The End of Ownership

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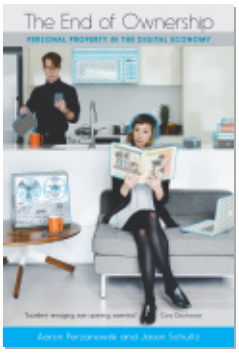

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6 The Promise and Perils of Digital Libraries

In 1731, Benjamin Franklin and a group of his colleagues founded the Library Company of Philadelphia, what many believe to be the first public library in America and perhaps even the world.[1] Any member of the public could join the Company by buying "shares" that allowed one to use the library space and borrow any library book as often as it was available. Money from the sale of shares went toward the purchase of additional books for shareholders to enjoy.

Today, such a model of sharing is well-accepted practice. There are over nine thousand public libraries in the United States alone in addition to university and private libraries. For decades and in some cases centuries, these institutions have purchased books in order to allow their members and patrons to browse and borrow them. For many, the library-lending model is a hallmark achievement for education and public access to knowledge. Libraries function as archives of our cultural heritage, accessible spaces where communities gather and learn, and curators of specialized collections.

Legally and historically, the practice of library lending has depended heavily on the exhaustion principle embedded in personal property ownership. When a library buys a book, it exhausts the copyright owner's interest in that particular copy. The library can subsequently lend it out sequentially to any number of patrons for as long as it likes, even to other libraries through processes such as an interlibrary loan. It can also repair the book, make a small number of archival copies, and resell or donate the book at any time—all without needing to ask permission or pay the copyright owner additional money. Simply put, once the library buys the book, it owns the book, which allows it to distribute or dispose of that copy according to its own communal values, practices, and ethics—even if they diverge from those of the publishers. The same applies to videos, music, and most other forms of physical media that libraries acquire.

As we have noted, this model enables numerous benefits—privacy, simplicity, community, and discovery of new interests and areas of study. For example, librarians have for decades held to a strict ethical code that includes protecting patron privacy. We see this not only in the American Library Association code of ethics, but also enshrined in state laws, and in various political conflicts, where librarians have spoken out against government requests for patron records.[2] This level of commitment has served as a model, both ethically and legally, for other media privacy laws, such as the Video Privacy Protection Act and the California Reader Privacy Act. As Neil Richards notes in his book *Intellectual Privacy*, such protections are fundamental to both intellectual and academic freedom, among other democratic values.[3]

Even the notion of browsing information—something we now apply to websites or social media profiles—derives much of its cultural meaning from the way in which libraries have presented books in open stacks, free for all to peruse without prepayment, self-identification, or technological constraint.[4] Owning those books provides the basis for these freedoms and the institutional autonomy that libraries provide to their patrons.

Yet there is an undeniable tension between such property rights in physical media and intellectual property rights in the underlying works. Copyright owners have often cringed at the book-lending model, imagining that even under the sequential one-copy-per-patron constraints of analog media, libraries would cannibalize their sales if too many patrons could simply borrow a book, album, or movie instead of buying a copy for themselves.[5]

A fascinating example of this fearfulness appears in Ted Striphas's book *The Late Age of Print*. Striphas recounts how in 1931, a group of book publishers hired PR pioneer Edward Bernays—the "father of spin"—to fight against used "dollar books" and the general practice of book lending. Bernays decided to run a contest to "look for a pejorative word for the book borrower, the wretch who raised hell with book sales and deprived authors of earned royalties." The contest generated an impressive list of verbal assaults on those who would dare to lend or receive a book without paying for the privilege to do so. Suggested names included "book weevil," "greader," "libracide," "booklooter," "bookbum," "culture vulture," "bookbummer," "bookaneer," "biblioacquisiac," and "book buzzard," with the winning entry being "booksneak."[6] In the digital era, borrowing can be easier than ever. It doesn't even require a trip to your local library, if you can

check out books from your e-reader. So the idea of frictionless digital book lending has some publishers absolutely terrified.[7]

Yet there is little doubt that digital lending and ebooks are critical to the future of libraries. Every year, ebook acquisitions continue to rise. For example, from 2010 to 2011, academic libraries increased their total ebook holdings from 158.7 million to 252.6 million.[8] In 2012, the American Library Association reported that 76 percent of public libraries offered free access to ebooks to library patrons—up over 20 percent since 2009.[9] A recent PricewaterhouseCoopers study suggests that the percentage of ebooks sold in the United States and Great Britain will surpass that of print media (including audiobooks) by 2018.[10] Library spending on children's, juvenile, and young adult ebooks in 2014 grew by 48 percent over 2013.[11] And according to the CEO of OverDrive, Inc., one of the dominant U.S. ebook providers, "Ninety-three percent of children between the ages of two and thirteen are reading or being read ebooks at least once per week."[12] While analog books don't appear to be disappearing anytime soon, ebooks are quickly becoming a centerpiece of what patrons want from their library's digital collection.[13]

So why does this matter? Won't libraries simply lend ebooks the same way they lend physical books now? Unfortunately, the answer is unclear because of differences in the distribution schema for analog and digital. First, as we've already discussed, borrowing digital books can result in the creation of additional copies on the computers, phones, or other devices patrons use to read them.[14] These extra copies arguably infringe on the copyright owner's exclusive right of reproduction, unless they fall under an exception or limitation, such as the exhaustion principle or the fair use doctrine. Second, because ebook sales are largely modeled on software sales, they often come with complex licenses that muddy the waters around ownership. Since libraries don't "own" the ebooks they buy in the same way as their physical book holdings, they can't rely on the simple rules of exhaustion to actuate large-scale lending on their own terms. While a few ebook publishers have allowed libraries to retain traditional ownership rights in ebooks, most publisher ebook licenses now attempt to dictate the precise terms under which libraries make works available to their patrons.

If this world view holds, then the shift to ebooks will change many fundamental functions within libraries—from acquisition and lending to archiving and fundraising. And it will have a profound effect on the benefits that ownership and exhaustion have historically provided, including privacy, simplicity, preservation, and community.

Fabricating Friction

Most libraries believe in broad public access to their holdings. However, with ebooks, the introduction of licensing models rather than sales has complicated, and some would say undermined, the library's mission. On the one hand, no one disputes that access to ebooks increases access to cultural heritage and scientific knowledge. On the other hand, ebook licenses often incorporate artificial restrictions. Publishers may insist on these provisions in order to introduce artificial friction between libraries and their patrons, to keep readers from becoming digital "booksneaks" and using libraries as a substitute for purchasing traditional and digital books.

There is no shortage of examples of this artificial friction. Publishers often limit the availability of titles by withholding them from circulation throughout a given year. They impose distribution delays by enforcing waiting periods between patron loan requests and downloads. They restrict lending geographically by deciding where a customer can borrow a book and even where they can read it. They cap the number of books each patron and each library can borrow and lend. And they charge libraries based on the number of times a book is lent instead of on a per-title basis. None of these limitations on libraries and their patrons exist for analog books. Library ownership of the books exhausts any attempt by publishers to assert such control. Yet ebook publishers use licensing and other technological constraints to attempt to wrestle back control over the world of digital library lending. And while there is certainly an appeal for libraries, who often suffer from severely constrained budgets, to embrace a more "on demand" and single-serving book acquisition business model, these practices when taken together raise real questions about the long-term impact they will have on library collections.

At first blush, such artificial friction may seem like an equitable balancing of intellectual property rights with digital media ownership. Even though such friction is unenforceable as a matter of copyright law for analog media because of exhaustion, those inefficiencies do attempt to simulate various market effects that would, in theory, reduce the impact of library lending of ebooks on publisher sales. The more friction patrons encounter, the more likely they will pay for the ebook instead of borrowing it from their local library for free.

Yet much like artificial gravity, there is a sense that such systems are a cheat of sorts. Rather than adapting to the new digital environment, these tactics seek to imperfectly impose restraints that would not naturally exist but for copyright holder concerns. Why shouldn't public libraries struggling

under ever-increasing financial constraints be allowed to capitalize on the benefits of digital copying, especially when publishers benefit from the decreased costs of digital production and distribution.

From a purely economic perspective, artificial friction may well alleviate the concerns of the media industries and even save libraries money if the pricing is fair. Yet copyright law was never designed solely to benefit private market actors. Instead, as a constitutional matter, U.S. copyright law was intended to use private market incentives in ways that ultimately benefitted the public at large, not exclusively or even primarily copyright holders. Thus, as enamored as some of the founders might have been with the romantic ideal of authors and inventors, it was ultimately public access to knowledge and the resulting "progress of science and the useful arts" that was the true metric of IP's success.

A library's ownership of its media—books, music, movies, newspapers, photographs, or software—vastly increases public access in ways that the private market alone cannot.[15] This is true for both analog and digital media. The more friction one puts between the public and library holdings, the fewer patrons have access to those holdings.

Of course, copyright owners argue that unless they profit sufficiently, they won't invest in the production of new works, which would result in the public having nothing to access. This well may be true at some point, but the exhaustion principle guarantees copyright owners at least one purchase per copy already—thus fulfilling some part of copyright's bargain between the public and the author. But what if this isn't enough in the digital age? As the Copyright Office asserted in a special report on "digital first sale" in 2001, "the potential harm to the market and increased risk of infringement that would result from [a digital exhaustion rule] could substantially reduce the incentive to create."[16] While it is true that digital copies lack both the friction of physical ones—in other words, the time and energy it takes to transfer a copy from one person or institution to another—and the same decay rate, there is still no question that initial digital sales are providing substantial compensation to copyright owners with significantly reduced costs for production, distribution, and inventory. Allowing transfers of rivalrous digital rights, consistent with the exhaustion principle, could provide much of the friction of physical books. The key is finding systems that continue to balance these objectives for digital works in the way that exhaustion has done historically.

Moreover, copyright has always coexisted with individuals and institutions owning copies as personal property. The idea that personal property rights in copies should always be subservient to copyright interests presents

a dangerous precedent for property rights in general. A shift from balancing copyright ownership with library media ownership to one where control is entirely within the hands and licensing terms of copyright owners raises great concerns.

Libraries without Collections

Let's take a step back and think about what all of these changes might do to the relationship between libraries and their patrons. As the inscription on the Boston Public Library facade proclaims, books on the shelves within are "free to all"—not only in the sense that no payment is required, but also in the sense that they come without strings attached—free from restraint, obligation, and complexity. However, in a world where every publisher insists on a different set of license terms and every ebook platform or DRM provider layers their own business models, software, and implementation on top of those licenses, library patrons nowadays are anything but free from complexity and restraint.[17] That complex patchwork has created real problems for libraries and their patrons. One recent study found patrons suffered through an average of nineteen clicks in order to check out a single ebook from most public libraries.[18]

Libraries have responded to this in several ways. In order to act as a buffer for patrons, many have tried to shoulder the burden by negotiating licensing deals with ebook vendors and publishers. This has led to serious dependencies. For example, most people have never heard of OverDrive, Inc., but this Cleveland, Ohio-based software vendor services over 90 percent of the library ebook market.[19] Other vendors include 3M and Baker & Taylor.

These vendors provide an electronic gateway that connects publishers to libraries and their patrons. They allow libraries to license ebooks stored on vendor servers, and using vendor software the ebooks are transferred to patrons for temporary use on their phones, tablets, or computers. At first, this seems innocuous enough and perhaps even ideal, as libraries can simply defer all customer service and technical issues to the vendors directly. However, this shift in the architecture of ownership and power creates an entirely different dynamic among publishers, vendors, libraries, and patrons. Prior to these systems, libraries would simply buy books from wholesale vendors, or occasionally directly from publishers, and maintain full control over their offerings. Library staff decided how to organize the books on the shelves, how long to allow them to be lent out, and what records to keep about their usage. Under the exhaustion rule, once the

library purchased a copy of a book, the publisher and the distributor have absolutely nothing to say about how, when, to whom, or how often that copy was lent to a patron or institution. Now, even the most prestigious libraries are often beholden to intermediaries such as OverDrive for many of these functions. Upstream providers control when and how books are available, which titles persist and which disappear from digital shelves and search queries, and often, which patrons may or may not access them and under which circumstances.[20]

For example, in 2011, HarperCollins, a major publisher, announced that it would only allow libraries to lend its ebooks twenty-six times before forcing them to expire. HarperCollins claimed these self-destructing books were calculated to represent the rate of physical decay in analog copies.[21] If a book is lent to patrons for two weeks at a time, that means HarperCollins expects libraries to replace popular hardcovers every year. Regardless of the accuracy of that estimate, this shift—from lending and borrowing as a normative, communal practice governed by copy ownership and internal library policies to a model that allows publishers to define the legal terms and technological conditions under which libraries lend books—raises serious concerns.[22]

In other instances, works simply aren't available on a platform or in a medium that allows for lending. Kevin Smith, director of Copyright and Scholarly Communications at Duke University Libraries, has documented the dearth of options facing libraries in one such case. He described a new recording of celebrated conductor Gustavo Dudamel and the Los Angeles Philharmonic that is only available as a digital download via iTunes. As Smith explains, "The licensing terms that accompany the 'purchase'—it is really just a license—restrict the user to personal uses. Most librarians believe that this rules out traditional library functions" like lending.[23] When librarians tracked down Universal, the copyright holder in the recording, it offered to provide them an educational license for use of 25 percent of the album. That license would last only two years and would run them $250 in processing fees plus an unspecified additional amount. That's the tangled web of licensing and negotiation with which libraries must now contend. Just a decade ago, a library could have bought the entire recording on a CD for less than $20 and lent it as it pleased.

Fortunately, it appears that some publishers are responding to these concerns with more progressive policies. For example, Penguin Random House (now consolidated after a merger) will be offering its adult and children's frontlist and backlist digital titles under a "one-e-Book and one-user" policy and dispensing with its one-year lending cap on all ebooks. Libraries will

now be able to loan the book out to as many patrons as they want as long as they follow an "exhaustion-like" single copy per patron rule.[24] Skip Dye, vice president of library sales for Penguin Random House, described the revised policy as an "opportunity for the full and permanent ownership of our titles purchased for [library] collections, which can evolve into a potentially unlimited number of library patrons borrowing that e-Book in perpetuity." This is a significant win for the library community; however, it is worth noting that it took nearly five years to negotiate the terms back to their analog equivalent.

Another example of expansive vendor control over library ebook lending is the use of proprietary software to define how patrons access ebooks from their phones, tablets, computers, or other devices and how libraries facilitate that access. Most of the time when a patron selects a book to check out from the library's catalog, they do so through the library website or app. However, as soon as the patron selects which book to read, the library is left out of the loop. The vendor takes over, transferring the ebook to the patron, and governing their interaction with the content.

At first, this may seem like just another technological evolution. However, it has serious implications for libraries and their patrons. For example, some vendors reserve in their software terms a unilateral right to terminate ebook access of any patron or library in the event that the vendor determines, in its sole discretion, that a patron or library fails to comply with the vendor's terms and procedures. In other words, if the vendor decides its terms have been violated, it can cut off a community's access to its ebooks. Imagine if Random House could walk into any library in the country and pull all of the books it published from the shelves if it suspected that a patron had made some objectionable use of them. That is the power that these vendors are now claiming.

Libraries have responded in a variety of ways, both institutionally and technologically. The ALA, its members, and other library associations have stepped up their emphasis on negotiating greater control in vendor contracts, particularly around patron privacy, a topic to which we will return. In addition, a new project called Library Simplified, a joint effort of public libraries in Boston, Cincinnati, New York, and Sacramento, among others, is seeking to create a special ebook reader—one made for libraries, by libraries—that consolidates and automates this complicated set of interactions, and reduces the number of clicks required to check out an ebook from nineteen to three. By reestablishing control over their relationship with their patrons, libraries may gain back some of their historical control over access

to knowledge and patron data, which they often protect more vigorously than commercial vendors do.

Libraries and Cultural Preservation

As we have noted, libraries, museums, and archives all serve an important function in preserving our culture, our history, and various forms of knowledge. Yet these functions depend inherently on these institutions having control over the works they acquire. Traditionally, control came concurrently with book ownership, as acquisition of the physical property rights in books provided libraries with the authority they needed to decide how, when, and where, and by whom it would be held. It also exhausted intellectual property rights in the book, preventing any interference with the library's mission by copyright owners. With ebooks, this mission is much more complex and challenging to fulfill. On the one hand, digital books are easier to store—they take up less physical space and can be moved more easily. But as we've noted, publisher- or vendor-imposed licenses and technological restrictions on ebooks introduce new problems.

These problems become especially acute for works at risk when their economic value may be less than their cultural value. In such situations, libraries as well as other participants in secondary markets, such as used bookstores, have greater incentives than publishers or ebook vendors to maintain copies of books since publishers can charge a premium on newer versions. First editions or recent textbooks are good examples. For analog books, this discrepancy between profit and preservation objectives can lead to situations where institutions such as libraries are willing to pay to purchase or digitize older works, but the works' copyright owners have either gone out of business, disappeared, or become impractical to find.

For these "orphan works," libraries often preserve physical copies and, in limited circumstances, make digital ones available to patrons. And while there is some concern that copyright owners might come out of the shadows and reclaim their orphaned works, there is a strong case that such forms of digital preservation and access qualify as fair use, in part because many libraries map digital access to physical holdings on a one-copy-to-one-copy basis.[25] In a world where copies reside on publisher or vendor servers, subject to restrictive license terms, the virtual holdings of every library are at risk of vanishing, especially if they are orphaned.[26] This fear has already become reality in the digital music industry, raising concerns at the Federal Trade Commission.[27]

Consider a recent preservation project at Yale University to archive 2,700 VHS tapes from the 1970s and 1980s featuring so-called "Scream Queens," horror and exploitation movies emblematic of "the home-video revolution of the time, as well as the cultural mores and politics of the Reagan era they emerged in."[28] While many might consider such a collection uncouth or bizarre, to cultural critics it "tell[s] the story of a particularly significant gap between the old Hollywood model of the '50s and '60s and the corporate mergers of the '80s that created today's modern media behemoths. In the era of video tapes, independent producers and distributors could reach a mass audience using cheap technology and local stores, both of which lowered the profit threshold for moviemakers."[29] Harvard and Cornell have taken on similar efforts to collect archives related to the emergence of hip-hop, and New York University has acquired its own collection of cultural artifacts related to the rise of Riot Grrrl, an underground feminist punk movement in the early 1990s. Such preservation efforts mainly come from secondary collectors, not the original publishers. In fact, in counterculture or low-budget genres such as these, publishers often go in and out of business quickly and are nearly impossible to track down in order to secure various legal permissions. Were these collections held in digital form on now-defunct vendor servers or controlled with proprietary vendor technology, it might have been impossible to save them for historical, cultural, and educational purposes.

The commitment to preservation itself is also cultural. Ownership of works over their lifetime promotes long-term thinking. As works age, librarians, archivists, and museum workers are continually reminded of their duties to retain these objects in ways that do not diminish access. Ephemeral "on demand" access systems, intangible licensed rights, and technological control mechanisms discourage these approaches and instead focus on more short-term goals such as convenience and instant gratification. Not that these short-term goals are unimportant or undesirable. In fact, they are some of the great benefits of the digital age. Librarians have been among the best at recognizing these benefits while at the same time understanding the long-term challenges.

In response, cultural institutions including many libraries are working to establish digital means of ensuring preservation. Efforts such as the Digital Preservation Network and Academic Preservation Trust are working to build federated "dark archives" that will keep redundant copies in case of catastrophic loss of originals. In order to do this, these efforts depend on both the doctrine of fair use and, in some cases, the narrow preservation provision in the Copyright Act to shore up the gap between what

exhaustion previously provided and where digital libraries and archives sit today.

When Copyright Owners Attack: IP as an Adversary of Preservation

Lack of perceived profitability isn't the only problem for preservationists. Modern history is replete with cases involving efforts to limit or decimate library holdings, often by political groups or governments.[30] While most of these challenges have been via political muscle, copyright holders have also sought to censor access to works. Most famously, the German government, copyright holder of Adolf Hitler's *Mein Kampf*, has prohibited the book's publication in Germany for decades, and only now must allow it for the first time in seventy-five years because the copyright has finally expired.[31] Here in the United States, we have seen similar attempts to use copyright law for purposes that work counter to the goals of preservation.

Take, for example, the case of *Worldwide Church of God v. Philadelphia Church of God, Inc.*[32] WCG was founded in 1934 as the "Radio Church of God" by Herbert Armstrong. Armstrong held the title of "Pastor General with the spiritual rank of Apostle" and led the church until his death in 1986. Along with many other publications, he wrote a 380-page book entitled *Mystery of the Ages* (*MOA*), of which WCG distributed over nine million free copies.

After Armstrong's death, WCG decided to stop publishing and using *MOA* for several reasons, including the fact that the church's positions on various doctrines such as divorce, remarriage, and divine healing had changed. Philadelphia Church of God (PCG), a rival whose members claimed to follow the "authentic" teachings of Armstrong, seized this opportunity and began printing and distributing *MOA* in its entirety. WCG sued PCG for copyright infringement and won, halting publication not because WCG would lose profits, but because WCG did not want PCG patrons to read it.

Now, to be fair, WCG did not request that anyone who already had *MOA* rid themselves of their copies or that any public libraries or archives destroy copies they owned. But it is important to note that WCG also lacked the legal authority to demand such actions. Copies of *MOA*, even infringing ones, cannot be reclaimed once sold because the copy is owned as personal property by the purchaser.[33] However, for digital copies that libraries don't own, any copyright holder who wants to remove a book from the shelf could simply terminate the libraries' license and remove the book.

A more recent example involved the best-selling book *The Boy Who Came Back from Heaven*, allegedly recounting the story of six-year-old Alex

Malarkey's visit to heaven after being injured in a car crash. Nearly five years after publication, Malarkey admitted that the story was fabricated, prompting its publisher to take "the book and all ancillary products out of print."[34] While some were sympathetic to the desire to withdraw the book, others saw it as an important flashpoint in an ongoing cultural and political dialogue about religious communities in America, part of a popular genre of "heavenly tourism."[35] Because of exhaustion, all analog copies of the book are still available to be preserved, analyzed, assigned in classes, and critiqued over any objection from the authors or publishers. The fate of the digital editions is less clear. As Amazon demonstrated with the remote deletion of *1984*, there is real risk of disappearing titles when copyright owners object to their existence.

Libraries and Safeguarding Patron Privacy

Libraries have also historically been safe spaces for readers who wish to protect their privacy.[36] This is not only due to the strong legal and ethical codes protecting library records from disclosure, but also the physical ownership of library media. Once the library purchases a work, the copyright owner has no legal interest in that particular copy anymore and cannot track or meter its use or whereabouts. Contrast this with ebooks that libraries must license. Even in the hands of libraries and their patrons, publishers can use a combination of license terms and technological controls to track their use. This raises a host of privacy issues, including potential chilling effects on those who would seek out controversial or revealing subjects such as medical treatments, sexuality, or unpopular belief systems.[37]

Moreover, the danger to patron privacy becomes amplified in a system where multiple parties have an interest in and access to the ebook distribution chain and related patron data. When a library owns a book, it can decide what patron records to keep and who can view them. Most ebook providers require that readers share data with multiple vendors, from DRM suppliers and e-reader app makers to the original publisher. Vendors may keep records on every transaction that flows through their servers, including which books you've checked out and which you've placed on hold for future reading.[38] Adobe's software has even tracked each page you've read and how long you lingered on it. Some emerging library standards are moving toward demanding strong privacy protection from ebook vendors, but such protection is no longer a given in a world where libraries must negotiate for it instead of one where they own and control the books directly.[39]

Our constitutional right to privacy that protects records of our reading habits from government surveillance and law enforcement subpoenas also depends, in part, on property rights in the media we access. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects." Our "papers" include the things we write and the things we read. And our "effects" include the property we own. The Fourth Amendment was intended as a buffer between what we read and write and the government's interest in gathering data on its citizens.[40] Obviously, we don't own the books we borrow from the library. But through both state and federal statutes as well as keystone court decisions, it is well established that libraries can object to inappropriate government requests for library records on our behalf.[41] But when that information is stored as part of a commercial transaction with vendors and publishers, it is often no longer within the protective ambit of the library's code of ethics or statutory protection. Instead, it potentially falls within what's called the third party doctrine, which holds that once a consumer voluntarily shares information—like what books they read and when—with a commercial entity, they may no longer have a reasonable expectation of privacy in that information, and the protections of the Fourth Amendment may no longer protect that information from disclosure.[42]

Yet why should we care if the government accesses the records of what we read or watch? Intellectual privacy of this sort is fundamental to a functioning democracy. As Justice William O. Douglas observed, "Once the government can demand of a publisher the names of the purchasers of his publications ... fear of criticism goes with every person into the bookstall ... [and] inquiry will be discouraged."[43] The most blatant example of such criticism and the anti-democratic effect it can have arose during the anti-communist witch hunts of the 1950s and 1960s. At the McCarthy hearings, many of those called to testify were questioned on whether they had read Marx and Lenin.[44] They were asked whether their spouses or associates had books by or about Stalin and Lenin on their bookshelves.[45] Congress even passed a law requiring individuals to file written requests with the U.S. Postal Service to receive "communist political propaganda" through the mails until the Supreme Court struck it down because it was "almost certain to have a deterrent effect" on speech and association protected by the First Amendment. The Court especially noted that "public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason."[46]

This threat is not merely hypothetical. There have been several famous cases of government agents seeking lists of what we read and watch. One of the most prominent involved Monica Lewinsky, the White House intern involved with President Bill Clinton. In his investigation as Special Counsel, Kenneth Starr issued subpoenas to Barnes & Noble and Kramerbooks, an independent book store in Washington, D.C., for a list of all Lewinsky's purchases over a thirty-month period. Kramerbooks fought back and went to court to protest the subpoena, asserting that the First Amendment protected readers from the chilling effect of the government knowing what they were reading.[47] Eventually, Lewinsky's lawyers turned over some of the information directly to Starr, and the bookstore was never required to comply with the government's request.[48]

Nor are such witch hunts solely vestiges of the analog era. In 2007, federal law enforcement came knocking on the door of Amazon.com, asking for the reading records of 120 of its customers. Amazon fought back, successfully convincing the trial court to reject the subpoena. In holding so, the court wrote: "If word were to spread over the Net—and it would—that the FBI and the IRS had demanded and received Amazon's list of customers and their personal purchases, the chilling effect on expressive e-commerce would frost keyboards across America ... well-founded or not, rumors of an Orwellian federal criminal investigation into the reading habits of Amazon's customers could frighten countless potential customers into canceling planned online book purchases, now and perhaps forever."[49]

Studies have confirmed this chilling effect. One survey found that 8.4 percent of Muslim Americans changed their Internet usage because they believed their habits were being tracked by the government.[50] Even the controversial section 215 of the USA PATRIOT Act, which the National Security Agency used to justify collecting millions of American phone records, was originally envisioned as the "library provision" that would allow the U.S. government to demand any patron's library records simply because they were somehow relevant to a terrorism investigation.[51]

It is reassuring that both commercial book vendors and libraries have stood up for the privacy of information about our reading habits, and perhaps they will be able to continue to do so even in the age of the ebook.[52] But what if they don't? Do we have any rights to stop them from turning over our information? The further up the chain the information travels, the less claim we have to privacy. It's one thing for your local library or bookstore to assert itself as a custodian of the record of your purchases and stand in your shoes to fight for your privacy; it's another to claim that your

book-viewing data, passed from device to provider to publisher, is somehow still yours. Thus, cloud storage and streaming books may also shift our sense of intellectual privacy if we are not able to secure it. Fortunately, California has taken a strong step in this direction by passing the Reader Privacy Act, which requires all vendors of electronic books and online book services to respect patron privacy. Perhaps other states will do the same.

Libraries and Innovation

In 1894, Historian John Willis Clark gave a lecture at Cambridge University entitled *Libraries in the Medieval and Renaissance Periods* in which he stated "[a] library may be considered from two very different points of view: as a workshop, or as a Museum. ... Mechanical ingenuity ... should be employed in making the acquisition of knowledge less cumbrous and less tedious; that as we travel by steam, so we should also read by steam, and be helped in our studies by the varied resources of modern invention."[53]

How does one "read by steam" in the digital age? Numerous library-related entities are exploring that question, from the Internet Archive's Open Library to the Digital Public Library of America.[54] Even the New York Public Library has a geek team, a group they call NYPL Labs.[55] NYPL Labs has produced many interesting projects to date—from annotating Google Maps of New York City with photos from their city archives to assisting scientists in analyzing climate change by tracking fish prices from nearly a century of digitized New York restaurant menus. All of this is possible because they own the physical materials and thus, digitizing them for analysis is a much simpler project. Consider, however, materials that are licensed and not owned. How does a library expand the public's understanding and engagement with materials when they belong to someone else and sit on remote servers they cannot access?

Or consider HathiTrust, a consortium of digital library efforts.[56] HathiTrust houses well over five million digitized books, the vast majority of which were scanned on behalf of the libraries by Google. When the Authors Guild sued HathiTrust for copyright infringement of these books, it asserted that the libraries had no right to lend the physical books they owned to Google for scanning purposes or to use the digital copies that Google provided them in exchange. Yet the courts that ruled on the case held that these actions were fair uses. HathiTrust transformed these paper-and-ink books into a massive digital archive and database, an altogether different sort of work, suitable for very different purposes. At the same time, it greatly increased access to knowledge.

What would have happened if those books had not been physically on the shelves for the library to lend to Google, but rather on the servers of OverDrive or various publishers? If the libraries tried to hand over to Google millions of ebooks, publishers and vendors would have pointed out that independent of copyright concerns, this violated the terms of their license agreements. The fact that access was conditioned on a license rather than ownership also could have changed the fair use analysis significantly. One fair use factor courts consider is the impact of the use on the market for the copyrighted work.[57] And if libraries are already negotiating and agreeing to license terms, presumably they could have paid more for terms that contemplated these sorts of uses. In this hypothetical scenario, the fact that libraries neglected to acquire such rights could be interpreted—wrongly, we think—by some courts as weighing against fair use. Regardless of the outcome, ownership of the books gave the libraries a certain independence from publishers as a practical matter. A library without physical books would be faced with the risk of losing access to their entire collection of ebooks if their actions upset vendors and publishers, putting them in a precarious position to fight for fair use and academic freedom in the first place. The security of owning the physical copies of the books provided libraries with the strength to stand up for what was ultimately ruled to be legal.

A Library with No Friends

Scattered across the United States are countless "Friends of the Library" groups. These supporters exist to raise money and help local libraries thrive in their communities. One of the main ways they do this is to host book donation efforts. These efforts ask local citizens and institutions to donate old books—not for the libraries' shelves, but to resell to help raise money for new library purchases. It is one of the most time-honored ways to give back, by giving away your old books so that the library can turn them into new ones.

But every single aspect of such fundraising depends on ownership. If patrons who buy ebooks don't own them and libraries they support can't own them, then how does one donate an ebook to one's local library at all?

This is not just a problem for libraries, but for many other access points for knowledge and cultural heritage. For example, consider Project Cicero,[58] an annual nonprofit book drive designed to create and supplement classroom libraries in under-resourced New York City public schools. Since 2001, Project Cicero has distributed 2.3 million books to more than 13,000 New York City classrooms, reaching over 550,000 students. It receives new and

used book donations from more than one hundred independent, public, and parochial schools each year.

But what will the future of such projects look like in a world when parents, teachers, students, and schools no longer own the books they use and read? What happens when your Kindle or iPhone won't let you donate your book? Or the terms of service for your ebook provider or the license agreement on the book itself forbid it? Or copyright law deems you an infringer for donating a used ebook to your local public library?

The problems facing libraries are, in many ways, the same problems confronting consumers writ large. Complex license terms, uncooperative technology, and outdated copyright laws interfere with the kinds of uses they've made for centuries. While some might suspect our fellow citizens of uncertain motives or questionable intentions, by focusing on libraries—a set of institutions and actors with a well-deserved reputation as responsible actors—it is easier to understand that a digital exhaustion doctrine is not meant to provide refuge for scofflaws and infringers. Instead, it's a way to protect the network of socially valuable uses that owning books makes possible.