

# THE \$500 EBOOK: HOW COPYRIGHT AND ANTITRUST LAW FAILED AMERICA'S LIBRARIES

## EXTENDING FIRST SALE DOCTRINE PROTECTIONS TO LIBRARIES' EBOOK PURCHASES OR IMPLEMENTING PRICE CAPS AS ALTERNATIVE SOLUTIONS TO LOWER EBOOK COSTS

### INTRODUCTION

Libraries are a fixture in American communities that people sometimes take for granted. People expect to find books on the shelves, computers for public use, children gathered for story times, and, increasingly, ebooks available to be checked out and read on personal devices. However, libraries face distinct financial disadvantages in purchasing and lending ebooks to readers, with both libraries and the public suffering from a lack of ebook availability as a result. Libraries are in a difficult position, forced to purchase ebooks from a small number of major American publishers at high prices and disadvantageous terms.<sup>1</sup>

Libraries pay inflated prices for ebooks, often many times the prices average consumers pay.<sup>2</sup> An ebook that costs consumers \$12 to \$15 can cost libraries \$50 to \$60.<sup>3</sup> One might think that libraries get added benefits from

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1. The so-called “Big 5 Publishers” currently dominate the U.S. market: “Hachette Book Group, HarperCollins, Macmillan Publishers, Penguin Random House, and Simon & Schuster.” AM. LIBR. ASS’N, BEFORE THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY: COMPETITION IN DIGITAL MARKETS 2 n.4 (2019) [hereinafter COMPETITION IN DIGITAL MARKETS], <https://www.ala.org/news/sites/ala.org.news/files/content/mediapresscenter/CompetitionDigitalMarket.s.pdf> [https://perma.cc/99TS-6GFA]. The pending sale of Simon & Schuster to Penguin Random House would reduce the number of major publishers to four, although this acquisition might be blocked for antitrust reasons. Benjamin Mullin & Jeffrey A. Trachtenberg, *Penguin Random House Parent to Buy Simon & Schuster From ViacomCBS*, WALL ST. J. (Nov. 25, 2020, 12:54 PM), <https://www.wsj.com/articles/penguin-random-house-parent-near-deal-to-buy-simon-schuster-from-viacomcbs-11606268232>.

2. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2–3; Alan S. Inouye, *The Future of Ebook Pricing*, AM. LIBRS. MAG. (July 9, 2019), <https://americanlibrariesmagazine.org/blogs/the-scoop/the-future-of-ebook-pricing/> [https://perma.cc/HF2D-A7BC]; James LaRue, *DCL Ebook Report, July 2015*, AM. LIBRS. MAG. (July 14, 2015), <https://americanlibrariesmagazine.org/blogs/e-content/dcl-ebook-report-july-2015/> [https://perma.cc/2PEE-2XAG] (using the consumer and library prices for Ellin Hilderbrand’s novel *The Rumor* to illustrate price differences).

3. “The dominant industry model of . . . a \$50–\$60 price point for popular new releases . . . is a

this higher price, like the ability to lend the book out to multiple people at the same time. However, this is not the case. Even though prices are higher than consumer prices, libraries can generally only lend an ebook copy to one patron at a time.<sup>4</sup> Libraries pay more because they must purchase special lending licenses directly from publishers.<sup>5</sup> These special licenses, like consumer ebook licenses, do not allow the purchaser to sell or permanently transfer the ebook to anyone else (including as a gift).<sup>6</sup>

Libraries' restricted ebook lending is due to the treatment of digital media ownership under copyright law. When libraries purchase physical books they do not have to pay extra to be able to lend them out because physical books are protected under a feature of copyright law known as the First Sale Doctrine.<sup>7</sup> As codified, the First Sale Doctrine states, "The owner of a particular copy or phono record lawfully made under . . . [Title 17 of the United States Code], or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phono record."<sup>8</sup> Thus, the First Sale Doctrine allows the purchaser of an item containing copyrighted material (like a book) to sell, lend, transfer, or gift the object to another person.<sup>9</sup> In other words, the buyer of a book retains all the rights over the future use of that physical object. Ebooks do not fall under the First Sale Doctrine because Congress has not extended the First Sale Doctrine to cover digital media.<sup>10</sup>

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multiple of the consumer price, which is typically in the \$12–\$15 range." Alan S. Inouye & Emily Wagner, *States Act on Ebooks*, AM. LIBRS. MAG. (Mar. 13, 2020), <https://americanlibrariesmagazine.org/blogs/the-scoop/macmillan-states-act-on-ebooks/> [<https://perma.cc/S7ZL-UG2H>].

4. Michael Kozlowski, *These Are the Terms Major Publishers Have for Libraries for Audiobooks and Ebooks in 2022*, GOOD-E-READER (Jan. 5, 2022), <https://goodereader.com/blog/e-book-news/these-are-the-terms-major-publishers-have-for-libraries-for-audiobooks-and-ebooks-in-2022> [<https://perma.cc/WE2F-NV6C>].

5. KEVIN RICHARDS, CONG. RSCH. SERV., LSB10453, COVID-19 AND LIBRARIES: E-BOOKS AND INTELLECTUAL PROPERTY ISSUES 3 (2020). These licenses are only available from publishers, not resellers. "If libraries wish to lend e-books, they must pay for a special license that permits subsequent distribution, and then follow the publisher's licensing terms." *Id.*

6. *See id.* at 2–3. Certain Kindle books can be loaned to another individual for 14 days. *Help & Customer Service: Lend Kindle Books*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GJUXNRAHSH6LX6FA#:~:text=S%20eligible%20Kindle%20books%20for,to%20read%20the%20loaned%20book.&text=Select%20the%20Actions%20button%20then,title%20on%20your%20eligible%20title> [<https://perma.cc/65Y6-XQKG>].

7. *See* 17 U.S.C. § 109(a) (2008) (codifying the First Sale Doctrine).

8. *Id.*

9. *See* H.R. REP. NO. 94-1476, at 79 (1976); *see also* Ali M. Stoepfelwerth, *Antitrust Issues Associated with the Sale of e-Books and Other Digital Content*, 25 ANTITRUST 69, 70 (2011). The First Sale Doctrine does not allow for any misuse of copyrighted material in the book but allows purchasers to dispose of the physical object however they see fit. H.R. REP. NO. 94-1476, at 79 (1976).

10. Matthew Chiarizio, *An American Tragedy: E-Books, Licenses, and the End of Public Lending Libraries*, 66 VAND. L. REV. 615, 629–34 (2013).

Furthermore, the vast majority of ebook purchases involve the purchase of a license rather than the outright purchase of a file to own. When consumers and libraries purchase ebooks, they are generally not obtaining ownership of the ebook, but rather a license to use the ebook for a specified period of time.<sup>11</sup> For consumers, the license is normally indefinite, but for libraries it is usually limited in duration and often for only two years.<sup>12</sup> Purchasing a license is not a sale that qualifies for First Sale protections.<sup>13</sup>

Ebooks are also generally priced higher than physical library books, even though the library only receives a license, not ownership, and ebooks do not require the same manufacturing, shipping, or storage costs as physical books. Ebooks do not get lost or damaged like physical books, so publishers would likely factor in some amount of avoided replacement cost so that they earn similar profits on ebooks compared to physical books. While libraries pay higher-than-consumer prices to buy “library-bound” physical books, these books are often made with sturdier binding and larger covers to endure years of wear.<sup>14</sup> Library ebook license purchases do not come with extra enhancing features.

Because libraries are purchasing limited licenses that allow them to lend the book only for a certain amount of time (usually two years) or for a specified number of loans (usually twenty-six loans),<sup>15</sup> libraries must repurchase ebooks after this limited period if they want to keep them in their collection. The cost of purchasing two-year licenses can become exorbitantly high, with a single ebook costing hundreds of dollars over the span of a few years.<sup>16</sup> For example, as the American Library Association explained to Congress, “*All the Light We Cannot See: A Novel* by Anthony Doerr, is priced as an eBook for \$12.99 to consumers. The library price is

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11. RICHARDS, *supra* note 5, at 2–3.

12. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2–3; Inouye, *supra* note 2 (“Four of the Big Five now employ a two-year access model, which poses challenges to collection development and preservation.”); Press Release, Am. Libr. Ass’n, ALA ‘Concerned’ Over Hachette Book Group Ebook and Audio Book Lending Model Changes (June 17, 2019), <http://www.ala.org/news/press-releases/2019/06/ala-concerned-over-hachette-book-group-ebook-and-audio-book-lending-model> [<http://perma.cc/5BZG-XMSF>].

13. Microsoft Corp. v. Harmony Computs. & Elecs., Inc., 846 F. Supp. 208, 213 (E.D.N.Y. 1994) (citing ISC-Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp. 1310, 1331 (N.D. Ill. 1990)) (“Entering a license agreement is not a ‘sale’ for purposes of the first sale doctrine.”); *see also* Stoepfelwerth, *supra* note 9, at 72–73 n.18; RICHARDS, *supra* note 5, at 2 (“Importantly, the copyright owner’s granting of a license is generally *not* regarded as a sale that would trigger § 109 protections.”).

14. Amy Salmond, *Why Library Bound Books Matter*, SALMOND LIBR. SERVS. (Nov. 6, 2018), <https://www.salmondlibraryservices.com/single-post/2018/11/06/why-library-bound-books-matter> [<https://perma.cc/82KL-76JL>].

15. RICHARDS, *supra* note 5, at 3. Four of the Big Five Publishers sell ebooks for two years of lending, while the fifth publisher, HarperCollins, sells an ebook for twenty-six checkouts. Kozlowski, *supra* note 4.

16. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2–3.

\$51.99—for two years or \$519.90 for 20 years—for one copy.”<sup>17</sup> The American Library Association, in its statement to the U.S. House of Representatives about digital markets, calls ebook pricing practices “[a]busive.”<sup>18</sup>

The combination of a lack of First Sale protections and the reliance on a licensing framework for ebook sales increases operating costs for libraries.<sup>19</sup> Libraries must continually repurchase titles at inflated costs or purchase extended licenses to keep titles in their collection.<sup>20</sup> Libraries also cannot resell old ebooks, as they often do with used physical books.<sup>21</sup>

Books also have nonfungible characteristics that restrict libraries’ purchase choices.<sup>22</sup> For example, a tenth grader who needs to read *1984* for English class cannot very well substitute *Fahrenheit 451* instead. A library would receive many complaints if it did not carry *Harry Potter* or *To Kill a Mockingbird* in its collection. Libraries get locked into purchasing ebooks from the one seller who is legally allowed to sell them any particular book, with the nonfungibility of books creating an upward price pressure.<sup>23</sup>

On top of high prices and limited licenses, libraries cannot purchase some ebooks because publishers refuse to sell to them. Amazon, the fifth-largest ebook publisher in the United States, and the largest ebook seller,<sup>24</sup> refused to sell Amazon Publisher ebooks to libraries until May 2021.<sup>25</sup>

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17. *Id.* at 3 (footnote omitted).

18. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2. For a library’s take on the situation, see *Libraries and eBooks: An Introduction*, DENVER PUB. LIBR. (Oct. 30, 2019), <https://www.denverlibrary.org/blog/books-research/lauren/libraries-and-ebooks-introduction> [<https://perma.cc/99E8-NT7S>].

19. RICHARDS, *supra* note 5, at 3. *But see* Chiarizio, *supra* note 10, at 626–28 (arguing—albeit nine years ago—that extending First Sale protections to library ebooks might be premature).

20. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2–3.

21. Used book sales are a common library fundraiser. Libraries can even sell used books online. *See, e.g., Thriftbooks Library Program*, THRIFTBOOKS, <https://www.thriftbooks.com/library/> [<https://perma.cc/HY4C-KEEL>].

22. Carl T. Bogus, *Books and Olive Oil: Why Antitrust Must Deal with Consolidated Corporate Power*, 52 U. MICH. J.L. REFORM 265, 312–13 (2019).

23. *See id.* Bogus further wrote:

Because of the unique nature of the book business, publishers do not really compete on price—or at least do not compete on price in the same way as producers of most other products. Consider someone shopping for extra virgin olive oil in the supermarket. There are many brands on the shelf in front of him, and he does not have a strong brand preference. Price may well be the determining factor. The more fungible the product, the more price is likely to be controlling. Nothing is less fungible than books. Each book is unique.

*Id.* at 312 (footnotes omitted).

24. Amazon sells two-thirds of ebooks in the United States market and is “the fifth largest publisher for eBooks by dollar sales.” COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2. Amazon sells 40% of books across all formats. Bogus, *supra* note 22, at 268.

25. Rebecca Klar, *Amazon Takes Big Step in E-book Deal with Libraries, but Activists Seek More*, HILL (June 2, 2021, 6:00 AM), <https://thehill.com/policy/technology/556381-amazon-takes-big-step-in-e-book-deal-with-libraries-but-activists-seek-more> [<https://perma.cc/5U2A-Q4SK>]. Amazon

Macmillan Publishers has tested out different restrictions on selling ebooks to libraries twice in the past few years.<sup>26</sup> During one “embargo”, which started on November 1, 2019, Macmillan barred libraries from purchasing more than one copy of any ebook within eight weeks of its initial publication.<sup>27</sup> Macmillan terminated this practice in March 2020.<sup>28</sup>

Allowing publishers to exploit the lack of First Sale protections and concentrated publishing market undermines one of our great public institutions.<sup>29</sup> Libraries support communities of all kinds across the country, providing educational resources, access to computers and the internet, community meeting spaces, lifestyle enrichment programs, literacy programs, and traditional book and media checkouts.<sup>30</sup> Libraries are funded overwhelmingly by local communities that dedicate their tax dollars to improving the lives of their residents and supporting public access to information and resources.<sup>31</sup>

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still does not sell Audible audiobooks or self-published ebooks to libraries. *Id.* For a discussion of Amazon’s allegedly anticompetitive practices in the ebook and e-reader market, see Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 746–83 (2017).

26. Macmillan tested out a restriction on selling ebooks to libraries in 2018 with a proposed four-month ban on books from Tor, a science fiction and fantasy division of Macmillan. Press Release, Am. Libr. Ass’n, *New Tor Delay on Library Ebooks Hurts Readers, Authors and Libraries* (July 19, 2018), <http://www.ala.org/news/press-releases/2018/07/ala-new-tor-delay-library-ebooks-hurts-readers-authors-and-libraries> [https://perma.cc/24CS-JNKU]. Other publishers have tried out similar policies as well, including Blackstone Audio, which announced a plan to restrict audiobook sales to libraries for ninety days in 2019. Press Release, Urban Librs. Council, *Top e-Content Publishers Are Taking ‘Dangerous Step Backwards’ with New Pricing Models for Libraries* (June 21, 2019), <https://www.urbanlibraries.org/files/ULC-Statement-on-eBooks.pdf> [https://perma.cc/ZR28-CWTF]. Some libraries have responded to restrictions with boycotts. The Washington Digital Library Consortium boycotted Blackstone for its policy. *Library Boycott of Blackstone eAudiobooks*, WHATCOM CNTY. LIBR. SYS., <https://www.wcls.org/library-boycott-of-blackstone-audio/> [https://perma.cc/F6J8-7XFB].

27. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2. Librarians referred to Macmillan’s practice as an “embargo.” Inouye & Wagner, *supra* note 3; Lynn Neary, *You May Have to Wait to Borrow a New E-Book from the Library*, Nat’l Pub. Radio (Nov. 1, 2019), <https://www.npr.org/2019/11/01/775150979/you-may-have-to-wait-to-borrow-a-new-e-book-from-the-library> [https://perma.cc/PHF5-JURD].

28. Press Release, Am. Libr. Ass’n, *ALA Welcomes Cancellation of Macmillan Embargo* (Mar. 17, 2020), <http://www.ala.org/news/press-releases/2020/03/ala-welcomes-cancellation-macmillan-embargo> [http://perma.cc/W6L6-FWYZ]; RICHARDS, *supra* note 5.

29. “Digital content gives publishers more power over prices, because it allows them to treat libraries differently than they treat other kinds of buyers.” Daniel A. Gross, *The Surprisingly Big Business of Library E-Books*, NEW YORKER (Sept. 2, 2021), <https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books> [https://perma.cc/4YEZ-Y6V7].

30. Libraries also provide tutoring, fitness programs, job search support, and notary services, as well as serve as polling stations, hold author events, and help people pursue educational opportunities. *See, e.g.*, ST. LOUIS CNTY. LIBR., <https://www.slcl.org> [https://perma.cc/F5X3-X5QF].

31. Talibah-mawusi Smith, *When the Well Runs Dry, Dig Deeper: The Case for Funding the Public Library, a Necessary Resource for Minorities*, 22 BERKELEY LA RAZA L.J. 137, 146 (2012).

Libraries lack the capacity to address the challenge that high ebook prices presents.<sup>32</sup> Congress should address this weakening of a public institution by securing libraries' right to purchase ebooks at fair prices. This would involve extending First Sale Doctrine protections to libraries' ebook purchases or implementing price caps on the sales of ebooks to libraries.

Part I of this Note introduces the First Sale Doctrine, the Sherman Act, and more information about how libraries and patrons are affected by the current situation. Part II argues for the extension of First Sale Doctrine protections to libraries' ebook purchases. Part III argues for an alternative solution implementing price caps on library ebook licenses. Part IV concludes.

## I. BACKGROUND

### A. *The First Sale Doctrine*

The First Sale Doctrine determines how purchasers of physical books may legally use those books. "The first sale doctrine in copyright law, also known as the exhaustion rule of intellectual property (IP) rights, limits the power of IP owners to control the downstream distribution and use of their products or copies of their products that bear their trademark or embody their invention or work."<sup>33</sup> This means that after a book is sold to the first buyer, the owner of the copyrighted material within the book has no say over how the owner of the book treats, transfers, or disposes of the physical book in the future.<sup>34</sup>

The First Sale Doctrine was established in *Bobbs-Merrill Co. v. Strauss*.<sup>35</sup> The Bobbs-Merrill Company published a book in which it printed instructions that the book was not to be sold for less than one dollar and that it would be copyright infringement to sell it below this price.<sup>36</sup> A seller

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32. The issue of high ebook prices received public and government attention when the ALA presented a statement about ebook prices and competition and digital markets before the U.S. House of Representatives Committee on the Judiciary. See COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 1. Senate Finance Committee Chair Ron Wyden and U.S. Representative Anna G. Eshoo also sent a letter to the Big Five publishers requesting comprehensive information on their ebook license practices and pricing for libraries. Press Release, United States Senate Comm. on Fin., Wyden, Eshoo Press Big Five Publishers on Costly, Overly Restrictive E-Book Contracts with Libraries (Sept. 23, 2021), <https://www.finance.senate.gov/chairmans-news/wyden-eshoo-press-big-five-publishers-on-costly-overly-restrictive-e-book-contracts-with-libraries> [https://perma.cc/5EXK-79MG].

33. Ariel Katz, *The First Sale Doctrine and the Economics of Post-Sale Restraints*, 2014 B.Y.U. L. REV. 55, 57 (2014).

34. *Id.*

35. 210 U.S. 339 (1908); see also Rachel Ann Geist, *A "License to Read": The Effect of E-Books on Publishers, Libraries, and the First Sale Doctrine*, 52 IDEA 63, 67 n.27 (2012); Chiarizio, *supra* note 10.

36. *Bobbs-Merrill Co.*, 210 U.S. at 341.

purchased the book from the Bobbs-Merrill Company at wholesale, sold the book to customers for less than a dollar, and was sued.<sup>37</sup> The Court held that this kind of price restriction on future sales was not valid under copyright law.<sup>38</sup>

This decision clarified a distinction between the physical book and the copyrighted material within it. The Court explained that “[t]he purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.”<sup>39</sup> A copyright holder’s “sole right to vend” lets the copyright holder control the initial publication sales of a book but does not allow it to impose price restrictions on resale with a party not in privity to it.<sup>40</sup> The Court did not address issues of “contract limitation” or “license agreements” which are relevant to the ebook discussion.<sup>41</sup>

The First Sale Doctrine was codified at section 27 of the Copyright Act of 1909, and later at section 109(a) of the Copyright Act of 1976.<sup>42</sup> According to Matthew Chiarizio, “[t]he legislative history of the 1976 Act provides evidence that library lending was one factor Congress considered in deciding to retain the first sale doctrine.”<sup>43</sup> Initially, libraries celebrated the First Sale Doctrine, regarding it “as a long-awaited confirmation that copyright owners could not ‘stay the free flow of the world’s thought’ to satiate their private greed.”<sup>44</sup> It confirmed libraries’ ability to lend purchased books as they saw fit.<sup>45</sup>

Importantly, the First Sale Doctrine allows libraries to participate in secondary markets, both to sell and purchase used books.<sup>46</sup> This meant that libraries could largely avoid discriminatory price practices by publishers.<sup>47</sup> If publishers wanted to set significantly higher prices for libraries, libraries could simply buy books from other sellers.<sup>48</sup> The First Sale Doctrine allows libraries to lend new or used books purchased from any seller.<sup>49</sup>

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37. *Id.* at 341–42.

38. *Id.* at 350.

39. *Id.* (alteration in original).

40. *Id.*

41. *Id.*

42. Geist, *supra* note 35, at 68–69.

43. Chiarizio, *supra* note 10, at 620 n.23 (discussing H.R. REP. NO. 94-1476, § 109, at 79 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5693 (“A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.”)).

44. Geist, *supra* note 35, at 68–69 (quoting M. L. Raney, *Copyright and the Publishers: A Review of Thirty Years*, 16 BULL. AM. LIBR. ASS’N 110, 115 (1922)) (footnote omitted).

45. Geist, *supra* note 35, at 68–69; Chiarizio, *supra* note 10, at 620.

46. Geist, *supra* note 35, at 72.

47. *Id.* at 72–73.

48. *Id.* at 73. “Thus, the first sale doctrine ensures that libraries operate free from price constraints by preserving secondary markets and preventing price discrimination.” *Id.*

49. Geist, *supra* note 35, at 69, 71–73. Libraries can also lend out donations. *Id.* at 72.

However, as digital media developed, it did not become eligible for First Sale Doctrine protections. The Digital Millennium Copyright Act of 1998 did not extend section 109 First Sale Doctrine protections to digital media such as ebooks, and the U.S. Copyright Office's 2001 report on the Act declined to recommend extending protection to digital media.<sup>50</sup>

One reason for the lack of extension of the First Sale Doctrine to digital media was the potential for copyright infringement during the lending or selling process.<sup>51</sup> The problem lies in the required duplication of a file in order to sell or lend it, which violates copyright law.<sup>52</sup> To send a file to someone else, a copy of the file must be created on the receiver's device.<sup>53</sup> The sender can delete her original file, but the duplicate will have already been made during the sending process. Because the sender has not sent her own original file, an illegal duplication has occurred.<sup>54</sup> This duplication can generally only be avoided through the sale of the physical device that hosts the file, which is legal.<sup>55</sup> This means it is legal to sell a Kindle with ebook files on it, but not to sell the ebook files separately.<sup>56</sup>

Another reason for the lack of extension of the First Sale Doctrine to digital media is the difficulties that would result from the existence of a digital resale market.<sup>57</sup> Because digital media does not suffer quick wear and tear through use, consumers might choose to purchase used media files at lower prices rather than purchase new media. This could have devastating effects on the entertainment industry by driving down the price of music and movies.<sup>58</sup> An electronic file can pass hands many more times than a physical book, which would eventually fall apart, or a Blu-ray or DVD disc, which would become scratched over time.<sup>59</sup> Digital files are easy to duplicate. Authentication procedures would be needed to prevent illegal sales.

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50. Chiarizio, *supra* note 10, at 631; U.S. COPYRIGHT OFF., DMCA SECTION 104 REPORT: A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO SECTION 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 1–2 (2001), <http://copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> [<https://perma.cc/ZP7N-CW5X>].

51. RICHARDS, *supra* note 5, at 2–3.

52. Chiarizio, *supra* note 10, at 626.

53. *Id.* at 630 n.81 (citing BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995)).

54. *Id.* at 630.

55. *Id.*

56. *Id.*

57. *Id.* at 630–31.

58. *Id.*; Sarah Reis, Note, *Toward a “Digital Transfer Doctrine”? The First Sale Doctrine in the Digital Era*, 109 NW. U.L. REV. 173 (2015) (discussing how a resale market that compensates the original owner could address the low-price problem and be less harmful to the entertainment and music industries).

59. Reis, *supra* note 58, at 194.



Currently, libraries lend out ebooks with Digital Rights Management (DRM) software that allows the borrower to view the ebook only during the lending period, and “returns” the ebook to the library when it is due, preventing borrowers from retaining illegal duplicate copies.<sup>60</sup>

Copyright-compliant lending licenses are only available for libraries to purchase from publishers, not resellers.<sup>61</sup> “[I]f libraries wish to lend ebooks, they must pay for a special license that permits subsequent distribution, and then follow the publisher’s licensing terms.”<sup>62</sup>

The First Sale Doctrine has led to a highly concentrated library ebook marketplace. Because the First Sale Doctrine does not apply to ebooks, libraries can only purchase ebooks directly from the original publishers. This means that libraries can only purchase the majority of their books from the Big 5 publishers.<sup>63</sup> This highly concentrated marketplace raises potential antitrust issues. To analyze the antitrust issues, background information on the Sherman Act and antitrust complaints is necessary.

### *B. The Sherman Act and Antitrust Complaints*

Antitrust law attempts to preserve competition in a free market through sections 1 and 2 of the Sherman Act. Section 1 of the Sherman Act states: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . among the several States . . . is declared to be illegal.”<sup>64</sup> When the Sherman Act was passed in 1890, there was little guidance on what agreements resulted in “restraint of trade.”<sup>65</sup> At first, the Supreme Court understood the Sherman Act to apply to every single agreement that was anticompetitive, regardless of intent.<sup>66</sup> Further case law would refine and limit the scope of illegal section 1 agreements.<sup>67</sup>

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60. For information on digital rights management, see Frederick W. Dingley & Alex Berrio Matamoros, *What is Digital Rights Management?*, in *DIGIT. RTS. MGMT.: THE LIBRS. GUIDE 1–25* (Catherine A. Lemmer & Carla P. Wale eds., 2016). Libraries usually manage digital lending through companies such as OverDrive, which facilitated 326 million digital checkouts worldwide in 2019. Chiarizio, *supra* note 10, at 641; *COMPETITION IN DIGITAL MARKETS*, *supra* note 1, at 2 n.7; *Public Libraries Reach Record-High Ebook and Audiobook Usage in 2019*, OVERDRIVE (Jan. 8, 2020), <https://company.overdrive.com/2020/01/08/public-libraries-reach-record-high-ebook-and-audiobook-usage-in-2019/> [<https://perma.cc/QR74-UQJX>].

61. RICHARDS, *supra* note 5, at 3.

62. *Id.*

63. The Big Five publishers publish over 80% of trade books in the U.S. *COMPETITION IN DIGITAL MARKETS*, *supra* note 1, at 2.

64. 15 U.S.C. § 1.

65. Stephen J. Marietta, *An Apple a Day Doesn’t Keep Doctor Miles Away: The Second Circuit’s Misuse of the Per Se Rule in United States v. Apple*, 69 RUTGERS U. L. REV. 325, 328 (2016).

66. *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290 (1897).

67. ELEANOR M. FOX & DANIEL A. CRANE, *CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT* 11 (4th ed. 2020).

A major development in the definition of section 1 came with the 1898 case of *United States v. Addyston Pipe & Steel Co.*<sup>68</sup> This Sixth Circuit opinion, written by Judge (and then Chief Justice) Taft, distinguished between competitor agreements that were “merely ancillary” to a legitimate business purpose and agreements made “merely to restrain competition.”<sup>69</sup> Ancillary agreements include, for example, noncompete agreements, which have “never been regarded as contracts in restraint of trade.”<sup>70</sup> Agreements to restrain competition, or “naked restraints,” are “illegal on their face.”<sup>71</sup>

Naked restraints include agreements to cooperate to stifle competition or engage in anticompetitive conduct.<sup>72</sup> A company may not cooperate with its competitors to set the same prices,<sup>73</sup> to put communal restraints on marketing,<sup>74</sup> or to engage in specific boycotts to freeze out a competitor.<sup>75</sup> However, a company can act in its own interest alongside other companies in the same market acting in their own interests and thereby obtain the benefits that would have resulted from an illegal anticompetitive agreement.<sup>76</sup> In this way, oligopolies evade regulation while causing harm to consumers.<sup>77</sup> The few firms in an oligopoly can easily signal to each other their stances on pricing and policies and engage in mutually advantageous behavior without ever coming to an explicit illegal agreement. If there are only four companies in an industry, each can pay attention to its competitors’ pricing changes and adjust its own prices accordingly.<sup>78</sup>

Section 2 of the Sherman Act, which applies to the behavior of monopolies, states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to

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68. 85 F. 271 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899).

69. *Id.* at 282; FOX & CRANE, *supra* note 67, at 20.

70. FOX & CRANE, *supra* note 67, at 25 (discussing *United States v. Joint-Traffic Ass’n*, 171 U.S. 505 (1898)).

71. *Id.* at 20, 24.

72. *Id.* at 68–71 (discussing cartels).

73. *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290 (1897).

74. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (holding competitors cannot agree to a moratorium on advertising of products not part of a joint venture).

75. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) (holding Visa and Mastercard’s exclusivity rules harmed competition by excluding American Express from their network of banks).

76. “Indeed it may be easier for firms in an oligopoly to achieve a supracompetitive price without any agreement than it is for firms in more fragmented markets to achieve a supracompetitive price through an explicit cartel.” FOX & CRANE, *supra* note 67, at 284.

77. See Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 9 (2004) (“For more than 100 years, the courts and antitrust enforcement agencies have struggled unsuccessfully to regulate the anticompetitive conduct of oligopolists.”); see also *id.* at 15–16 (“In the last several decades, a consensus has begun to emerge among economists and antitrust commentators on how oligopolists’ tacit collusion harms consumers.”).

78. This nonexplicit pricing practice is known as parallel pricing. See generally Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143 (1993).

monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony,” but does not specify what it means to “monopolize” trade.<sup>79</sup>

The case of *United States v. Aluminum Co. of America* helped define monopolization.<sup>80</sup> The Second Circuit found that Aluminum Company of America (Alcoa) monopolized the American aluminum market because it had monopoly power and excluded its competitors from the market by dominating all new market opportunities.<sup>81</sup> Monopoly power was established because Alcoa represented over 90% of the relevant market and thereby had “control” of the market.<sup>82</sup> Once a company has monopoly power, any exclusionary actions constitute a violation of the Sherman Act; Alcoa was found to have violated the Act by excluding its competitors.<sup>83</sup>

The Supreme Court updated the definition of monopoly power in *United States v. E.I. du Pont de Nemours & Co.*<sup>84</sup> The Court clarified that “[m]onopoly power is the power to control prices or exclude competition.”<sup>85</sup> In *United States v. Grinnell Corp.*, the Court defined the required exclusionary act as “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>86</sup>

For an antitrust complaint brought by a private party, the plaintiff must show an “antitrust injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”<sup>87</sup> This means the injury must result from an “anticompetitive aspect of the practice under scrutiny.”<sup>88</sup> It is not enough for a complaint to show that prices are higher than they would be in a perfect market. For a section 1

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79. 15 U.S.C. § 2.

80. 148 F.2d 416 (2d Cir. 1945).

81. *Id.* at 429–32.

82. *Id.* at 425 (“We conclude therefore that ‘Alcoa’s’ control over the ingot market must be reckoned at over ninety per cent; that being the proportion which its production bears to imported ‘virgin’ ingot.”).

83. *Id.* Judge Learned Hand emphasized that simply existing as a monopoly does not violate the Sherman Act. *Id.* at 424. Monopolies are only illegal if there is anticompetitive (exclusionary) conduct. If a company becomes a monopoly by delivering better products and service (but does nothing to harm its competitors other than engage in its own business), there is no violation of the statute. U.S. DEP’T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 5 (2008), <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1> [<https://perma.cc/MP9P-92DG>] (“[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.” (quoting *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004))).

84. 351 U.S. 377 (1956).

85. *Id.* at 391.

86. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–571 (1966).

87. *FOX & CRANE*, *supra* note 67, at 626 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990)).

88. *Id.*

violation, an agreement between competitors that harms or prevents competition must be shown.<sup>89</sup> For a section 2 claim, the company in question must have monopoly power (usually meaning the company comprises 70–75% of the relevant market) and be engaging in some exclusionary (anticompetitive) act.<sup>90</sup>

A lower standard of misconduct is required for oligopolies to be held in violation of antitrust law than for a monopoly.<sup>91</sup> This lower threshold exists because it is generally considered more anticompetitive for competitors to conspire to limit competition than for a single large company, acting in its own interest, to pursue practices that are inherently anticompetitive.<sup>92</sup> Accordingly, it is easier to bring an antitrust claim when multiple companies are involved in concerted conduct than when a single company dominates the market.<sup>93</sup>

The Sherman Act generally allows a company to choose with whom to deal and to whom it wants to sell its products. This concept is known as the right of “refusal to deal.”<sup>94</sup> This right is limited for monopolies and for competitors trying to influence the market through concerted efforts but is very broad for individual companies.<sup>95</sup> There are governmentally-approved exemptions to the Sherman Act, including for government-established

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89. The Apple/Amazon ebooks case *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), showed that evidence of agreement between publishers can be circumstantial; evidence of competing publishers’ dinners and meetings was held to show conspiracy, even though the substance of the discussions at these meetings was unknown.

90. JULIAN O. VON KALINOWSKI, STEVEN E. SLETTEN, ADAM DI VINCENZO & KAITLIN ZUMWALT, *ANTITRUST LAWS AND TRADE REGULATION: DESK EDITION* § 3.02 (Matthew Bender ed., 2022), LexisNexis.

91. *But see* Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497 (arguing that single-firm monopolies do not pose fewer anticompetitive risks than cartels do and therefore the lower standard is misguided).

92. *See* FOX & CRANE, *supra* note 67, at 68; *see also* *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) (explaining that cartels are per se illegal under antitrust law while monopoly power is not).

93. Kerry Gutknecht, Note, *Apple and Amazon’s Antitrust Antics: Two Wrongs Don’t Make a Right, but Maybe They Should*, 22 *COMMLAW CONSPICUOUS* 160, 163–64 (2013) (explaining that it is more difficult to bring an action under the Sherman Act against a single actor than a group).

94. An often-cited case supporting an individual company’s refusal to deal is *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”). *See also* Ernest H. Schopler, Annotation, *Refusals to Deal as Violations of the Federal Antitrust Laws* (15 U.S.C.A. §§ 1, 2, 13), 41 A.L.R. Fed. 175 (1979).

95. Schopler, *supra* note 94. Monopolies are prevented from blocking access to “essential facilities.” Adam Candeub, *Trinko and Re-Grounding the Refusal to Deal Doctrine*, 66 U. PITT. L. REV. 821, 828 (2005). For a discussion of refusal to deal concerning intellectual property licensing, see Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *Unilateral Refusals to License*, 2 J. COMP. L. & ECON. 1 (2006).

monopolies in areas like public utilities, which are prone to monopolization.<sup>96</sup>

While copyright and antitrust law have shaped the ebook marketplace, a discussion of the marketplace would not be complete without an assessment of its ultimate effects on libraries and patrons.

### C. *Negative Impact on Patrons and Libraries*

Libraries' restricted access to ebooks negatively impacts individual ebook borrowers. People with visual disabilities or visual processing difficulties rely on the changeable fonts in ebooks to read large-print and easy-to-process fonts.<sup>97</sup> Ebooks are crucial to this group because large-print editions of physical books can be released months after the standard edition.<sup>98</sup> Other people with physical disabilities rely on ebooks because e-readers can be "lighter and easier to hold" than some physical books.<sup>99</sup> People with lower incomes that use the library as their main information source are also disparately impacted<sup>100</sup>: some patrons can afford to buy books when they cannot obtain them quickly from libraries, but "[l]ong wait times at libraries can bar access altogether to those who cannot afford to purchase e-books or physical books."<sup>101</sup> Additionally, more people are relying on ebooks during the COVID-19 pandemic because they are

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96. Public utilities are regulated by the government to a much greater extent than private industry and are sometimes subject to antitrust exceptions. John P. Ludington, Annotation, *Valid Governmental Action as Conferring Immunity or Exemption from Private Liability Under the Federal Antitrust Laws*, 12 A.L.R. Fed. 329 (1972). Public utilities are regulated in part because of monopolistic tendencies in the energy and telecommunications sectors, due to the prohibitively high cost of developing physical infrastructure. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1635 (2018); David Elliot Berman & Victor Pickard, *Should the Internet Be a Public Utility? Hundreds of Cities Are Saying Yes*, FAST CO. (Nov. 18, 2019), <https://www.fastcompany.com/90432191/telecoms-wield-enormous-power-over-the-internet-but-cities-are-fighting-back> [<https://perma.cc/N4VA-7WFF>].

97. Jason Daley, *Why New Restrictions on Library E-Book Access Are Generating Controversy* SMITHSONIAN MAG. (Nov. 4, 2019), <https://www.smithsonianmag.com/smart-news/librarians-are-arms-about-new-ebook-restrictions-1-180973459/> [<https://perma.cc/C6HF-B676>]; *#eBooksForAll Frequently Asked Questions*, AM. LIBR. ASS'N, <https://ebooksforall.org/index.php/faq/> [<https://perma.cc/7P92-TXWX>].

98. Daley, *supra* note 97.

99. *#eBooksForAll Frequently Asked Questions*, *supra* note 97. Ebooks can be read on almost any personal electronic device, including phones, computers, tablets and e-readers. The device must simply have an app (such as the Kindle app or Overdrive's Libby app) installed. Some libraries even lend out e-readers to patrons. *See, e.g., Borrow an eReader*, HUBBARD PUB. LIBR., <https://www.beyond-books.org/ereaders> [<https://perma.cc/BL2E-XAK8>].

100. Smith, *supra* note 31, at 146.

101. RICHARDS, *supra* note 5, at 4. Waiting lists for popular ebooks become prohibitively long. Michael Lambert, *How a Publisher Is Punishing Library Users with eBooks Limit*, S.F. CHRON. (Oct. 30, 2019), <https://www.sfchronicle.com/opinion/openforum/article/How-a-publisher-is-punishing-library-users-with-14572856.php> [<https://perma.cc/R24S-NHUG>].

homebound or cannot physically go to the library.<sup>102</sup> Unequal access to ebooks in public libraries worsens society's "digital divide."<sup>103</sup>

Ebook restrictions affect libraries as an institution. Libraries reallocate money from other areas of their limited budgets to pay inflated costs for ebooks.<sup>104</sup> Less available materials and less money weakens libraries' community impact. Weakening libraries deprives communities of access to information, educational resources, and community meeting places.<sup>105</sup> When libraries cannot offer current information and resources to the public, this hampers their mission and harms their communities, especially lower income and minority communities.<sup>106</sup>

Weakening libraries disparately impacts minority and low-income communities.<sup>107</sup> Black and Latinx library patrons are more likely than the general population to use library computers and internet and are more likely to report that the library helps people find jobs or research health information.<sup>108</sup> Additionally, "lower-income Americans, blacks and Hispanics are more likely to say that closing their local public library would have a major impact on them or their family. About half (49%) of all Hispanics say closing the library would have a major impact on them or their family" compared to only 32% of the general public.<sup>109</sup> Serious

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102. Libraries have offered many services remotely during the COVID-19 pandemic, and demand for ebook lending increased. Elizabeth A. Harris, *Libraries Strive to Stay 'Community Living Rooms' as They Reopen*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/books/coronavirus-library-reopening.html?searchResultPosition=5> [<https://perma.cc/79B6-MQZE>]. "Libby, an e-book lending app for libraries, saw a 51 percent increase in the checkout of e-books after shutdown orders were issued in mid-March [of 2020]." *Id.*

103. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2; Geoffrey A. Fowler, *Want to Borrow that E-Book from the Library? Sorry, Amazon Won't Let You.*, WASH. POST (Mar. 10, 2021), <https://www.washingtonpost.com/technology/2021/03/10/amazon-library-ebook-monopoly/> [<https://perma.cc/ED8S-KLJ8>].

104. *See, e.g.*, Daniel A. Gross, *The Surprisingly Big Business of Library E-Books*, NEW YORKER (Sept. 2, 2021), <https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books> [<https://perma.cc/GBG2-W78B>] ("The high prices of e-book rights could become untenable for libraries in the long run, according to several librarians and advocates I spoke to.").

105. Latinx communities would be especially affected. "The most frequent library visitors among library users are Hispanics: 21% say they go to the public library at least once a week, compared with the 14% figure for all respondents." JOHN HARRIGAN ET AL., PEW RSCH. CTR., LIBRARIES AT THE CROSSROADS 13 (2015). Black, Latinx, and low income patrons are also more likely to use library computers and internet. *Id.* at 17.

106. *Id.* at 9; *see also supra* note 101 and accompanying text.

107. Smith, *supra* note 31, at 148; HARRIGAN ET AL., *supra* note 105, at 8 ("Lower-income Americans, Hispanics and African Americans are more likely to say that libraries impact their lives and communities than other Americans.").

108. HARRIGAN ET AL., *supra* note 105, at 17. "[C]ertain groups are more likely to say libraries help people find jobs: 58% of Hispanics[,] . . . 55% of African Americans[,] . . . [and] 53% of those in households with annual incomes under \$30,000 say this." *Id.* at 8. These communities are also more likely to say that libraries help with finding health information and that libraries help people identify whether information is trustworthy. *Id.* at 29–30. *See also* Smith, *supra* note 31, at 149.

109. HARRIGAN ET AL., *supra* note 105, at 31.

informational and community equity issues emerge when libraries are weakened by unfair ebook pricing.

These issues can be addressed by solutions that improve the ebook marketplace and lower the cost of library ebooks. One potential solution involves extending First Sale Doctrine protections to libraries' ebook purchases.

## II. EXTENDING FIRST SALE DOCTRINE PROTECTIONS TO LIBRARIES' EBOOK PURCHASES

Congress should extend First Sale Doctrine protections to libraries' ebook license purchases.<sup>110</sup> Libraries should be able to purchase an ebook license from any seller and legally lend it out as they would with a physical copy. While it would be complicated and probably unwise to eliminate the First Sale Doctrine for other digital media or for ebooks sold to nonlibrary consumers,<sup>111</sup> libraries should receive this special protection for public lending purposes because it would promote greater information equity and end discriminatory pricing practices against libraries.<sup>112</sup> With First Sale Doctrine protections, libraries would no longer have to purchase special licenses from publishers.<sup>113</sup> With no special license required, it might be harder for publishers to justify higher prices to libraries.

Given that physical library books are often repurchased due to wear and tear, sellers might price library ebooks higher than physical books to compensate for the profit they would otherwise yield from selling replacement physical books. Creating an extension of First Sale Doctrine protections to library ebooks would not affect the current library ebook lending model (like a physical book, an ebook can only be used by one

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110. See Geist, *supra* note 35 (arguing for an extension of the First Sale Doctrine to libraries' ebook purchases); RICHARDS, *supra* note 5, at 4 (suggesting, as one of several recommendations, that Congress extend First Sale Doctrine protections to libraries' ebook licenses).

111. See discussion *supra* Section I.A for an explanation of some of the difficulties posed by a potential digital resale market. For discussion of how a digital resale market that compensates the original copyright owner could address some of the potential harms of this type of market, see Reis, *supra* note 58, at 202–06.

112. Libraries should not be allowed to resell their digital ebooks. This could create digital market regulation problems. See discussion *supra* Section I.A. Perhaps, at some point, blockchain technology could be used to regulate the resale of digital media and prevent the sale of unauthorized copies. RICHARDS, *supra* note 5, discusses expanding 17 U.S.C. § 108 or § 110 to provide limited copyright protection for libraries during the COVID-19 pandemic:

§ 108 allows “a library or archives” to make a limited number of copies, in certain circumstances, for archival purposes without infringing the copyright. Congress could consider broadening § 108 or § 110 by adding protection from infringement when a library makes a copy of an e-book for the purposes of or as incidental to lending.

*Id.* at 4.

113. RICHARDS, *supra* note 5, at 3.

person at a time), so there is no justification for a price difference as a result.<sup>114</sup>

This extension of First Sale protections would not need to affect the prevailing two-year term offered for library ebook licenses. The two-year license model is responsive to the fact that demand for popular books is highest shortly after their release and wanes over time. It also balances the interests of publishers who want to be compensated for ebooks that do not need replacing because of the lack of wear and tear on digital files. If First Sale protections are extended to library ebooks, Congress should stipulate that these protections cannot be contracted away upon the purchase of a license. This is not an unusual protection internationally. “For example, contracts inconsistent with library copyright exceptions are unenforceable in some other countries.”<sup>115</sup> An International Federation of Library and Institutions (IFLA) report describes how various countries do not allow publishers to override through contracts copyright protections for libraries. This is described as “an affirmation that the public interest goals of copyright exceptions need to be protected.”<sup>116</sup>

Extending First Sale Doctrine protections would help lower ebook prices and work in harmony with the current licensing model. Libraries seek to cultivate long-term collections, and lower prices mean repurchasing licenses is less burdensome. Competitive pressure might even lead sellers to offer licenses for longer than two years.

Lower ebook prices could help reduce paper waste as well. Because physical books are currently priced lower than ebooks, libraries are incentivized to purchase physical copies of books instead of ebooks, even when ebooks would better serve their needs.<sup>117</sup> Libraries get rid of many copies of physical books once their initial popularity passes,<sup>118</sup> which is particularly wasteful if these superfluous copies end up in landfills. Lowering ebook prices would make ebooks a more enticing purchase for

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114. *Id.*

115. Alan Inouye, Opinion, *Bring Back Equitable Access for the Digital Age: Congress Must Act*, HILL (Feb. 12, 2020), <https://thehill.com/blogs/congress-blog/politics/482840-bring-back-equitable-access-for-the-digital-age-congress-must> [<https://perma.cc/G96P-GJQL>].

116. IFLA, PROTECTING EXCEPTIONS AGAINST CONTRACT OVERRIDE: A REVIEW OF PROVISIONS FOR LIBRARIES 1 (2019), [https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/contract\\_override\\_article.pdf](https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf) [<https://perma.cc/4ZGN-P6HP>]. For an overview of how copyright law affects and accounts for libraries around the world, see World Intellectual Property Organization [WIPO], *Study on Copyright Limitations and Exceptions for Libraries and Archives*, at 19–31, WIPO Doc. SCCR/17/2 (Aug. 26, 2008), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf) [<https://perma.cc/C5QX-7D48>].

117. LaRue, *supra* note 2 (providing an example of the difference between library and consumer ebook prices).

118. Libraries often try to sell these copies at a heavy discount, and so earn back a small fraction of the money, but it is still inefficient and wasteful to purchase large numbers of temporary books.



libraries and lead to more efficient maintenance of library collections. Ebook collections also save physical space in the library for other uses.

Extending First Sale Doctrine protections to libraries' ebook purchases would lower prices and stimulate competition in the ebook sellers' market. If extending the First Sale Doctrine is not feasible, another solution to the high-price problem would be to implement price caps on the library ebook licenses that publishers sell.

### III. IMPLEMENTING PRICE CAPS ON LIBRARY EBOOK LICENSES

Current antitrust law does not adequately protect libraries from a highly concentrated market in which libraries cannot effectively choose with whom to do business.<sup>119</sup> Libraries cannot adequately redress unfair ebook pricing through antitrust litigation. To prevail on an antitrust complaint, a plaintiff must show a competitive injury "of the type the antitrust laws were intended to prevent".<sup>120</sup> For section 1 of the Sherman Act, this requires an agreement between competitors that harms competition.<sup>121</sup> While libraries have spent a great deal of money on expensive ebook licenses,<sup>122</sup> to have a viable section 1 complaint they would still have to prove a joint effort by publishers to set high prices.

Section 2 of the Sherman Act concerns monopolies and there is no monopoly to be addressed here. There is no individual publisher that holds enough market share to be a monopoly.<sup>123</sup> Amazon is the only ebook *seller* that might be considered a monopoly, because it accounts for approximately two-thirds of American ebook sales, but it is only the fifth-largest publisher.<sup>124</sup>

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119. The ALA asserts that "denying or delaying new content to libraries . . . is a market failure . . ." COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 3. An oligopoly is recognized as a type of noncompetitive market and could represent a market failure. Steven L. Schwarcz, *Ring Fencing*, 87 S. CAL. L. REV. 69, 84–85 (2013).

120. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.").

121. 15 U.S.C. § 1.

122. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 1 ("[O]ver the past ten years, libraries have spent over \$40 billion acquiring content."). "Content" here means total materials; it is not stated what portion of the total ebooks represent.

123. Generally, a monopolist must constitute around 70% of the market, although a monopoly can exist with a slightly lower market share. It depends on how much market and price control the company has. VON KALINOWSKI ET AL., *supra* note 90.

124. Bogus, *supra* note 21, at 268. According to COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2 n.3, "Amazon also commands vertical integration advantages as its share of the overall sales of eBooks in the U.S. is 83%" (citing Mike Shatzkin, *A Changing Book Business: It All Seems to Be Flowing Downhill to Amazon*, IDEA LOGICAL CO. (Jan. 22, 2018), <https://www.idealog.com/blog/changing-book-business-seems-flowing-downhill-amazon/>).

Because there is no joint publisher effort to stifle competition or raise prices and no monopoly, libraries could not prevail on an antitrust complaint. Antitrust law has not been able to prevent exceedingly high ebook prices because oligopolies can raise the prices in a market as long as the companies involved do not cooperate or agree to cooperate to raise prices.<sup>125</sup> As has been noted by economists, each company in an oligopoly can observe the prices and policies of its competitors and then decide to implement similar prices or policies. But parallel conduct is not a violation under antitrust law.<sup>126</sup>

The government cannot force publishers to sell ebooks to libraries because of the Sherman Act's refusal to deal concept.<sup>127</sup> Additionally, coercing publishers would violate the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, which stated that Congress cannot use the Commerce Clause to compel individuals to engage in commerce in which they otherwise would not have engaged.<sup>128</sup> Forcing a publisher to sell to a library when the publisher would prefer to abstain from the transaction would be a direct violation of this prohibition on compelled commerce.

An alternative solution to extending First Sale Doctrine protections would be to implement price caps on the ebook licenses publishers sell to libraries. Price regulation is used by all levels of government in "such disparate businesses as utilities, apartment leasing, nursing homes and insurance."<sup>129</sup> When regulating utilities the term for price caps is "ratemaking."<sup>130</sup> Publishers might argue that to implement price caps would

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[<https://perma.cc/M66U-XE5DJ>]). Additionally, Amazon benefits when libraries lend ebooks through the OverDrive platform. "Via OverDrive's Kindle partnership, when a library user wants to read a library e-book on the Kindle platform, the user is delivered to Amazon, which takes over and manages the loan, and, of course, captures the usage data generated." Andrew Albanese, *Bibliotheca Calls Out Amazon for Meddling in the Library E-book Market*, PUBLISHERS WKLY. (Aug. 27, 2019), <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/81046-bibliotheca-calls-out-amazon-for-meddling-in-the-library-e-bookmarket.html#:~:text=Librarians%20have%20long%20long%20voiced,exclusively%20through%20its%20Audible%20division> [<https://perma.cc/4Z4D-WDFC>]. The libraries receive no compensation for this data. *Id.*

125. FOX & CRANE, *supra* note 67, at 284–302 (discussing noncompetitive behavior without collaboration).

126. *Id.*

127. A business's freedom to choose whom to sell, or refuse to sell, products to is a traditional part of the Sherman Act. *Refusal to Supply*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/refusal-supply> [<https://perma.cc/V7HJ-2Q7G>].

128. 567 U.S. 519, 522 (2012).

129. John N. Drobak, *Constitutional Limits on Price and Rent Control: The Lessons of Utility Regulation*, 64 WASH. U. L.Q. 107, 107 (1986).

130. See Brandon H. Ito, *Price Controls in Paradise: Foreshadowing the Legal and Economic Consequences of Hawai'i's Gasoline Price Cap Law*, 27 U. HAW. L. REV. 549 (2005), for a discussion of Hawai'i's gasoline price cap and theories about why price caps are not more commonplace.

be confiscatory, but “essentially all that is required by the modern constitutional limits on ratemaking” is “to prevent grossly unfair treatment of investors.”<sup>131</sup> Where the public interest is held to outweigh private interests, ratemaking may be constitutional even if it “result[s] in considerable financial harm to . . . investors.”<sup>132</sup> Here, there is a public interest in making information accessible, which could allow for the reduction of high ebook prices that may have resulted from the Big Five publishers’ oligopolistic hold on the market.<sup>133</sup>

Implementing price caps could be an easier solution to implement than extending First Sale Doctrine protections because it would involve less change. Implementing price caps would not change the ebook market structure. Price caps would not prevent publishers from refusing to sell ebooks to libraries or placing restrictions on new ebook purchases. Publishers would retain more control over the distribution of their ebooks than with the alternative First Sale Doctrine proposal. For these reasons, this solution could be more palatable to the publishing industry than the extension of First Sale Doctrine protections.

However, implementing price caps on library ebooks could be an onerous task. It would require setting a “fair” price for ebooks, which would involve a delicate balancing of publisher, library, and taxpayer interests. This price could be tied to the consumer ebook price (for example, a library ebook price cap could be set at 200% of the cost of the same consumer ebook). Additionally, price caps would require an enforcement mechanism and the accompanying costs for monitoring prices and punishing violators.

Antitrust law does a poor job of controlling oligopolies, which in this instance has likely led to high prices.<sup>134</sup> Libraries and their patrons have suffered as a result of these high prices.<sup>135</sup> Libraries as institutions serve the public good by promoting informational and technological equality. It is reasonable that society put the needs of this public institution dedicated to

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131. John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U. L. REV. 65, 124 (1985) (quoting JAMES BONBRIGHT, VALUATION OF PROPERTY 1155 (1937)).

132. *Id.* at 124.

133. COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 2.

134. Oligopolies can lead to higher prices. *Cf.* Guy Sagi, *The Oligopolistic Pricing Problem: A Suggested Price Freeze Remedy*, 2008 COLUM. BUS. L. REV. 269, 272–86 (2008) (discussing game-theoretic models of oligopolistic price setting); Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 152–54 (2002) (discussing twentieth-century empirical economic research finding an association between market concentration and price and assessing criticism of that research); FOX & CRANE, *supra* note 67, at 284.

135. Inouye, *supra* note 115.

providing open access to information above those of private publishers seeking to maximize profits. Price caps on ebooks would do just that.

### CONCLUSION

The Big Five Publishers publish over 80% of trade books in the American market.<sup>136</sup> A small group of companies determines the informational resources of our taxpayer-funded community organizations through a failure of copyright and antitrust law.<sup>137</sup> Because libraries are a captive market to publishers, they are forced to accept high prices. They must purchase ebooks from these publishers or risk becoming outdated relics.<sup>138</sup>

Extending First Sale Doctrine protections or implementing price caps on libraries' ebook purchases would help lower the high costs to libraries. Providing libraries with the opportunity to purchase ebooks at a reasonable price will strengthen our libraries so they can better serve our communities.

Libraries are one of America's great equalizers and a rare place for people to come together as a community. When libraries suffer, the public suffers. Congress has recognized that libraries face a worsening situation regarding ebooks and digital markets,<sup>139</sup> and should take the opportunity to strengthen libraries' positions as pillars of their communities. Congress should enact legislation that either extends First Sale Doctrine protections to libraries' ebook license purchases or sets price caps on library ebook licenses. Libraries add value to our communities and promote equality by providing open access to information and educational opportunities to people of all backgrounds. This public mission deserves special recognition through federal legislation. Without Congressional support of libraries, informational inequity will only continue to grow.

*Ali Petot\**

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136. COMPETITION IN DIGITAL MARKETS, *supra* note 1.

137. "We cannot rely upon special favors granted by private companies (and quasi-monopoly collecting societies) to define our access to culture, even if the favors are generous, at least at the start." Gregory K. Laughlin, *Digitization and Democracy: The Conflict Between the Amazon Kindle License Agreement and the Role of Libraries in a Free Society*, 40 U. BALT. L. REV. 3, 46 (2010) (quoting Lawrence Lessig, *For the Love of Culture*, NEW REPUBLIC, Feb. 4, 2010, at 28–29).

138. Patron demand for ebooks has increased greatly over the past several years. 30% of adults said they read ebooks in 2021 compared with only 17% in 2011. Michelle Faverio & Andrew Perrin, *Three-in-Ten Americans Now Read E-books*, PEW RSCH. CTR. (Jan. 6, 2022), <https://www.pewresearch.org/fact-tank/2022/01/06/three-in-ten-americans-now-read-e-books/>. The COVID-19 pandemic has led to a huge surge in library ebook lending. For example, "[in 2020], the Denver Public Library increased its digital checkouts by more than sixty per cent." Gross, *supra* note 104.

139. Congress invited the American Library Association to present a statement at their hearing "Competition in Digital Markets." COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 1.

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