ dictate the future of the first sale

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\textsuperscript{115} Id. at 478. This argument presumes that libraries operate within the limits of market forces. However, libraries by definition operate outside of market forces because they offer a public good \textit{for free}. Gasaway, \textit{supra} note 3, at 134. They do not make money off of the materials they lend. \textit{Id.} They are driven solely by the desire to provide access to the most people at the least cost. \textit{Id.} The fact that libraries have been insulated from price discrimination has been a primary reason public libraries have been so successful in disseminating copyrighted works. See \textit{supra} Part I.B.

\textsuperscript{116} See U.S. COPYRIGHT OFFICE, \textit{supra} note 99, at xi (questioning the consumer demand for a change in the law).

\textsuperscript{117} Id. at xxi.
\end{footnotesize}
Unfortunately, the economic model that drove Congress to stay its hand at preserving the first sale doctrine has failed to ensure the survival of either publishers or libraries in the digital era.

B. Publishers and the Dangers of E-Books

At the time of the DMCA, the movement towards digital works was fairly limited in scope; e-books were in their infancy, and many remained unconvinced that a physical book could ever be displaced by an electronic file. Still, publishers knew that e-books were on the horizon. If the transformation to digital was handled badly, widespread consumer piracy and

118 Id. at xi. Libraries received only vague reassurances that they “serve[ed] a vital function in society,” and that Congress would “continue to work with the library and publishing communities on ways to ensure the continuation of library functions that are critical to our national interest.” Id.


industry bankruptcy could become a reality in just a few years.\textsuperscript{121} If the transformation was handled well, however, e-books could save the industry from shrinking profit margins and reinvigorate consumer interest in books.\textsuperscript{122}

Just a decade later, every major publishing company has adopted ‘e-books’ as “a swift and economical way to bring [books] . . . to the average reader.”\textsuperscript{123} At least ten different types of serious e-readers were on the market in 2010,\textsuperscript{124} and consumers now purchase more e-books than printed copies through online retailers such as Amazon.com.\textsuperscript{125} Still, the question of whether e-

\textsuperscript{121} See Farmer, supra note 119 (citing reports that the book industry could expect to lose $1.5 billion by 2005 due to online piracy of e-books).

\textsuperscript{122} See Ken Auletta, Publish or Perish: Can the iPad Topple the Kindle, and Save the Book Business?, THE NEW YORKER (Jan. 26, 2010), http://www.newyorker.com/reporting/2010/04/26/100426fa_fact_auletta (last visited Feb. 18, 2011) (discussing hopes that e-books would revamp interest in reading).

\textsuperscript{123} Hannibal Travis, Building Universal Digital Libraries: An Agenda for Copyright Reform, 33 PEPP. L. REV. 761, 774 (2006).


books will save or destroy the publishing industry is far from resolved. Publishers must still bypass several obstacles before they can secure their fates in the digital era.

The first and biggest obstacle publishers face with e-books is the same concern they argued before Congress a decade ago: piracy. The piracy of digital music almost destroyed the music industry, and early studies suggest that the same dangerous trend is looming on the horizon for e-books. Online e-book piracy represents roughly 10%, or $3 billion, of all books

126 See Auletta, supra note 122 (noting publishers called the ipad the “Jesus tablet” in the hopes that it would save the industry from Amazon).


128 See Rich, supra note 127 (“For now, electronic piracy of books does not seem as widespread as what hit the music world, when file-sharing services like Napster threatened to take down the whole industry.”).

129 When Dan Brown’s much-anticipated novel The Lost Symbol was released in September 2009, it sold more digital copies than hardback copies. Frisch, supra note 127. While publishers greeted the high numbers with enthusiasm and hope, their exuberance was short-lived. Id. “Less than 24 hours after its release, pirated digital copies of the novel were found on file-sharing sites . . . [w]ithin days, it had been downloaded for free more than 100,000 times.” Id. The piracy trend is not just affecting novels; publishers of academic textbooks from grade school to graduate levels have reported finding illegal, digital copies of the works all over the Internet. Id.
sales, and 1.5–3 million people search for pirated e-books every single day. While it was difficult for pirates to spend the time and energy making multiple copies of tangible books, a would-be consumer can now locate and download a pirated e-book in less than five minutes.

The second obstacle publishers face is the elusive ‘sweet spot’ of e-book pricing (the highest price that consumers will pay to read an e-book without pirating it). Consumers simply do not understand why they should pay the same price for an e-book as they would for a tangible copy. Admittedly, the publishing industry does save on printing and shipping costs,


132 Id.


134 See id. (“‘I just don’t want to be extorted,’ said Joshua Levitsky, a computer technician and Kindle owner in New York. ‘I want to pay what it’s worth. If it costs them nothing to print the paper book, which I can’t believe, then they should be the same price. But I just don’t see how it can be the same price.’”).

135 See Reese, supra note 20, at 644–45 (discussing how limitations on the ability to resell licensed, digital works has impacted their affordability).
which generally run about “12.5% of the average hardcover retail list price,” but that still leaves over 85% of industry costs unaccounted for. The average price of a hardcover book is $26. To obtain the profits necessary to sustain the current publishing paradigm, an e-book would have to be sold for $22. Currently, however, the average price of an e-book ranges from $12 to $15, almost half the sustainable price. Despite the fact that these prices reflect


137 *Id.* The majority of these costs are spent on developing the content that is published—on editing, marketing, and writing the book itself. *Id.* In the words of one publisher: “[w]e develop it; we design it; and we deliver it however our readers want it.” Harold McGraw III & Philip Ruppel, *Don't Write Off Publishers; 5 Myths About an Industry That is Adapting—Not Printing its Epitaph*, USA TODAY, Oct. 6, 2010, at 21A.


139 $22 is roughly 85% of $26, which is the estimated percentage of costs retained with e-books. *Id.*

140 Rich & Stone, *supra* note 133. In an effort to capture an early edge in the e-book market, Amazon bought e-books from publishers “for about thirteen dollars and sold them for $9.99, taking a loss on each book in order to gain market share and encourage sales of its electronic reading device, the Kindle.” Rich, *supra* note 136. At the end of 2009, Amazon “accounted for an estimated eighty per cent of all electronic-book sales, and $9.99 seemed to be established as the price of an e-book. Auletta, *supra* note 122. While e-book sales were booming, publishers were unable to realize any profits on the books because consumers were becoming accustomed to the $9.99 price. *Id.* In early 2010, the publisher Macmillan decided to take the lead in forcing Amazon to let it dictate the price at which its e-books would be sold. *Id.* Under Macmillan’s
just half of the cost of a normal print copy, many consumers, outraged by what they consider to be the “greed” of publishers and authors, turn to piracy.\textsuperscript{141}

Increasing competition for author royalties further complicates this pricing dilemma.\textsuperscript{142}

In the internet age, the historical publishing structure is no longer necessary to disseminate books to the reading public.\textsuperscript{143} As a result, almost anyone can publish an e-book.\textsuperscript{144} This increase in competition has given authors newfound leverage when it comes to negotiating publishing model, many books would still be sold at or under the $9.99 price, but publishers would not be restricted to the price point and the retail giant’s self-imposed discounts would disappear. \textit{Id.}

When Macmillan successfully eradicated the $9.99 pricing model, publishers and authors were “taken aback” by the outrage consumers displayed at the price change:

‘The sense of entitlement of the American consumer is absolutely astonishing,’ [stated one author]. ‘It’s the \textit{Wal-Mart} mentality, which in my view is very unhealthy for our country. It’s this notion of not wanting to pay the real price of something.’ Amazon commenters attacked [the author] after his publisher delayed the e-book version of his novel by four months to protect hardcover sales. [While the author] was not sure whether the protests were denting his sales . . . he said, ‘It gives me pause when I get 50 e-mails saying ‘I’m never buying one of your books ever again. I’m moving on, you greedy, greedy author.’”

\textit{Id.} Evidently, the publishers’ revolt against Amazon’s $9.99 pricing model came just in time.

\textsuperscript{141} See Rich & Stone, \textit{supra} note 133 (“[I]f consumers balk at price increases, piracy could grow rapidly.”).

\textsuperscript{142} Auletta, \textit{supra} note 122.

\textsuperscript{143} See \textit{id}. (discussing arguments that the current structure of the publishing industry takes too much money from authors and is inefficient).

\textsuperscript{144} \textit{Id.}
agreements. Unfortunately, most major publishers do not have the flexibility to compromise and sustain their hierarchy of editors, marketers, and agents.\textsuperscript{145} While competitors such as Amazon offer authors 70\% royalties on every e-book sold, major publishing houses are currently offering as little as 20\%.\textsuperscript{146} With e-books growing in popularity, these diminished royalty rates are a major concern for authors\textsuperscript{147}; naturally, few can afford to see their incomes cut in half.\textsuperscript{148} Already, many authors are choosing to leave publishers behind, and the numbers suggest that more are soon to follow suit.\textsuperscript{149}


\textsuperscript{147} Book Publishers’ Agency Model is Not Working, supra note 145.

\textsuperscript{148} Id.

\textsuperscript{149} See, e.g., Alison Flood, US Authors Blame Publishers for Wylie Amazon eBook Deal, THE GUARDIAN.CO.UK (July 17, 2010, 3:55 PM), http://www.guardian.co.uk/books/2010/jul/27/authors-guild-amazon-andrew-wylie (last visited Feb. 18, 2011) (discussing literary agent Andrew Wylie’s decision to bypass traditional publishing houses when publishing e-books of authors such as Philip Roth and John Updike, and the Authors Guild’s response that publishers had brought it on themselves).
To adapt to these increasing threats, market theory suggests publishers should license, rather than sell, their works.\textsuperscript{150} Unfortunately, these restrictive license agreements create yet another obstacle for publishers: disgruntled consumers.\textsuperscript{151} While the traditional, tangible book is bought and sold, e-books are licensed, and often the restrictive terms of these licenses make it impossible for readers to enjoy the traditional benefits they have come to expect from the first sale doctrine:

\begin{quote}
[M]any of the rights that purchasers of goods have come to expect—for instance, the right to use the goods for their intended purpose, or to resell them—do not automatically apply to purchases of most software or digital content. Instead, the copyright holder must specifically grant such rights. If such rights are withheld or withdrawn, the buyer may find that he has in fact bought nothing at all.\textsuperscript{152}
\end{quote}

\\textsuperscript{150} Cohen, \textit{supra} note 111, at 477 (discussing the belief of market theorists that “pure private ownership would be a more efficient method of managing our culture's creative resources”).


\\textsuperscript{152} Seringhaus, \textit{supra} note 9, at 164 (emphasis added). Instead, purchasers are merely receiving a license to read. \textit{Id}.
While several retailers have reshaped their licensing models to imitate the lending privileges of the first sale doctrine,\textsuperscript{153} the ability to lend a particular e-book is still subject to publisher approval and significantly limited by digital rights management (DRM) software.\textsuperscript{154} The consumer frustration incited by these restrictions has actually incited piracy, rather than deterred it; many pirates see little reason to license a legitimate e-book and its accompanying restrictions when they can download and own a pirated copy DRM and license-free.\textsuperscript{155}

Thus, a decade after publishers abandoned the first sale doctrine for market theory, e-books and their accompanying license agreements have led to a rising tide of digital piracy, increasing pressure to lower prices, and a disgruntled and frustrated array of consumers. Still, for publishers, the uncertainty of e-books and the instincts of self-preservation lead to the conclusion that more control, not less, is called for.\textsuperscript{156} Facing the economic uncertainty of e-books, publishers are clinging to licensing and will not be selling their digital content to anyone anytime soon.


\textsuperscript{154} \textit{See id.} (noting that only books “approved by the publisher or rights holder” can be lent).

\textsuperscript{155} \textit{See} Magee, \textit{supra} note 152 (interviewing one book pirate who claims he will “not buy DRM’d ebooks that are priced at more than a few dollars, but would pay up to $10 for a clean file if it was a new release”).

\textsuperscript{156} Cichoki, \textit{supra} note 15.
C. Judicial Ambivalence and Market Theory

While digital license agreements may seem necessary to publishers who fear the ease and dangers of digital piracy, the widespread use of these agreements carry profound implications for how commercial copyright transactions transpire.\textsuperscript{157} As these licenses become the norm, rather than the exception, “the model for online publishing is shifting from a property-based system of transactions governed by copyright law to a contract-based system of transactions governed by whatever terms the market will bear, even if such terms do not further the pro-dissemination values inherent in the Copyright Clause and in copyright law.”\textsuperscript{158} As these license agreements “increasingly blur[] the crucial distinction in copyright law between rights in the intangible intellectual property and possession of the actual chattel property,”\textsuperscript{159} courts are adding to the confusion by ratifying, rather than clarifying, the diminished role of the first sale doctrine in the twenty-first century.\textsuperscript{160}

Historically, “no bright-line rule distinguish[ed] mere licenses from sales.”\textsuperscript{161} It was often left to courts to decide whether questionable agreements should be construed as sales or

\textsuperscript{157} See Seringhaus, supra note 9, at 164.


\textsuperscript{159} Keith Harris, For Promotional Use Only: Is the Resale of a Promotional CD Protected by the First Sale Doctrine?, 30 CARDOZO L. REV. 1745, 1756 (2009).

\textsuperscript{160} Id.

\textsuperscript{161} Vernor v. Autodesk, Inc., 555 F. Supp. 2d 1164, 1172 (W.D. Wash. 2008), vacated, 621 F.3d 1102 (9th Cir. 2010).
licenses, based upon the intent of the parties and the language of the contract.\textsuperscript{162} Courts could thus circumvent contractual agreements that attempted to bypass the first sale doctrine to further the pro-dissemination values inherent in copyright law.\textsuperscript{163} In the digital age, however, ‘market theory’ suggests that there is “no public interest justification for [judicial] intervention through rules such as [the first sale doctrine] unless the market cannot be relied upon to serve that public interest.”\textsuperscript{164} Under a market-centric approach, judges should seek to avoid impeding market forces except in extreme circumstances.\textsuperscript{165} With a rising tide of digital licenses dominating commercial transactions, it is increasingly easy for judges to shrug aside the policies championed by the first sale doctrine in favor of copyright owners who are struggling to stay afloat.

A recent federal case, \textit{Vernor v. Autodesk, Inc.},\textsuperscript{166} highlights the growing power of the license and its eroding effect on the first sale doctrine. Autodesk, a software publisher, sued Vernor for attempting to resell its software through e-Bay.\textsuperscript{167} From all appearances, Vernor was an ‘owner’ of the copies of the software; they were authentic copies, and he had lawfully acquired them from former Autodesk customers.\textsuperscript{168} However, if those Autodesk customers were not owners but licensees, he could not have gained legal title to the software and thus would not

\textsuperscript{162} Id.

\textsuperscript{163} See supra note 57 and accompanying text.

\textsuperscript{164} Olson, supra note 158, at 88.

\textsuperscript{165} Id. at 89.

\textsuperscript{166} 621 F.3d 1102 (9th Cir. 2010).

\textsuperscript{167} Id. at 1103.

\textsuperscript{168} Id. at 1105.
be an ‘owner’ with the right to resell that software on e-Bay.\textsuperscript{169} Thus, the prime issue in the case was whether the transaction between Autodesk and its customers should be construed as a license or a sale.\textsuperscript{170}

The District Court noted that the Ninth Circuit precedents on point, \textit{US v. Wise\textsuperscript{171}} and the more recent \textit{MAI Sys. Corp. v. Peak Computer, Inc.\textsuperscript{172}} were irreconcilable in their treatment of copyright licenses.\textsuperscript{173} The \textit{Wise} court used a holistic approach to determine whether a contract was a license or a sale, looking to the economic realities of the transaction.\textsuperscript{174} Such an approach,

\begin{itemize}
\item \textsuperscript{169} \textit{Id.} at 1107.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} 550 F.2d 1180 (9th Cir. 1977).
\item \textsuperscript{172} 991 F.2d 511 (9th Cir. 1993).
\item \textsuperscript{173} \textit{Vernor}, 621 F.3d at 1172.
\item \textsuperscript{174} Brief for Electronic Frontier Foundation, et al. as Amici Curiae Supporting Plaintiff-Appellee’s Petition for Rehearing En Banc, \textit{Vernor v. Autodesk, Inc.}, 621 F.3d 1102 (2010) (No. C-07-1189-RAJ), \textit{available at http://www.librarycopyrightalliance.org/bm~doc/lca_vernor12oct10.pdf} (emphasis omitted) (The \textit{Wise} court stated that “in each case, the court must analyze the arrangement at issue and decide whether it should be considered a first sale” or a license). The court’s economic realities approach in \textit{Wise} utilized a series of factors to determine whether a first sale or license occurred: “whether the agreement (a) was labeled a license, (b) provided that the copyright owner retained title to the prints, (c) required the return or destruction of the prints, (d) forbade duplication of prints, or (e) required the transferee to maintain possession of the prints for the agreement’s duration.” \textit{Vernor}, 621 F.3d at 1108.
\end{itemize}
designated the ‘Economic Realities’ approach,\textsuperscript{175} allows the court to look past the language of the contract and consider a variety of factors, including whether “the possessor of the copy has a right of perpetual possession,”\textsuperscript{176} to determine the true nature of the transaction at issue. The counter approach established by \textit{MAI Systems} is often referred to as the ‘Magic Words’ approach.\textsuperscript{177} Under this approach, the court shows extreme deference to the copyright owner’s construction of the agreement; if it can be construed on its face as a license, rather than a sale, the court will construe it as such.\textsuperscript{178} As \textit{Wise} was the earlier of the two precedents, the District Court elected to apply \textit{Wise} and determined that the original transaction was not a license, but a sale, thus upholding the application of the first sale doctrine.\textsuperscript{179}

\textsuperscript{175} \textit{See} Brief for Electronic Frontier Foundation et al., \textit{supra} note 174, at 18 (noting that the Second Circuit in \textit{Krause v. Titleserv}, 402 F.3d 119 (2005), “made its determination based upon the economic realities of the transaction”).

\textsuperscript{176} \textit{Id.} at 13.


\textsuperscript{178} \textit{Id.} (noting that “for certain courts it is as if merely saying the magic words ‘we license not sell’ puts an end to the inquiry” and dubbing such an approach “the Magic Words approach.”). The 1993 MAI case contained a single footnote, which stated, without reference or citation, that “[s]ince MAI licensed its software, the Peak customers do not qualify as "owners" of the software . . . .” \textit{MAI Sys. Corp.}, 991 F.2d at 519 fn. 5.

\textsuperscript{179} \textit{Vernor}, 555 F. Supp. 2d at 1172 (“Where opinions of three-judge Ninth Circuit panels conflict, the court must rely on the earliest opinion.”).
The Ninth Circuit reversed the district court’s ruling and attempted to reconcile the two precedents by establishing a new test.\textsuperscript{180} After examining \textit{MAI Systems} and \textit{Wise}, the court found they established three factors for determining “whether a software user [was] a licensee, rather than an owner of a copy.”\textsuperscript{181} The factors included, “whether the copyright owner specifies that a user is granted a license”; “whether the copyright owner significantly restricts the user’s ability to transfer the software”; and “whether the copyright owner imposes notable use restrictions.”\textsuperscript{182} Finding all three factors satisfied, the Ninth Circuit held that Vernor did not ‘own’ the software he had purchased. Thus, Vernor was not entitled to resell the software under the first sale doctrine, and his efforts to do so constituted copyright infringement.\textsuperscript{183}

The Ninth Circuit justified its holding by noting that those copyright owners who had filed amicus briefs with the court\textsuperscript{184} had “presented policy arguments that favor[ed] [the court’s]

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\item \textsuperscript{180} \textit{Vernor}, 621 F.3d at 1110–11 (describing a new three-part test that reconciles \textit{MAI Sys. Corp.} and \textit{Wise}).
\item \textsuperscript{181} \textit{Id}.
\item \textsuperscript{182} \textit{Id}.
\item \textsuperscript{183} \textit{See id}. at 1113 (noting its holding, “that a software customer bound by a restrictive license agreement may be a licensee of a copy not entitled to the first sale doctrine or the essential step defense.”)
\item \textsuperscript{184} \textit{See id}. at 1114 (“[T]he Software & Information Industry Association ("SIIA"), and the Motion Picture Association of America ("MPAA") have presented policy arguments that favor our result.”). While these copyright owners did not specifically include the American Association of Publishers, their arguments and policy interests are equivalent.
\end{footnotes}
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result.” Specifically, the court noted that its holding “(1) allow[ed] for tiered pricing for different software markets, such as reduced pricing for students or educational institutions; (2) increase[ed] software companies' sales; (3) lower[ed] prices for all consumers by spreading costs among a large number of purchasers; and (4) reduc[ed] the incidents of piracy by allowing copyright owners to bring infringement actions against unauthorized resellers.” In contrast, the court dismissed the concerns of the American Library Association. While it agreed that “the software industry's licensing practices could be adopted by other copyright owners, including book publishers,” it noted that Congress could “modify the first sale doctrine” if it felt these “policy considerations” required a different approach.

The Ninth Circuit’s reasoning and deference to the market concerns of copyright owners mirrored the rationale of the market theory currently underlying and justifying digital licensing. The court explicitly chose to establish a rule that sidestepped harm to any commercial copyright markets, regardless of how slight, rather than uphold the underlying policy goals of the first sale doctrine. Even more troubling is that, under the Ninth Circuit’s new test, whether a transaction is a sale or a license depends solely on the actions of the copyright

185 Id.

186 Id. at 1115.

187 Id.

188 Compare id. (noting that the economic policies favored by its holding), with Cohen, supra note 111 (discussing the economic arguments in favor of private ordering of copyrights under market theory).

189 See supra text accompanying note 186.
owner.190 As long as a copyright owner portrays the transaction as a license and attempts to impose restrictions on the work’s transfer and use, the court will construe the agreement as a license regardless of the consumer’s intent or the economic realities of the transaction.191 Thus, the Ninth Circuit’s decision tilts the license-sale dichotomy heavily in publishers’ favor. Just by following three simple steps, publishers can rest assured that, at least in the Ninth Circuit, no one who buys their e-book will legally be able to lend, resell, or gift it without their authorization.

Further, the court’s decision concedes that publishers can bypass the first sale doctrine by placing licenses not just on digital e-books, but on their printed counterparts as well. Autodesk’s software was not digitally distributed; it was packaged and sold in physical copies, with its license agreement attached to the software box.192 Under the court’s reasoning, there appears to be no reason why publishers could not impose a similar license on the inside cover of every book they sell.193 Such a practice, adopted en masse, would render the first sale doctrine irrelevant. Secondary markets would disappear and traditional privileges such as selling, lending, or gifting would be under the complete control of publishers.

190 See supra text accompanying note 182.

191 See supra text accompanying note 182.

192 Vernor, 555 F. Supp. 2d at 1166.

While *Vernor* was limited to the Ninth Circuit and subject to appeal, a recent Supreme Court case, *Costco Wholesale Corp. v. Omega*\(^{194}\), further restricts the application of the first sale doctrine.\(^{195}\) Omega claimed Costco, a large wholesale retailer, infringed its copyrights by importing Omega watches from other countries and then reselling them in the United States.\(^{196}\) While Costco claimed it could resell the watches under the first sale doctrine, Omega argued the doctrine’s application was limited in scope to copies that were manufactured in the United States.\(^{197}\) The Ninth Circuit agreed with Omega and held that the first sale doctrine did not apply.\(^{198}\) After hearing oral arguments and receiving multiple amicus briefs, the Supreme Court issued a sparse one sentence, per curiam decision affirming the judgment “by an equally divided Court.”\(^{199}\) This terse decision suggests that the Supreme Court agrees that any effort to preserve the first sale doctrine should be an act of Congress, not the courts.\(^{200}\)

\(^{194}\) No. 08-1423, 2010 U.S. LEXIS 9597 (Dec. 13, 2010).


\(^{196}\) Omega v. Costco Wholesale Corp., 541 F.3d 982 (9th Cir. 2008).

\(^{197}\) *Id.* at 985.

\(^{198}\) *Id.* at 987.


\(^{200}\) Goldstein, *supra* note 199.
Vernor and Costco hold profound implications for the continued viability of traditional library practices. Libraries’ only solace from restrictive and costly license agreements rests in the printed copies they have legitimately purchased under the first sale doctrine. Yet the Supreme Court’s decision removed millions of library books from the scope of the first sale doctrine overnight. “Over 200 million books in U.S. libraries have foreign publishers,” and American publishers often employ independent, offshore companies to print their books. Thus, under the reasoning of Costco, libraries can no longer lend any of these books without facing the risk that they will be sued for copyright liability.

At the very least, the courts have left libraries drowning in a wellspring of legal uncertainty and confusion as their traditional lending freedoms are slowly whittled down to negotiated, contractual rights. Publishers, fearing industry failure and digital piracy, are turning to strictly negotiated license agreements to protect their commercial interests, and the courts are accepting these agreements with little concern for how they will impact libraries or the general public’s ability to access knowledge. Just a century ago, the thought that publishers would attach licenses to tangible books was considered an “unthinkable act of tyranny” that was swiftly

201 See supra Part I.B.

202 Brief for the American Library Association et al. as Amici Curiae Supporting Petitioner at 4, Costco Wholesale Corp. v. Omega, No. 08-1423 (2010).

203 Id.

204 Id. at 13.

205 Id. at 4.

206 See supra Part II.C.
rejected by Congress. Yet today such acts are generally accepted, and the pro-dissemination policy underlying the first sale doctrine has been all but abandoned. As the digital trend continues and e-books grow in popularity, libraries are finding it increasingly difficult to provide access and disseminate knowledge without the protection of the first sale doctrine, and no one is paying any attention to their cries for help.

D. Libraries, Publishers, and E-Books

While publishers have spent the last decade exploring how to reach an e-book price that will deter piracy without bankrupting their industry, libraries have been struggling to discover a sustainable way to lend e-books to their patrons. A library’s primary goal is to “preserve in perpetuity access to information,” and e-books make it easy for libraries to meet that goal. Digital files erase storage and maintenance concerns and avoid normal wear and tear.

\[\text{See Common-Law Rights as Applied to Copyright, supra note 24, at 16.}\]
\[\text{See Seringhaus, supra note 9, at 164 (noting software licenses are well established and currently used for e-books).}\]
\[\text{See Cichoki, supra note 15, at 31–32 (“[L]ibraries and library patrons are losing their ability to use information in traditional ways and to take advantage of the efficiencies to provide information and to access information that digital technologies promise and enable.”).}\]
\[\text{Id.}\]
\[\text{Id. at 39.}\]
\[\text{Travis, supra note 123, at 762.}\]
\[\text{ABBY SMITH, COUNCIL ON LIBRARY AND INFORMATION RESOURCES, WHY DIGITIZE? (1999), available at } \text{http://www.clir.org/pubs/reports/pub80-smith/pub80.html (noting digital files “can be compressed for storage” and protect originals from “wear and tear”).}\]
book, once purchased, can theoretically last forever.\footnote{Travis, supra note 123, at 762.} E-books also avoid the transaction costs that previously dissuaded patrons from visiting the library.\footnote{Audrey Watters, Will Your Local Library Lend E-books? (Or Can They?), NY TIMES (Nov. 11, 2010), http://www.nytimes.com/external/readwriteweb/2010/11/10/readwriteweb-will-your-local-library-lend-e-books-or-can-3532.html?ref=technology (last visited Feb. 17, 2011).} They eliminate the need to drive to the library to check out a book,\footnote{The Publishers’ Association in the United Kingdom is currently contesting this aspect of e-book lending. See Benedict Page & Helen Pidd, eBook Restrictions Leave Libraries Facing Virtual Lockout, THE GUARDIAN, (Oct. 26, 2010), http://www.guardian.co.uk/books/2010/oct/26/libraries-ebook-restrictions (last visited Feb. 17, 2011) (noting the Publishers Association “just announced a clampdown, informing libraries they may have to stop allowing users to download ebooks remotely and instead require them to come to the library premises, just as they do to get traditional print books – arguably defeating the object of the e-reading concept”).} the hassle of carrying the books home, and late fees if books are not returned on time.\footnote{See id. (noting that e-books avoid late fees and allow patrons who otherwise may not be able to visit the library the ability to browse and checkout books).} Further, e-books are actually drawing new and younger patrons through libraries’ doors.\footnote{Motoko Rich, Libraries and Readers Wade into Digital Lending, NY TIMES (Oct. 14, 2009), http://www.nytimes.com/2009/10/15/books/15libraries.html (last visited Feb. 17, 2011).} Libraries want to offer books that their patrons want to read, and e-books are increasingly what library patrons want.\footnote{219}
Unfortunately, publishers are not enthusiastic about libraries lending e-books.\textsuperscript{220} While libraries are thrilled by thoughts of unlimited, universal access, publishers are anything but overjoyed that the physical and temporal restrictions of library lending can be easily eliminated in the digital age.\textsuperscript{221} If an e-book can be downloaded by multiple library patrons at a single time, without ever stepping foot in a library,\textsuperscript{222} why would anyone ever purchase an e-book again?\textsuperscript{223} As publishers increasingly cling to license agreements as their industry ‘goes digital,’ they have little incentive to make it easy for libraries to lend e-books to their patrons.\textsuperscript{224}

Of course, under the first sale doctrine, libraries were fairly insulated from publishers’ fears; they could lend books whenever and however they wished, and there was little publishers could do to stop it.\textsuperscript{225} Under the new licensing regime, however, libraries are stripped from (discussing how college students are visiting the library several times a month because of e-books).

\textsuperscript{219} Id.


\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} Id.

\textsuperscript{224} See Hellman, \textit{supra} note 78 (noting that the Macmillan CEO’s questioning of how free access from public libraries could be a good model for publishers in the digital age).

\textsuperscript{225} See \textit{supra} Part I.B.
actually owning content. As a result, “contractual obligations rather than [the first sale doctrine determine] how libraries may lend, copy, archive, and preserve content.” Libraries must pay fees for access to works at rates determined by the publishing companies, and their ability to lend these works is completely subject to publisher restrictions.

This licensing model raises several issues for libraries. First, licensing eliminates a library’s ability to effectively manage its budget in response to changing economic climates. The first sale doctrine allowed libraries to work economically because they could acquire books over time. Then, when they had the money to do so, they could purchase books and build their collection. When times were tough, libraries might not be able to purchase new books, but their collection would remain in tact. Under a licensing system, however, the collection will disappear because it is only available as long as libraries can afford to provide access to it. A budget cut to a library in the digital age may mean that its collection will decrease by 50% or more. Under a licensing regime, libraries will no longer be permanent repositories of

226 Cichoki, supra note 15, at 38.

227 Id.

228 Id. at 41.

229 Id.

230 Spalding, supra note 62.

231 Id.

232 Id.

233 Id.

234 Id.
knowledge but fair weather entities whose very existence depends on the health of the stock market.

The e-book licensing model also isolates libraries from the market power of consumers. When the first sale doctrine had some weight, libraries were subjected to the same price models as everyone else but reaped a much larger return on their investment because the books they purchased were read over and over again. They spread the cost of access, and secondary markets ensured that this cost remained low. However, as e-books are licensed, not sold, they cannot be resold without the publishers’ permission. Thus, libraries will no longer be able to access works through secondhand stores, donations, or inter-library loan. With these secondary markets eliminated, publishers can, and do, charge libraries more than the average consumers. While a consumer might pay a one-time fee of $9.99 for unlimited access to an e-book, a library must pay a costly subscription fee, year after year, to ensure they can continue to provide access to that copyrighted work. As publishers charge higher prices, libraries will no longer be cost-effective, and communities will find it increasingly difficult to fund their operations.

235 Id.
236 Id.
237 Id.
238 Id.
239 Id.
240 Id.
241 See, e.g., Cichoki, supra note 15, at 39–40 (discussing the subscription fees involved in the license agreements of NetLibrary).
Further, libraries face significant barriers when they attempt to aggregate their bargaining power in order to negotiate license agreements that preserve library privileges.\footnote{Josh Hadro & Norman Oder, \textit{COSLA’s eBook Feasibility Report Suggests National Buying Pool}, LIBRARYJOURNAL.COM, (July 18, 2010), http://www.libraryjournal.com/lj/home/886084-264/coslas_ebook_feasibility_report_suggests.html.csp (last visited Feb. 17, 2011).} The most recent effort, led by the Chief Officers of State Library Agencies (COSLA), sought to create “[a] single, national purchasing point” for libraries in order to consolidate bargaining power and “create real leverage” when it comes to negotiating license agreements with publishers.\footnote{Id.} Unfortunately, these efforts have been hampered by the fact that most libraries receive the bulk of their funding from local sources, which are often unwilling to dish out limited funds for the benefit of libraries nationwide.\footnote{Id.} Publishers are also not eager to work with a national organization designed to bully them into offering e-books at lower prices when they already face increasing pressure from disgruntled authors and consumers.\footnote{Id.} Thus, despite the need for efforts such as COSLA’s, they face several obstacles that make it unlikely they will find success.

Finally, libraries are slowly losing control of their content to publishers. Because publishers retain control of their e-books, they can restrict libraries from exercising rights they would otherwise enjoy under the Copyright Act.\footnote{See Cichoki, supra note 15, at 39–41 (discussing how licensing terms prevent library functions such as preservation and replacement, reproduction, and fair use).} For example, license agreements often prohibit libraries from copying parts of the works for their patrons or participating in interlibrary
loans, although these two activities are explicitly authorized in § 108 of the Copyright Act.\textsuperscript{247} Yet because the Act explicitly states that such exemptions do not excuse libraries from “adher[ing] to any contractual terms it accepted at the time it acquired a copy of the work,” they afford libraries no relief from the restrictions imposed by current licensing models.\textsuperscript{248}

The fact that publishers retain control of their content also means that they can alter the terms of the license agreement, or revoke access to their content, at any time.\textsuperscript{249} For example, one library in the United Kingdom recently lent a book, on accident, to a patron outside of its designated geographical service area.\textsuperscript{250} In response, the Publisher’s Association amended its lending guidelines to prevent all libraries from engaging in remote lending of e-books at any time.\textsuperscript{251} Now, libraries in the United Kingdom can only lend e-books to patrons when they are physically present at a library branch.\textsuperscript{252} Exemptions to the guideline will be made by the publishers, not the libraries, on a case-by-case basis.\textsuperscript{253} This is a prime example of how

\textsuperscript{247} Id. at 40.

\textsuperscript{248} Id. at 38.

\textsuperscript{249} See, e.g., Brad Stone, Amazon Erases Orwell Books From Kindle, NY TIMES, July 18, 2009, at B1 (discussing how Amazon remotely deleted editions of George Orwell’s 1984 and Animal Farm from users’ Kindles).


\textsuperscript{251} Id.

\textsuperscript{252} Id.

\textsuperscript{253} Id.
publishers, not libraries, now dictate when and how libraries will lend their books. By utilizing the new economic power afforded them by the digital era, publishers can lay a heavy hand on library operations and shape them to their liking.\textsuperscript{254} Rather than becoming independent arbiters of copyrighted content, e-book licenses are turning once independent libraries into mere interfaces for accessing publishers’ copyrighted content.\textsuperscript{255} If libraries continue to lose all autonomy from copyright owners, there is no reason publishers could not eradicate library lending completely.

III. \textbf{Preserving Free Access and the First Sale Doctrine: A Publisher-Library Partnership}

In 2001, Congress chose to abdicate the pro-dissemination policy underlying copyright law and let ‘market theory’ play out over the course of the next decade. Since then, sales have shifted to licenses, and almost every traditional form of media has gone digital.\textsuperscript{256} Yet despite the fact that licenses have become the norm for publisher-consumer transactions, the threats posed by digital media to established copyright regimes are far from resolved.\textsuperscript{257} While everyone waits for digital licensing to discourage piracy and preserve their shrinking profit

\textsuperscript{254} Cichoki, \textit{supra note} 15, at 39.

\textsuperscript{255} \textit{Id.} at 40.

\textsuperscript{256} \textit{See id.} at 50 (discussing how “digital formats and licensing negotiations” are being used by a variety of digital content providers, and are altering “the terms of how information is exchanged and made available”).

\textsuperscript{257} \textit{See supra} Part II.B.
margins, these licenses are destroying libraries and rendering it impossible for them to fulfill their historic mission of preserving access to information for posterity.\textsuperscript{258}

This section argues that, while it may be too late to avoid digital licensing altogether, this negative side effect could be avoided if Congress simply preserved the application of the first sale doctrine in publisher-library transactions. Such a digital first sale doctrine would ensure the continued existence of a sacred democratic institution, and do little to hurt publishers’ efforts to ensure their continued viability in the digital age.

First, free and convenient access to e-books could help curb the shift to piracy. E-books are currently pirated for three main reasons: 1) to obtain access for free; 2) to preview the copy before it is purchased; and 3) to avoid frustrating restrictions on use.\textsuperscript{259} Under the first sale doctrine, libraries offered the free access most pirates seek: the ability to browse and read books without any financial investment, with few restrictions.\textsuperscript{260} Currently, however, license restrictions make it extremely difficult for libraries to offer access to e-books in a convenient and cost-effective manner.\textsuperscript{261} E-books are often distributed to libraries far after they are released for sale, and often at strictly limited numbers that cannot flexibly respond to patron demands.\textsuperscript{262}

\textsuperscript{258} Spalding, supra note 62.

\textsuperscript{259} Magee, supra note 151.

\textsuperscript{260} See supra Part I.B.

\textsuperscript{261} Spalding, supra note 62.

These limitations make libraries an ineffective and frustrating source of e-books. As a result, publishers are crippling a prominent and legal alternative to consumer piracy. If publishers begin actually selling rather than licensing e-books to libraries, thus preserving the first sale privileges that make them convenient and easy to access, would-be pirates would have a convenient, viable (and legal) alternative to piracy when they wanted access to a book without paying for it.

Second, geographical restrictions can and will be preserved in the digital age, thus moderating the effect of library lending upon publishers’ profits. It is extremely improbable that libraries will ever provide universal access to their collections because libraries are community-centered organizations. They are funded by—and their operations are tailored to—the specific communities they serve. Just as these communities do not want to fund national efforts to

263 Id.

264 Granted, this is assuming that these pirates are also potential library patrons. However, even if they are not, that would still suggest that library lending would at the very least not add to the growing number of e-book pirates.

265 Lorcan Dempsey, Libraries and the Long Tail: Some Thoughts About Libraries in a Network Age, D-LIB MAG., Apr. 2006, available at http://www.dlib.org/dlib/april06/dempsey/04dempsey.html (“The library collection is driven by local perception of need and available resources: collection development activities exist to balance resource and need. A large research library and a busy public library system will [thus] have different profiles . . .”).

266 See Hadro & Oder, supra note 242.
combine the market power of libraries nationwide,\textsuperscript{267} they will not want to fund library access without at least some assurance that the resulting benefits will be confined to those who subsidize it. Thus, publishers can rest assured that libraries do not need to be constrained by restrictive licenses to ensure their operations remain geographically limited in scope.

Third, preserving a first sale doctrine for libraries in the digital age will not eliminate the other rights and privileges publishers enjoy under the Copyright Act.\textsuperscript{268} Publishers will still have exclusive rights over their copyrighted works; if libraries or their patrons copy e-books and distribute them freely, publishers will be able to seek redress in the federal courts.\textsuperscript{269} Avoiding these expensive lawsuits is of paramount importance to libraries and their limited budgets.\textsuperscript{270} Because publishers can and will sue to enforce their exclusive rights, libraries have every incentive to ensure that their patrons cannot illegally copy or pirate their books. Thus, when libraries loan publishers’ e-books, it will be in a controlled environment with rules and policies that librarians will strictly enforce.\textsuperscript{271}

\textsuperscript{267} \textit{Id.}

\textsuperscript{268} \textit{See} Seringhaus, \textit{supra} note 9, at 161.

\textsuperscript{269} \textit{See} Friedman, \textit{supra} note 49, at 646.

\textsuperscript{270} \textit{Id.}

Fourth, recent studies suggest that promoting books through free access may potentially boost e-book sales. Authors and publishers are increasingly giving away e-books for free in order to increase interest in—and visibility of—their copyrighted works. Evidence suggests that these free e-books can be an effective short-term promotional tool, “a way of distinguishing a less-well-known author from the marketing juggernauts of the most popular books.” A recent study by two professors at Brigham Young University, while not conclusive, hesitantly confirmed, “free digital book distribution [by publishers] tends to increase print sales.” However, not all publishers are in favor of free e-books. Some fear that if the market is

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274 Id.


flooded with free e-books, they may supplant purchased e-books. As one publisher once said, “free is not a business model.”

If publishers want to offer readers a chance to explore e-books and boost consumer interest, without risking the dangers of a ‘free business model,’ there is a logical alternative: libraries. Libraries allow patrons to browse titles, browse within books, and even read a book without fostering any general sense of entitlement because libraries are the one place the American public expects to be able to access books and other information for free. By partnering with libraries, publishers can utilize this expectation to achieve the promotional benefits of free e-book titles without running the risk that the free titles will supplant their own sales.

These library websites also offer publishers a cost-effective way to market their books. The long tradition of public libraries as sources of literature and knowledge makes their website a natural place for consumers to search for e-book titles to browse and borrow. A recent report suggests that libraries can become a source of revenue for publishers by acting as “on-demand retail outlets.” For example, the New York Public Library purchased two e-book copies of Sarah Blake’s novel The Postmistress. The two copies remained checked out

277 Id.


279 OVERDRIVE, supra note 273, at 7.

280 Id.

281 Id.

282 Id.
throughout the month of February. Nevertheless, “[t]he Postmistress eBook title page at New York Public Library was still viewed 53 times.” If such an e-book title page also contained a link to a website where the e-book could be purchased, any patron who wanted to read the e-book immediately, without waiting for its return to the library, could do so. Libraries could thus ultimately enhance, rather than hurt, a publisher’s retail sales.

In light of these factors, it is extremely unlikely that any congressional effort to preserve the first sale doctrine in the realm of library lending will have the disastrous consequences publishers predict. If anything, preserving the first sale doctrine may even help publishers curb consumer antagonism and limit the effects of digital piracy. Further, if Congress does preserve the first sale doctrine, the benefits to libraries and society as a whole are enormous. Public libraries champion the ideals of freedom of speech, independence, and the American dream. President Franklin Roosevelt stated that libraries were “essential to the functioning of a democratic society,” one of “the great tools of scholarship, the great repositories of culture, the great symbols of the freedom of the mind.” Over the course of the last century, there has been no question in the minds of the public, of Congress, or the courts that “public access to information and free public libraries” are vastly important to the well being of our democratic

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.* (noting that “Retail outlets such as LibraryBIN [that link users to retail sites from library websites] reinforce that library sales do not come at the expense of retail sales – rather, library availability enhances retail sales”).

society.\textsuperscript{288} And while libraries are important to the well being of society, the first sale doctrine is fundamental to the well being of libraries.\textsuperscript{289}

\textbf{CONCLUSION}

The decision to let economics, rather than social policy, drive the future of the first sale doctrine and libraries in the digital era now threatens the existence of both.\textsuperscript{290} Motivated by the financial fears of copyright giants, Americans have surrendered free access in exchange for a system where ideas cannot be shared or explored without paying a price. Forums for discussion and commentary are being silenced by lawsuits and license agreements, and the courts, constrained by congressional apathy, are turning a deaf ear. By sanctioning the licensing of intellectual property, the very backbone of social progress and creativity, Congress has unwittingly fulfilled the dire prophecy made by Representative Parkinson back in 1908, allowing

\begin{itemize}
  \item[{\textsuperscript{288}}] Gasaway, \textit{supra} note 3, at 116.
  \item[{\textsuperscript{289}}] See \textit{supra} Part I.B. It is important to note that preserving a first sale doctrine solely for publisher-library transactions without more would still eliminate the secondary markets libraries economically depend on. See \textit{supra} Part I.B. This paper argues for a first sale doctrine for libraries, and not the general public, because digital licensing has already become the norm in e-book transactions and thus would likely be extremely difficult to eradicate completely. This means, however, that any digital first sale doctrine enacted by Congress for the sake of libraries would need to address the potential for price discrimination and ensure that the prices at which e-books are sold to libraries remain comparable to the license fees charged to the average consumer.
  \item[{\textsuperscript{290}}] For further discussion of libraries and/or the first sale doctrine in the digital era, see Cichoki, \textit{supra} note 15, Reese, \textit{supra} note 20, and Travis, \textit{supra} note 123.
\end{itemize}
Publishers to “fix any condition” on how and when the American public can access information in the most basic of democratic institutions: the library.\textsuperscript{291}

No advantage is served by denying libraries a digital first sale doctrine: for publishers, for authors, or for the American public. Only Congress can abandon the economic principles plaguing copyright jurisprudence and ensure that libraries can continue to safeguard free access to information for the benefit of society as a whole.

\textsuperscript{291} Common-Law Rights as Applied to Copyright, supra note 24, at 35.