



**Association of American Publishers  
Statement Submitted for the Hearing Record  
House Judiciary Committee  
Subcommittee on Courts, Intellectual Property, and the Internet  
June 17, 2014**

**Hearing on “First Sale Under Title 17”  
June 2, 2014**

**Introduction**

On behalf of its members, the Association of American Publishers (“AAP”) appreciates this opportunity to place its views in the hearing record of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet (“IP Subcommittee”) regarding the impact of the Supreme Court’s recent *Kirtsaeng* decision on the publishing industry and the unprecedented level of access to copyrighted digital content made possible by innovative, new, license-based business models that would be decimated by the creation of a “digital” first sale doctrine.

In particular, AAP submits this post-hearing statement on behalf of the broader publishing industry<sup>1</sup> to support and elaborate upon the oral and written testimony presented at the IP Subcommittee’s June 2<sup>nd</sup> hearing by Stephen Smith, President and CEO of John Wiley & Sons (“CEO Smith”), regarding the importance of three issues: (1) maintaining a properly-tailored first sale doctrine;<sup>2</sup> (2) addressing harms caused by the *Kirtsaeng* decision through a legislative solution that reinstates a meaningful right to control unauthorized importation; and (3) providing effective copyright protections to foster continued innovation in broadening access to

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<sup>1</sup> The Association of American Publishers (AAP) represents over 400 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses.

<sup>2</sup> The first sale doctrine codified at section 109(a) of the Copyright Act is limited to tangible copies that are owned, rather than licensed or leased, by the person in possession of them, and is an exception only to the exclusive right of distribution.

digitally transmitted copyrighted works, bearing in mind the harm that a digital first sale doctrine would cause to this robust and growing market.<sup>3</sup>

## **Reaffirming a Meaningful Importation Right**

### Relevance of First Sale Doctrine to Importation

As a general matter, AAP agrees with hearing witness Greg Cram of the New York Public Library that the first sale doctrine has and continues to provide important public benefits including: the right for U.S. libraries to lend printed books in their collections to the public and for owners of used printed books and physical copies of movies and music (CDs, DVDs)<sup>4</sup> to resell their copies, all without further involvement of the owners of the copyrights to those works.<sup>5</sup> The statutory provision that authorizes these activities is Section 109 of the Copyright Act, officially titled “Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.” In application, the benefits of the limitation become available after the first transfer of ownership, usually the “first sale”<sup>6</sup> of a physical copy of a copyrighted work to an end-user, hence the doctrine is popularly referred to as the “first sale doctrine.”

Excluding commercial quantities of books intended for sale exclusively in foreign markets from entering the U.S. market without the authorization of the rights holder, however, is a completely separate issue. As explained below, publishers have never harbored any intention of using a right to control importation to restrict age-old library lending practices for works

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<sup>3</sup> See generally *BookStats Volume 3*, 2013 (available for purchase at <http://bookstats.org/>) (showing that in the past five years, unit sales of trade eBooks have increased over 4,456%); see also Book Industry Study Group, *Digital Books and the New Subscription Economy* (forthcoming Jun. 2014) <https://www.bisg.org/news/digital-subscriptions-inevitable-and-driven-market> (studying the market forces that are fueling growth of a multitude of different eBook and journal subscription services).

<sup>4</sup> AAP recognizes that the Copyright Office, as of 2001, believed that, in general, digital works embodied in a physical object, e.g., a CD or DVD, would be subject to the traditional first sale doctrine, though, subsequent caselaw has brought this conclusion into question. Compare Copyright Office, *DMCA Section 104 Report* at 100 (2011), [http://www.copyright.gov/reports/studies/dmca/dmca\\_study.html](http://www.copyright.gov/reports/studies/dmca/dmca_study.html); with *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010); *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011) (establishing a fact-specific balancing test for determining whether a digital work embodied in a physical format can be “owned” (and thus be subject to the first sale doctrine) by a third-party who acquires the physical object, or whether such third-party only acquires a license to use the digital work without reference to the first sale doctrine. Therefore, some CDs and DVDs may be sold via license and not be subject to the first sale doctrine.

<sup>5</sup> *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) available at <http://judiciary.house.gov/cache/files/00f54728-f9f3-41e6-8245-52beeb779d2e/060214-first-sale-testimony-cram.pdf> (Written Testimony of Greg Cram, New York Public Library, also noting that publishers and libraries are “working collaboratively to resolve digital issues” and conceding that “business models are evolving and experimentation is occurring” at 14); see also American Library Association, *ALA Releases 2014 State of America’s Libraries Report* (Apr. 14, 2014) <http://www.ala.org/news/press-releases/2014/04/ala-releases-2014-state-america-s-libraries-report> (stating that “2013 ended with all the major U.S. publishers participating in the library ebook market, though important challenges, such as availability and prices, remain.”).

<sup>6</sup> Section 109 does not actually require a commercial transaction for its benefits to become available, rather any transaction that transfers legal ownership of a particular copy of a work is sufficient.

published abroad.<sup>7</sup> Rather, AAP’s proposed solution is intended to increase exports and global access to U.S. content and reverse the damage caused by the *Kirtsaeng* decision to our diplomatic and economic reach.

### Unauthorized Importation Under the Copyright Act

Like Wiley, AAP’s member publishers all strive in unique ways to educate, inform, and entertain audiences around the world by making their books and journals available in local markets. Until last March, when the Supreme Court issued its *Kirtsaeng* decision, publishers were able to rely on Section 602(a)(1) of the Copyright Act to prevent the unauthorized importation of non-pirated copies of U.S. works produced and intended only for sale abroad.<sup>8</sup> Specifically, Section 602(a)(1) provides that: “[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106.” Section 602(a)(3) also lists several specific exceptions to this general prohibition, which allow the importation of copies: (1) by the U.S. or a state government; (2) for private use and not for distribution; and (3) for certain nonprofit scholarly, educational, or religious purposes, such as library lending.

However, as explained in the concurring opinion of Justice Kagan (joined by Justice Alito) in *Kirtsaeng*, the Court was bound by precedent established in the 1998 *Quality King v. L’Anza* decision, holding that the first sale doctrine limited a copyright owner’s right to prevent unauthorized importation as an infringement of the distribution right.<sup>9</sup> The *Quality King* decision only pertained to “re-imported” works that were originally manufactured and sold in the U.S., and therefore did not reach the question of whether this policy should apply to works manufactured and intended only for sale abroad. Still constrained by this precedent, Justices Kagan and Alito joined the majority opinion in *Kirtsaeng*, but recognized that applying the first sale doctrine to limit a copyright owner’s control of the importation of U.S. works made and intended for sale abroad significantly diminished the scope of 602(a)(1)’s importation right, “limit[ing] it to a fairly esoteric set of applications.”<sup>10</sup> Justice Ginsburg’s dissent (joined by

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<sup>7</sup> See *supra* note 5 at 10-11 (noting that “for almost 400 years, libraries in America have been lending books and other materials”). This long history of lending indicates to AAP that publishers and libraries can operate in mutually beneficial ways. Our suggested legislative fix for the *Kirtsaeng* decision is not intended to disrupt these longstanding lending practices.

<sup>8</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. \_\_\_, 133 S.Ct. 1351 (U.S. 2013). However, the Supreme Court did agree with the Solicitor General that “the [Copyright] Act itself makes clear...that foreign-printed *pirated* copies are subject to the Act” under 602(a)(2), which prohibits importation of such copies. *Id.* at 1353 (internal citations omitted).

<sup>9</sup> *Quality King Distributors v. L’Anza Research Int’l*, 523 U.S. 135 (1998).

<sup>10</sup> *Kirtsaeng*, 133 S.Ct. 1372 (2013) (Kagan, J., *concurring*).

Justice Kennedy and, in substantial part, by Justice Scalia) also noted that the majority opinion rendered the exceptions set forth in Section 602(a)(3) essentially meaningless.<sup>11</sup>

### What's At Stake for Publishers and the United States

There is substantial demand for U.S. published works around the world, which U.S. publishers strive to satisfy through tailored purchasing and licensing arrangements and the creation of special editions of their works for sale in specific foreign markets.<sup>12</sup> U.S. copyright owners, like other U.S. producers of tangible goods, seek to vigorously compete in foreign markets because such export trade extends their opportunities to recover their R&D and production costs across a larger number of transactions than is possible through dependence on domestic trade alone. Furthermore, the continuing success of such export trade in U.S. copyrighted works substantially benefits the U.S. economy, job markets, and consumers.<sup>13</sup>

However, CEO Smith testified that the *Kirtsaeng* decision has “created confusion and disruption in the global marketplace, lessening the availability of [Wiley] products and placing [the company] at a competitive disadvantage” and has provided a general “disincentive for U.S. publishers to participate in foreign markets.”<sup>14</sup> Specifically, the decision eliminates a publisher’s ability to engage in foreign market segmentation which, as a practical matter, requires price differentials based on “pricing to the market” to ensure the reasonable affordability of the works to consumers in specific markets; allows arbitrageurs to actively undermine the domestic market for copyrighted works by importing lower-priced foreign copies into the U.S. for commercial resale; offers a new opportunity to counterfeiters to recapture foreign markets as the publishers’ legitimate, lower-priced books are stripped out the markets by arbitrageurs; and constrains the development of goodwill for the United States, its people, and their values derived from access to U.S. educational content. This is the present, real-world impact of the *Kirtsaeng* decision—reduced U.S. content in foreign countries, diminishing export revenues and increased piracy.

Publishers understand that library and consumer advocates have concerns regarding overly expansive applications of the importation right.<sup>15</sup> For example, hearing witnesses Cram

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<sup>11</sup> *Id.* at 1379 (2013) (Ginsburg, J., *dissenting*) (noting that “the Court’s decision also overwhelms 17 U.S.C. 602(a)(3)’s exceptions to 602(a)(1)’s importation prohibition...For example, had Congress conceived of §109(a)’s sweep as the Court does, what earthly reason would there be to provide, as Congress did in §602(a)(3)(C), that a library may import “no more than five copies” of a non-audiovisual work for its “lending or archival purposes?”).

<sup>12</sup> See generally, *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) available at <http://judiciary.house.gov/cache/files/f05f9055-75b3-4a01-b2e7-9d770c5b9223/060214-first-sale-testimony-smith.pdf> (Written Testimony of Stephen Smith, CEO John Wiley & Sons).

<sup>13</sup> Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report* (Nov. 19, 2013) ([http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html)) (reporting that the U.S. copyright industries contributed over \$1 trillion in added value to the U.S. economy in 2012).

<sup>14</sup> *Id.* at 5.

<sup>15</sup> See *supra* note 5 at 10-11 (explaining that despite the fact that “libraries in America have been lending books and other materials” for “almost 400 years,” the library community fears that a strong importation prohibition would

and Band both testified that a decision supporting market segmentation in the *Kirtsaeng* case could have subjected libraries to liability for lending copies of works that were manufactured abroad.<sup>16</sup> The solution proposed in Justice Kagan’s concurrence and supported by the publishing industry (detailed below), however, is intended to safeguard existing library lending practices, while providing copyright owners with tools to address unauthorized commercial importation of works intended for foreign markets.

### Proposed Legislative Solution

As stated by CEO Smith, “when properly applied, [the first sale doctrine] avoids interference with a copyright owner’s importation rights in order to ensure that authors, publishers and other distributors of works that depend upon copyright in making these works available to the public can operate effectively in the full range of industrialized and developing world markets by implementing market-appropriate price differentials.”<sup>17</sup> Unfortunately, the Supreme Court majority in *Kirtsaeng*, abandoning the Court’s usual deference to Congress regarding the public policy determinations underlying specific statutory provisions and language in the Copyright Act,<sup>18</sup> has unnecessarily broadened the application of the first sale doctrine with regard to unauthorized importation. Still, the divided Court encouraged Congress to clarify its intent regarding Section 602(a) and offered a way for Congress to reinstate a meaningful importation right while maintaining a proper balance between users and copyright owners.<sup>19</sup>

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require “libraries to stop circulating or distributing or displaying the millions of books in their collections that were printed abroad”); see also *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) available at <http://judiciary.house.gov/cache/files/f5adac7a-241d-4a7c-b201-56ddcfc05477/060214-first-sale-testimony-band.pdf> (Written Testimony of Jonathan Band, Owners’ Rights Initiative at 10 discussing burden that a domestic exhaustion rule would place on charitable organization that “have no way of knowing if an item donated to them had first been sold in the United States with the manufacturer’s authorization.”).

<sup>16</sup> *Id.*

<sup>17</sup> See *supra* note 12.

<sup>18</sup> *Kirtsaeng*, 133 S. Ct. at 1388 (noting that: “The Court[’s majority opinion] fails to give meaningful effect to Congress’ manifest intent in §602(a)(1) to grant copyright owners the right to control the importation of foreign-made copies of their works.” Justice Ginsburg objects to this lack of deference to Congress by citing the following precedent *American Trucking Assns.*, 310 U. S. 534, 542 (1940); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” (internal quotation marks omitted). AAP agrees with Justice Ginsburg on this point and supports Congressional reaffirmation of the importation right given the majority’s departure from the standard practice of deferring to Congress on matters of copyright law. See *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003) (assessing “whether the [Copyright Term Extension Act’s] extension of existing copyrights exceed[ed] Congress’ power under the Copyright Clause,” the Supreme Court decided to “defer substantially to Congress” on that point given that “it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.”) (internal citations omitted).

<sup>19</sup> *Kirtsaeng*, 133 S. Ct. at 1371 (stating for the majority opinion that “whether copyright owners should, or should not, have more than ordinary commercial power to divide international markets is a matter for Congress to decide.”). The concurrence also notes that “if Congress thinks copyright owners need greater power to restrict importation and thus divide markets, a ready solution is at hand—not the one John Wiley offers in this case, but the one the Court rejected in *Quality King*” (AAP’s Proposed Legislative Solution). *Id.* at 1373.

Specifically, as explained in the concurring opinion in *Kirtsaeng* and argued by the Solicitor General of the United States in the *Quality King* case, importation is a distinct type of distribution and an action that may be regulated under the Copyright Act *without limitation by the first-sale doctrine*.<sup>20</sup> That is because the first sale doctrine deals with selling or otherwise disposing of copies, but does not address *importing* them.

Congress can and should clarify that the right to control importation is not subject to the application of the first sale doctrine. Specifically, the reference to Section 106 in Section 602(a)(1) should be eliminated and the text narrowed to simply state that unauthorized importation of copies that “have been acquired outside the United States is an infringement of the copyright owner’s right to import or authorize the importation of such copies or phonorecords.” This alteration would leave intact the ruling in *Kirtsaeng* that the first sale doctrine, as a general matter, applies to copies “lawfully made under this title,” *without regard to the place of their manufacture*, whenever the owner of such copies sells or otherwise disposes of possession of them; but would not provide a defense to the unauthorized importation of such copies. It would also provide critical copyright protection for U.S. copyright owners while still allowing U.S. consumers to purchase books abroad, bring them to the U.S. and give them away, or in the case of libraries, lend them to the public without fear of infringement liability. This solution incorporates many of the consumer benefits of the *Kirtsaeng* decision supported by the New York Public Library and Owners’ Right Initiative

The majority opinion in the divided *Kirtsaeng* Court ignored the fact that Congress, anticipating some of the concerns of libraries and others regarding the potential for U.S. consumers to risk infringement liability for using unauthorized import copies, included specific exceptions in Section 602(a)(3) to address that issue. The legislative fix proposed above would impose liability on the unauthorized importation, but not domestic use, of copies that are manufactured and intended for sale in foreign markets. However, as part of revisions to Section 602(a)(1), and to alleviate concerns regarding the worst-case, hypothetical scenarios described by some of the *amici* in the *Kirtsaeng* case, Congress could also consider whether reasonable limitations and exceptions to the scope and applicability of the right to control unauthorized importation, in addition to those already set out in Section 602(a)(3), are necessary and appropriate. Such reasonable limitations and exceptions would leave no doubt that concerns about potential downstream infringement liability or other possible adverse impact on, for example, libraries and museums in the U.S. have been addressed, while still providing copyright owners with the legal basis for managing the unauthorized importation which was the entire purpose of the enactment of Section 602(a)(1).

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<sup>20</sup> *Id.* at 1372, 1373 FN 1-2 (highlighting *Quality King*’s application of the ‘first sale’ doctrine to the importation provisions of Section 602(a)(1) as the real “culprit” of minimizing the scope of 602(a)(1) and describing the Solicitor General’s argument that was rejected in the *Quality King* decision as a cogent approach which recognizes that the two provisions can reasonably be read to “regulate separate, non-overlapping spheres of conduct.” Justice Kagan goes on to explain that “reversing *Quality King*—would yield a... sensible scheme of market segmentation... because ... [that] approach turns on the *intended market* for copies... instead [of] their *place of manufacture*.”).

## Digital First Sale

Publishers appreciate the attention this issue was given at the hearing, and in particular, found that questions asked by Chairman Goodlatte captured the gravamen of what is at stake and the reality that there is no need for Congress to create a “digital” first sale doctrine. Specifically, Chairman Goodlatte asked the CEO of ReDigi,<sup>21</sup> John Ossenmacher, whether copyright owners currently have the ability under the Copyright Act to permit resale of digital content by way of contract. Mr. Ossenmacher, who had originally tried to launch his digital content resale service with the authorization of rights holders,<sup>22</sup> said “Yes.” In follow-up, Chairman Goodlatte asserted that the logical conclusion from the fact that the right to authorize digital resale already exists, is that right holders must also have an *equal right to decline to authorize resale of digital content* and that market forces can determine whether digital resale becomes a reality. From publishers’ perspective, the recent and continuing launch of innumerable new business models embracing technology to provide flexible access to unprecedented amounts of content (*see* Appendix for examples), illustrates that market forces are alive and well, and that Congress does not need to take any action to create a new “digital” first sale doctrine. In fact, with respect to books, many of the benefits associated with the first sale doctrine are becoming more widely available for digital works (e.g., personal sharing and library lending of eBooks) or are even better than what is available in the analog world (e.g., e-textbook rental and chapter-specific purchasing).

Additionally, the first sale doctrine, as codified at Section 109(a) of the Copyright Act, states that “the *owner* of a *particular* copy or phonorecord lawfully made” under the Copyright Act may “without the authority of the copyright owner...sell or otherwise dispose of the possession of *that* copy or phonorecord.”<sup>23</sup> While the Supreme Court’s *Kirtsaeng* decision may have ignored Congress’s intent with respect to Section 602 (unauthorized importation), there is no debate that the Court was correct in stating that “Section 109(a) now makes clear that a lessee of a copy will *not* receive ‘first sale’ protection but one who *owns* a copy will.”<sup>24</sup> This is significant because many of the innovative, new business models (iTunes, Spotify, Scribd, Netflix, Nook, etc.) providing unprecedented levels of access to copyrighted content in digital

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<sup>21</sup> ReDigi is a company attempting to facilitate the resale of legally downloaded sound recordings (and potentially eBooks and other digital copyrighted works) with or without right holder permission. A federal judge in New York recently issued an injunction against ReDigi on grounds that its facilitation of the resale (without right holder permission) of lawfully acquired copies of such works that are downloaded in digital format is infringing. The court ruled that the process of transferring a downloaded digital copy of a work necessarily involves *reproduction* of the work, which is distinct from the exclusive *distribution* right that is subject to the first-sale doctrine and, in the case of ReDigi’s resale service, was a violation of the copyright owner’s exclusive reproduction right. *Capitol Records, LLC v. ReDigi, Inc.* 2013 U.S. Dist. LEXIS 48043 (S.D.N.Y. March 30, 2013).

<sup>22</sup> Presentation, John Ossenmacher, The Resale Market, (May 20, 2013) (noting that “Redigi can, and wants, to participate with you.”) (on file with author).

<sup>23</sup> Emphasis added.

<sup>24</sup> *Kirtsaeng*, 133 S. Ct. at 1353.

formats are commonly, though not exclusively, based on contractual end-user license agreements that do not convey ownership of the content to the purchaser but instead authorize the purchaser to use the digital song, book, adaptive learning content etc. as a licensee subject to certain terms and conditions.<sup>25</sup> Furthermore, in 2001, a Copyright Office study on whether to create a digital first sale doctrine (“First Sale Report”) explained that the current first sale doctrine explicitly limits only the copyright owner’s exclusive *distribution* right under Section 106(3).<sup>26</sup> Given this narrow scope, the Copyright Office concluded that Section 109(a)’s reference to “a particular copy” and “that copy” meant that the statute only applied to physical copies of copyrighted works, as no right other than the distribution right is implicated by the transfer of a material copy of a work from one person to another.<sup>27</sup>

### Divergent Consumer Expectations in the Digital Age: Ownership v. Access

Advocates for creating a “digital” first sale testified that consumers, when they “buy” an eBook or digital copy of a song or movie, expect that they should have the same right to own and resell that book, song, or movie as they have with physical copies.<sup>28</sup> The Copyright Office’s First Sale Report, however, found that:

Digital communications technology enables authors and publishers to develop new business models, with a more flexible array of products that can be tailored and priced to meet the needs of different consumers. Requiring that transmissions of digital files be treated just the same as the sale of tangible copies artificially forces authors and publishers into a distribution model based on outright sale of copies of the work. The sale model was dictated by the technological necessity of manufacturing and parting company with physical copies in order to exploit a work — neither of which apply to online distribution.<sup>29</sup>

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<sup>25</sup> See Appendix for a list of examples of new license-based business models for which the first sale doctrine, under the Supreme Court’s reasoning, does not apply; see also *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) available at <http://judiciary.house.gov/cache/files/1003410c-d1ba-4083-9bdc-0d2ed72fcf09/060214-first-sale-testimony-villasenor.pdf> (Written Testimony of John Villasenor at 1, explaining that digital first sale is moot with respect to license-based content); *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Oral Statement of John Ossenmacher testifying that he is not against licensing, but rather that consumers are “pro choice” regarding options for consuming content and conceding that digital first sale should not apply to streaming and subscription content when it is clearly licensed.).

<sup>26</sup> *DMCA Section 104 Report* at 78 (2011).

<sup>27</sup> *Id.*

<sup>28</sup> Compare *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Oral Statement John Ossenmacher describing the expectation of the average consumer that “buys” an eBook on Amazon to be an expectation that he owns the eBook, not a license to access the eBook); *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Oral Statement of Chairman Goodlatte explaining that he does not expect to acquire the same rights in an eBook as he does when he purchases a paperback).

<sup>29</sup> *DMCA Section 104 Report* at 91-92.

Based on these findings, the Copyright Office recommended that “if the sale model continues to be the dominant method of distribution, it should be the choice of the market, not due to legislative fiat.”<sup>30</sup> Publishers and distributors of books and journals exist in a very competitive marketplace that drives solutions to meet customer needs. Therefore, we continue to agree with the Copyright Office and Chairman Goodlatte that rights holders should be free to react to the demands of the market in deciding whether the sales model should apply to digital content, and that the Copyright Act must continue to incentivize rights holders to invest, develop and offer new methods of accessing content through a full-range of sales and license-based business models.

At the moment, with the continually growing popularity of streaming models for digital music and audio-visual programming, eTextbook and movie rentals, as well as library eBook lending, and eBook subscription services for digital works as well as short-term rental options in the physical realm, such as Car-2-Go and Rent-the-Runway, consumers appear to be embracing the flexibility of access models instead of outright ownership.<sup>31</sup> CourseSmart, an eTextbook rental platform founded by publishers, offers an example of how license-based access models for digital content can provide consumers with greater customization, flexibility, and affordability. The image below<sup>32</sup> shows the rental options presented to the student:

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<sup>30</sup> *Id* at 92.

<sup>31</sup> See generally Mary Meeker, *Internet Trends: End of the Year Report*, KPCB, <http://www.kpcb.com/insights/2012-internet-trends-update> (Dec. 3, 2012) (describing the ‘asset-light generation’ with contrasts between old “asset-heavy” preferences and new “asset-light” preferences. For example, slide 67 contrasts paying for “ownership” of albums and CDs in stores with paying for “access” to content through “instant on demand streaming” (slide 68 contrasts VHS and Netflix and slide 72 contrasts physical textbooks and Chegg (an e-Textbook rental company)); Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy* <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy> (Dec. 1, 2013) (discussing numerous new businesses that show how society is “moving from a world where we’re organized around ownership to one organized around access to assets”); Alan McGlade, *Steve Jobs was Wrong: Consumers Want to Rent Their Music Not Own It*, <http://www.forbes.com/sites/alanmcglade/2013/03/25/steve-jobs-was-wrong-consumers-want-to-rent-their-music-not-own-it> (Mar. 25, 2013); *The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Post-hearing Statement of the Association of American Publishers available at <http://www.publishers.org/attachments/docs/publicstatements/aapstatement-riseofinnovativebusinessmodels.pdf> (describing a number of new business models, including ones based upon access instead of ownership).

<sup>32</sup> CourseSmart, *Society: The Basics Twelfth Edition* (last visited Jun. 17, 2014) <http://www.coursesmart.com/society-the-basics-twelfth-edition/john-j-macionis/dp/9780205899173> (illustrating the various prices and levels of access publishers are providing to student through licensed rentals of eTextbooks).



**eTextbook**

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Author(s): John J. Macionis

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Notably, the terms for 120-day; 180-day; or Unlimited rental are clear here. Although voluntary steps to provide “plain English” explanations of access rights may be desirable for consumers of digital content in other contexts, a regulatory approach for providing such explanations is unnecessary and would be inappropriate in creating static requirements for dynamic markets.<sup>33</sup> Publishers are willing to do their part, individually or perhaps through broader development of voluntary best practices, to help alleviate any consumer confusion that may exist, for example, in scenarios where a consumer “buys” a license (authorizing access or other specified uses) to an eBook from an e-Retailer.

CourseSmart illustrates the commitment of publishers to use new business models to meet more specific consumer demands. The market is working, and, a robust digital resale segment could develop if consumers demand and the market supports it because there is nothing in the Copyright Act that prevents a rights holder from authorizing outright sales or resale of digital content. Even though the future of digital resale is uncertain, what is certain is that, if the exclusive rights afforded to copyright owners under Section 106 are meaningfully protected, copyright owners will be able to continue to invest in new ways to enhance their digital products to provide even greater customer experiences.

### Physical v. Digital

In addition to the policy considerations discussed above, there are also practical differences between physical and digital copies of copyrighted works that caution against the creation of a “digital” first sale doctrine. While there are many similarities between books in

<sup>33</sup> See *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Oral Statement of Sherwin Siy, Public Knowledge, testifying that Congress does not need to take legislative action to define the difference between a license and a sale in answer to Chairman Goodlatte’s question as to whether Congress should make such a law.); *supra* note 24 (Oral Statement of John Villasenor agreeing that Congress should not define what constitutes a sale or a license, preferring instead for the market and courts to resolve this issue, despite his belief that some aspects of current online transactions may not be clear to some consumers).

physical and digital form, some key features of digital books that are most appreciated by consumers, such as the ability to access them instantly online, their exponentially-enhanced portability, and their capacity to withstand deterioration from repeated use, are significant differences in functionality that make the acquisition and transfer of digital books implicate the exclusive rights of copyright more substantially than do such transactions involving a physical book.

The Copyright Office's First Sale Report explained that "time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner's market, no longer exists in the realm of digital transmissions. The ability of such 'used' copies to compete for market share with new copies is thus far greater in the digital world."<sup>34</sup>

Moreover, as Rep. Ted Deutch pointed out at the hearing, new business models providing access to digital content give consumers new benefits that are impracticable, if not impossible, with physical works, such as cloud-storage, multi-device access, free re-downloading (if a device is broken, stolen, lost, etc.), not to mention access to vast amounts of content<sup>35</sup> at minimal cost. AAP agrees with Rep. Deutch that the growth of these new access models and their related benefits indicates that the balance between copyright owners and users seems to be "alive and well."<sup>36</sup> However, attempting to apply the "first sale" doctrine to digital books (and other copyrighted works distributed through downloads, streaming or other forms of online transmission) would dismiss the significant practical differences between physical and digital works, in order to create a broad and unnecessary limitation on the exclusive rights of copyright owners that would undermine efforts to provide consumers with more tailored options for accessing content.<sup>37</sup>

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<sup>34</sup> *DMCA Section 104 Report* at 82-83.

<sup>35</sup> See e.g., Scribd, [www.scribd.com](http://www.scribd.com) (last visited Jun. 17, 2014) (allowing subscribers to "read unlimited books for just \$8.99/month" "on any device" offering "thousands of bestsellers" and over 400,000 books).

<sup>36</sup> *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Oral Statement of Rep. Ted Deutch).

<sup>37</sup> Moreover, as pointed out by a representative of the software community, allowing resale of digital content without right holder authorization through the creation of a digital first sale doctrine would expose consumers to greater risks from unscrupulous vendors selling pirated content potentially infected with malware or other viruses. *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) <http://judiciary.house.gov/cache/files/9e2b302a-bbc6-4cb4-a529-24a0a101aaba/060214-first-sale-testimony-simon.pdf> (Written Testimony of Emery Simon, BSA: The Software Alliance at 5). Offering vendors of pirated content a legitimate market in which to operate and profit off of unwitting consumers is not worth undermining the variety of legitimate consumer options for accessing digital content at various price points that currently exist.

## Forward and Delete

While publishers are clearly embracing technology to bring new levels of access, interactivity and user benefits to consumers, AAP's members believe the question of whether or not technology can ensure that the original copy of a work no longer exists after it has been resold, should not determine the viability of a digital first sale doctrine. Proponents of digital first sale argue that copyright owners would be protected by the inclusion of a "forward and delete" requirement in any digital first sale legislation, requiring that the owner of the copy being transferred destroy the original copy and, presumably, any incidental, backup or other copies in her possession. At the hearing, the CEO of ReDigi testified that technology exists to implement such a requirement, although questions raised by Rep. Hakeem Jeffries cast serious doubt on whether digital content is ever really "deleted."<sup>38</sup>

Given the fact that many users of digital content (typically, but not always, pursuant to an authorizing license) can currently download multiple copies on multiple devices (desktop computer, laptop, tablet, e-reader, smart phone, etc.) or access copies through remote cloud storage, the practical likelihood that any technology could ensure compliance with a "forward and delete" requirement is virtually nil. Furthermore, as Ranking Member Jerry Nadler pointed out, the copyright owner's ability to enforce such compliance could require intrusive investigation or monitoring of an individual's computer and devices.<sup>39</sup>

## **Conclusion**

AAP thanks the IP Subcommittee for having this hearing in New York City, home of many authors and publishers, and appreciates this opportunity to give the publishing industry's perspective on *Kirtsaeng* and digital first sale. At various points in this copyright review, the IP Subcommittee has asked stakeholders to identify what is and is not working in the current Copyright Act. This hearing documents one example in each category with respect to the first sale doctrine. In the wake of the Supreme Court's interpretation of Section 602(a) in *Kirtsaeng*, publishers believe the importation right cannot operate as Congress intended unless Congress acts to ensure that the Copyright Act affords copyright owners a *meaningful* right to control unauthorized importation of copies of their works that are intended for distribution only outside the U.S. in order to facilitate the effective exercise of their exclusive distribution right in the context of global trade.

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<sup>38</sup> AAP appreciates Rep. Jeffries' efforts to reflect this practical reality in the hearing record through the following exchange with witness Ossenmacher:

Jeffries: "When you hit the delete button on an email, is that email actually deleted? Answer (Ossenmacher): "No." Jeffries: "Ok, now, that email content is transferred to a trash folder, correct?" Answer: "Yes." Jeffries: "Now if you hit the delete button in that trash folder, is that email now actually deleted?" Answer: "Not necessarily." Question: "There's a ghost of that email that exists that can be recovered, correct." Answer: "Correct."

<sup>39</sup> *First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Oral Statement of Rep. Jerry Nadler).

With respect to creating a “digital” first sale doctrine, publishers agree with the CEO of ReDigi and Chairman Goodlatte that there is nothing in the current Copyright Act prohibiting rights holders from authorizing resale of digital content. As explained at the hearing, and hopefully made clear by this statement as well, copyright owners are constantly responding to the demands of the market by developing new ways to deliver more customized, flexible and useful options for consumers to access digital content. Therefore, time and consumer behavior will tell if the market can support a digital resale business, but there is no need for Congress to impose this specific business model by statutory mandate. Rather, publishers ask Congress to respect the constitutional aim of copyright law to provide incentives for copyright owners to disseminate new works, as well as create them, and preserve the current environment facilitating experimentation and innovation instead of undermining it with an unnecessary and inappropriately restrictive requirement in a “digital” first sale doctrine.

We look forward to continued engagement with the IP Subcommittee as it undertakes future hearings on other copyright issues.

Sincerely,



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**Association of American Publishers  
Statement Submitted for the Hearing Record  
House Judiciary Committee  
Subcommittee on Courts, Intellectual Property, and the Internet  
June 17, 2014**

**Hearing on “First Sale Under Title 17”  
June 2, 2014**

**Appendix of New Business Models<sup>40</sup>**

**Business Models Facilitating Library eBook Lending<sup>41</sup>**

Lending has been one of the primary benefits of the first sale doctrine. Publishers understand the importance of library lending and are encouraged by the American Library Association and Witness Greg Cram’s recognition that, today, all major trade publishers offer eBook lending programs, and that libraries and publishers are working together to find a sustainable way to make eBook lending more available consistent with their mutual and respective interests. Examples of these experimental business models are provided below:

*Hachette* Offers “all of its e-book titles to libraries simultaneously with print editions and with unlimited single-user-at-a-time circulations,” reducing the price of the eBook one year after publication.<sup>42</sup>

*HarperCollins* Offers e-book titles to libraries and allows libraries to lend new titles 26 times before the license expires.

*Macmillan* Started offering library lending of e-book titles in March 2013 under licenses that allows libraries to lend the titles for two years or 52 lends, whichever comes first.<sup>43</sup>

*Penguin Random House* Penguin licenses eBook titles to libraries for one-year lending terms.<sup>44</sup> Random House offers e-book titles to libraries under perpetual licenses.

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<sup>40</sup> This appendix is not intended as either an endorsement or critique of any of the business models provided, but rather is intended to illustrate the array of innovative developments that are making the benefits of the first sale doctrine, such as: library and personal lending as well as more affordable pricing (customarily through buying used books or recouping part of the initial cost through reselling a book) available, often through licensing, with regard to digital content. The examples below also illustrate how license-based business models for digital books, journals and academic content can respect copyright and offer consumers new benefits, such as customization and multi-device access, that are not feasible for print materials.

<sup>41</sup> <http://www.ala.org/transforminglibraries/frequently-asked-questions-e-books-us-libraries>

<sup>42</sup> [Press Release](#)

<sup>43</sup> <http://www.macmillanlibrary.com/2013/10/07/ebooks-for-libraries/>

*Simon & Schuster* Currently offers all of its titles (new and backlist) for one year to New York area libraries under a pilot program testing out a number of different eBook distributors.<sup>45</sup>

*Kindle Owners' Lending Library* "The Lending Library features over 500,000 titles, including many New York Times bestsellers. Books borrowed from the Lending Library have no due date and can be delivered to other Kindle devices registered to your Amazon account."<sup>46</sup>

*CloudLink* Permits libraries to lend eBooks within a given consortium, provided the publisher has not expressly prohibited such sharing.<sup>47</sup> AAP has members that permit such lending and others that oppose such lending, but this diversity of licensing practices illustrates how copyright owners and users can competitively experiment with market-based solutions to develop models that address their respective needs.

## **Sharing eBooks with Friends and Family**

*Amazon* "You can lend a Kindle book to another reader for up to 14 days. The borrower does not need to own a Kindle device and can read the book after downloading a free Kindle reading app."<sup>48</sup>

*Nook* "You can lend eligible books to NOOK friends, or any BN.com account - up to 14 days. You will not have access to your book while it is lent out (similar experience with paper book), and each book can only be lent one time. You can view a list of all your lendable books by tapping LendMe, found under the My Stuff icon along the top of the screen in your Library."<sup>49</sup>

## **eTextbook and Journal Rental**

*CourseSmart* As noted in AAP's post-hearing statement, CourseSmart is an eTextbook rental platform founded by publishers, using licensing to offer faculty and students greater customization, flexibility, and affordability in accessing digital content. Not only does CourseSmart offer eTextbooks at significantly less cost (up to 60% less) than traditional print textbooks, it offers access of multiple devices, sharing of content, digital searching, and enhanced accessibility.<sup>50</sup>

*Kindle Textbook Rental* "Kindle Textbook Rental is a flexible and affordable way to read textbooks. You can rent for the minimum length, typically 30 days, and save up to 80% off the print list price. If you find you need your textbook longer, you can extend your rental by as little

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<sup>44</sup> <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/59255-penguin-expands-e-books-in-libraries-adds-friction-to-kindle-lends.html>

<sup>45</sup> <http://www.mhpbooks.com/simon-schuster-announce-new-ebook-lending-program-for-libraries/>

<sup>46</sup> <http://www.amazon.com/gp/help/customer/display.html?nodeId=200757120>

<sup>47</sup> Matt Enis, MELSA, *3M Develop New eBook Sharing Feature Consortia*, LIBRARY JOURNAL: THE DIGITAL SHIFT, <http://www.thedigitalshift.com/2013/11/ebooks/melsa-3m-develop-new-ebook-sharing-feature-consortia/> (Nov. 5, 2013).

<sup>48</sup> [http://www.amazon.com/gp/help/customer/display.html/ref=hp\\_left\\_v4\\_sib?ie=UTF8&nodeId=200549320](http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=200549320)

<sup>49</sup> <http://www.barnesandnoble.com/u/Support-NOOK-Tablet/379003185>

<sup>50</sup> <http://www.coursesmart.com/ourproducts>

as 1 day as many times as you want and just pay for the added days.”<sup>51</sup> In describing the rental process, Amazon’s information page notes that to complete the order the purchaser clicks on the "Rent now with 1-click" button.

*Chegg* “Helping students save time, save money and get smarter” by offering eTextbooks at up to 90% less than the list price of print textbooks,<sup>52</sup> Chegg also offers students a one-stop-shop to buy and sell physical textbooks and provides immediate access to “courtesy eTextbooks” during the time that you wait for the arrival of your print edition.

*DeepDyve* Leading professional and scholarly publishers, including Elsevier, Wiley, IEEE and others, are experimenting with the rental model for providing more affordable and tailored access to the latest journal content, with no embargo period. DeepDyve allows anyone to rent full articles to read on any device with an Internet connection for 30-days and up to 1-year, depending on the needs of the user, all at nominal rates.<sup>53</sup>

## **Subscription Services**

As explored in the forthcoming Book Industry Study Group survey of the eBook and journal subscription market, there are a number of different models that range from unlimited access to short-term rental.<sup>54</sup> Some of these models are described below:

### **Popular Fiction and Non-Fiction**

Many of AAP’s member publishers offer their fiction and non-fiction titles through one or more of the following subscription services.

*Scribd* Provides customers with unlimited, instant access, on any device to a vast library of over 400,000 eBooks for just \$8.99 per month.<sup>55</sup>

*Oyster* Described as “the Netflix for books,” Oyster provides subscribers with unlimited access to over 500,000 titles accessible on their Apple, Android, Nook or Kindle devices, all for just \$9.95 per month.<sup>56</sup>

*Entitle* For just \$9.99 a month, Entitle offers subscribers perpetual access (i.e. you can cancel your subscription and keep your books) to two new eBooks each month from among 200,000 titles, including thousands of new releases and bestsellers. Subscribers can read their books online or offline of any device.<sup>57</sup>

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<sup>51</sup> <http://www.amazon.com/gp/feature.html?docId=1000702481>

<sup>52</sup> <http://www.chegg.com/>

<sup>53</sup> <http://www.deepdyve.com/>

<sup>54</sup> Book Industry Study Group, *Digital Books and the New Subscription Economy* (forthcoming Jun. 2014) <https://www.bisg.org/news/digital-subscriptions-inevitable-and-driven-market> (studying the market forces that are fueling growth of a multitude of different eBook and journal subscription services).

<sup>55</sup> [www.scribd.com](http://www.scribd.com)

<sup>56</sup> <https://www.oysterbooks.com/about>

<sup>57</sup> <https://www.entitlebooks.com/>

## Professional

*Safari Books Online* Starting from \$39 per month for individual users to custom-priced/ custom-tailored subscriptions for multi-national companies (including Google and Amazon)<sup>58</sup>, Safari offers professional content ranging from "the latest bestsellers, pre-publication exclusives, video courses, cutting-edge conference sessions, or timeless tech and business classics, Safari's selection of tens of thousands of books and courses is unrivaled — and growing every day."<sup>59</sup>

## New Content Models

In addition to more flexible price and access models, many academic publishers are also using licensing to offer more customized and adaptive learning content to faculty and students. A number of these new adaptive content offerings are described in AAP's earlier statement on *The Rise of Innovative Business Models*,<sup>60</sup> another example is provided below:

*MindTap Chemistry* Cengage Learning's MindTap Chemistry is licensed to the student for the duration of a course at less than the price of a traditional print textbook and is the next generation of educational technology products for the higher education market. Unlike other digital solutions, MindTap is not a static content set, developed around homework and textual material. MindTap is courseware, whose architecture makes personalization by professors or students, the key value proposition. Using enhanced analytics and immediate feedback, MindTap provides a student with a personalized study plan and remediation loops. Professors can add a wide range of OER, Cengage or their own content to the course to further enrich the learning experience and to make the course their own.

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<sup>58</sup> <http://www.safaribooksonline.com/pricing>

<sup>59</sup> <http://www.safaribooksonline.com/>

<sup>60</sup> *The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Post-hearing Statement of the Association of American Publishers available at [http://www.publishers.org/ attachments/docs/publicstatements/aapstatement-riseofinnovativebusinessmodels.pdf](http://www.publishers.org/attachments/docs/publicstatements/aapstatement-riseofinnovativebusinessmodels.pdf) (describing new adaptive learning systems such as ALEKS and LearnSmart Advantage offered by McGraw-Hill and WileyPLUS offered by John Wiley & Sons at page11).