

“LENDING” INSTITUTIONS: THE IMPACT OF THE E-BOOK ON THE AMERICAN LIBRARY SYSTEM

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The sharing of knowledge, specifically through the evolution of library systems, is an essential part of modern democracy and is governed in America by the First Amendment and by copyright law. In recent years, however, the circulation of e-books—text in electronic format read via specialized equipment and software—has created a potential challenge to traditional notions of copyright protection. In this note, the author analyzes the compatibility of the e-book with the American library system as it currently exists through empirical data on the use and expert opinion of e-books in public and academic libraries. Heralded in previous years as the next major advance of the “reading experience,” the e-book has not lived up to expectations and is often criticized because of the many usage limitations imposed by digital-rights management software. Many questions regarding the legality of this type of software and its permissible manipulation are currently unanswered. This is perhaps best evidenced by the case of the Russian computer company Elcomsoft, which was criminally prosecuted under the Digital Millennium Copyright Act for developing software capable of “cracking” the protection on e-books. The company was ultimately cleared. The debate over the interaction between this new form of book and copyright law has undoubtedly impacted public perception of e-books. Hence, the author conducted empirical research to determine the effect of such unresolved issues by posing questions to different types of libraries throughout the country. From this research, the author concludes that e-books still possess some potential in American libraries if the technology becomes more focused on readers and if electronic publishers relax some of the use restrictions currently afforded to them by law.

I. INTRODUCTION

If the Framers of the U.S. Constitution were to stroll the aisles of Barnes & Noble, they might be more overwhelmed than most avid readers upon surveying the spectacle of modern book marketing. America’s robust book trade is made possible through the specific power the Fram-

* I appreciate the help of Professors Bruce Smith, Janis Johnston, and Paul Callister. My thanks also go to the librarians who aided me in gathering the information for this Note.

ers granted Congress. Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹

Authors enjoy copyright protection while American readers enjoy the books protected by United States copyright law.² There is perhaps no better evidence of book appreciation rooted deeply in the fabric of American culture than our library system, which was built on the premise that book sharing is essential to a thriving democracy.³ The copyright statute has built-in exceptions that allow libraries to disseminate information without such rigid constraints as those imposed on the general public.⁴

The advent of the e-book,⁵ however, has rewritten the rules on how new forms of the written word and the notion of the lending library are to coexist. Despite early projections, American book consumers have demonstrated a cool disregard for e-books based on disappointing sales figures.⁶ According to critics, one of the e-book’s biggest shortcomings is that readers are unable to use these books in the same way they use printed books.⁷ Specifically, the current reader software necessary to read e-books prohibits printing, sharing, or using other software to read the books aloud.⁸ In addition, e-book owners are limited in the devices with which they can read their e-books: readers may not switch from their laptops or home computers to more convenient hand-held devices to read e-books after they have purchased them.⁹

Perhaps the most telling proof of the public’s disregard for e-books was the plight of Dmitry Sklyarov, a Russian computer programmer arrested and charged under the Digital Millennium Copyright Act (DMCA).¹⁰ The DMCA has been controversial since its inception in 1998 and, as yet, is largely unproven in the courts.¹¹ Sklyarov ran afoul of the DMCA by writing a computer program that allowed e-book customers to use their e-books without the digital-rights management restraints

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1. U.S. CONST. art. I, § 8, cl. 8.
 2. Copyright Act of 1976, 17 U.S.C. § 101 (2000).
 3. See American Library Association, *ALA Mission, Membership, Organization*, at <http://www.ala.org/alaorg/mission.html> (2002) (mission statement).
 4. 17 U.S.C. §§ 107–109.
 5. Merriam-Webster’s online dictionary defines “e-book” as “a book composed in or converted to digital format for display on a computer screen or handheld device.” Merriam-Webster, Inc., *Merriam-Webster Online*, at <http://www.m-w.com> (2003).
 6. John Aguilar, *E-book Industry Seeks Standards, Public Acceptance*, BOULDER COUNTY BUS. REP., Nov. 2, 2001, at 1A (noting slow acceptance of e-book technology and a lack of available electronic titles).
 7. See Stephanie C. Ardito, *The Case of Dmitry Sklyarov*, INFO. TODAY, Nov. 1, 2001, at 24.
 8. See *id.*
 9. See *id.*
 10. *Id.*; see also *United States v. Sklyarov*, No. CR 01-20138 (N.D. Cal. filed Aug. 28, 2001).
 11. See *id.*; see also *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999).

already built into their e-book reader software.¹² The substantial public outcry caused by Sklyarov's arrest and subsequent indictment allied many individuals and groups that would ordinarily be considered strange bedfellows: hackers and their attorneys, inflamed "netizens," civil libertarians, academics, computer programmers, foreign governments, and librarians.¹³ In exchange for cooperating with federal prosecutors against his employer, Elcomsoft, charges against Sklyarov were later dropped.¹⁴

This note examines the compatibility of the e-book with the American library system. Using the case of *United States v. Sklyarov* as a point of departure, it evaluates whether the e-book market has lived up to the projections of the publishing industry and addresses some of the shortcomings surrounding current e-book technology. Part II of this note surveys the current state of e-book reader software, digital-rights management, and how the phenomenon surrounding the *Sklyarov* case crystallized the attitudes of many different constituents against current e-book marketers. Part III analyzes empirical data gained on e-book use within major metropolitan libraries, smaller public libraries, and law libraries. Finally, part IV argues that despite industry estimates, e-books are not nearly as apt to catch on with the American reading public as was once hoped because restrictive digital-rights management makes them less attractive by the standards of traditional "book culture." This proposition is supported by sample data collected from eighteen representative libraries. Without an appropriate balance between protecting copyrighted works and the public's right of fair use, e-books stand to wither as a viable alternative to traditional paper book publishing. A brief conclusion summarizes the most important issues surrounding the digital-rights management aspect of e-books and the impact of e-books on the American library system.

II. AWAKENING "BOOK CULTURE": *UNITED STATES V. SKLYAROV*

A. *Historical Overview of Libraries*

It is hard to dispute the importance of the book not only in America today, but throughout the history of both the ancient and modern worlds. On a very basic level, libraries function as a means of preserving communication, allowing civilization to storehouse recorded information for easy retrieval and future use.¹⁵ More importantly, culture advanced as man no longer needed to relearn information; accumulated knowledge

12. Ardito, *supra* note 7, at 24.

13. *See id.*; *DMCA Protester Cracks Microsoft's Copyright Protection Code*, NEWSBYTES NEWS NETWORK, Oct. 19, 2001, available at 2001 WL 23419539.

14. Jon Healey, *Russian Firm Cleared in Digital-Piracy Trial*, L.A. TIMES, Dec. 18, 2002, at C1.

15. *See* ELMER D. JOHNSON, COMMUNICATION: AN INTRODUCTION TO THE HISTORY OF WRITING, PRINTING, BOOKS AND LIBRARIES 6 (4th ed. 1973).

could be passed not only to contemporaries, but recorded for all posterity.¹⁶

As civilized man made and kept written records, most great ancient cultures began to use libraries.¹⁷ Ancient Egyptians not only amassed legal and religious records, but also warehoused important information within business libraries and private collections.¹⁸ Archaeologists have unearthed private libraries entombed with their owners to discover more than just everyday family records and correspondence, but more fascinating reading such as travel stories, war adventures, and magic books.¹⁹ Other ancient civilizations that maintained libraries include Babylonia, Assyria, Sumer, China, and the Greeks, who created the great library of the world in Alexandria.²⁰

At the peak of the Roman Empire, there were no fewer than twenty-eight public libraries in its capital city alone.²¹ These libraries were publicly owned and available to anyone who could read, including members of the upper classes as well as the slave population.²² Some prominent authors of the era allowed their works to be sold by only one bookseller, but no copyright laws barred the copying of any work.²³ Thus, the free dissemination of information through libraries has been a hallmark of civilization. “[T]he library in some form is a necessary part of any advanced human society. The preservation of recorded knowledge is vital to cultural growth and progress.”²⁴

The impetus for the establishment of the American lending library can be traced to Benjamin Franklin, who organized the Library Company of Philadelphia in 1731.²⁵ Any “civil gentleman” was entitled to use the library, but the privilege of borrowing was reserved for members only.²⁶ The concept spread quickly throughout pre-Revolutionary America, with libraries springing up in at least sixty-four locations throughout the colonies.²⁷ Franklin was obviously very gratified at the popularity that his Philadelphia library model had gained, waxing nostalgic in his *Autobiography*:

This was the mother of all the North American subscription libraries, now so numerous. It has become a great thing itself and [is] continually increasing. These libraries have improved the general

16. *Id.* at 5.

17. *Id.* at 28.

18. *Id.*

19. *Id.*

20. *Id.* at 29–33, 39.

21. *Id.* at 35.

22. *Id.*

23. *Id.* at 37.

24. *Id.* at 40.

25. Louis B. Wright, *Book, Libraries, and Learning*, in *READER IN AMERICAN LIBRARY HISTORY* 17, 27 (Michael H. Harris ed., 1971).

26. *Id.*

27. *Id.*

conversation of Americans, made the common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defence of their privileges.²⁸

Indeed, beyond the establishment of the American public library system, there is even more obvious evidence of sharing as an essential part of book culture within our lexicon. Cherished books are often “dog-eared,” where corners are bent for finding favorite passages time and again.²⁹ Popular books are “well-thumbed” by the book’s owner or any number of others to which the book passed.³⁰ More manifestations of the importance of sharing books are found within libraries themselves, such as the concept of the “circulation desk.”

B. *The E-Book: What Happens When Good Books Go Digital?*

Because sharing is a long-established facet of book culture, some aspects of e-books conflict with the way readers use printed books. It is helpful to explain the way e-books are used to better understand these conflicts.

Since the time personal computers made their way into homes in the 1980s, the computing industry heralded the arrival of the e-book.³¹ Online retailers such as Amazon.com, Inc. market e-books, which are formatted for compatibility with one of a number of e-book software programs.³² One criticism of e-books regarding software is that not every e-book is compatible with every e-book reader software package.³³ The most popular programs are Adobe Systems’s Advanced eBook Reader and Microsoft Reader.³⁴

As an example, a customer who purchases an e-book to use with Microsoft Reader goes through a number of steps. Upon purchase from an online retailer, the e-book comes equipped with one of three levels of copyright protection, which are specified according to the preferences of the publisher.³⁵ Current bestsellers come with the highest level of protection.³⁶

The utility of e-books begins to diverge from their printed counterparts, thanks to digital-rights management, a euphemism for the types of

28. *Id.* (quoting THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 86 (Max Farrand ed., 1949)).

29. Webster’s Dictionary defines the term “dog-ear” as a “turned-down corner of the page of a book.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 395 (1984).

30. Webster’s Dictionary defines the verb “thumb through” as “[to] browse rapidly through (the pages of a publication).” *Id.* at 1207.

31. Karlin Lillington, *The Writing’s on the Screen*, NEW SCIENTIST, Oct. 27, 2001, at 37.

32. Wade Roush, *Breaking Microsoft’s E-book Code*, MIT’S TECHNOLOGY REVIEW, Nov. 1, 2001, at 24.

33. *Id.* (stating that “access to owner-exclusive e-books is limited to the devices on which those copies of the software are installed”).

34. *See id.*

35. *Id.*

36. *Id.*

use restrictions found on digital intellectual property.³⁷ E-book users cannot make backup copies of their purchase, which means that the e-book is erased should the purchaser ever experience a hard-drive failure.³⁸ Purchasers cannot print pages or loan their e-books to friends.³⁹ Cut-and-paste functions for transferring text are disabled by reader software as well.⁴⁰ E-book customers generally cannot read their e-books on more than one device, such as a laptop computer or more portable handheld organizers and e-book readers, although some e-book software is being redesigned to permit users to read their e-books on as many as four different devices.⁴¹ E-books cannot be read aloud using other computer software, a function that critics have argued is an especially important potential use to the visually impaired.⁴² Commentators describe trying to use e-books in these ways as “run[ning] smack into the digital equivalent of an electrified fence.”⁴³

C. *The Collision with Fair Use and First Sale*

United States copyright law recognizes limitations on the exclusive rights given to copyright owners. These principal limitations are the doctrines of fair use and first sale.⁴⁴

Fair use allows the use of a copyright protected work “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.”⁴⁵ These uses are not the only authorized ones under “fair use.”⁴⁶ Four factors are considered in determining a fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁷

In turn, the first sale doctrine allows the owner of a copy of a work to sell or dispose of the copy without the authority of the copyright owner.⁴⁸

37. Bret A. Fausett, *DRM For the Forces of Good*, WEB TECHNIQUES, Nov. 1, 2001, at <http://www.newarchitectmag.com/archives/2001/11/legal/> (last visited Mar. 5, 2003).

38. See Roush, *supra* note 32, at 24.

39. *Id.*

40. *Brave New Battleground*, U.S. NEWS & WORLD REP., Sept. 10, 2001, at 14.

41. *Id.*

42. Electronic Frontier Foundation, *Frequently Asked Questions (and Answers) About the Dmitry Sklyarov & ElcomSoft Prosecution*, at http://www.eff.org/IP/DMCA/US_v_Elcomsoft/us_v_elcomsoft_faq.html (last modified Feb. 19, 2002).

43. See Roush, *supra* note 32, at 24.

44. 17 U.S.C. §§ 107, 109 (2000).

45. *Id.* § 107.

46. See *id.*

47. *Id.*

48. *Id.* § 109.

For example, the owner of a copy of a textbook may resell that book to a fellow student or even give the book away without infringing any of the copyright owner's rights.

Both fair use and first sale can be problematic in terms of the limitations that publishers place on e-books. Former fair uses of a printed work are prohibited if the work is in e-book form because of the restrictions digital-rights management schemes place on e-book functionality. In addition, first sale of an e-book is often impossible because, generally, the technology restricts e-book owners to reading their e-books on only one machine.⁴⁹ Typically, e-book owners cannot give their e-books away because the books are essentially shackled to the machine on which they were originally downloaded.⁵⁰

In the wake of the *Napster* litigation, copyright holders are even more interested in protecting as many of their rights as possible.⁵¹ To guard against a copyrighted work free-for-all that the *Napster* decision sought to stop, publishers turn to digital-rights management systems.⁵² Publishers do have cause to be concerned: the *Napster* case showed that due to the ease with which perfect digital copies can be made of copyrighted works, millions of users can trade thousands of files without one dime of royalty payments for the copyright holder.⁵³

Copyright law itself represents a weighing of the interests of a free flow of ideas benefiting the public against the rights of authors to profit from their work.⁵⁴ The consequences of favoring one side over the other can be severe. If authors enjoy too much copyright protection, the public loses access to valuable ideas as well as the freedom to incorporate these ideas in their own speech.⁵⁵ If copyright law fails to protect authors against unauthorized use of their work, creative individuals will lose the incentive to create because they cannot capture a monetary benefit from their labor.⁵⁶

Thus, an integral question surrounding copyright law in the context of digital-rights management is whether media companies are overzealously protecting the rights of the copyright holder while ignoring the rights of the end-user.⁵⁷ Commentators on e-book technology agree that

49. See *Brave New Battleground*, *supra* note 40, at 14.

50. See Ardito, *supra* note 7, at 24.

51. See *Brave New Battleground*, *supra* note 40, at 14. In *Napster*, a group of record companies successfully sued for copyright infringement. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022, 1024 (9th Cir. 2001). This claim was based on the method by which Napster enabled its users to share files of copyright-protected audio files. *Id.* at 1011–13.

52. Mike Godwin, *Napster for Novels?*, REASON, Jan. 2, 2002, at 61.

53. *Id.* (explaining that Napster allowed millions of users to trade copyrighted digital music over the Internet without paying royalties).

54. *Brave New Battleground*, *supra* note 40, at 14.

55. See generally Eldred v. Ashcroft, 123 S. Ct. 769 (2003); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001).

56. *Brave New Battleground*, *supra* note 40, at 14.

57. *Id.*

digital-rights management tools are necessary if e-books are to become a viable commercial medium; without copyright protection, literary works, as well as other copyrightable material, would easily become exploited and distributed without recourse via the Internet.⁵⁸

D. The E-Book Market: From Sizzle to Fizzle?

In the days before the “dot-bomb” economy took hold, the publishing industry touted e-books as “the next big thing.”⁵⁹ In fact, early predictions foretold that e-books could comprise ten percent of the book publishing market as early as 2005.⁶⁰ Oddly enough, Forrester Research published a more recent study predicting that by the same date, the e-book’s market share will make up one-sixth of the total book publishing market—the equivalent of \$7.8 billion.⁶¹ More conservative estimates, put forth by analysts at Accenture, predict the figure will be \$2.3 billion by 2005.⁶²

Early estimates were credible when viewed in light of Stephen King’s early success with online story marketing.⁶³ King’s venture into e-retailing began with a story available only online called “Riding the Bullet.”⁶⁴ The undertaking was wildly successful, attracting in excess of 400,000 downloads in forty-eight hours.⁶⁵ However, King’s next digital undertaking in the form of an electronic serial novel flopped.⁶⁶

From a merely pragmatic standpoint, readers say digital-rights management issues have seriously hampered e-book market growth.⁶⁷ E-book reading limited to a laptop computer is awkward at best: “It’s like having a cat perched on your lap on a hot summer’s day,” said Bill Hill, a researcher in Microsoft’s eBook Group.⁶⁸ Even if e-book customers elect to use a more portable handheld device, obstacles still exist. Batteries only last a few hours and the device’s small screens make reading text in bright sunlight very difficult.⁶⁹

Despite the recent economic downturn, Internet usage is projected to grow to record levels in the near future and intellectual property makes up twenty percent of total world trade.⁷⁰ Why have e-books not

58. Lillington, *supra* note 31, at 37–38.

59. Janet Forgive, *Facing a New Chapter: NetLibrary’s Future Hinges on Customers, Bankruptcy Court*, ROCKY MOUNTAIN NEWS, Dec. 17, 2001, at 1B.

60. See Godwin, *supra* note 52, at 61.

61. Lillington, *supra* note 31, at 37.

62. See *id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. See *id.*

68. *Id.*

69. *Id.*

70. Bob Shingleton, *Here Come ‘Browse and Mouse’ Books*, THE BOOKSELLER, Sept. 21, 2001, at 22.

ridden the wave of growth enjoyed by other digital media? Michael Holdsworth, business development director for Cambridge University Press, explained: “E-publishing is moving far more slowly than anyone expected. There are no clear business models emerging; the name of the game at present is to play along with every model that looks credible. . . . [T]here are huge challenges in file format, workflows and related areas, particularly rights.”⁷¹

Understandably, some industry analysts are not as high on e-books as they once were. Despite his prediction of \$7.8 billion in revenues for e-books by 2005, Forrester Research’s Daniel O’Brien expressed doubts for the format in the short term.⁷² “I think it’s going nowhere fast,” he said.⁷³ “The value proposition wasn’t well thought out.”⁷⁴ Industry insiders tend to agree. “It’s still kind of an esoteric, inside, early adopter kind of people who buys [sic] these things. None of us has sat down on a bus next to someone with a reading device,” said Richard Curtis, president of a New York literary agency and an online e-book publishing house.⁷⁵

However, there are still plenty of publishing pundits who believe that e-books are a sleeping giant. Former Random House CEO Alberto Vitale expressed this sentiment at the annual 2001 Frankfurt Book Fair.⁷⁶ “Last year we felt that the e-book would grow and flourish much faster than it has. But the fact remains that the new technologies are here to stay. The e-book industry is a vibrant one—it will not wither on the vine. Progress is unstoppable.”⁷⁷ Notably, Barnes & Noble Digital seems to have endorsed this apparent growth potential as it began offering its first full list of e-books in the fall of 2001, stating that “e-books have the potential to be the next form of mass market distribution.”⁷⁸

E. E-Book Hatred Gains a Poster Child: United States v. Sklyarov and the DMCA

Given the significant disapproval that e-book publishing received in its brief but tumultuous past, an event in the summer of 2001 gave numerous groups the ammunition they had been waiting for. Few could have guessed that a simple presentation would provoke a firestorm of worldwide criticism.

Twenty-six-year-old Dmitry Sklyarov was leaving Las Vegas on July 16, 2001, when Federal Bureau of Investigation (FBI) agents appre-

71. *Id.*

72. See Aguilar, *supra* note 6, at 1A.

73. *Id.*

74. *Id.*

75. *Id.*

76. Philip Jones, *Determined Mood Prevails in Digital Hall*, THE BOOKSELLER, Oct. 19, 2001, at 13.

77. *Id.*

78. Michael Calder, *Digital Feast and Famine in the U.S.*, THE BOOKSELLER, Oct. 26, 2001, at 12.

hended him in the parking lot of his hotel and took him into federal custody.⁷⁹ The retiring Muscovite Ph.D. candidate had been invited to speak at DEFCON 7, an annual conference some regard as a convention for hackers as well as computer security professionals.⁸⁰ As a cryptography expert, Sklyarov intended to speak about the development of the Advanced eBook Processor, a program designed to allow users to circumvent the digital copyright protection devices within Adobe Systems, Inc.'s eBook Reader software.⁸¹

While a student in Moscow, Sklyarov also worked for Elcomsoft Co. Ltd., a Russian software company with a primary clientele of law enforcement and security departments, including the FBI and U.S. military.⁸² Elcomsoft's Advanced eBook Processor removed the restrictions that Adobe's eBook Reader placed on digital manipulation of e-books.⁸³ Specifically, by using Sklyarov's program, customers who purchased and downloaded e-books either to their personal computers or portable devices possessed greater capabilities than the limited uses permitted by eBook Reader.⁸⁴ These increased capabilities included the purchaser's ability to "copy, distribute, print, or have the text read audibly by the computer."⁸⁵ E-book customers who used Sklyarov's software in conjunction with eBook Reader essentially "unlocked" digital protections: Sklyarov's software enabled users to make copies of their e-book, e-mail files to friends, or free the text to be read aloud by other computer programs.⁸⁶ While all of these activities can be illegal in certain circumstances, they can also arguably fall under the protection afforded individual users under the fair use doctrine of the Copyright Act.⁸⁷

Federal prosecutors charged Sklyarov with violating the antitrafficking provision of 17 U.S.C. § 1201(b)(1)(A).⁸⁸ This law prohibits the manufacturing, importing, offering to the public, providing, or otherwise trafficking in "any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a

79. Sabrina Tavernise, *Russians Deem Arrest Insult to Their Industry*, N.Y. TIMES, Aug. 30, 2001, at C3.

80. *Id.*

81. *Id.*

82. Carrie Kirby, *Sklyarov Denies He's a Hacker*, S.F. CHRON., Aug. 31, 2001, at B1.

83. Indictment of Dmitry Sklyarov at 2, United States v. Sklyarov (No. CR 01-20138), available at http://www.eff.org/IP/DMCA/US_v_Elcomsoft/20010828_sklyarov_elcomsoft_indictment.pdf (Aug. 28, 2001).

84. See Kirby, *supra* note 82, at B1.

85. See Indictment of Dmitry Sklyarov at 2.

86. See Kirby, *supra* note 82, at B1.

87. 17 U.S.C. § 107 (2000); see also John E. Ottaviani, *DMCA Faces Free Speech Challenges*, NAT'L L.J., Oct. 22, 2001, at C1 ("Before the DMCA was enacted, manufacturers of devices that permitted one to copy works generally considered themselves protected by the fair use provisions of the Copyright Act so long as their devices had substantial noninfringing uses.").

88. 17 U.S.C. § 1201(b)(1)(A).

portion thereof.”⁸⁹ Prosecutors also charged him with aiding and abetting the trafficking of circumvention technology under 18 U.S.C. § 2, which provides that any person who aids, abets, counsels, commands, induces, or procures the commission of an offense against the United States or “willfully causes an act to be done” by himself or another person which would be an offense against the United States is punishable as a principal offender.⁹⁰

Interestingly, the government did not allege that Sklyarov actually engaged in copyright infringement; in fact, his actions in writing the e-book processing software violated no Russian or U.S. copyright law.⁹¹ This contradiction is one of the most controversial nuances of the DCMA—the statute does not require actual proof of copyright infringement for criminal liability to attach.⁹²

Sklyarov was in custody from July 17, 2001, to August 6, 2001, when he was released on a \$50,000 bail.⁹³ His case was originally litigated by the Electronic Frontier Foundation (EFF), a not-for-profit organization based in San Francisco that promotes technology-related civil liberty issues.⁹⁴ As the case progressed, noted litigator John Kecker took on the Sklyarov case pro bono.⁹⁵

On December 13, 2001, Kecker negotiated a pretrial diversion agreement with the U.S. Attorney for the Northern District of California.⁹⁶ This agreement allowed Sklyarov to return home to Moscow but required that he check in with the U.S. Attorney’s office once a month.⁹⁷ As part of the agreement, Sklyarov also agreed to give testimony that would potentially aid the U.S. government in prosecuting Sklyarov’s employer, Elcomsoft.⁹⁸ On December 17, 2002, a federal jury acquitted Elcomsoft of charges federal prosecutors brought against it under the DMCA.⁹⁹

The high-profile events surrounding Sklyarov’s arrest and subsequent August 28, 2001, indictment provoked considerable outrage among

89. *Id.*

90. 18 U.S.C. § 2 (2000).

91. Patti Waldmeir, *Locking Up the Lock-Pickers: A Young Russian’s Arrest Has Raised Questions About an Experiment in Protecting Copyright Online*, FIN. TIMES (London), Sept. 6, 2001, at 14.

92. *Attack of the Copyright Cops*, SAN JOSE MERCURY NEWS, Sept. 1, 2001, available at LEXIS, News Group File.

93. See Kirby, *supra* note 82, at B1.

94. See Electronic Frontier Foundation, *Statement on the Arrest of Dmitry Sklyarov*, available at http://www.eff.org/IP/DMCA/US_v_Elcomsoft/20010718_eff_sklyarov_statement.html (July 18, 2001) (statement of EFF Executive Director Shari Steele).

95. Shannon Lafferty, *Kecker Takes on Russian Programmer*, THE RECORDER, Sept. 28, 2001, at 1.

96. Sklyarov Diversion Agreement, *United States v. Sklyarov* (No. CR 01-20138 RMW), available at http://www.eff.org/IP/DMCA/US_v_Elcomsoft/20011213_sklyarov_agreement.pdf (Dec. 13, 2001).

97. *Id.* at 6.

98. *Id.*

99. Healey, *supra* note 14, at C1.

many interest groups.¹⁰⁰ Protesters organized, staged a series of events across the world in support of Sklyarov, and created a web site (www.freesklyarov.org) to support and provide updates on his health, mood, and the state of his legal situation on a daily basis.¹⁰¹ The online community launched a boycott of Adobe products.¹⁰²

Most interesting about the debate surrounding *United States v. Sklyarov* were the players. The motley crew of vocal protesters included prominent law professors, civil libertarians, members of Congress, online rights groups, hackers, e-book publishers, students, foreign governments, journalists, the web community, foreign media, and librarians.¹⁰³ Not only were Sklyarov's backers numerous and diverse, but they were vocal. One particularly riled pundit referred to both Adobe and the DMCA's backers as "pinheads," enforcers of the DMCA as "pack[s] of jackals," particular types of digital-rights management as "cheeseball," and accused Adobe of "greed, incompetence, and pure wicked behavior," all in the same article.¹⁰⁴

Sklyarov was a convenient martyr on which to pin a myriad of arguments, not the least of which was the consuming public's demonstrated distaste for e-books. The story of the arrest itself was compelling. In surprising candor even by British media standards, the Financial Times of London spun the story in no doubt the same way many other sympathizers viewed the incident: "feckless young Russian computer geek jailed for violating evil American copyright law."¹⁰⁵ Sklyarov also received public sympathy as "a Slavic version of Hugh Grant."¹⁰⁶

After observing the outpouring of support for Sklyarov, EFF lawyers met with Adobe Systems, whose request for government action originally resulted in the FBI's arrest of Sklyarov.¹⁰⁷ In a terse and cryptic press release issued after the meeting, Adobe withdrew its support for all criminal complaints.¹⁰⁸ Speculators have observed that Adobe's compliance may have been partially motivated by the boycott that Sklyarov supporters organized and the black cloud of attacks by an enraged hacker community.¹⁰⁹

100. See, e.g., Justin Ware, *University of Minnesota Grad Students Rally Behind Russian Jailed in United States*, MINNESOTA DAILY, Sept. 6, 2001.

101. *Free(d) Dmitry Sklyarov!*, at <http://www.freesklyarov.org> (last visited Sept. 23, 2002).

102. Paul Somerson, *Busted*, ZIFF DAVIS SMART BUS. FOR THE NEW ECON., Oct. 1, 2001, at 31.

103. *Id.*

104. *Id.*

105. Waldmeir, *supra* note 91.

106. *Id.*

107. *Adobe Says It Has No Responsibility For Dmitry*, THE INDUSTRY STANDARD, Sept. 4, 2001, available at <http://www.thestandard.com/article/0,1902,28875,00.html>.

108. *Id.*

109. See Roush, *supra* note 32, at 24.

F. A Renewed Debate of the DMCA

Sklyarov's arrest launched a new wave of commentary regarding the DMCA.¹¹⁰ Enacted by Congress in 1988, the DMCA was promoted by its proponents as necessary to bring the United States' domestic law in compliance with the World Intellectual Property Organization (WIPO) Copyright Treaty.¹¹¹ However, scholars questioned whether the anticircumvention provisions contained in the DMCA were necessary at all for the United States to comply with its treaty obligations.¹¹² The language of the Treaty only requires signatories to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights."¹¹³

Prior to the *Sklyarov* and *Elcomsoft* cases, the only lawsuits arising under the DMCA were civil actions.¹¹⁴ Perhaps the most noted of these concerned DeCSS, a circumvention tool designed to allow users of Linux computer operating systems to play DVDs on their computers without industry-approved, "authorized" device drivers.¹¹⁵

One of the most closely followed DMCA cases was an action brought by Professor Ed Felten, a computer scientist at Princeton University who accepted the recording industry's challenge to find weaknesses within current technology measures protecting music.¹¹⁶ Instead of accepting the contest's cash prize and requisite confidentiality agreement, Professor Felten and his research colleagues decided to present a paper on their work at the Fourth International Information Hiding Workshop.¹¹⁷ Very shortly before the presentation, Felten received a letter from the Recording Industry Association of America (RIAA) and the Secure Digital Music Initiative (SDMI)—the contest's sponsor—threatening the researchers with civil litigation under the DMCA should Felten present the paper.¹¹⁸ As a result of these threats, Felten and his colleagues decided to withdraw from the conference.¹¹⁹

Felten sued the RIAA, SDMI Foundation, and the Department of Justice in June 2001, and in early October, the Government filed a mo-

110. See Heather Green, *Why the E-Free-Speech Debate Matters*, BUS. WK. ONLINE, Sept. 12, 2001, at http://www.businessweek.com/technology/content/sep2001/tc20010912_1569.htm.

111. See Ottaviani, *supra* note 87, at C1.

112. See *id.*

113. World Intellectual Property Organization Copyright Treaty art. 11 (Dec. 20, 1996), available at <http://www.wipo.org/eng/diplconf/distrib/94dc.htm>.

114. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 437–38 (2d Cir. 2001).

115. *Id.*

116. Barbara Simons, *The ACM Declaration in Felten v. RIAA*, 44 COMM. OF THE ACM 23, 23 (2001).

117. *Id.* at 24.

118. *Id.*

119. *Id.*

tion to dismiss.¹²⁰ The Government argued that Felten's case was "not ripe": his claims that the DMCA stifled his research into breaking copyright protection technologies were unwarranted under the DMCA so far, and his research would continue to survive based on the DMCA's exception that criminal penalties do not apply to educational institutions.¹²¹ On November 28, 2001, a federal judge found Felton had no case or controversy.¹²²

Among the long list of problems with the DMCA that critics suggest is the problem Felten encountered—it stifles legitimate cryptographic research. A prominent Dutch programmer and cryptographer refused to publish his research, for example, because he travels often to the United States and fears fates similar to either Sklyarov or Felten.¹²³ In an unusual move reminiscent of warnings issued by the U.S. State Department, the Russian government advised its programmers to exercise caution when traveling in the United States for fear of the DMCA's long-arm effects.¹²⁴

G. Libraries and the DMCA

The American Library Association (ALA) was founded in 1876 and today remains a well-organized professional association with thousands of members.¹²⁵ The association has a number of specialized branches, including the ALA Office for Information Technology.¹²⁶ This Office expressed its concern that the DMCA has a "real and potential[ly] adverse impact . . . on the public's ability to make non-infringing use of copyrighted works."¹²⁷

The ALA asked a number of scholars to speak on its behalf in the Copyright Office's DMCA hearings.¹²⁸ Among them was Siva Vaidyanathan, an academic who has written on copyright law and expressed the ALA's concerns succinctly:

It's no secret that some big publishers have been waging commercial and legislative war on libraries for some years now. These publishers see every use of interlibrary loan as a lost sale. And the

120. Scarlet Pruitt, *Ashcroft to Academics: DMCA Is Not Your Problem*, INFOWORLD, Oct. 11, 2001, available at <http://www.infoworld.com/articles/hn/xml/01/10/11/011011hndmca.xml>.

121. *Id.*

122. Transcript of Motions, *Felten v. Recording Indus.*, No. 01-CV-2669 (D. N.J. Nov. 28, 2001), available at http://www.eff.org/IP/DMCA/Felten_v_RIAA/2011128_hearing_transcript.pdf.

123. Jennifer Lee, *Compressed Data: Travel Advisory for Russian Programmers*, N.Y. TIMES, Sept. 10, 2001, at C4.

124. *Id.*

125. DENNIS THOMISON, *A HISTORY OF THE AMERICAN LIBRARY ASSOCIATION* xi (1978).

126. See American Library Association, *ALA Offices Menu Page*, at http://www.ala.org/alaorg/offices_home.html (2002).

127. American Library Association, *ALA Office for Information Technology Policy*, at <http://www.ala.org/oitp/copyr/anticir.html> (last modified Aug. 31, 2000).

128. See Damien Cave, *Copywrong?*, at http://dir.salon.com/tech/feature/2001/08/31/dmca_report/index.html (Aug. 31, 2001).

DMCA is a big ICBM in that war. These publishers would like nothing better than to be able to dictate the terms of use in libraries. And by moving all their content to digital streams, encrypted, tethered to specific devices and controlled by restrictive contracts, they can effectively squeeze libraries to death.¹²⁹

This theme of attack is consistent with the ALA's own mission, embodied in its "The Freedom to Read" statement:

The freedom to read is essential to our democracy. It is continuously under attack. Private groups and public authorities in various parts of the country are working to remove or limit access to reading materials

. . . .
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Now as always in our history, reading is among our greatest freedoms. The freedom to read and write is almost the only means for making generally available ideas or manners of expression that can initially command only a small audience.¹³⁰

The ALA's statement contains seven propositions, including the reason that the organization is so interested in voicing its opinions about the DMCA: "It is the responsibility of publishers and librarians, as guardians of the people's freedom to read, to contest encroachments upon that freedom by individuals or groups seeking to impose their own standards or tastes upon the community at large."¹³¹ The question of whether the "encroachment" of e-books and the public's "freedom to read" can coexist remains unanswered.

III. ANALYSIS

Perhaps the best way to gauge both the current allure and future prospects of the e-book as applied to lending libraries is to consider the opinions of librarians. Not only are librarians able to shed light on their experience with the e-book medium, they are also well positioned to decide whether e-books are ever capable of meeting the needs of the reading public.

A. *The Data Set*

To determine how e-books are being received in libraries, as well as their potential to gain market share among published works, I conducted research via telephone interviews and an e-mail survey of various types

129. *Id.*

130. American Library Association, *The Freedom to Read Statement*, available at <http://www.ala.org/alaorg/oif/freeread.html> (last modified Aug. 19, 2002).

131. *Id.*

of libraries. The subject librarians can be divided into two groups: twelve public librarians, some of whom serve inner-city populations, and six law librarians.

Public librarians were asked a series of five questions:

1. In what ways does your library make use of e-books?
2. Are e-books something you would plan on expanding upon for your patrons? Why or why not?
3. Have you encountered any problems offering e-books to the public? If so, what were they?
4. Based on your experience, do e-books have a viable chance of becoming more popular with the reading public? Why or why not?
5. Does your library serve an inner city area? If so, do these patrons have any problems accessing e-books?

Law librarians were asked a slightly different set of questions, based on the fact that there are currently very few law-related books available in e-book format:

1. Does your library offer any titles on e-book?
2. Do you see the potential for any legal books to be available in e-book format?
3. How would e-books and the digital-rights management systems that accompany them impact access to legal information?
4. Based on your experience, do you think e-books have a viable chance of becoming more popular with the reading public? Why or why not?
5. Does your library offer its services to the community at large (i.e., local practitioners, pro se clients)?

B. Survey Results

Concerning the first question posed to both public and law librarians, libraries fall into four basic categories. These are: (1) libraries that do not offer e-books; (2) libraries that have independently acquired e-book titles in their collections; (3) libraries that offer access to larger, off-site collections of e-books (such as netLibrary¹³²); and (4) those that offer both their own e-book acquisitions and access to off-site collections.¹³³

132. NetLibrary is a company that provides online e-books, to members, including libraries. See netLibrary, *About Us*, at http://www.netlibrary.com/about_us/company_info/index.asp (2003).

133. See E-mail from Celeste Choate, South Branch Manager, Clinton-Macomb Public Library (Clinton Township, Mich.), to Claire E. Craig (Mar. 29, 2002, 15:09 CST) (on file with author); E-mail from Cynthia Newton Cobb, Director, Lee County Library System (Lee County, Fla.), to Claire E. Craig (Apr. 2, 2002, 15:15 CST) (on file with author); Telephone Interview with Michael Daw, Electronic Formats Librarian, Golden Gate University School of Law Library (Apr. 3, 2002); Telephone Interview with Roberto Estevez, Chief of Information Resource Management, San Francisco Public Library (Mar. 15, 2002); Telephone Interview with Nina Freed, Head of General Reference, Cleveland Public Library (Mar. 14, 2002); E-mail from Harriet Henderson, Director, Montgomery County Department of Public Libraries (Montgomery County, Md.), to Claire E. Craig (Apr. 2, 2002, 14:14 CST) (on file with author); E-mail from Corinne Hill, Denton Public Library

1. *E-book Offerings*

Only three of the eighteen libraries surveyed do not offer their patrons any materials on e-book.¹³⁴ Judith A. Meadows, Director and State Law Librarian of Montana, offered the following reason: “We’ve never been asked for any titles on e-book. We are a very customer-driven library. When our customers start asking for it, we’ll start looking into it.”¹³⁵

a. E-books in Law Libraries

State law libraries may be at the far end of the spectrum in terms of how slow they are to adopt e-book technology for several reasons. First, not many law-related titles have made their way onto e-book format. “Issues related to e-books haven’t hit law libraries yet. Right now, e-books are mostly popular fiction.”¹³⁶ However, a limited number of governmental publications are available via e-book, making the issues surrounding them increasingly pertinent to academic libraries.¹³⁷

Furthermore, the fact that law libraries are just entering the e-book realm makes them a fair barometer for judging how e-books and their accompanying digital-rights management systems will assimilate—law libraries are a climate where fair use under the Copyright Act is read with incredible breadth.¹³⁸ “Publishers don’t understand that we’re in the business of giving the store away,” said Michael Daw, Electronic Formats

(Denton, Tex.), to Claire E. Craig (Apr. 2, 2002, 12:50 CST) (on file with author); Interview with Janis Johnston, Director, Albert E. Jenner Memorial Law Library, University of Illinois College of Law (Jan. 24, 2002); Telephone Interview with Catherine L. Kerr, Associate Director for Library Services and Assistant Professor of Law, Pepperdine University Law Library (Apr. 3, 2002); E-mail from Mabel Anne Kincheloe, Materials Management Director, Gwinnett County Public Library (Lawrenceville, Ga.), to Claire E. Craig (Apr. 1, 2002, 13:41 CST) (on file with author); Telephone Interview with Lawrence Tobe Liebert, Director of Public Services, University of Texas Jamail Center for Legal Research (Apr. 3, 2002); E-mail from Ross McLachlan, Library Services Administrator, Phoenix Public Library, to Claire E. Craig (Apr. 4, 2002, 17:39 CST) (on file with author); Telephone Interview with Judith A. Meadows, Director and State Law Librarian of Montana (Apr. 2, 2002); E-mail from Donna Nicely, Director, Nashville Public Library, to Claire E. Craig (Apr. 4, 2002, 09:38 CST) (on file with author); Telephone Interview with Nicky Stanke, Director, Stockton-San Joaquin County Public Library (Mar. 14, 2002); E-mail from Jerry Thrasher, Director, Cumberland County Public Library (Fayetteville, N.C.), to Claire E. Craig (Apr. 2, 2002, 11:37 CST) (on file with author); Telephone Interview with Lorna Truck, Deputy Director, Public Library of Des Moines (Mar. 14, 2002); Telephone Interview with Jeffrey Weber, Branch Director, Casa View and Oak Lawn Branches of the Dallas Public Library (Mar. 23, 2002); Telephone Interview with Julia Wentz, Associate Director, Loyola University of Chicago School of Law Library (Apr. 3, 2002).

134. See Telephone Interview with Judith A. Meadows, *supra* note 133; Telephone Interview with Nicky Stanke, *supra* note 133; Telephone Interview with Lorna Truck, *supra* note 133.

135. Telephone Interview with Judith A. Meadows, *supra* note 133.

136. Interview with Janis Johnston, *supra* note 133.

137. *Id.*

138. “[Digital rights management systems] limit your use in order to protect content. But in law, precedent is everything. We have to get our hands on everything in law library-land, and we have a very generous reading of fair use.” Telephone Interview with Michael Daw, *supra* note 133.

Librarian, Golden Gate University School of Law Library.¹³⁹ “Lawyers cite to everything because we work on precedent. We need to cut and paste.”¹⁴⁰

The second reason offered for the absence of e-books in law libraries is that electronic legal research has significant disadvantages in addition to rewards, as Janis Johnston, Director of the Albert E. Jenner Memorial Law Library at the University of Illinois College of Law, explained:

The ideal for electronic information in libraries is not a question of either/or. There are extensive merits to electronic research. A good example is the ease of Shepardizing electronically. But, electronic law books also can pose a bad research hazard. It can be very misleading to use hierarchically structured text like the U.S. Code electronically because just seeing a fragment of it on a computer screen can make it appear out of context.¹⁴¹

Third, many legal information seekers simply prefer paper.¹⁴² Interestingly, several law librarians commented on the seeming ease with which e-book electronic search functions would match the needs of those searching for legal information.¹⁴³ However, no one predicts a completely digitized law library. “A major market for legal publishing will still be on paper. It’s no coincidence that Lexis was started by a paper company (Mead Data Systems). The library fifty years from today will look a lot like the one we’re in today,” said Daw.¹⁴⁴

b. E-books in Public Libraries

Public libraries seem more willing to experiment with incorporating e-books into their collections. Only three of ten public libraries surveyed that offer their patrons e-books provide access to a large, off-site e-book service by itself.¹⁴⁵ NetLibrary is one popular e-book service that these libraries offer.¹⁴⁶ This enterprise has undergone recent changes and garnered lukewarm reception with survey respondents.¹⁴⁷

139. *Id.*

140. *Id.*

141. Interview with Janis Johnston, *supra* note 133.

142. Telephone Interview with Lawrence Tobe Liebert, *supra* note 133.

143. *See id.*; Telephone Interview with Judith A. Meadows, *supra* note 133; Telephone Interview with Julia Wentz, *supra* note 133.

144. Telephone Interview with Michael Daw, *supra* note 133.

145. *See* E-mail from Cynthia Newton Cobb, *supra* note 133; Telephone Interview with Nina Freed, *supra* note 133; E-mail from Jerry Thrasher, *supra* note 133.

146. E-mail from Celeste Choate, *supra* note 133; Telephone Interview with Nina Freed, *supra* note 133; E-mail from Mabel Anne Kincheloe, *supra* note 133.

147. *See* Forgive, *supra* note 59, at 1B. “A professor had great problems using an e-book she wanted from netLibrary, and I tried to download it for her. It was clunky, had goofy paging, hard to navigate, slow, and we couldn’t cut and paste in chunks.” Telephone Interview with Michael Daw, *supra* note 133.

Additionally, some of these libraries use public response to netLibrary materials to gauge the need to pursue e-book acquisition overall. “According to the statistics, those titles available through netLibrary on e-book aren’t being used very much at all,” said Nina Freed, Head of General Reference at the Cleveland Public Library.¹⁴⁸ “We would not expand on our e-book offerings based on what we’ve seen so far.”¹⁴⁹

Conversely, some libraries have experimented with acquiring and offering e-book titles themselves.¹⁵⁰ In spring 2001, the Dallas Public Library conducted an experiment in its Oak Lawn Branch.¹⁵¹ “We bought four RCA e-book readers and loaded them with a variety of nonfiction, biographies, business titles, history, general interest, fiction, mystery and romance,” said Jeffrey Weber, Branch Director of the Casa View and Oak Lawn Branches of the Dallas Public Library.¹⁵² The e-book reader was available for checkout on the premises.¹⁵³ As explained previously, libraries that acquire e-book titles themselves must provide patrons access to either reading terminals or portable e-book readers with pre-loaded e-book titles.¹⁵⁴

“Initially, it was our intent to expand the project system-wide,” said Corinne Hill of the Denton Public Library (Denton, Texas), who oversaw the pilot while working at the Oak Lawn Branch.¹⁵⁵

We purchased the Readers for the pilot project so that we could explore the technology. It was never our intent to manage equipment—we envisioned managing downloads. But at the end of the first year, it became apparent that copyright issues would prevent us from managing downloads. Therefore, the project was not expanded system-wide, but was maintained at the Oak Lawn Branch.¹⁵⁶

According to Weber, the pilot was not successful.¹⁵⁷ A problem with the technology occurred when the e-book reader units needed repair.¹⁵⁸ The logistics of checking out e-book readers to the public was a challenge and possible deterrent as well.¹⁵⁹ “We haven’t had an e-book reader checked out recently, but that could be attributed to our check-

148. Telephone Interview with Nina Freed, *supra* note 133.

149. *Id.*

150. See E-mail from Celeste Choate, *supra* note 133; Telephone Interview with Roberto Estevez, *supra* note 133; E-mail from Harriet Henderson, *supra* note 133; E-mail from Mabel Anne Kincheloe, *supra* note 133; E-mail from Donna Nicely, *supra* note 133; Telephone Interview with Jeffrey Weber, *supra* note 133.

151. E-mail from Corinne Hill, *supra* note 133; Telephone Interview with Jeffrey Weber, *supra* note 133.

152. Telephone Interview with Jeffrey Weber, *supra* note 133.

153. *Id.*

154. See *supra* notes 49–50 and accompanying text.

155. E-mail from Corinne Hill, *supra* note 133.

156. *Id.*

157. Telephone Interview with Jeffrey Weber, *supra* note 133.

158. *Id.*

159. *Id.*

out policy: e-book readers can be checked out for two weeks with no renewal, and there's a \$300 replacement cost if something should happen to them."¹⁶⁰

c. E-book Technology Limits Popularity

Another general theme behind most librarians' pessimistic outlook for e-books within their libraries is the limit of current technology. The surveyed librarians raised several different issues in this regard.

First, respondents consistently mentioned that text either on computer screens or smaller e-book reader devices is difficult to read.¹⁶¹ "E-books wouldn't add value to any book being read for aesthetic experience only, any linear book," said Nicky Stanke, Director of the Stockton-San Joaquin County Public Library.¹⁶² The aesthetic aspect of book reading is important to a number of librarians.¹⁶³ "I still think that people prefer to hold the darn book in their hands," said Meadows.¹⁶⁴ The time-tested "bathtub-beach test," which e-books in their current form clearly fail, is also important.¹⁶⁵ Not only is it inadvisable to use electronic appliances near water, but sunlight that hits an e-book reader at just the right angle renders its LCD screen completely unreadable.¹⁶⁶ "People who are in love with books don't love e-books. People who love e-books love the technology," said Freed.¹⁶⁷

Second, some libraries that have purchased e-book readers for their patrons find administration difficult.¹⁶⁸ "Circulating them is a hassle," said Celeste Choate, South Branch Manager of the Clinton-Macomb Public Library (Clinton Township, MI).¹⁶⁹ Among the numerous "hassles" is the fact that one-fourth of her library's e-book readers "crash[ed] and die[d]" in the past eighteen months.¹⁷⁰ Patrons sometimes lose the readers and the library must bill those patrons for the replacement

160. *Id.*

161. Four of twelve public librarians mentioned readability concerns as a problem with e-books. See E-mail from Celeste Choate, *supra* note 133; Telephone Interview with Nina Freed, *supra* note 133; Telephone Interview with Nicky Stanke, *supra* note 133; Telephone Interview with Jeffrey Weber, *supra* note 133. More interestingly, all of the six law librarians interviewed commented on readability factors impacting e-books' popularity and potential for future growth. See Telephone Interview with Michael Daw, *supra* note 133; Interview with Janis Johnston, *supra* note 133; Telephone Interview with Catherine L. Kerr, *supra* note 133; Telephone Interview with Lawrence Tobe Liebert, *supra* note 133; Telephone Interview with Judith A. Meadows, *supra* note 133; Telephone Interview with Julia Wentz, *supra* note 133.

162. Telephone Interview with Nicky Stanke, *supra* note 133.

163. See Telephone Interview with Roberto Estevez, *supra* note 133; Telephone Interview with Nina Freed, *supra* note 133; Telephone Interview with Judith A. Meadows, *supra* note 133.

164. Telephone Interview with Judith A. Meadows, *supra* note 133.

165. Telephone Interview with Roberto Estevez, *supra* note 133.

166. *Id.*

167. Telephone Interview with Nina Freed, *supra* note 133.

168. See E-mail from Celeste Choate, *supra* note 133; Telephone Interview with Jeffrey Weber, *supra* note 133.

169. E-mail from Celeste Choate, *supra* note 133.

170. *Id.*

cost.¹⁷¹ It is also inconvenient to show customers how to use the readers, as well as to review the library's rules and regulations sheets for e-book reader checkouts.¹⁷² The Dallas Public Library also encountered logistical problems with their e-book readers.¹⁷³ "I have one here in my office that's dead," Weber said.¹⁷⁴ "The staff tells me they're not terribly reliable."¹⁷⁵

The third problem is created by different e-book platforms and software. Four of the twelve public libraries surveyed noted that the lack of a standardized e-book format compatible with all types of e-book readers was troubling.¹⁷⁶ Furthermore, both of the public libraries that do not currently offer e-books to their patrons cited the lack of a standardized e-book format as a reason why they have not pursued e-book acquisition.¹⁷⁷ The issues of downloading and uploading are especially relevant to public libraries because the lack of a standardized e-book format makes managing e-book collections particularly difficult.¹⁷⁸ Regarding e-book reading programs, one law librarian and one public librarian independently used the word "clunky" to describe their experience with using e-book software.¹⁷⁹ Some survey respondents drew the connection between this perceived "clunkiness" and the digital-rights management systems that impede e-book functionality.¹⁸⁰ "Printing from netLibrary is purposefully made pretty difficult," said Tobe Liebert, Director of Public Services at the University of Texas Jamail Center for Legal Research.¹⁸¹ Related problems of cutting and pasting also exist, as discussed previously.¹⁸² "I think the restrictions on using e-books are a big bummer," said Catherine L. Kerr, Associate Director for Library Services and Assistant Professor of Law at Pepperdine University Law Library.¹⁸³ "When I first looked at an e-book, I wondered what it could be useful for."¹⁸⁴

Fourth, the e-book reader's initial expense is a problem. Half of the surveyed public libraries cited the associated costs of offering e-books to

171. *Id.*

172. *Id.*

173. Telephone Interview with Jeffrey Weber, *supra* note 133.

174. *Id.*

175. *Id.*

176. See Telephone Interview with Roberto Estevez, *supra* note 133; E-mail from Harriet Henderson, *supra* note 133; Telephone Interview with Nicky Stanke, *supra* note 133; Telephone Interview with Lorna Truck, *supra* note 133.

177. See Telephone Interview with Nicky Stanke, *supra* note 133; Telephone Interview with Lorna Truck, *supra* note 133.

178. Telephone Interview with Lorna Truck, *supra* note 133.

179. See Telephone Interview with Michael Daw, *supra* note 133; Telephone Interview with Roberto Estevez, *supra* note 133.

180. *E.g.*, Telephone Interview with Lawrence Tobe Liebert, *supra* note 133.

181. *Id.*

182. See Forgive, *supra* note 59, at 1B.

183. Telephone Interview with Catherine L. Kerr, *supra* note 133.

184. *Id.*

the public as an impediment to their use in the present and future.¹⁸⁵ “We would like to [expand our e-book offerings], but we do not have sufficient funding to initiate the service of [hand-held devices],” said Jerry Thrasher, Director of the Cumberland County Public Library (Fayetteville, N.C.).¹⁸⁶ “We have it on a ‘wish list’ for private donor funding,” but there have been no takers to date.¹⁸⁷ On the receiving end of e-book lending, two public librarians mentioned that the high cost of e-book reader replacement makes potential borrowers wary of checking out e-book readers to begin with.¹⁸⁸

d. Issues of Access

Survey respondents mentioned several e-book issues related to the public’s ability to access library information. These include the learning curve of technology and the trade-off between choosing to offer titles in e-book instead of print.¹⁸⁹

Daw offered an example of the learning curve required by new technology when his library tried to shift from a traditionally paper source to the same information on CD-ROM:

We wound up throwing out those CDs because it created such an uproar among the people who knew exactly where to find what they needed on paper. You can’t grab e-book information easily, photocopy it, or print it. There is major time involved in learning new technology, and lawyers aren’t especially tolerant people.¹⁹⁰

In addition, older individuals are not predisposed to using e-books overall according to Weber.¹⁹¹

If titles were made available on e-book, libraries with limited resources would be forced to choose between offering patrons an e-book or a paper copy of the same text.¹⁹² “If we pay for a database with access to legal e-books, we probably can’t afford a print version,” said Meadows.¹⁹³ “Our customers range from ages 15 to 85. A lot of them prefer legal materials on paper. I worry about that because we serve a lot of pro se clients.”¹⁹⁴ Meadows also noted the problem of offering sufficient

185. See E-mail from Celeste Choate, *supra* note 133; E-mail from Harriet Henderson, *supra* note 133; E-mail from Mabel Anne Kincheloe, *supra* note 133; E-mail from Jerry Thrasher, *supra* note 133; Telephone Interview with Lorna Truck, *supra* note 133; Telephone Interview with Jeffrey Weber, *supra* note 133.

186. E-mail from Jerry Thrasher, *supra* note 133.

187. *Id.*

188. See E-mail from Celeste Choate, *supra* note 133; Telephone Interview with Jeffrey Weber, *supra* note 133.

189. Telephone Interview with Michael Daw, *supra* note 133; Telephone Interview with Judith A. Meadows, *supra* note 133; Telephone Interview with Jeffrey Weber, *supra* note 133.

190. Telephone Interview with Michael Daw, *supra* note 133.

191. Telephone Interview with Jeffrey Weber, *supra* note 133.

192. Telephone Interview with Judith A. Meadows, *supra* note 133.

193. *Id.*

194. *Id.*

computer terminals if e-books continue to be bound to specific computers.¹⁹⁵

Once again, digital-rights management systems for e-book technology have a great effect on library offerings, said Liebert.¹⁹⁶ “It certainly restricts impact greatly from a library’s point of view. It would limit use to the public when you go to licensed content. It limits our ability to offer services to the public significantly.”¹⁹⁷

A surprising result of the survey relates to the phrase “digital divide,” which was coined by the U.S. Department of Commerce to describe the technology knowledge gap between those with economic resources and those without such resources.¹⁹⁸ Of the eleven public libraries that serve inner-city or low-income areas, seven do not show a link between socioeconomic status and the ability to fully utilize technology.¹⁹⁹

We do serve areas of the county with new immigrants. They are big users of the Internet, emailing back home. While they cannot afford to own a computer, they seem to have little trouble using e-mail, so I think they catch on to technology as quickly as anyone else if a language barrier does not get in the way. Fortunately, one feature of e-books is that you can select the language on some of them.²⁰⁰

One reiterated theme among these librarians was that problems with technology among the less privileged are more linked to overall literacy than with technology in particular.²⁰¹ Roberto Estevez of the San Francisco Public Library said: “There is no difference in access issues among inner-city patrons and more affluent patrons. The issue is the sophistication level of library users in general. People either learn how to use the library, or they don’t.”²⁰²

e. Optimism for E-books?

The problems surrounding e-book use in libraries have not dampened some librarians’ overall outlook, however. Most respondents

195. *Id.*

196. Telephone Interview with Lawrence Tobe Liebert, *supra* note 133.

197. *Id.*

198. See U.S. DEPT. OF JUSTICE, PRESIDENT’S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET, THE ELECTRONIC FRONTIER: THE CHALLENGE OF UNLAWFUL CONDUCT INVOLVING THE USE OF THE INTERNET, *available at* <http://www.usdoj.gov/criminal/cybercrime/unlawful.htm> (Mar. 2000); see also U.S. DEPT. OF COMMERCE, NATIONAL TELECOMMUNICATIONS & INFORMATION ADMINISTRATION, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE, *available at* <http://www.ntia.doc.gov/ntiahome/fttn99/contents.html> (last visited Sept. 23, 2002).

199. See *supra* note 133.

200. E-mail from Mabel Anne Kincheloe, *supra* note 133.

201. Telephone Interview with Roberto Estevez, *supra* note 133; Telephone Interview with Nina Freed, *supra* note 133.

202. Telephone Interview with Roberto Estevez, *supra* note 133.

thought e-books had a place within the library system, albeit under some specific conditions.²⁰³

Only one of eighteen surveyed librarians had a primarily positive response to all survey questions posed.²⁰⁴ Ross McLachlan, Library Services Administrator of the Phoenix Public Library, reported that the library will expand upon its e-book offerings because “[f]ocus group[s], especially those composed of teen[s], clearly indicate that there is an increasing demand for everything in electronic format so they can be accessed not only from the library, but from home or office.”²⁰⁵ In light of the previously discussed problems associated with managing e-book circulation,²⁰⁶ the Phoenix Public Library has decided to develop its own research/reference library aimed particularly at students in search of homework assistance.²⁰⁷

The thought that time can cure some e-book problems is common among surveyed librarians.²⁰⁸ Julia Wentz of Loyola University Chicago’s Law Library thought that some resistance is expected with any change and that “disguising” e-books to look more like conventional books may help readers acclimate to e-books more quickly.²⁰⁹ “I read recently that the reason they started putting engines in the front of cars was that people were used to their carriages being pulled by horses,” she said.²¹⁰ “If e-books looked more like a book—for example, if they looked like a .pdf format—people could more easily remember what they had read and have a sense for where in the text they had read it.”²¹¹ A similar “phasing-in” of the electronic format occurred when library card catalogs first became computerized.²¹² “Early computer displays actually looked like a card until people got used to using the computer to look up information. Only after time did it change format to incorporate more functional elements.”²¹³

Some survey respondents took a more long-term view in predicting when the public will acclimate to the e-book.²¹⁴ Mabel Anne Kincheloe,

203. See *supra* note 133.

204. E-mail from Ross McLachlan, *supra* note 133.

205. *Id.*

206. See *supra* notes 168–84 and accompanying text.

207. E-mail from Ross McLachlan, *supra* note 133. E-book collections are popular among students looking for homework help, according to survey respondents. E-mail from Donna Nicely, *supra* note 133.

208. E-mail from Harriet Henderson, *supra* note 133; Telephone Interview with Catherine L. Kerr, *supra* note 133; E-mail from Mabel Anne Kincheloe, *supra* note 133; Telephone Interview with Judith A. Meadows, *supra* note 133; Telephone Interview with Lorna Truck, *supra* note 133; Telephone Interview with Jeffrey Weber, *supra* note 133; Telephone Interview with Julia Wentz, *supra* note 133.

209. Telephone Interview with Julia Wentz, *supra* note 133.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. E-mail from Mabel Anne Kincheloe, *supra* note 133; Telephone Interview with Judith A. Meadows, *supra* note 133; Telephone Interview with Julia Wentz, *supra* note 133.

Materials Management Director of the Gwinnett County Public Library (Lawrenceville, Ga.), thought that e-books will catch on “but for the children who are preschoolers now. My three-year-old grandson is already enjoying his e-book reader.”²¹⁵

In addition, most of the surveyed librarians were hopeful that the underlying technology will continue to develop and ease some of the current difficulties they encounter with e-books.²¹⁶ Technological developments will need to resolve the problems of readability, portability, and compatibility that currently hamper e-books, as discussed previously.²¹⁷

All of these issues compound to present a larger view of the complexities of e-book problems. One librarian simply summed it up this way: “I don’t think e-books are meeting people’s needs.”²¹⁸

IV. RESOLUTION

Based on the results of the survey, e-books possess at least a chance for success if technology issues are resolved by content providers and software and hardware producers. It is relatively clear among e-book users what kinds of shortcomings need to be resolved. However, the one major point of contention will continue to be how copyright issues are settled. Without some compromise between content providers using digital-rights management systems and those institutions like libraries that depend on fair use, e-books will be doomed to a minor role in library collections or none at all. “This is the single issue that will determine whether this format survives,” said Hill.²¹⁹

Indeed, copyright issues relating to digital-rights management have inflamed some librarians to the point of e-book ambivalence.²²⁰ “There’s a lack of information among patrons that e-books are available for checkout. I have a very difficult time getting librarians to load e-books into their catalog,” said Estevez.²²¹ Logically, if librarians are not willing to work with or recommend e-books, the public will not have as much opportunity to become familiar with the technology.

Estevez, especially, felt very strongly about the collision of digital-rights management and fair use:

Digital rights management is a problem only from the vendor’s point of view. The problem is that they don’t believe in fair use at all. They’re trying to control rights that people already have pretty

215. E-mail from Mabel Anne Kincheloe, *supra* note 133.

216. *See, e.g.*, E-mail from Harriet Henderson, *supra* note 133; E-mail from Mabel Anne Kincheloe, *supra* note 133.

217. *See supra* notes 161–88 and accompanying text.

218. Telephone Interview with Jeffrey Weber, *supra* note 133.

219. E-mail from Corinne Hill, *supra* note 133.

220. Telephone Interview with Roberto Estevez, *supra* note 133.

221. *Id.*

well established, and they're trying to do it under the label of "digital rights management."²²²

Johnston recognized the policy of lending libraries.²²³ "There is a fundamental conflict with the privatization of information and the mission of the library system," she said.²²⁴ "Institutions like libraries are created for the public good. We exist because the free, or low cost, dissemination of information is perceived as a societal good. When information is increasingly turned into a for-profit commodity, the library's ability to fulfill its role is restricted."²²⁵

Until electronic publishers relent and loosen the vice-like hold they have on their rights, e-books will be a gilded, disappointing economic vessel. "There are risks security like digital rights management tries to minimize, but there is also security so safe that no one can use the content," said Daw.²²⁶ "The more frustrating content providers make it to use their technology, the lonelier they will be."²²⁷

V. CONCLUSION

The present is a watershed in the evolution of copyright law. Americans have a long tradition of using books in a very open way, as evidenced by the pervasiveness and success of its lending library system. Libraries depend on the doctrines of fair use and first sale to function, but the recent introduction of e-books has altered the versatility that most people have come to associate with books in general.

E-book publishers are anxious to protect their rights to the fullest extent possible for a number of reasons. First, recent litigation has shown that online intellectual property is highly vulnerable to exploitation. Second, those in the e-book business, which was once trumpeted to be a robust new area of publishing, lose revenue to misappropriated intellectual property.

The collision of library culture and the e-book business is evident in the way libraries have used e-book technology thus far in its lifecycle. Libraries do what many people enjoy doing with their own books—share with others. Because of the restrictions on sharing, libraries have been hesitant to fully embrace e-book technology. This impediment accounts for the general public's chilly reception of the e-book as well.

To overcome this large obstacle, modern copyright law must anticipate fair use of not only printed material but digital media as well. E-book publishers will need to retain some copyright protection while loosening the reins on the rights they currently protect. As digital-rights

222. *Id.*

223. Interview with Janis Johnston, *supra* note 133.

224. *Id.*

225. *Id.*

226. Telephone Interview with Michael Daw, *supra* note 133.

227. *Id.*

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management currently exists, e-book users are presumed guilty of infringement and therefore unable to make lawful fair use of their legally obtained copies. Unless an appropriate balance is struck between the need for digital-rights management and the need for the public to receive legal access to copyrighted works, the e-book market has no real prospect of ever expanding beyond an esoteric niche market supported by a small minority of readers willing to give up their rights to use the work under U.S. copyright law.

