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## Sometimes I Feel Like Somebody's Watching Me . . . Read?: A Comment On The Need For Heightened Privacy Rights For Consumers Of Ebooks, 30 J. Marshall J. Info. Tech. & Privacy L. 281 (2013)

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## COMMENTS

### SOMETIMES I FEEL LIKE SOMEBODY'S WATCHING ME . . . READ?\*

### A COMMENT ON THE NEED FOR HEIGHTENED PRIVACY RIGHTS FOR CONSUMERS OF EBOOKS

MEREDITH MAYS ESPINO\*\*

*“As nightfall does not come at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness.”*

- Supreme Court Justice William O. Douglas<sup>1</sup>

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\* Because eReaders are capable of reporting our reading habits, we lack privacy when we use them. Book services monitor readers when they are used. How much they actually monitor us is anyone's guess. Rockwell, *Somebody's Watching Me*, on *Somebody's Watching Me* (Motown Records 1984) (the title is an allusion to *Somebody's Watching Me*, a song about a man who feels as if he is being spied upon. “I'm just an average man, with an average life . . . I always feel like somebody's watching me. And I have no privacy . . . I always feel like somebody's watching me. I want my privacy.”).

\*\* Candidate for Juris Doctor, The John Marshall Law School, 2015; B.A. in Liberal Studies, University of Illinois at Springfield, 2008. I would like to thank Zayna Nubani and especially Pamela Szelung for their immeasurable and invaluable assistance in editing this Comment. I would also like to thank Edgar Espino for providing constant encouragement, support, and an endless supply of coffee throughout the writing of this comment and without which my journey through law school would not have been possible.

1. Michael Posner, *Human Rights in the Post-September 11 Environment*, 5 SEATTLE J. FOR SOC. JUST. 181, 195 (2006) (citing Letter from William O. Douglas to the

## I. INTRODUCTION

If you use an eReader<sup>2</sup> or another electronic device for your reading, someone is watching you read. Rather, something is watching what you read, how long you read, whether you stopped reading at a certain page, whether you bookmarked certain passages, and even whether you needed to look up a word if you are reading from an eReader.<sup>3</sup> eReaders and other electronic devices are quickly becoming the primary mode of reading. The books, magazines, and other reading materials that are available from sources such as Amazon,<sup>4</sup> Barnes & Noble,<sup>5</sup> Google Play,<sup>6</sup> and iTunes<sup>7</sup> are almost limitless.

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Young Lawyers Section of the Wash. State Bar Assoc. (Sept. 10, 1976), in *THE DOUGLAS LETTERS* 162 (Melvin I. Urofsky ed., 1987)). Douglas' warning is one we should heed. While it may not feel as if we are in danger of losing our civil liberties when book services spy on us, Douglas reminds us not to become complacent. We must be ever vigilant, even when it seems as if all is right with our world. When we become complacent, that is when it is when we lose our civil liberties, including our privacy. *Id.*

2. An eReader is a portable electronic device that displays digital versions of books, periodicals, and other printed materials. eReaders allow readers to make annotations and highlight text. Most eReaders use e-ink technology, which simulates printed paper, reducing eyestrain and glare. Reading materials are downloaded via an internet connection. Most recently, eReaders have color displays and offer web browsing. 7 *Things You should Know About eReaders*, EDUCAUSE (Mar. 2010), <http://net.educause.edu/ir/library/pdf/eli7058.pdf>.

3. Nicole Ozer, *Digital Books: A New Chapter for Reader Privacy*, AM. CIV. LIBERTIES UNION OF N. CAL., 4 (Mar. 2010), [https://www.aclunc.org/issues/technology/asset\\_upload\\_file295\\_9047.pdf](https://www.aclunc.org/issues/technology/asset_upload_file295_9047.pdf).

4. Amazon.com is an online retailer of books, videos, household items and thousands of other products. *Amazon.com, Inc. Company Profile, Information, Business Description, History, Background Information on Amazon.com, Inc.*, REFERENCE FOR BUSINESS, <http://www.referenceforbusiness.com/history2/35/Amazon-com-Inc.html> (last visited July 18, 2013).

5. Barnes & Noble began as a brick-and-mortar store but expanded to online bookselling in the 1980s. In July 2009, Barnes & Noble expanded to digital books, or ebooks. *Barnes & Noble History*, BARNES & NOBLE, [http://www.barnesandnobleinc.com/our\\_company/history/bn\\_history.html](http://www.barnesandnobleinc.com/our_company/history/bn_history.html) (last visited July 18, 2013).

6. Google Play is a cloud-based application from Google, where consumers can purchase books, music, movies, and other applications for Android devices. Because it is cloud-based, purchased materials are accessible on any Android device. Jamie Rosenberg, *Introducing Google Play: All Your Entertainment, Anywhere You Go*, GOOGLE OFFICIAL BLOG (Mar. 6, 2012), <http://googleblog.blogspot.com/2012/03/introducing-google-play-all-your.html>.

7. iTunes is an application developed by Apple that sells, organizes, and stores music and video content. Content may be streamed to Macs and PCs. *Apple iTunes*,

However, those who pay for and download these ebooks are not purchasing the ebooks. Instead, consumers purchase licenses, allowing them to download, store, and read the books.<sup>8</sup> At any time, the ebook supplier can revoke the licenses. For example, Amazon found itself in an ironic 1984-esque incident in which Amazon deleted the books *1984* and *Animal Farm* from thousands of Kindle eReaders.<sup>9</sup> Amazon claimed that the novels were illegal copies that had been added to Amazon's book selection by a third party.<sup>10</sup> Without warning, Amazon deleted downloaded copies of the two Orwell novels.<sup>11</sup> Shocked and angry, Kindle customers had no idea that they did not actually own the books.<sup>12</sup> "[N]o judge can order a physical bookseller to come into your house and retrieve a book they've sold you, and saying things are different for the Kindle raises some interesting questions about what Amazon thinks 'ownership' means."<sup>13</sup>

A license is not ownership. A license is a privilege without a possessory estate.<sup>14</sup> In short, these suppliers of ebooks are not booksellers in the traditional sense because the purchasers do not ultimately have ownership of the books after the sale is complete.<sup>15</sup> To own is to "hold as property."<sup>16</sup> Consumers do not own the copy of the publication they are reading.<sup>17</sup> They cannot sell the books or lend them without

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CNET: DOWNLOAD.COM (Jan. 28, 2013), [http://download.cnet.com/Apple-iTunes/3000-2141\\_4-10235268.html](http://download.cnet.com/Apple-iTunes/3000-2141_4-10235268.html).

8. *Nook*® *Terms of Service*, BARNESANDNOBLE.COM LLC, <http://www.barnesandnoble.com/u/Terms-of-Service-NOOK-HD-HD-Plus/379003804/> (last visited Feb. 7, 2014); *Amazon Kindle Store Terms of Use*, AMAZON.COM (Sept. 6, 2012), [http://www.amazon.com/gp/help/customer/display.html/ref=help\\_search\\_1-4?ie=UTF8&no-deId=201014950&qid=1367214596&sr=1-4](http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-4?ie=UTF8&no-deId=201014950&qid=1367214596&sr=1-4).

9. Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 18, 2009), [http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?\\_r=0](http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0).

10. *Id.*

11. *Id.*

12. *Id.*

13. Nilay Patel, *Amazon Clarifies Kindle Book-Deletion Policy, Can Still Delete Books*, ENGAGET.COM (Oct. 1, 2009, 2:27 PM), <http://www.engadget.com/2009/10/01/amazon-clarifies-kindlebook-deletion-policy-can-still-delete-b/>.

14. BLACK'S LAW DICTIONARY 634 (6th ed. 1991).

15. *Nook*® *Terms of Service*, *supra* note 8; *Amazon Kindle Store Terms of Use*, *supra* note 8.

16. THE MERRIAM-WEBSTER DICTIONARY 374 (1998).

17. *Nook*® *Terms of Service*, *supra* note 8; *Amazon Kindle Store Terms of Use*, *supra* note 8.

permission of the book seller.<sup>18</sup> The payment is for a license to read the book.<sup>19</sup>

In addition to having the ability to arbitrarily revoke licenses purchased by consumers, ebook suppliers can also mine all sorts of data about your reading habits.<sup>20</sup> Did you read the entire book? How long did it take you? Did you start and then stop? How long before you stopped? On what page did you stop? If you did finish the book, did you purchase the sequel, if there was one? How long after finishing, did you purchase the sequel?

For example, John purchases books on career changes, resumes, and lawsuits against employers on his Amazon Kindle eReader. Amazon begins to sell its readers' information to a data mining company who, in turn, has contracts with various employers to provide information on the reading habits of their employees. John's employer is one of the contracting employers. The data mining company<sup>21</sup> sends a report to John's employer listing the career-changing and employment law books. What do you think happens to John? In all likelihood, as a result of Amazon's decision to sell John's private reading habits to a third party for profit, John would probably be terminated by his employer; and it is perfectly legal for Amazon to do so in nearly every jurisdiction.

Due to privacy implications for readers, governmental and commercial entities should be prohibited from mining reader data without strict safeguards, including passage of the Reader Privacy Act in all states and amending the definition of "library" in all state and federal statutes to include purveyors of ebooks. In order to ensure that data cannot be used to destroy patron privacy, libraries and ebook services should be prohibited from collecting information beyond that which is necessary to complete the business transaction and should

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18. *Nook*® *Terms of Service*, *supra* note 8; *Amazon Kindle Store Terms of Use*, *supra* note 8.

19. *Nook*® *Terms of Service*, *supra* note 8; *Amazon Kindle Store Terms of Use*, *supra* note 8.

20. Ozer, *supra* note 3.

21. Data mining companies glean personal information taken from multiple internet sources, including tracking software on computers, create dossiers on each person, then sells the information about two-fifths of a cent per person to advertisers and other interested parties. Joel Stein, *Data Mining: How Companies Now Know Everything About You*, *TIME MAGAZINE* (Mar. 10, 2011), <http://www.time.com/time/magazine/article/0,9171,2058205,00.html>.

subsequently destroy circulation information after each transaction is completed.

This Comment proposes that eReader book services are simply commercial lending libraries. They should be regulated with the same privacy protections as traditional library records by amending the definition of “library” to include these services. A library is “a place in which books and related materials are kept for use but not for sale.”<sup>22</sup> This definition is the very description of the services provided by book services like Amazon,<sup>23</sup> Barnes & Noble,<sup>24</sup> Google Play,<sup>25</sup> and iTunes.<sup>26</sup> Their patrons should have the same privacy protections as those who patronize traditional libraries. However, definitions vary by states and most do not encompass book services. Therefore, the definitions in the various states should be amended to specifically include book services.

Stronger protection for e-reader consumers lies in the passage of the Reader Privacy Act. The Reader Privacy Act is a state solution providing protections from governmental and commercial intrusions. The Act prohibits the commercial providers of books (book sellers) from sharing personal information related to users of the book service, except under court order.<sup>27</sup> If there is a court order to share the information, the book seller has the opportunity to contest the order.<sup>28</sup> Further, the subject of the order has the right to be informed of the order and has the opportunity to contest the order as well.<sup>29</sup> This Comment will also propose that the Reader Privacy Act, passed in California and introduced in the legislatures of New York and New Jersey, should be passed

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22. THE MERRIAM-WEBSTER DICTIONARY, *supra* note 16, at 300.

23. Amazon.com is an online retailer of books, videos, household items and thousands of other products. *Amazon.com, Inc. – Company Profile*, *supra* note 4.

24. Barnes & Noble began as a brick and mortar store but expanded to online bookselling in the 1980s. In July 2009, Barnes & Noble expanded to digital books, or ebooks. *Barnes & Noble History*, *supra* note 5.

25. Google Play is a cloud based application from Google, where consumers can purchase books, music, movies and other applications for Android devices. Because it is cloud-based, purchased materials are accessible on any Android device. Rosenberg, *supra* note 6.

26. iTunes is an application developed by Apple that sells, organizes and stores music and video content. Content may be streamed to Macs and PCs. *Apple iTunes*, *supra* note 7.

27. Reader Privacy Act, CAL. CIV. CODE § 1798.90, et al. (2011); A.B. 3802, 215 Legis. (NJ 2013), A05094, 2013-2014 Regular Sessions (NY 2013).

28. *Id.*

29. *Id.*

in all states.<sup>30</sup>

Part II of this Comment will discuss the infiltration of eReaders into the U.S. market, and the privacy protections that have evolved through history to the privacy protections that consumers now enjoy at brick-and-mortar libraries. Part III will analyze the necessity of protecting consumers of ebooks and will propose three solutions: (i) pass the Reader Privacy Act in all states; (ii) amend the definition of “library” in all state and federal statutes to include ebook sellers; and (iii) prohibit libraries and book services from collecting information beyond that which is necessary to complete the business transaction and then subsequently destroy circulation information after each transaction is completed.

## II. BACKGROUND

### A. EBOOKS ON THE RISE

eReaders are portable electronic devices that allow consumers to download thousands of books, magazines, and other reading materials from book sellers and store all of them on one device.<sup>31</sup> eReaders allow users to change font sizes, an advantage for those with vision limitations.<sup>32</sup> Further, eReaders automatically start on the last page read or users can set bookmarks.<sup>33</sup> However, reading of ebooks is not just reserved to eReaders; other platforms also allow readers to read books digitally. Tablets have become an increasingly popular option for book consumption.<sup>34</sup> Tablets have similar functionality but also have additional capabilities akin to laptops.<sup>35</sup> Lastly, ebooks also can be read on

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30. *Id.*

31. COREY SANDLER, *KOBO E-READER FOR DUMMIES* 1 (2011).

32. Miriam Karmel, *Tools for Low Vision Patients: High Hopes for High-Tech Gadgets*, AMERICAN ACADEMY OF OPHTHALMOLOGY, <http://www.aao.org/publications/eyenet/201202/lowvision.cfm> (last visited Mar. 16, 2014).

33. *Id.*

34. Jim Algar, *Can eReaders Survive a Tablet Computer Onslaught?*, UNITED PRESS INTERNATIONAL (Sept. 1, 2013, 6:30 AM), [http://www.upi.com/Science\\_News/Technology/2013/09/01/SciTechTalk-Can-e-readers-survive-a-tablet-computer-onslaught/UPI-64551378031400/](http://www.upi.com/Science_News/Technology/2013/09/01/SciTechTalk-Can-e-readers-survive-a-tablet-computer-onslaught/UPI-64551378031400/).

35. Matt Smith, *Can a Tablet Replace Your Laptop? We Used an iPad for Three Months to Find Out*, DIGITAL TRENDS (June 15, 2013), <http://www.digitaltrends.com/computing/can-a-tablet-replace-your-laptop/>.

smartphones.<sup>36</sup>

The use of eReaders and reading ebooks has skyrocketed. One in five Americans own an eReader.<sup>37</sup> Another one in five Americans own a tablet.<sup>38</sup> Forty-two percent of consumers who read ebooks do so on a computer.<sup>39</sup> Forty-one percent read them on an e-Reader.<sup>40</sup> Twenty-nine percent read on their smartphones.<sup>41</sup> Twenty-three percent do so on their tablets.<sup>42</sup> For ease of discussion, “eReaders” in the remainder of this Comment will refer to all platforms used for reading ebooks.

Sixty-one percent of American consumers purchase licenses to possess and read their books on eReaders.<sup>43</sup> Amazon, Barnes & Noble, Google, Kobo, Sony, Adobe, and Apple are some of the most prolific providers of ebooks. While only sixteen percent of Americans read ebooks in 2011, that number increased to twenty-three percent in 2012.<sup>44</sup> Because reading is increasingly done on eReaders, the privacy of consumers purchasing licenses to and reading ebooks has become a concern.

## B. READERS’ PRIVACY IS FRAGILE

### 1. Governmental Privacy Intrusions

Governments have wondered, or worried, about what Americans are reading for some time. As far back as the 1910’s, programs have been established to gather intelligence about Americans’ reading habits.

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36. Jeremy Greenfield, *Do You Read Ebooks on Your Phone?*, DIGITAL BOOK WORLD (Sept. 11, 2012), <http://www.digitalbookworld.com/2012/do-you-read-ebooks-on-your-phone/>.

37. Lee Rainie, Kathryn Zickuhr, Kristen Purcell, Mary Madden, & Joanna Brenner, *The Rise of E-Reading*, PEW INTERNET (Apr. 4, 2012), <http://libraries.pewinternet.org/2012/04/04/the-rise-of-e-reading>.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Greg Bensinger, *The E-Reader Revolution: Over Just as It Had Begun?*, WALL ST. J. (Jan. 4, 2013, 1:25 AM), <http://online.wsj.com/article/SB10001424127887323874204578219834160573010.html>.



During World War I, military officials requested that libraries report patrons that asked about books on explosives and even requested that those books be removed from shelves.<sup>45</sup> Many librarians were eager to help the military authorities.<sup>46</sup> When World War II erupted, these requests were made again, this time for explosives and cryptology.<sup>47</sup> Again, librarians eagerly complied.<sup>48</sup>

Afterward, when World War II had ended, McCarthyism and The Red Scare spread throughout the nation. Senator Joseph McCarthy created mass hysterical paranoia that communists and sympathizers had pervaded the government.<sup>49</sup> Public servants were required to sign "loyalty oaths."<sup>50</sup> The first loyalty oath case was against, among others, a librarian who questioned the Government's right to request information regarding patrons and possible subversive activities.<sup>51</sup> Persons accused of violating the loyalty oath were investigated, questioned, held for trial, or even brought before Congress.<sup>52</sup> Despite unreliable and scant evidence, those accused lost their jobs and some were even jailed.<sup>53</sup> Most of the accused were later exonerated.<sup>54</sup> It was not until McCarthyism began that librarians, through the American Librarians Association,<sup>55</sup> reversed course and became champions for protecting the

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45. Joan Starr, *Libraries and National Security: A Historical Review*, 9 FIRST MONDAY (2004), available at <http://firstmonday.org/ojs/index.php/fm/article/view/1198/1118#note6>.

46. *Id.*

47. *Id.*

48. *Id.*

49. ALFRED FRIED, MCCARTHYISM, THE GREAT AMERICAN RED SCARE: A DOCUMENTARY HISTORY 4 (1996).

50. *Parker v. L.A. Cnty.*, 338 U.S. 327, 327 (1949).

51. *Id.*; Jean Preer, *The American Heritage Project: Librarians and the Democratic Tradition in the Early Cold War*, 28 LIBR. & CULTURE 165, 167 (1993).

52. Reader's Digest, *Contempt of Congress Prosecutions*, in READER'S DIGEST FAMILY ENCYCLOPEDIA OF AMERICAN HISTORY 288 (1975); Ellen Schrecker, *Blacklists and Other Economic Sanctions*, MODERN AMERICAN POETRY, <http://www.english.illinois.edu/maps/mccarthy/schrecker5.htm> (last visited Mar. 20, 2014).

53. *Id.*

54. *Id.*

55. American Library Association is the trade association for librarians, libraries, and library users. Founded in 1876, "the mission of ALA is to provide leadership for the development, promotion, and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all." *About ALA*, AMERICAN LIBRARY ASSOCIATION, <http://www.ala.org/aboutala/> (last

“freedom to read.”<sup>56</sup>

The end of McCarthyism did not spell the end of government spying through citizens’ reading habits. COINTELPRO was the acronym for the F.B.I.’s five domestic “counterintelligence programs,” whose mission was to neutralize political dissidents, i.e., communists, civil rights activists, Vietnam War protesters, and others.<sup>57</sup> COINTELPRO used sometimes illegal means to obtain information.<sup>58</sup> The program lasted until 1971, when a break-in at an F.B.I. office led to the exposure of the program, leading to its end.<sup>59</sup> The F.B.I. admits that it was “rightfully criticized by Congress and the American people for abridging First Amendment rights and for other reasons.”<sup>60</sup> However, the F.B.I.’s admission of spying on library patrons did not abate the activity.

Later, the Library Awareness Program (LAP) was another F.B.I. program established to investigate library patrons beginning in the 1970s.<sup>61</sup> The F.B.I. interrogated and attempted to elicit librarian assistance to obtain names, circulation information, service requests, and nationalities or national origins of library patrons.<sup>62</sup> The F.B.I. claimed that the program was launched to protect against espionage and the requests were not for general monitoring but in response to specific targets.<sup>63</sup> However, librarians stated that they were asked to report patrons with accents and foreign-sounding names.<sup>64</sup>

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visited Mar. 14, 2014).

56. Starr, *supra* note 45.

57. *FBI in Your Library*, AMERICAN LIBRARY ASSOCIATION, <http://www.ala.org/Template.cfm?Section=ifissues&Template=/ContentManagement/ContentDisplay.cfm&ContentID=21662> (last visited Mar. 19, 2014).

58. Final Report of the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, S. REP. NO. 755, 94th Cong., 2d Sess. Book II (1976).

59. Mark Mazzetti, *Burglars Who Took on F.B.I. Abandon Shadows*, N.Y. TIMES (Jan. 7, 2014), [http://www.nytimes.com/2014/01/07/us/burglars-who-took-on-fbi-abandon-shadows.html?\\_r=0](http://www.nytimes.com/2014/01/07/us/burglars-who-took-on-fbi-abandon-shadows.html?_r=0).

60. *FBI Records: The Vault – COINTELPRO*, FEDERAL BUREAU OF INVESTIGATION, <http://vault.fbi.gov/cointel-pro> (last visited Mar. 14, 2014).

61. Ulrika Ekman Ault, Note, *The FBI’s Library Awareness Program: Is Big Brother Reading over Your Shoulder?*, 65 N.Y.U. L. REV. 1532, 1534 (1990).

62. *Id.*

63. *Id.*

64. *Id.* at 1536.

The F.B.I. claimed that the program was not a general policy but was directed at scientific and technical libraries in New York City.<sup>65</sup> However, university libraries in several states, including “California, Maryland, Michigan, Ohio, Texas, Utah, Virginia, and Wisconsin” also were visited and received requests by the F.B.I.<sup>66</sup> The program was revealed to the public in 1987 in a New York Times article.<sup>67</sup> While the F.B.I. told Congress that the program ended in 1987, documents suggest that the program continued until 1989.<sup>68</sup>

Recent history has given us another threat to our freedom to read. In 1978, the Foreign Intelligence Surveillance Act (FISA) was passed to heighten the government’s ability to surveil foreign operatives within the United States to obtain foreign intelligence.<sup>69</sup> “[F]ederal authorities may obtain a FISA order for access to any tangible item no matter who holds it, including by implication library loan records and the records of library computer use.”<sup>70</sup> While the Attorney General could authorize surveillance for up to a year, after that, authorization was required from the Foreign Intelligence Surveillance Court (FISC), also known as the FISA Court.<sup>71</sup>

The so-called USA PATRIOT Act perverted FISA’s purpose and expanded its reach. The “wall” between the intelligence community and law enforcement was toppled.<sup>72</sup> In the hysteria following the attacks on September 11, 2001, Congress passed the USA PATRIOT Act and gave law enforcement greater access to all sorts of personal records, including library records.<sup>73</sup> Now, government officials do not need a warrant to obtain a patron’s library records if they are investigating in the name of terrorism.<sup>74</sup>

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65. *Id.* at 1537.

66. *Id.*

67. Robert D. McFadden, *F.B.I. in New York Asks Librarians' Aid in Reporting on Spies*, N.Y. TIMES (Sept. 18, 1987), <http://www.nytimes.com/1987/09/18/nyregion/fbi-in-new-york-asks-librarians-aid-in-reporting-on-spies.html>.

68. Starr, *supra* note 45.

69. Symposium, *Electronic Surveillance of Terrorism: The Intelligence/Law Enforcement Dilemma-A History*, 11 LEWIS & CLARK L. REV. 1099, 1113-14 (2007).

70. CHARLES DOYLE, CONG. RESEARCH SERV., RS21441, LIBRS. AND THE USA PATRIOT ACT (2005).

71. Symposium, *supra* note 69.

72. *Id.*

73. DOYLE, *supra* note 70.

74. Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Liv-*

One such request was challenged by the American Civil Liberties Union on behalf of a Connecticut library.<sup>75</sup> While much of the record is sealed, an unsealed declaration, though heavily redacted, explains the effect of exposing patrons' records to government officials.<sup>76</sup> The declaration explains that patrons assume that their reading records are private and "free from government monitoring."<sup>77</sup>

The gag that comes with these types of records requests also kept this public servant from not only discussing this particular request, but from engaging in discussions regarding the general subject of government spying on library patrons.<sup>78</sup> In the end, the gag order was lifted

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*ing: Libraries, the Right to Read, and A First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 808 (2006); see also *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot Act") Act of 2001*, PUB. L. NO. 107-56, 115 STAT. 272 (2001).

75. Eric Lichtblau, *F.B.I., Using Patriot Act, Demands Library's Records*, N.Y. TIMES (Aug. 26, 2005), <http://www.nytimes.com/2005/08/26/politics/26patriot.html>.

76. The parties of the suit were under a gag order and were unable to reveal their identities; therefore, court documents were necessarily redacted. In 2006, it was revealed that the declarant was Peter Chase. At the time of the suit, Chase was Vice President, Library Connection Inc.; Director, Plainville Public Library; and Chairman, Intellectual Freedom Committee for the Connecticut Library Association. Declaration of [redacted], *Am. Civil Liberties Union v. Gonzalez*, No. 3:05cv1256 (D. Conn.), Aug. 31, 2005, ECF No. 33-2; Peter Chase, *Doe v. Gonzales: Fighting the FBI's Demand for Library Records – Statement of Peter Chase*, AM. CIVIL LIBERTIES UNION (May 30, 2006), <https://www.aclu.org/national-security/doe-v-gonzales-fighting-fbis-demand-library-records-statement-peter-chase>.

77. Declaration of [redacted], *Am. Civil Liberties Union v. Gonzalez*, No. 3:05cv1256 (D. Conn.), Aug. 31, 2005, ECF No. 33-2. An excerpt of the Declaration is as follows:

I believe that, in order for democracy to work, citizens must have access to a wide range of information on which to base their decisions, and that citizen's reading choices, like their voting choices, need to be private. I, therefore, believe that libraries have an affirmative obligation to protect the privacy of their patrons and their library records, both paper and electronic. I also believe that the need for such privacy is greatest in times of war or threats to national security when the risk of government intrusion is highest and the need for an informed and aware citizenry greatest . . . In my three decades of experience as a librarian, I have learned that library patrons take the right of privacy within libraries very seriously. I believe that library patrons use books and computers within libraries under the assumption that what they read and view is private and free from government monitoring. I believe that if American citizens were to learn that the government had served a library with an NSL, it would influence the ongoing public debate about the Patriot Act. *Id.*

78. *Id.*

and the request was withdrawn.<sup>79</sup> Sadly, this was not the only or last request. In the first four years of the FISA expansion, patron records were requested from libraries over 200 times.<sup>80</sup>

For nearly a century, American governments have been relentlessly prying into the reading habits of its constituents. From World War I to the PATRIOT Act, library patrons' records have been endangered. As discussed below, protections have been put in place for library readers. However, even with federal protections, stronger protections are needed. Such protections are most likely to emanate from the individual states.

## 2. Commercial Privacy Intrusions

Government entities are not the only ones interested in what Americans are reading. The major ebook publishers can now track the reading habits of its customers.<sup>81</sup> Amazon, Apple, Google and others can track not only what readers are reading on eReaders but how much readers are reading, what search terms are used to find books, where readers stop in a book, passages highlighted, and pages bookmarked.<sup>82</sup>

Even textbook publishers have started tracking. While many other publishers have been gathering data on students using ebooks, CourseSmart allows professors to track whether their students are reading, for how long, when they read, and what they are reading.<sup>83</sup> CourseSmart provides the professor a report for each student showing the average length of time a student reads each time the student reads; the average number of pages the student reads; the average number of highlights, notes, and bookmarks; and an Engagement Index.<sup>84</sup> The Engagement Index purports to show how engaged students are with the material by using certain matrix.<sup>85</sup> However, studying done offline is

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79. *Librarians' NSL Challenge*, AM. CIVIL LIBERTIES UNION (May 26, 2006), <http://www.aclu.org/national-security/librarians-nsi-challenge>.

80. Lichtblau, *supra* note 75.

81. Alexandra Alter, *Your Ebook is Reading You*, WALL ST. J. (July 19, 2013), <http://online.wsj.com/article/SB10001424052702304870304577490950051438304.html>.

82. *Id.*

83. David Streitfeld, *Teacher Knows if You've Done the E-Reading*, N.Y. TIMES (Apr. 8, 2013), [http://www.nytimes.com/2013/04/09/technology/coursesmart-e-textbooks-track-students-progress-for-teachers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/04/09/technology/coursesmart-e-textbooks-track-students-progress-for-teachers.html?pagewanted=all&_r=0).

84. *Id.*

85. *Id.*

not included so the data can be skewed.<sup>86</sup>

A student interviewed about the CourseSmart's tracking program expressed anxiety that the inaccurate engagement numbers could give professors a negative opinion of students to their detriment.<sup>87</sup> She had a low engagement score despite being a good student.<sup>88</sup> She was concerned because her professor, who sees her lower Engagement Index on her tracking report, is an advisor to a professional organization in which she is a member.<sup>89</sup> The tracking of her reading by CourseSmart without her consent and reporting the data to her professor is an invasion of the student's privacy that could have a devastating impact on her career.

Currently, there is no way to opt-out of the tracking.<sup>90</sup> For now, publishers and book sellers are trying to determine how they are going to use the data collected.<sup>91</sup> Amazon aggregates data and posts it online, such as the most highlighted passages.<sup>92</sup> Amazon also uses some of the data for targeted advertising, i.e., advertising directed and specifically selected to the individual reader.<sup>93</sup> Further, the privacy policies of most eReader providers allow the providers to share readers' information without consent.<sup>94</sup>

### C. LIBRARY PRIVACY PROTECTION STATE STATUTES TODAY

Nearly all states have statutes regarding privacy rights for library patrons. Georgia is the only state lacking a statute protecting the privacy rights of library patrons—its statute was repealed effective

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Alter, *supra* note 81.

91. *Id.*

92. *Id.*

93. Kate Kaye, *Amazon's and Facebook's Ad Privacy Practices Irk Ad Agencies*, AD AGE DIGITAL (Jan. 2, 2013), <http://adage.com/article/digital/amazon-s-facebook-s-ad-privacy-practices-irk-ad-agencies/238946/>.

94. Husna Haq, *E-readers and ebook Platforms Track Users' Activity, Says a New Study*, THE CHRISTIAN SCIENCE MONITOR (Dec. 6, 2012), <http://www.csmonitor.com/Books/chapter-and-verse/2012/1206/E-readers-and-ebook-platforms-track-users-activity-says-a-new-study>.

January 1, 2013.<sup>95</sup> State laws provide varying levels of protection for library patrons but, other than Georgia, protections do exist.

In most states, library patrons' information is protected against any intrusion, except with the patrons' consent, for library administration purposes, and pursuant to court order. This is true in twenty-seven states, including Arizona, New York, and Texas.<sup>96</sup> Unlike book services, traditional libraries may not sell or otherwise provide patron information to advertisers, data mining companies, informal governmental inquiry, or other third parties.

The vast majority of states, including Florida, Massachusetts, and New Jersey, as well as the District of Columbia have laws that apply only to public libraries.<sup>97</sup> Ten states, including Delaware, Hawaii, and Kentucky, protect patron records against disclosure by open records requests by exempting library records from the state's open records statutes.<sup>98</sup> Six states, including Illinois, Maryland, and New Hampshire, have statutes that have privacy protections built into the library statutes and also have exemptions from the state's open records statutes.<sup>99</sup> Finally, twelve states, including Michigan, Missouri, and North Carolina have statutes that cover all libraries or could be interpreted as covering all libraries.<sup>100</sup> In 2013, Arizona included ebooks in its statute that protects patrons' public library records.<sup>101</sup> Clearly, the states have

95. Confidential nature of library records which identify user library materials, GA. CODE ANN. § 24-9-46 (West 2011). Georgia's statute applied to public libraries only. Personal identifying information was confidential, not public, and could not be disclosed except (a) to library staff for purposes of library administration; (b) with the patron's, or, in the case of a minor, their parent's or guardian's, consent; or (c) pursuant to a court order. *Id.*

96. ARIZ. REV. STAT. ANN. § 41-151.22 (2011); N.Y. C.P.L.R. § 4509 (McKinney 1988); TEX. GOV'T CODE § 552.124 (West 2011).

97. FLA. STAT. ANN. § 257.261 (West 2003); MASS. GEN. LAWS CH. 78, § 7 (1988); N.J. STAT. § 18A:73-43.2 (West 1985); D.C. CODE § 39-108 (1999).

98. 29 DEL. CODE ANN. § 10002(l)(12) (West 2012); OIP Op. Ltr. No. 90-30 (Dep't of Atty. Gen. of Haw. Oct. 23, 1990); OAG 81-159 (Atty. Gen. of Ky. 1981) and OAG 82-149 (Atty. Gen. of Ky. 1982).

99. 75 ILL. COMP. STAT. ANN. 70/1(1)(a-b); 5 ILL. COMP. STAT. ANN. 140/7(1)(c) (West 2012); MD. CODE ANN., EDUC., § 23-107 (West 1990); MD. CODE ANN., STATE GOV'T § 10-616(e) (West 2012); N.H. REV. STAT. ANN. § 91-A:5 (IV) (2008); N.H. REV. STAT. ANN. § 201-D:11 (2009).

100. MICH. COMP. LAWS § 397.602(h) (1990); MO. ANN. STAT. § 182.817 (West 1986); N.C. GEN. STAT. ANN. § 125-18 (West 1985).

101. H.B. 2165 (Az. 2013).

varying degrees of protection for library records, except in Georgia, where there is none.

#### D. YOU PAID TO BORROW THAT BOOK, YOU DIDN'T BUY IT

On one fateful Friday in 2009, Amazon customers got a rather shocking surprise when two books were removed from their devices.<sup>102</sup> Ironically, those books were George Orwell's *1984* and *Animal Farm*.<sup>103</sup> Customer reports of other books, including *Harry Potter* and those by Ayn Rand were also reported as previously removed.<sup>104</sup>

Amazon could remove those books from eReaders because the consumers did not own their copies of the books they thought they had purchased. They had purchased only licenses. Amazon's Kindle Store's Terms of Use state clearly, "Kindle Content is licensed, not sold, to you by the Content Provider."<sup>105</sup> That means, and the Terms of Use clearly state, that the content (i.e., books) may not be sold or given away.<sup>106</sup>

Barnes & Noble has a similar set-up. "The Software has been licensed, not sold, to you."<sup>107</sup> Unlike Amazon, Barnes & Noble Nook customers can lend books through their licensed lending program. However, the consumer cannot sell or give away the book after it is purchased.<sup>108</sup>

Purchasing a license for a book is no different from a library patron checking out a book from a library. The *Merriam-Webster Dictionary* defines a library as "a place in which books and related materials are kept for use but not for sale."<sup>109</sup> Amazon, Barnes & Noble, and the other ebook sellers, in their digital offerings, provide a place where books are licensed for use but not for sale. eReader book sellers are for-profit lending libraries. In most states, library patrons' information is protected against any intrusion except with the patron's consent, for library administration purposes, and pursuant to court order.<sup>110</sup>

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102. Stone, *supra* note 9.

103. *Id.*

104. *Id.*

105. Amazon Kindle Store Terms of Use, *supra* note 8.

106. *Id.*

107. Nook® Terms of Services, *supra* note 8.

108. *Id.*

109. THE MERRIAM-WEBSTER DICTIONARY, *supra* note 16.

110. ARIZ. REV. STAT. ANN. § 41-151.22 (2011); N.Y. C.P.L.R. § 4509 (McKinney 1988); TEX. GOV'T CODE § 552.124 (West 2011).



## E. READER PRIVACY ACT

While state privacy statutes provide some protection for traditional library patrons, what about patrons of electronic content providers, i.e., the private, for-profit libraries? Protection is scant. “Digital book services without reader privacy protections create a ‘gold mine’ of information that can be used against readers without their knowledge and without proper due process.”<sup>111</sup> Readers of digital material are scandalously exposed.

In response to the lack of protection provided for book service consumers, California passed the Reader Privacy Act.<sup>112</sup> The Act defines book services to include those who sell and lend books.<sup>113</sup> The Act prohibits disclosure of personal information, broadly defined, to any third party, including law enforcement, without a court order.<sup>114</sup> The requirements for a court order are laid out and rather stringent, requiring the court to find a compelling interest and that the information sought cannot be obtained from less intrusive means.<sup>115</sup> The party seeking the records, including law enforcement, must provide notice to the book service and allow the book service to contest the order.<sup>116</sup> The user of the book service is also to receive a notice of the order and, in some cases, opportunity to quash the order.<sup>117</sup> Finally, the book service must publish online statistical information about requests in a searchable format.<sup>118</sup>

California is not alone in its attempt to protect readers’ privacy. Both New Jersey and New York have Reader Privacy Act bills pending in their respective legislatures.<sup>119</sup> In 2013, New Jersey’s Assembly passed the bill and it was sent to the Senate.<sup>120</sup> Unfortunately, the bill did not pass the Senate prior to the end of the session.<sup>121</sup>

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111. A.B. 5094 Memo, A.B. 5094, 2013-2014 Regular Sessions (NY 2013).

112. Reader Privacy Act, CAL. CIV. CODE § 1798.90, et al. (2011).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. A.B. 3802, 215 Legis. (NJ 2013); A05094, 2013-2014 Regular Sessions (NY 2013).

120. A.B. 3802, 215 Legis. (NJ 2013).

121. *Id.*

While movement is slow, there is hope that the statute will pass and readers in New York will get privacy protections for their electronic reading.

While the use of eReaders and other devices providing reading material are growing at a rapid rate, protections are vital in promoting intellectual freedom and protecting privacy of readers.<sup>122</sup> Privacy protections for patrons of traditional libraries have enjoyed evolving and strengthening protections—from no protection at the beginning of the early twentieth century to strong, though imperfect, protection today. However, patrons of electronic for-profit libraries (i.e., ebook sellers) do not have the same protections.<sup>123</sup> In fact, their protections are scant. Passage of the Reader Privacy Act, amending the definition of “library” to include electronic for-profit libraries, and requiring for-profit libraries to destroy data once there is no longer transactional necessity would provide patrons and readers of electronic materials on electronic devices, the privacy to enjoy their intellectual freedom sans fear of reprisal or privacy intrusion.

### III. ANALYSIS: BUILD A MOAT AROUND READERS’ INFORMATION

This Comment proposes that the Reader Privacy Act should be passed in all states. Further, the definition of “library” should be changed to include ebook sellers.<sup>124</sup> Finally, libraries and book sellers should be required to destroy circulation information when there is no longer a transactional necessity.

#### A. PASS THE READER PRIVACY ACT IN ALL STATES

Because more readers are consuming their reading material on eReaders and other devices, it is essential that privacy protections be put in place. The Reader Privacy Act defines book services to include those who sell and lend books.<sup>125</sup> The Act prohibits disclosure of personal information, broadly defined, to any third party, including

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122. Rainie, Zickuhr, Purcell, Madden, & Brenner, *supra* note 37.

123. A.B. 5094 Memo, A.B. 5094, 2013-2014 Regular Sessions (NY 2013).

124. THE MERRIAM-WEBSTER DICTIONARY, *supra* note 16 (a library is “a place in which books and related materials are kept for use but not for sale”).

125. Reader Privacy Act, CAL. CIV. CODE § 1798.90, et al. (2011).

commercial enterprises and law enforcement, without a court order.<sup>126</sup> Amazon, Barnes & Noble, Google Play, iTunes, and other providers of books stored and read on eReaders and other devices would be covered under the Act. The Reader Privacy Act should be passed so that: (i) commercial snooping would be greatly limited and law enforcement would have to go beyond a mere request;<sup>127</sup> (ii) patrons would be given the opportunity to protect their privacy by quashing requests in court;<sup>128</sup> and (iii) statistical reporting would give patrons and the general public information on the pervasiveness of the privacy invasions, increasing public awareness, and allowing for a more informed discussion on privacy rights.<sup>129</sup>

Under the Act, the personal information of patrons of ebook services would be better protected against disclosure to any third party, commercial or governmental, without a court order.<sup>130</sup> A court order requires a compelling interest and that the information sought cannot be obtained from less intrusive means.<sup>131</sup> In other words, reader data collection would occur less often, providing some solace to readers who prefer to keep their reading habits to themselves. Protections would reduce the chilling effect on readers who fear reprisal from discovery of personal reading preferences.<sup>132</sup>

For example, Emma has moments of regret concerning her marriage to Sean. She purchases books on divorce on Google Play. Google begins selling its readers' information to a data mining company. Sean suspects Emma may be planning something unpleasant and hires an investigator who purchases a report about Emma from said data mining company. Sean sees the report, and despite Emma's uncertainty about her true feelings, now believes that his wife is going to divorce him. They have no prenuptial agreement but he does have a friend who works at a bank in the Cayman Islands.<sup>133</sup> What do you think Sean

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126. *Id.*

127. A.B. 3802, 215 Legis. (NJ 2013); A05094, 2013-2014 Regular Sessions (NY 2013).

128. *Id.*

129. *Id.*

130. Reader Privacy Act, CAL. CIV. CODE § 1798.90, et al. (2011).

131. *Id.*

132. A.B. 5094 Memo, A.B. 5094, 2013-2014 Reg. Sess. (NY 2013).

133. The banks in the Cayman Islands are well known for being havens of asset hiding and protection. Their bank secrecy laws makes it nearly impossible to track and, therefore, gain access to assets. Robert J. Mintz, *Cayman Islands*, LAW OFFICES OF

does? It is possible that Sean empties their bank accounts into his own account in the Cayman Islands, and then disappears, leaving her with nothing.

Personal health information can also be inferred from reading information. For example, Susan has HIV. She knows the stigma that is still attached to the disease. Instead of heading out to the bookstore in her small town, she decides to purchase books on HIV and self-help books to deal with the emotional toll her diagnosis brings. Unfortunately, avoiding her neighborhood bookstore did not help her. She purchased the books on her Nook. The State Health Department purchases lists of readers of such books to suss out infected persons to offer information on limiting exposure to sexual partners and offer assistance with obtaining medications. The State Health Department's system is hacked and the data, including Susan's, is posted on a popular website, frequented by members of her community.

While there is no indication that non-anonymized data is sold to data mining companies or government agencies at this time, there is also no indication that the data is not. Nor are there any protections or restrictions against selling the reader data to data mining companies. Currently, Amazon aggregates reader data and posts it online.<sup>134</sup> Amazon also uses the data it has gathered to advertise products from its website specifically selected to the individual reader, a practice commonly known as targeted or behavioral advertising.<sup>135</sup>

Readers purchasing these electronic reading materials are clearly exposed. eReaders are encouraging reading in the United States, but one incident similar to the ones described above could reverse this trend in reading.<sup>136</sup> A third of Americans surveyed said that they read much more with their eReader than without.<sup>137</sup> Without the use of eReaders and other devices, people would simply read less, or not at all. Ideas would no longer flow freely but would be stifled simply because readers' reading information would not be protected.

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ROBERT J. MINTZ, <http://www.rjmintz.com/offshore-havens/bank-secrecy-havens/cayman-islands/> (last visited July 18, 2013).

134. Alter, *supra* note 81.

135. Kaye, *supra* note 93.

136. Amy Gahran, *Ebooks Spur Reading Among Americans, Survey Shows*, CNN (Apr. 5, 2012), <http://www.cnn.com/2012/04/05/tech/gaming-gadgets/e-reader-survey-pew-gahran>.

137. *Id.*

Further, the Act requires that the party seeking the records (i.e., law enforcement) provide notice to the book service and the book service must be able to contest the order. Therefore, the keeper of the records has the ability to better protect its patrons and maintain the patrons' confidence in the integrity of the service.<sup>138</sup> Confidence in the privacy of their data will give readers confidence to purchase books from book sellers, especially those book sellers that stridently protect their readers from privacy intrusions.

More importantly, the user of the book service is also entitled to receive a notice of the order and, in some cases, opportunity to invalidate the order.<sup>139</sup> Currently without any legislation in place similar to the Reader Act, there is little to no requirements to notify readers of the privacy invasion.<sup>140</sup> Notification and the ability to respond empower readers to protect their information while reigning in law enforcement and commercial interlopers' overreach into the personal reading habits of eReader consumers.

There is significant history to law enforcement's invasion of reader privacy. We have yet to fully understand the significance or consequence of commercial privacy invasion and its negative effects, including what happens to the information when a book service's system is breached and personal reading information is available to the masses. What happens if an employer gets a copy of your reading list? What secrets does your reading list tell about you? Does it suggest that you are contemplating filing suit against your employer? Does it suggest that you have health issues? Does it say that you like to read erotica? Does it reveal your political or religious inclinations?

Finally, the requirement that book services report statistical information about requests and publish the information online in a searchable format gives the public the opportunity to see the pervasiveness of privacy invasions.<sup>141</sup> One of the difficulties in privacy protection is public education as to what data is collected, what is shared, and with whom.<sup>142</sup> Without the Reader Privacy Act, book services are not obliged to disclose how often their information is being requested and disclosed. This requirement is a significant step in this public

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138. Reader Privacy Act, CAL. CIV. CODE § 1798.90, et al. (2011).

139. *Id.*

140. A.B. 5094 Memo, A.B. 5094, 2013-2014 Reg. Sess. (NY 2013).

141. Reader Privacy Act, CAL. CIV. CODE § 1798.90, et al. (2011).

142. A.B. 5094 Memo, A.B. 5094, 2013-2014 Reg. Sess. (NY 2013).

education effort.

While a state solution does not protect readers against federal privacy intrusions, a federal solution is not feasible. Recently, the *Indiana Law Review* published a comment advocating for the passage of the Reader Privacy Act in the states as merely a springboard to a substantially similar federal solution.<sup>143</sup> The note argued that passage in the states would force Congress' hand in passing the Reader Privacy Act as federal law.<sup>144</sup> However, it is not feasible. Past action in Congress showed interest in protecting privacy.<sup>145</sup> Unfortunately, recent history has shown that Congress not only lacks the political will to strengthen privacy laws but instead, has worked to weaken them.<sup>146</sup> For example, when Congress failed to pass an adequate update to the now antiquated Electronic Communications Privacy Act,<sup>147</sup> states stepped in to pass their own laws protecting their constituents.<sup>148</sup> Even bills introduced in Congress to prohibit or limit domestic spying have been voted down.<sup>149</sup> A state based solution is the only viable solution at this time.

While California has passed the Reader Privacy Act, New York has the Reader Privacy Act bill pending in its legislatures. It is imperative that not only New York enacts this legislation, but that all states take

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143. Andrew A. Proia, Note, *A New Approach to Digital Reader Privacy: State Regulations and Their Protection of Digital Book Data*, 88 IND. L.J. 1593 (2013) (advocating the passage of the Reader Privacy Act in multiple states as a means to push for federal regulation).

144. *Id.*

145. Julian Sanchez, *On Digital Privacy, Congress' Offer Is This: Nothing*, CATO INSTITUTE (Jan. 2, 2013 3:54 PM), <http://www.cato.org/blog/digital-privacy-congress-offer-nothing>.

146. Editorial Board, *Congress Can Stop Privacy Abuse*, N.Y. TIMES (June 7, 2013), <http://www.nytimes.com/2013/06/08/opinion/congress-can-stop-privacy-abuse.html>.

147. *Electronic Communications Privacy Act (ECPA)*, ELECTRONIC PRIVACY INFORMATION CENTER, <http://epic.org/privacy/ecpa/> (last visited Sept. 1, 2013). The Electronic Communications Privacy Act of 1986 ("ECPA") prohibits certain wiretapping, eavesdropping, and unauthorized access to electronic communications while in an electronic storage system. Because the law, with minor amendments throughout time, was passed well before much of today's technologies were ever imagined, issues have developed in protecting communications and information. For example, email stored on a home computer is protected, email stored elsewhere, such as a cloud drive is not. *Id.*

148. Brian Fung, *Did You Know Montana Was a Leader on Privacy Laws? Neither Did Montana*, N.Y. TIMES (Aug. 8, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/28/did-you-know-montana-was-a-leader-on-privacy-laws-neither-did-montana/#comments>.

149. Editorial Board, *supra* note 146.

their readers' privacy seriously and pass the Act. The protections provided in the Reader Privacy Act would reduce the chilling effect on readers who fear reprisal from discovery of personal reading preferences.

The Reader Privacy Act gives book service patrons what they do not have now—protection against invasions of privacy as to their reading habits. As described above, the Act should be passed for the reasons that follow: (i) commercial snooping would be greatly limited and law enforcement would have to go beyond a mere request;<sup>150</sup> (ii) patrons would be given the opportunity to quash requests in court, to protect their privacy;<sup>151</sup> and (iii) statistical reporting would give patrons and the general public information on the pervasiveness of the privacy invasions, increasing public awareness, and allowing for a more informed discussion on privacy rights.

#### B. AMEND THE DEFINITION OF "LIBRARY" IN ALL STATE AND FEDERAL STATUTES TO INCLUDE EBOOK SELLERS

eReader book services should be included in the statutory definition of "library" to ensure that the protections for libraries are applied to all such commercial services. The definition of "library" should be amended to include private, for-profit libraries, including those that charge a fee for borrowing the book or those that license the books but do not actually sell them. eReader book sellers are for-profit lending libraries and, with the change in definition, will be required to provide the same protections to those who use traditional libraries. In most states, the readers' information is protected against any intrusion except with the patron's consent, for library administration purposes, and pursuant to court order.<sup>152</sup>

What is a library, exactly? The *Merriam-Webster Dictionary* defines a library as "a place in which books and related materials are kept for use but not for sale."<sup>153</sup> The definition is the very description for the services provided by Amazon, Barnes & Noble, and the other similar services. Many states have defined libraries not by what they are but

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150. A.B. 3802, 215 Leg. (NJ 2013); A05094, 2013-2014 Reg. Sess. (NY 2013).

151. *Id.*

152. ARIZ. REV. STAT. ANN. § 41-151.22 (2011); N.Y. C.P.L.R. § 4509 (McKinney 1988); TEX. GOV'T CODE § 552.124 (West 2011).

153. THE MERRIAM-WEBSTER DICTIONARY, *supra* note 16.

under whose dominion they are regulated. In several states, the definition is similar to the following: “Library’ means a library that is established by the state, a county, city, town, school district, or a combination of those units of government, a college or university, or any private library open to the public.”<sup>154</sup> Most states do not bother to define library at all.

Because libraries have traditionally been governmental institutions, it requires a stretch of the traditional view to see eReader book providers as libraries. However, that is exactly what they are. Books are kept on the servers of the book sellers. Consumers purchase a license to read the book, or in other words, to borrow the book, albeit for a fee.<sup>155</sup> The books are then housed on the eReader. At any time, the book seller can retake control of the book.<sup>156</sup>

These services are, at their core, a private, for-profit library—they lend reading materials, via license, for a fee. Patrons do not own the books they pay to read.<sup>157</sup> The license is the equivalent of a library card for each book, one for which the patron pays. The patron may have the book for as long as the license is valid. Since there is little difference between traditional library patrons and those of book services—these for-profit libraries—ebook patrons should have the same privacy rights as those of traditional library patrons. Amazon, Barnes & Noble, Google Playstore, iTunes, etc. are “a place in which books and related materials are kept for use but not for sale.”<sup>158</sup> They are libraries.

The expansion of the definition of “library” to include book services like Amazon, Barnes & Noble, and other ebook sellers would extend the same protections provided to traditional library patrons to users of those electronic services. While no state’s law circumvents court ordered spying, it would protect against other privacy invasions, including invasions from commercial entities.<sup>159</sup> Including ebook sellers in the definition would go a long way to protect reader privacy.

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154. MONT. CODE ANN. § 22-1-1102 (West 1985).

155. *Amazon Kindle Store Terms of Use*, *supra* note 8; *Nook® Terms of Services*, *supra* note 8.

156. *Amazon Kindle Store Terms of Use*, *supra* note 8; *Nook® Terms of Services*, *supra* note 8.

157. *Amazon Kindle Store Terms of Use*, *supra* note 8; *Nook® Terms of Services*, *supra* note 8.

158. THE MERRIAM-WEBSTER DICTIONARY, *supra* note 16.

159. See, e.g., ALASKA STAT. ANN. § 40.25.140 (West 1985); IND. CODE ANN. § 5-14-3-4(b)(16) (West 2012); LA. REV. STAT. ANN. § 44:13 (2001).



Therefore, eReader book providers should be included in the statutory definition of “library.” If there is no statutory definition of a library, then a definition should be added and it must include book services. States must define the term “library” to ensure that the protections for libraries are applied to all such institutions. Included in the definition should be private, for-profit libraries, including those that charge a fee for borrowing the book or those that license the books but do not actually sell them. With this slight revision, ebook licensees will have the same protections as those who patronize traditional brick-and-mortar libraries.

#### C. REQUIRE LIBRARIES AND BOOKSELLERS TO DESTROY CIRCULATION INFORMATION WHEN THERE IS NO LONGER A TRANSACTIONAL NECESSITY

Of course, if readers’ data did not exist on book services’ servers, readers’ privacy would be significantly easier to protect. Obviously, if ebook providers did not collect and keep information on their patrons, they would have nothing to produce or share with third parties. Therefore, ebook providers should be required to delete consumer history when it is no longer transactionally necessary and there is no pending court order to produce such information.

This idea is not altogether new. The Video Privacy Protection Act of 1988 requires that personally identifiable information, including rental history, must be deleted as soon as practicable, but no later than one year from the date the information becomes transactionally unnecessary and there are no pending court orders to produce the information.<sup>160</sup> “[T]he term ‘personally identifiable information’ includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.”<sup>161</sup> While this statute only applies to video tape rental, the same concept could very easily be applied to book services.

Data is collected, presumably, for innocent purposes, such as marketing.<sup>162</sup> However, the data collection possibilities are vast and so are the opportunities for privacy intrusion. Be it from commercial or governmental interlopers, data can be used for a variety of reasons, and not always innocent ones. Governmental agencies can and, if given the

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160. Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(e) (2002).

161. *Id.* at § 2710(a)(3).

162. Stein, *supra* note 21.

chance would, use the data for nefarious purposes, including domestic spying. Commercial purposes include marketing but can also include the sale of information—a very valuable commodity—to employers, spurned lovers, hackers, criminals—to anyone willing to pay.

The best way to avoid privacy invasion is to eliminate the opportunity for possible invasions. The best way to do that is by eliminating the information that is so valuable to both the innocent and less than innocent. Delete the data once its primary purpose has been completed. Once the transaction has taken place, the data is only really useful to those who wish to use the data for purposes unintended by the consumer. If book sellers did not store information on their customers, they would have nothing to produce or share with third parties.

While book sellers will shun this proposition because they could make additional revenue on the sale of readers' data, by doing so, they risk alienating the very readers they court. By eliminating the temptation of selling readers' information, they will also be protecting it.

#### IV. CONCLUSION

Privacy for readers has been fragile. History of governmental intrusion from the World Wars to today's war on terror shows that government agencies have been determined to discover our reading habits as both a method of security and deterrence. Commercial intrusions upon readers' privacy are burgeoning and potentially limitless. The reasons for commercial intrusions into reader privacy may be innocent (marketing) to nefarious (blackmail). The risk of innocent uses does not outweigh the nefarious. Because book sellers can mine nearly limitless data about their customers, that data must be protected in favor of reader privacy.<sup>163</sup>

eReaders and other devices capable of providing our reading material are taking over the literary world. They are quickly becoming the primary mode of reading material consumption. However, those who pay for and download these books are not purchasing them but are purchasing the right to borrow the book.<sup>164</sup> The book provider can at any time revoke the license.<sup>165</sup> In short, these suppliers of ebooks are not

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163. A.B. 5094 Memo, A.B. 5094, 2013-2014 Reg. Sess. (NY 2013).

164. *Amazon Kindle Store Terms of Use*, *supra* note 8; *Nook® Terms of Services*, *supra* note 8.

165. Stone, *supra* note 9.

booksellers as the books are not purchased.<sup>166</sup> They are libraries.

Therefore, protections afforded traditional libraries must be expanded to cover these new, electronic, for-profit versions. eReader book sellers are simply high tech commercial lending libraries, i.e., “a place in which books and related materials are kept for use but not for sale.”<sup>167</sup> Their readers should have the same privacy protections as those who patronize traditional libraries. Governmental and commercial entities should be prohibited from mining reader data without strict safeguards. To do this, the states must: (i) pass the Reader Privacy Act in all states; (ii) amend the definition of “library” in all state and federal statutes to include book sellers; and (iii) require libraries and booksellers to destroy circulation and license purchasing information when there is no longer a transactional necessity.

These solutions are reasonably simple ways to create an optimal privacy framework to increase reader privacy and protecting intellectual freedom without overburdening book sellers.

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166. *Nook*® *Terms of Services*, *supra* note 8; *Amazon Kindle Store Terms of Use*, *supra* note 8.

167. THE MERRIAM-WEBSTER DICTIONARY, *supra* note 16.