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REVISITING READER PRIVACY IN THE AGE OF THE E-BOOK

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I. INTRODUCTION

If there is no privacy of thought—which includes implicitly the right to read what one wants, without the approval, consent or knowledge of others—then there is no privacy, period.1

A. The E-Book Revolution

With the release of popular e-book readers such as the Apple iPad and the Amazon Kindle, as well as Google's massive effort to digitize millions of paper books,2 the volume of digital books available to Americans is growing exponentially.3 The databases maintained by e-book providers that track what people read are expanding just as rapidly.4 Although much has been written about

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The Software will provide Amazon with data about your Kindle and its interaction with the Service (such as available memory, up-time, log files, and signal strength). The Software will also provide Amazon with information related to the Digital Content on your Kindle and Other
the impact of this development on intellectual property rights (for authors, publishers, libraries, researchers, and consumers), few have considered its impact on reader privacy. This Comment explores this oft-neglected issue.

Part II of this Comment explores the current developments that are bringing reader privacy to the forefront, the legal protections that safeguarded reader privacy in the past, and why those protections are inadequate to safeguard reader privacy in the age of the e-book.

Part III of this Comment argues that the collection, use, and disclosure of reader habit information is a threat to reader privacy, that reader privacy is a constitutionally-protected right that should be preserved, and that traditional reader privacy protections should be extended to the new context.

Part IV of this Comment explores potential solutions to the e-reader privacy problem and proposes the enactment of a federal reader privacy statute to stop the erosion of this fundamental right.

II. BACKGROUND

Before the issue of preserving reader privacy in the age of the e-book can be properly analyzed, a thorough understanding of the existing legal framework, ongoing disputes, and current developments in e-book user tracking is required. This section of the Comment explores these topics.

Devices and your use of it (such as last page read and content archiving).


A. Current Developments

According to the Book Industry Study Group, "[e]-book sales grew exponentially in the first quarter of 2010, jumping from just one-and-a-half percent of total U.S. book sales in 2009, to five percent of the market in the first quarter of 2010." By mid-2011, after experiencing a 160.1 percent increase in sales over the same period in 2010, e-books had become second only to paperback books as the most popular book format. Sales of e-book readers were also exploding. Apple sold three million iPads in the first eighty days following its release. It is estimated that Amazon sold three million Kindles by the end of 2009. By the second quarter of 2010, Amazon was selling more Kindles than it was hardcover books. In the six month period between November 2010 and May 2011, the number of American adults possessing an e-book reader doubled from six to twelve percent of that population.

Meanwhile, e-book providers are collecting massive amounts of information about individual reading habits. Google, for instance, collects the following information related to users of its Google Books site: the query term or page request (which may include specific pages within a book that are browsed), Internet Protocol address, browser type, browser language, the date and time of the request, and one or more cookies that may uniquely

13. A cookie is "a message, or segment of data, containing information
identify the reader's browser. Amazon retains information about the books, magazine subscriptions, newspapers, and other digital content that is stored on each Kindle as well as the history of the reader's interaction with that content. This retention includes an automatic bookmark of the last page read, the content deleted from the device, and any annotations, bookmarks, notes, highlights, or similar markups made by the reader. This data can be combined with other data (e.g., search history) to create detailed profiles of each individual user. The threat to one's privacy from such tracking is not only electronic. When a person prints a digital book on paper, a watermark, indicating who purchased it and when, may be printed as well.

There are intense economic incentives for e-book providers to disclose this information to others. Individual digital behavioral data is especially valuable to marketers, who can use the information to target advertising. According to industry experts, companies can expect up to ten times the revenue for advertisements based on behavioral data. Targeted advertising is a critical goal of e-book providers. In fact, Google was careful to about a user, sent by a Web server to a browser and sent back to the server each time the browser requests a Web page.” Cookie Definition, DICTIONARY.COM, http://dictionary.reference.com/browse/cookie (last visited Sept. 5, 2011).


16. Amazon Kindle: License Agreement and Terms of Use, supra note 4.


18. See Amended Settlement Agreement at 57, Authors Guild, Inc. v. Google, Inc., No. 05-cv-01836 (S.D.N.Y. Nov. 9, 2010), available at http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/amended-settlement-agreement/Amended-Settlement-Agreement.pdf (stating that when a user prints out pages of a book under the Institutional Subscription Database, Google will include a visible watermark which displays encrypted session identifying information “which could be used to identify the authorized user that printed the material or the access point from which the material was printed.”).


retain the right to control behavioral data about users of Google Books in its recent settlement with copyright owners.22 These developments have brought the issue of reader privacy to the forefront.

B. Legal Backdrop

1. The United States Has a Long History of Protecting Reader Privacy

The U.S. Supreme Court has indicated that the right to receive speech is a critical component of the First Amendment.23 As the Court stated in Griswold v. Connecticut,24 "[t]he right to freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read."25 In Island Trees School District v. Pico by Pico, the Court stated, "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them.... More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."26

More directly, federal courts have supported the notion that the First Amendment right to receive speech incorporates a right to reader privacy.27 During the era of McCarthyism,28 the Supreme

24. Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (explaining why a state law that prohibited the distribution of information on contraceptives violates not only the First Amendment rights of the speaker/distributer, but also the rights of individuals who would receive/read the information).
25. Id.
26. Island Trees Sch. Dist. v. Pico by Pico, 457 U.S. 853, 867 (1982) (explaining why the removal of books from a school library based on the viewpoints contained within them violated students' rights to receive information, which necessarily follows from the expressed First Amendment right to publish it).
Court held that an individual could not be held in contempt for failing to provide the government with a list of individuals who purchased political books.\footnote{United States v. Rumely, 345 U.S. 41, 47-48 (1953). In a concurring opinion, Justice Douglas surmised that requiring a person to disclose what she has read in the past and what she will read in the future would strike fear into readers and suppress their freedom. Id. at 57 (Douglas, J., concurring).} Twelve years later, the Court held that a postal regulation requiring those who wanted to receive Communist Party propaganda to notify the United States Postal Service of their desire was unconstitutional because of the chilling effect the disclosure of individual reading habits would produce.\footnote{Lamont v. Postmaster General, 381 U.S. 301, 305 (1965). Justice Douglas wrote, “I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.” Id. at 306.}

Cases involving McCarthy-era laws are not the only context where courts asserted the right to reader privacy. A law criminalizing the private possession of “obscene” materials was held unconstitutional because a man enjoys “the right to be free from state inquiry into the contents of his library.”\footnote{Stanley v. Georgia, 394 U.S. 557, 565 (1969) (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”).} More recently, a government subpoena for the reading records of 120 Amazon.com customers was rejected for its chilling effect on free speech.\footnote{In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006, 246 F.R.D. 570, 573 (W.D. Wis. 2007). Expressing its concerns, the court observed: “The subpoena is troubling because it permits the government to peek into the reading habits of specific individuals without their prior knowledge or permission. . . . [I]t is an unsettling and un-American scenario to envision federal agents nosing through the reading lists of law-abiding citizens while hunting for evidence against somebody else. . . . [I]living in the land of the free means that it’s none of the government’s business what books people are reading.” Id. at 572-73.}

At least one state court has recognized a constitutional right to reader privacy. The Colorado Supreme Court held that reader privacy is protected under both the First Amendment of the U.S. Constitution and the free speech provision of the Colorado State Constitution.\footnote{Tattered Cover v. City of Thornton, 44 P.3d 1044, 1053-54 (Colo. 2002). As to federal law, the court opined, “[i]n sum, the First Amendment embraces the individual’s right to purchase and read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read.” Id. at 1053. As to Colorado state law, the court surmised, “the right to purchase books anonymously is afforded even greater respect under our Colorado Constitution than under the United States Constitution.” Id. at 1054.}

State library confidentiality statutes have also fostered the
notion of a right to reader privacy. Forty-eight states and the District of Columbia have enacted such laws. Although the protection provided by these statutes varies from state to state, there are some common elements among them. Most require the strict maintenance of confidentiality of library records; restrict the disclosure of library records to third parties; require a court order or subpoena as well as notice to the affected library patron prior to the release of patron records; cover library records in both paper and electronic form; and impose penalties for violations of patron privacy. Some library confidentiality statutes even require libraries to implement and use privacy enhancing technologies.

In addition to public library confidentiality statutes, two


36. E.g., ALA. CODE § 41-8-10 (2009) (mandating that registration and circulation records of publicly supported libraries remain confidential); N.Y. C.P.L.R. § 4509 (2009) (classifying library records containing the names or other personally identifying details of patrons as confidential information).

37. E.g., S.C. CODE ANN. § 60-4-10 (2008), (declaring that confidential records may not be disclosed to anyone other than library personnel or persons authorized by the library patron to inspect his or her records); WIS. STAT. § 43.30 (2008) (prohibiting the disclosure by publicly-supported libraries of records containing personally identifiable patron information).

38. E.g., 75 ILL. COMP. STAT. 70/1(a) (2009) (forbidding anyone from releasing the contents of library circulation records to the public absent a court order); 27 ME. REV. STAT. § 121 (2009) (requiring the express written permission of the patron involved or a court order for the release of library circulation records).


40. E.g., Ark. CODE ANN. § 13-2-702 (2009) (punning a violation of the statute as a misdemeanor offense punishable by a fine of not more than two hundred dollars ($200) or thirty (30) days in jail, or both); Mont. Code ANN. § 22-1-1111 (2007) (granting the person whose circulation records were wrongfully disclosed a civil right of action for actual damages or one hundred dollars ($100), whichever is greater, as well as reasonable attorney fees and costs if he or she prevails).

41. E.g., Ark. CODE ANN. § 13-2-703(b) (2009) (requiring public libraries to use an automated or Gaylord-type circulation system that does not identify a patron with circulated materials after materials are returned).
states have enacted laws that prohibit private book sellers from disclosing information about reader purchases.42 In effect, these laws extend the protections afforded by state library confidentiality statutes to private sector entities. Two additional state legislatures are currently considering the adoption of reader privacy statutes that apply to private e-book sellers.43

Librarians are long-time defenders of the right of reader privacy. The Library Code of Ethics, promulgated by the American Library Association (ALA), recognizes a library patron's right to privacy.44 The ALA's Intellectual Freedom Manual states that "the freedom to read is essential to our democracy."45 Furthermore, libraries and library associations are drafting and following privacy guidelines for online resources, including e-books.46
2. Existing Reader Privacy Safeguards Are Inapplicable

Existing privacy safeguards do not protect e-book reader privacy. There are a number of reasons why this is so.

First, although the privacy protections offered by most state library confidentiality statutes are robust, they simply do not apply to commercial e-book providers such as Google, Apple, Amazon, and Barnes & Noble.47 The scope of these statutes only encompasses public or publicly-supported institutions.48 Although two states have enacted statutes restricting the disclosure of customer purchase records by book sellers, the remaining forty-eight states have not.49

Second, existing privacy laws are not designed to protect reader privacy.50 The United States lacks a comprehensive privacy law.51 Its privacy laws are sectoral in nature and narrowly tailored.52 The focus of most of these laws is on governing the collection, retention, use, protection, and disclosure of personally

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47. See CHARLES R. MCCLURE, JOHN CARLO BERTOT & DOUGLAS L. ZWEIZIG, PUBLIC LIBRARIES AND THE INTERNET: STUDY RESULTS, POLICY ISSUES, AND RECOMMENDATIONS 45 (1994) available at http://www.eric.ed.gov/PDFS/ED371768.pdf (stating "[l]aws that protect users' confidentiality under current systems, however, do not extend to Internet-based user information requests. As Internet-based library services increase, patron record privacy laws will need to be amended to accommodate the electronic networked environment.").

48. See e.g., CAL. GOV. CODE § 6267 (2009) (covering "any library which is in whole or in part supported by public funds."); 75 ILL. COMP. STAT. 70/1(c)(i) (2009) (defining "library" as "any public library or library of an educational, historical or eleemosynary institution, organization or society.").

49. Ozer, supra note 15, at 3. In its Google Books Privacy Policy, Google recognizes its responsibility to comply with state statutes regulating the disclosure of book purchases by private booksellers:

Some jurisdictions have special "books laws" saying that this information is not available unless the person asking for it meets a special, high standard such as proving to a court that there is a compelling need for the information, and that this need outweighs the reader's interest in reading anonymously under the United States First Amendment or other applicable laws. Where these "books laws" exist and apply to Google Books, we will raise [our level of protection].


identifiable information by entities in specific industries—health care companies, financial services institutions, creditors, etc. None of these laws was designed to govern the collection, use, or disclosure of reader habit information by e-book providers.

Finally, the privacy policies of e-book service providers fail to guarantee readers robust privacy rights. It is true that the Federal Trade Commission (FTC) can and does take action against companies that violate their own privacy policies. However, the contents of those policies are unregulated and can be changed at will. For instance, the protections promised to readers by some e-book service providers in their privacy policies fall far short of


56. See, e.g., In re Eli Lilly & Co., FTC Docket No. C-4047 (May 8, 2002), available at http://www.ftc.gov/os/2002/05/ellililydo.htm (ordering Eli Lilly to establish an information security program after it mistakenly disclosed the names and e-mail addresses of 669 Prozac users to one another in violation of its own privacy policy); In re Gateway Learning Corp., FTC Docket No. C-4120 (Sept. 10, 2004), available at http://www.ftc.gov/os/caselist/0423047/040917do0423047.pdf (ordering Gateway not to share information with third parties that it collected from consumers prior to adopting a privacy policy revision permitting it to do so); In re Guess.com, Inc., FTC Docket No. C-4091 (July 30, 2003), available at http://www.ftc.gov/os/2003/08/guessdo.pdf (ordering Guess to establish an information security program after customer information was stolen by hackers despite assurances in Guess’s privacy policy that it had employed reasonable safeguards to protect the information).

those guaranteed in library confidentiality statutes.58

3. Reader Privacy as an Issue in Current Litigation

The controversy over whether reader privacy protections should be preserved in the age of the e-book was recently brought to the forefront when a group of authors sued Google for copyright infringement after Google undertook efforts to digitize millions of books and make them available on its web site.59 In October 2008, the litigants agreed to settle the case and submitted a jointly prepared settlement agreement to the court for its approval.60 The ALA and several civil liberties groups filed briefs with the court, both in opposition to and in favor of the settlement, but with each requesting that the court add reader privacy protections to the final order.61 Additionally, each group sought to represent the

58. See, e.g., Google Privacy Policy, supra note 57 (stating that Google will provide Google Books records to the government based solely on its own “good faith belief” that disclosure is “reasonably necessary” and without notice to the reader).


interests of e-book readers in the litigation.\textsuperscript{62}

In November 2009, the litigants withdrew the original settlement agreement and filed an amended version with the court.\textsuperscript{63} The court preliminarily approved the amended settlement on November 19, 2009.\textsuperscript{64} The amended settlement agreement, however, did little to satisfy reader privacy advocates.\textsuperscript{65} On March 22, 2011, the court rejected the amended settlement agreement, citing various concerns, including reader privacy issues, in support of its decision.\textsuperscript{66} The parties to the suit are now left to decide whether to revise and re-submit the settlement agreement a third time, litigate the original suit, appeal the court's rejection of the amended settlement agreement, or abandon the suit altogether.\textsuperscript{67} With reader privacy concerns currently in the spotlight, an analysis of the topic is appropriate and timely.

III. ANALYSIS

In this section, this Comment argues that unregulated collection, use, and disclosure of reader habit information by e-book providers represents a serious threat to reader privacy. Additionally, it contends that reader privacy is a constitutionally-protected right and that the use of copyright law and the judicial system to assist in the abridgment of that right amounts to impermissible state action. Furthermore, the Comment maintains that copyrights can be enforced without sacrificing reader privacy. Finally, it argues that since e-book providers are taking on the functions once performed by public libraries, they should be required to provide similar privacy protections to readers.

\textsuperscript{62} See supra note 61 and accompanying text (identifying a number of motions and briefs filed in the Google Books litigation by nonparties—each seeking to represent the interests of e-book readers in the case).

\textsuperscript{63} See Amended Settlement Agreement, supra note 18 (containing revised settlement terms and conditions).


A. The Collection, Use, and Disclosure of Reader Habits by E-Book Providers Is a Threat to Reader Privacy

1. How Reading Habit Information Can Be Misused

Without limitations on the disclosure of reader habits by e-book providers, this information could end up in the hands of the government, health insurers, divorcing spouses, or other third parties via subpoenas.68 Health insurers could utilize a reader's selection of books about treating chronic back pain as support for their decision to deny health coverage to that individual.69 A divorcing spouse could subpoena Apple to obtain evidence that her soon to be ex-husband read a book on his iPad about hiding assets offshore.70 The Department of Homeland Security could request from Amazon a list of all Kindle owners who read an e-book written by a radical Islamic cleric to create a terrorism suspect list.71 The potential to misuse reader habit information is limited only by the imaginations of those with whom it is shared.

2. There Is a History of the Government and Others Attempting to Obtain Reader Habit Information

The possibility of third parties seeking reader habit information is more than mere speculation. The government and third parties have already targeted libraries and other online aggregators of information.72 Between 2001 and 2005, libraries

68. See EFF Brief, supra note 1, at 4-5. See also FED. R. CIV. P. 26(b)(1) (permitting parties to a lawsuit to “obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense”); FED. R. CIV. P. 45(a)(1)(D) (stating that “[a] command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.”).


71. See Miles Benson, In the Name of Homeland Security, Telecom Firms Are Deluged With Subpoenas, GLOBAL RESEARCH (Dec. 30, 2005), http://www.globalresearch.ca/index.php?context=va&aid=1677 (noting a substantial increase in the volume of subpoenas that online service providers have received from law enforcement agencies since the passage of the USA PATRIOT Act).

were contacted by law enforcement officials seeking information on patrons at least two hundred times. In 2006, AOL received almost one thousand requests per month for information on subscribers in criminal and civil cases. In 2005, the Department of Justice requested every single Google search inquiry for a period of two months. In 1997, the Drug Enforcement Agency subpoenaed Ronin Publishing for the names and addresses of all Arizona residents who purchased books on hydroponics.

3. The Intentions of the Reader Habit Information Collector Are Only Partially Relevant

Those who support the unrestricted ability of e-book providers to collect reader habit information point out the voluntary efforts that Google, Amazon, Barnes & Noble, Apple, and others have made to address reader privacy concerns and to “not be evil.” While the intentions of e-book providers to do the right thing are laudable, e-book providers cannot control the actions of the government or third parties. History is filled with examples of information that was collected for proper reasons and later misused.
B. Reader Privacy Is a Constitutionally-Protected Right That Is Infringed by E-book Reader Tracking

Although the Supreme Court has never explicitly endorsed the idea, legal scholars have long argued that reader privacy is implicitly guaranteed by the First Amendment of the U.S. Constitution. This conclusion is based on the fact that surveillance of reader habits inhibits both the creation and reception of constitutionally-protected speech.

1. Reader Tracking Chills Expression

The chilling effect of tracking what one reads has been noted by courts and demonstrated in one recent study. A Virginia book store received a grand jury subpoena for Monica Lewinsky's book purchases by the Office of Independent Council and was thereafter informed by many of its loyal customers that they would no longer shop there if the store disclosed her book purchase records. A federal district court acknowledged that without the ability to remain anonymous, many individuals will not read sexually explicit materials online. One study found that 8.4% of Muslim Americans changed their online reading habits after 9/11 because they believed they were being watched by the government.


80. See, e.g., Cohen, supra note 27, at 1003 (contending that the right to read anonymously is more deeply engrained in our heritage than the right to speak anonymously); Eric Robertson, Comment, A Fundamental Right to Read: Reader Privacy Protections in the U.S. Constitution, 82 U. COLO. L. REV. 307, 324-30 (2011) (arguing that a distinct fundamental right to reader privacy arises from the First Amendment right to receive information and ideas).

81. Cohen, supra note 27, at 1008.

82. See EFF Brief, supra note 1, at 2 (asserting that “[t]his chilling effect, which is well documented in contexts involving physical books, serves as the basis for a long line of legal precedents, statutes, and policies strongly protecting reader privacy.”).


84. ACLU v. Gonzales, 478 F. Supp. 2d 775, 805-06 (E.D. Pa. 2007) (enjoining enforcement of the Child Online Protection Act [COPA] on First and Fifth Amendment grounds because the statute was not narrowly tailored to Congress’s compelling interest of protecting minors and was unconstitutionally vague and overbroad).

85. Dawinder S. Sidhu, The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans, 7 UNIV. MD. L.J.
The constitutional right to express ideas is equally impacted by reader tracking. It is likely that authors will be hesitant to write about controversial topics when they know the research they perform in support of their arguments is being tracked. Because people are less likely to read controversial works when they know they are being watched, the market for controversial works is likely to shrink. A diminished market will result in lower revenues for publishers and authors, making authors less likely to produce these works. Thus, reader tracking has a chilling effect on both the reader and the author.

2. Telling People They Can Choose an Alternative Source Is No Solution

Some commentators have suggested that readers who do not wish to be tracked can simply choose alternatives, such as reading paper books or using e-book providers that do not track usage. This suggestion may not be feasible. Almost all leading e-book providers gather reader habit information. Many current and future titles will only be released electronically. Thousands of

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86. The brief filed by privacy authors and publishers in opposition to the Google settlement illustrates this point by stating:
[A]uthor Ayelet Waldman may want to be able to research deadly weapons for one of her mystery novels, without fear that the government will learn of it and suspect her of criminal activity. When Jonathan Lethem researches a disease like Tourette's Syndrome for his novel *Motherless Brooklyn*, he does not want his insurance company to be able to discover that information in a lawsuit and to draw improper assumptions from it.

EFF Brief, *supra* note 1, at 16.

87. *See Lamont*, 381 U.S. at 308 (concluding that if individuals were forced to identify themselves to receive controversial materials, “[it] would be a barren marketplace of ideas that had only sellers and no buyers.”).

88. *See* EFF Brief, *supra* note 1, at 16 (noting that “[t]he price of this reluctance to be tracked will be shrinking readership and, in turn, shrinking revenue for the Privacy Authors and Publishers.”).


91. *See* Ken Auletta, *Publish or Perish: Can the iPad Topple the Kindle, and Save the Book Business?*, THE NEW YORKER, Apr. 26, 2010, http://www.newyorker.com/reporting/2010/04/26/100426fa_fact_auletta (exploring how the advent of electronic readers and companies like Apple and Amazon are changing the traditional business models companies use to sell and distribute books).
titles in Google Books are out of print or "orphan" editions that cannot be found elsewhere. As the supply of paper books dwindles and the portfolio of e-books expands, libraries are simply subscribing to online services to enhance their collections.

Even if there were feasible alternatives to e-book providers that track reading habits, readers should not be forced to seek them out. The U.S. Supreme Court has made it clear that, when it comes to the exercise of one’s First Amendment rights, the existence of an alternative means of expression or the reception thereof is no excuse for permitting the abridgement of one’s rights.

3. Permitting the Abridgement of the Right to Reader Privacy Is State Action

The violation of a constitutionally-protected right requires some form of state action. Since e-book providers are private corporations, the linkage between their abridgement of reader privacy rights and government action is a significant hurdle to overcome for those hoping to challenge the constitutionality of reader tracking in court. State action may be found, however, in the fact that e-book providers have leveraged a government-granted, limited monopoly and the legal system to further the abridgement of reader privacy rights.

Copyright law provides authors and their agents (in this case, e-book providers) with the rights necessary to control the use and distribution of their works. Thus, a copyright is essentially a

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93. See, e.g., Pat Tully, 1998-2009: How Libraries Have Changed, WESLEYAN UNIV. BLOG (Nov. 13, 2009), http://ptully.blogs.wesleyan.edu/2009/11/13/over-the-past-10-years-how-libraries-have-changed (noting that spending for electronic resources has now risen to sixty percent of acquisitions and spending for electronic services has now risen to eighty percent of subscriptions).
94. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976) (proclaiming, “[w]e are aware of no general principle that freedom of speech may be abridged when the speaker’s listeners could come by his message by some other means . . . .”); Schneider v. New Jersey, 308 U.S. 147, 163 (1939) (holding “[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged of the plea that it may be exercised in some other place.”).
96. See Cohen, supra note 27, at 1019 (noting the difficulty in finding state action in the abridgement of reader privacy rights by private book sellers).
97. See 17 U.S.C. § 106 (2002) (stating that “the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . .”).
limited monopoly granted to the author (and/or his agents or assignees) by the federal government. If this limited monopoly is utilized for the purposes of abrogating First Amendment rights, however, then it is arguably state action.

Furthermore, courts are being asked to adjudicate disputes between e-book providers and copyright holders that implicate the constitutionally-protected right of reader privacy. If a court produces a ruling, such as the approval of a settlement agreement, that permits the abridgement of a constitutionally-protected right, then this is state action.

C. Copyrights Can Be Enforced Without Sacrificing Reader Privacy

Under the Copyright Act of 1976, an author, or his agent, has a right to control the public distribution of his work. E-book providers have attempted to justify reader tracking as a mechanism necessary to enforce copyrights in a digital environment. In support of this argument, they point to the fact that their licensing agreements with copyright holders require them to utilize digital rights management technologies as a condition of use.

This argument might be persuasive if e-book providers only

101. See Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (holding that the application of a state law of promissory estoppel in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (holding that the application of a state libel law that imposes invalid restrictions on constitutional freedoms of speech and press constitutes "state action" under the Fourteenth Amendment).
103. See, e.g., Google Books Privacy Policy, supra note 14 (stating, "[t]o fulfill contractual commitments to rightholders who license us books, we use log information (including IP address and cookie from the user's browser but not including user account information) to enforce security limits . . . .").
104. See, e.g., Amended Settlement Agreement, supra note 18, at Attachment D (requiring that "Google shall use commercially reasonable efforts to authenticate individual End Users purchasing access to individual Books through the use of account login or other equivalent method. An End User that is logged in will be identified as an Identified User based upon such End User's login account information."
used reader tracking information to enforce copyrights and for no other purpose. But as demonstrated in Part II, e-book providers have reserved the right to utilize this information for other purposes (e.g., advertising) as well as to share it with others.\textsuperscript{105} Furthermore, there is nothing stopping e-book providers from tracking the habits of readers of non-copyrighted materials (e.g., works in the public domain) or those accessing copyrighted materials as a fair use.\textsuperscript{106}

The argument that user tracking is necessary to enforce copyrights is based on the flawed premise that knowing the individual reader’s identity is necessary to accomplish copyright enforcement.\textsuperscript{107} There are anonymous payment technologies, however, that allow one to control the use of copyrighted works without requiring that the reader identify himself or herself.\textsuperscript{108} These technologies could be used by e-book providers to satisfy the need of copyright owners to get paid while simultaneously maintaining reader privacy.

\textsuperscript{105} See, e.g., Google Privacy Policy, supra note 57 (stating that “Google uses the DoubleClick advertising cookie on AdSense partner sites and certain Google services [including Google Books] to help advertisers and publishers serve and manage ads across the web” and that user information may also be shared with “affiliated companies or other trusted businesses” or the government); Amended Settlement Agreement, supra note 18, at 49 (reserving for Google the right to advertise next to e-book text).

\textsuperscript{106} See Julius Melnitzer, Policing the New Digital Borders, LEXPERT, Nov.-Dec. 2006, at 3-4, available at http://www.hayeselaw.com/POLICING%20THE%20NEW%20DIGITAL%20BORDERS.pdf (describing how the technological protection mechanisms utilized by copyright owners may restrict access to works in the public domain and/or prohibit users from exercising their fair use rights). The privacy policies of Google, Apple, Amazon, and Barnes & Noble fail to indicate that reader activity tracking is not performed for works in the public domain (i.e., there is no indication that the copyright status or type of use of an e-book in any way changes whether and/or how reader activity is tracked). Google Privacy Policy, supra note 57; Apple Consumer Privacy Policy, supra note 57; Amazon.com Privacy Policy, supra note 57; Barnes & Noble Privacy Policy, supra note 57.

\textsuperscript{107} See John D. Shuff & Geoffrey T. Holtz, Copyright Tensions in a Digital Age, 34 AKRON L. REV. 555, 555 (2001) (stating that a copyright is considered primarily an economic right). The supposed necessity of authenticating the reader is based primarily upon the assumption that a payer must be identified in order for a payment to be processed, but this may not be the case. See supra note 103 and accompanying text (identifying anonymous payment technologies).

D. A Change in Context Should Not Result in a Loss of Protections

Authors and publishers of electronic content have resisted government regulation of their activities.\(^9\) In many ways, however, e-book providers have taken on the role that public libraries once performed in our society. The phrase that reader privacy advocates use to describe this transition is that e-book providers are “stepping into the shoes” of librarians.\(^10\)

1. Ways in Which E-Book Providers Are “Stepping into the Shoes” of Librarians

There are at least three ways e-book providers are supplanting libraries as sources of literary works. First, some e-book providers actually obtain the contents of works from public institutions. In the case of Google Books, for instance, it is mostly library books which are currently available to the public at large that are being scanned into Google’s collection.\(^11\) Thus, Google has relied on the efforts of publicly-supported institutions to develop a commercial for-profit offering.\(^12\)

Second, e-book providers enjoy near monopolistic market status.\(^13\) Given the resources that Google has expended in

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110. E.g., CDT Brief, supra note 61, at 5 (“[T]his puts Google in the shoes of a vital American institution, the library.”); Academic Author Objections, supra note 61, at 7 (“T[he company has so far refused to stand in the shoes of librarians with respect to duties of patron confidentiality.”).


112. See EFF Brief, supra note 1, at 19 (“Google [is] convert[ing] public library books into a private set of services.”).

113. See, e.g., Cory Doctorow, Google Book Search Settlement Gives Google a Virtual Monopoly Over Literature, BOING BOING (Apr. 17, 2009), http://boingboing.net/2009/04/17/google-book-search-s-1.html (discussing Google’s monopoly on “orphan” works); Rory Maher, Amazon’s Big Kindle Cave Could Threaten
developing its enormous collection, a competitor is unlikely ever to challenge it.114 When a small number of entities control the distribution of large amounts of information to the public, government often increases regulation to ensure that First Amendment rights are maintained.115

Finally, public libraries are purchasing less paper books and increasingly providing patrons with access to e-book provider collections via institutional subscriptions.116 Since patrons are accessing these e-books from a public library, the requirements of library confidentiality statutes, which prohibit disclosure of reader habit information, may apply to e-book service providers via the agreements they have with libraries.117

2. The Future of Reading in the E-Book Age

It is not difficult to imagine that in the not-so-distant future, it will be nearly impossible for a reader to access literary works in any manner except through e-book providers—even when utilizing a public institution such as a library.118 The relevant question

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115. See Columbia Broad. System, Inc. v. Democratic Nat. Comm., 412 U.S. 94, 101 (1973) ("Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values."); DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 593 (17th ed. 2011) (contending that the natural scarcity of radio spectrum, which led to the concentration of power over information delivered via this medium among relatively few players, is thought to justify greater government regulation and oversight).


117. See Intell. Freedom Comm., Questions and Answers on Privacy and Confidentiality, AM. LIBR. ASS'N, http://www.ala.org/Template.cfm?Section=interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15347 (last visited Sept. 5, 2011) (stating that "[i]third parties are not bound by library confidentiality statutes or other laws protecting the privacy of user records," so "[l]ibraries need to ensure that contracts and licenses [with third party information service providers] reflect their policies and legal obligations concerning user privacy and confidentiality.").

raised is whether we, as a society, are willing to accept the loss of
the reader privacy rights we have enjoyed in the past simply
because the format of works has changed from the written word to
the e-book reader. \(^{119}\) When considering the importance of the
fundamental freedoms that are at stake, logic dictates that the
protections currently afforded to library patrons should be
extended to e-book readers.

IV. PROPOSAL

Having established the critical importance of reader privacy
to free expression and the threat created by unrestricted reader
tracking by e-book providers, this Comment turns to the question
of what should be done to preserve this fundamental right in the
age of the e-book.

A. Potential Resolutions to the Reader Privacy Issue

A number of potential responses to the erosion of reader
privacy protections might be suggested. Industry self-regulation is
one option. Under this theory, the looming threat of government
regulation will prod e-book providers into developing and enforcing
reader privacy standards. \(^{120}\) Because of the enormous economic
rewards for leveraging consumer behavior information, previous
self-regulatory efforts in the information privacy space produced
limited success. \(^{121}\)

Independent third party certification and verification of e-
book provider privacy practices is another possibility. Online

\(^{119}\) As EPIC, commenting on the proposed Google Books settlement, stated:
Thus the settlement would transfer detailed personal information that
has been subject to some of the best privacy laws and practices in the
United States and make it available to once [sic] company that already
has more information about the interests of Internet users than any
other organization in the world in a way that is without precedent and
without constraint.

EPIC Motion, supra note 61, at 14.

\(^{120}\) See Joel R. Reidenberg, Restoring Americans' Privacy in Electronic
the debate over self-regulation, U.S. industry took privacy more seriously only
when government threats of regulation were perceived as credible.”); Peter P.
Swire, Markets, Self-Regulation, and Government Enforcement in the
Protection of Personal Information, in Privacy and Self-Regulation in the
Information Age, U.S. DEPT. OF COMMERCE, Aug. 15, 1997, at 3-11,
http://ssrn.com/abstract=11472 (arguing that industry members might
rationally prefer an unregulated market in which they can sell personal
information to a self-regulated market, and therefore only the threat of
mandatory government regulation can induce them to self-regulate).

\(^{121}\) See Chris Jay Hoofnagle, Privacy Self Regulation: A Decade of
Disappointment, ELECTRONIC PRIVACY INFO. CTR., Mar. 4, 2005, at 9-11,
http://epic.org/reports/decadedisappoint.pdf (chronicling ten years of failed self
regulatory regimes in the information privacy space).
“privacy seal” programs have been established for that very purpose. With these programs, a certifying authority examines an applicant's privacy policy and information handling practices. If they meet certain predefined standards, the applicant is permitted to display the certifying authority's seal on its web site. However, research indicates that because certifying bodies are lackadaisical in their enforcement of program requirements, the privacy practices of seal holders are no better than those of nonmembers. Yet consumers perceive seal holders (unjustifiably so) as being more protective of their privacy.

Market regulation is another potential solution. This approach is premised on the notion of privacy as a negotiable item. A willing consumer trades some aspect of privacy as part of the transaction for goods or service. However, there is a disparity in bargaining power between e-book providers and individual consumers, who are essentially given the choice between using the service as is or not using it at all. Furthermore, competition is much less of a change agent when there is an oligopoly of players in the industry.

Another option is for civil libertarian groups to aggressively intervene in legal disputes implicating reader privacy. This is essentially what has been done in the Google Books case.

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125. Id. at 46.


127. Id.


129. See Thomas A. Piraino, Jr., Regulating Oligopoly Conduct Under the Antitrust Laws, 89 MINN. L. REV. 9, 18 (2004) (explaining that, under the Nash Equilibrium theory, players in an oligopoly are not likely to change practices for fear that this will invite aggressive competition from the other players in the industry).

130. See FED. R. CIV. P. 24(a)(2) (2006) (permitting intervention by any party who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.").

131. See supra note 61 and accompanying text (discussing the briefs filed by
problem with this approach is that unless a court is involved in a dispute that implicates reader privacy issues, it will have no jurisdiction to intervene in the matter.132

Extending state library confidentiality laws to apply to e-book providers is an option that has been suggested by at least one librarian.133 However, such laws are not uniform.134 Furthermore, it is questionable whether individual states can regulate what is largely an intrastate activity under the Dormant Commerce Clause of the U.S. Constitution.135

Another option is to leverage the e-book providers' own privacy policies as a reader privacy protection enforcement mechanism. Some e-book providers' privacy policies state that changes will not be made that lessen user privacy without the user's expressed consent.136 The FTC can utilize the FTC Act to prevent an e-book provider from amending its privacy policy to offer readers less protection.137 The problem, however, is that existing privacy policies fall short of providing adequate reader privacy protections.138

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132. See U.S. CONST. art. III, § 2, cl. 1 (requiring the existence of a "case or controversy" as a prerequisite to judicial branch intervention); Flast v. Cohen, 392 U.S. 83, 94-95 (1968) (explaining the meaning and scope of the "case or controversy" clause).


134. See NCCUSL Acts – List, UNIFORM L. COMM’N, http://www.ncusl.org (last visited Sept. 5, 2011) (demonstrating the absence of a model state library confidentiality statute). In lieu of a uniform law, the library confidentiality statutes of all forty-eight states that have enacted them are different. See State Privacy Laws Regarding Library Records, supra note 34, at 7 (linking to the text of all existing state library confidentiality statutes).

135. See Dan L. Burk, How State Regulation of the Internet Violates the Commerce Clause, 17 CATO J. 147, 153 (1997), available at http://www.ca to.org/pubs/journal/cj17n2/cj17n2-2.pdf (arguing that state regulation of activity that is largely intrastate in nature is unconstitutional).

136. E.g., Google Privacy Policy, supra note 57 (stating "[w]e will not reduce your rights under this Privacy Policy without your explicit consent."); Amazon.com Privacy Policy, supra note 57 (stating "[w]e ... will never materially change our policies and practices to make them less protective of customer information collected in the past without the consent of affected customers.").

137. See 15 U.S.C. § 45(a) (2006) (granting the FTC the power to prevent "unfair or deceptive acts or practices"). Violation of an organization’s own privacy policy may constitute a deceptive act under the FTC Act. See, e.g., In Re Gateway Learning Corp., 138 F.T.C. 443, 467 (2004) (finding that Gateway's retroactive application of a materially changed privacy policy to information it had previously collected from consumers without notifying the affected consumers of the change was an unfair and deceptive practice in violation of the FTC Act).

138. See supra note 58 and accompanying text (noting a substantial deficiency in the Google Books Privacy Policy related to the standard it will
The weakness in most of these potential solutions is that they do not have the force of law. The maintenance of a constitutionally-rooted right is left to private entities. There is no guarantee that this protection will be effective or enduring. This is insufficient when the goal is protecting a fundamental right.1

B. A Better Solution: The Federal Reader Privacy Statute

Unlike the measures described above, a federal reader privacy statute would provide nationally consistent and enforceable protection.146 It would eliminate the need for digital readers to challenge the actions of e-book providers in court on constitutional grounds, where demonstrating state action is likely to be a substantial obstacle.141 It takes the task of defining the scope of required reader privacy protections out of the hands of e-book providers and places it into the hands of Congress, which better represents reader interests.

What would a federal reader privacy statute look like? Fortunately, the enactment of a federal statute that prohibits the disclosure to third parties of records concerning individual consumption of constitutionally-protected speech is not without precedent.142 The Video Privacy Protection Act (VPPA) provides a good model from which to build upon.143

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utilize in determining whether or not to disclose personally identifiable reader information to the government upon request).


140. Because most e-books are delivered via the Internet (i.e., in electronic transmissions that cross state lines), Congress should have no problem regulating e-book providers under the authority of the Commerce Clause of the U.S. Constitution. See Patrick J. Carleton, Note, Internet Activity and the Commerce Clause: Expansion of Federal Subject Matter Jurisdiction and Limitation of States’ Police Power?, 79 U. DET. MERCY L. REV. 659, 660 (2002) ("For federal legislation that derives its authority from the Commerce Clause, the courts have found that Internet activity will satisfy an interstate commerce jurisdictional element requirement.").

141. See supra note 96 and accompanying text (noting the difficulty of demonstrating state action in the activities of private e-book providers).


143. Although the VPPA and the CCPA provide consumers with similar privacy protections within their respective industries, the VPPA was enacted four years later and contains some key provisions that are notably absent from the CCPA. Compare CCPA, 47 U.S.C. § 551(a)-(h) (2006) (enacted in 1984), with VPPA, 18 U.S.C. § 2710 (2006) (enacted in 1988). Unlike the CCPA, the VPPA contains a law enforcement exception requiring the existence of
Like the VPPA, the federal reader privacy statute would make an e-book provider liable to a customer for knowingly disclosing to anyone personally identifiable reader information.\textsuperscript{144} This broad prohibition would be accompanied by specific exceptions.\textsuperscript{145} Permitted, for example, would be the disclosure of personally identifiable reader information to the reader and to anyone with the expressed consent of the reader.\textsuperscript{146}

Additionally, the statute would permit disclosure of personally identifiable reader information to a law enforcement agency pursuant to a valid warrant, grand jury subpoena, or court order.\textsuperscript{147} It would also permit disclosure of personally identifiable reader information in a civil proceeding pursuant to a court order, but only upon a showing of a "compelling need" for the information that cannot be accommodated by any other means and with notice to the customer.\textsuperscript{148}

The statute would include an exception for disclosure of personally identifiable reader information to third parties incident to the "ordinary course of business" of the e-book provider.\textsuperscript{149} However, this exception would be narrowly tailored to specific situations to prevent abuse.\textsuperscript{150}

If an e-book provider impermissibly disclosed reader habit information, the statute would grant any individual affected by the disclosure a private right of action against the e-book provider.\textsuperscript{151} The court would be permitted to award the affected individual actual damages, punitive damages, costs, and attorneys' fees.
The statute would make personally identifiable reader information inadmissible as evidence in a court of law if not obtained via proper legal process. It would require destruction of personally identifiable reader information after a certain period of time. Finally, the statute would preempt inconsistent state laws except for those offering greater reader privacy protections.

Although a useful template, the VPPA only governs the disclosure of protected information to third parties. The federal reader privacy statute proposed here would go even further by mandating adherence to a privacy framework known as the Fair Information Principles. This framework would require public disclosure of reader tracking practices, limit initial data collection and subsequent use, and mandate the maintenance of reasonable information safeguards.

Admittedly, drafting a federal reader privacy statute is not without its challenges. For example, the statute must define terms such as “e-book,” “e-book provider,” “personally identifiable reader information,” “compelling need,” and “valid business processing” precisely, yet flexibly.

152. See id. § 2710(c)(2) (containing a listing of the remedies available under the VPPA’s private cause of action).
153. See id. § 2710(d) (stating that records obtained via a disclosure of personally identifiable information that was not authorized by the VPPA are inadmissible as evidence in a legal proceeding).
154. See id. § 2710(e) (containing the VPPA’s requirement that personally identifiable information be destroyed by video rental stores not later than one year after it was collected).
155. See id. § 2710(f) (preempting state laws that require disclosure in a manner inconsistent with the VPPA).
156. See id. § 2710(b)(1) (limiting the scope of the statute to a video tape service provider who knowingly discloses the personally identifiable information of a consumer without authorization).
157. See CDT Brief, supra note 61, at 11-14 (recommending that the federal court reviewing the Google Books settlement agreement mandate adherence to the Fair Information Practices principles as a condition of approval).
159. See 18 U.S.C. § 2710(a) (West 2011) (defining the key terms used in the VPPA). In the case of an e-book reader privacy statute, the line between what constitutes an “e-book” and other forms of digital media will be especially difficult to draw (and redraw) over time.
C. Prospects for a Federal Reader Privacy Statute

The idea of enacting a federal statute to protect reader privacy is not a new one. Unfortunately, little progress has been made in the decade and a half since the idea was first proposed. However, the last few years have brought about extraordinary changes in the source and format of books as well as the technology used to track reader behavior. Five years ago, few would have imagined that a search engine company would possess

160. See Cohen, supra note 27, at 1031 (proposing the enactment of a federal reader privacy statute).

the rights to twelve million books and that digital book readers would be the thickness of a few sheets of paper, sell for little more than the price of a law school casebook, and transmit detailed reader histories to personal computer manufacturers and online book sellers.

Although most readers took their privacy rights for granted in the world of paper books, an increasing number of readers are realizing that these rights are in danger of being lost forever in the digital world. Moreover, the controversy over the Google Books Settlement is causing legal scholars, civil libertarians, and ordinary readers to reconsider how best to maintain reader privacy rights. If there is an optimal time to introduce e-book reader privacy legislation, it is now.

V. CONCLUSION

This Comment examined reader privacy protections in the world of paper books, the rise of the e-book and electronic reader tracking, and the gap between new technologies and existing laws. It argued that unregulated reader tracking threatens privacy, that reader privacy is a constitutionally-protected right, and that the reader privacy protections enjoyed in the paper world should be migrated to the digital world. Finally, this Comment examined a number of potential responses to the erosion of reader privacy in the digital age, proposed the enactment of a comprehensive federal e-book reader privacy statute, and suggested that now is the best time to legislate. As award winning author Jonathan Lethem stated:

Now is the moment to make sure that [digital books are] as private as the world of physical books. If future readers know that they are leaving a digital trail for others to follow, they may shy away from important but eccentric intellectual journeys.

162. See Steven Levy, Amazon's Third Generation Kindle Keeps E-Reader Fire Burning, WIRED (Aug. 22, 2010), http://www.wired.com/reviews/2010/08/pr_kindle3 (reporting that the newest Amazon Kindle e-book reader is only one-third of an inch thick and weighs a mere 8.7 ounces).