

January 2008

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Recommended Citation

Carol Simpson, *An ILL Wind: Libraries and Interlibrary Loan of Audiovisuals*, 11 SMU SCI. & TECH. L. REV. 163 (2008)

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An ILL Wind: Libraries and Interlibrary Loan of Audiovisuals

Carol Simpson*

I. INTRODUCTION

This article exists through the grace of interlibrary loan. In doing any form of scholarly research, few writers have the luxury of convenient access to every source that might be relevant to the topic at hand. Most rely on distant libraries through a process known as interlibrary loan¹ (ILL) to supply articles, texts, and visual materials that are unavailable locally. However, scholars are not the only library patrons who utilize interlibrary loan. Teachers request materials that are not in the limited collections of their local libraries. Students borrow items their libraries cannot afford to stock because of limited demand or because they are out of print. Consumers seek information for personal enlightenment that their public libraries may never have anticipated a patron would request. Through their law firm libraries or public law libraries, lawyers request materials to prepare briefs or exhibits, or to develop litigation theories. All these uses rely on specific exemptions within the copyright act to permit libraries to provide information critical to individual patrons.²

The concept of copyright was established in the United States through the Constitution, under the powers of Congress: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."³ Under this clause, the intent is clear: to promote the progress of science (learning) and the useful arts (invention) through public access to published works.⁴ Traditionally, access to these works containing social and cultural records

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1. Interlibrary loan may be defined as: "... the sharing of materials among libraries, be they across town or across the globe. It is a service that provides access to the collections of libraries throughout the world. Interlibrary Loan service is primarily conducted library-to-library, on behalf of the patron (a *mediated service*). . . . Interlibrary Loan provides access to materials not held in or otherwise unavailable from a library's collection. . . . Interlibrary Loan comprises two parts: Borrowing and Lending, and two parties: the borrowing, or requesting library, and the lending, or responding library. Most libraries function as both borrowers and lenders." Andrew Hilyer, *What is Interlibrary Loan?*, 13 JOURNAL OF INTERLIBRARY LOAN, DOCUMENT DELIVERY & INFORMATION SUPPLY, No. 1/2 2002, at 1, 2.
2. Association of Research Libraries: Fair Use Legislation, <http://www.arl.org/pp/ppcopyright/fairuse/index.shtml> (last visited Feb. 4, 2007).
3. U.S. Const. art. I, § 8, cl. 8.
4. Laura N. Gasaway, *The New Access Right and Its Impact on Libraries and Library Users*, 10 J. INTELL. PROP. L. 269, 272 (2003).

was provided by a combination of privately owned copies and copies made available through public libraries.⁵ However, the goal of public access to published materials as an exchange for the copyright monopoly has been seriously threatened by a growing number of publishers who refuse to allow public access to their published works.⁶ These publishers of print and audio-visual materials are claiming both the monopoly of copyright and the restrictions of licensing without accepting the concomitant obligations of public access implied within the concept of copyright. As a result, the general public underwrites profit for these publishers, and valuable information that would be available through public channels such as libraries is shut off out of fear of litigation. From a social policy standpoint, continuing this practice of dual protection will create an information elite composed of only those who can afford to license access to information created by these publishers.

II. A BALANCE OF RIGHTS

Much like the concept of a patent, in which an inventor's time-limited monopoly in his invention is achieved at the price of publication, a copyright owner's rights are purchased with limitations, as well. An author of a copyrighted work owns six rights, all detailed within § 106 of the codified Copyright Act.⁷ Among the rights granted to an author are: 1) right of reproduction; 2) right of adaptation; 3) right of distribution; 4) right of public performance; 5) right of public display; 6) right of digital transmission of sound recordings.⁸ An author's monopoly on the rights in his work may be abridged by various means such as fair use, a concept detailed within the law and interpreted through the courts.⁹ Another limit of an author's rights curtails the right of distribution.¹⁰ Called the doctrine of "first sale," this policy terminates a copyright owner's right to control distribution of the physical copy – the printed book, cassette tape, videocassette, or computer disc – after the first sale of the item.¹¹ From that point on, the copyright owner may no

5. *Id.*

6. *Id.*

7. 17 U.S.C.A. § 106. (West 2007).

8. *Id.*

9. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (declaring that some degree of fair use historically has been applied as fundamental to the basic purpose of copyright law). Limitations on the rights of copyright holders are established in 17 U.S.C. §§ 107-122, and include such exceptions to a copyright holder's rights as fair use, library exemptions and the doctrine of first sale.

10. 17 U.S.C.S. § 109 (LexisNexis 2006).

11. *Walt Disney Productions v. Basmajian*, 600 F. Supp. 439, 442 (D.C.N.Y. 1084) (holding that animation cels given to an animator during the course of his employment could be sold by the recipient over the objection of the copyright owner). *But see Adobe Systems, Inc. v. Stargate Software, Inc.*, 216 F. Supp.

longer claim rights over the physical entity, while at the same time owning the expression of ideas that is contained within that physical entity.¹² Without the first sale doctrine, people would not be able to give copyrighted books, videos, etc. as gifts, sell them in garage sales, resell used textbooks, or loan books to friends without first securing permission of the copyright owner. While copyright owners may grumble over the doctrine, first sale has made access to copyrighted works more affordable, contributed to continuing access to copyrighted works, and permitted users to access copyrighted works without giving any notice to the copyright owner of the identity of those using the materials.¹³ The doctrine of first sale enables libraries to provide books and media to their patrons without previously securing permission of the author to distribute the materials in this manner,¹⁴ and through this ability makes access to information affordable for the general public.¹⁵ The Copyright Act “creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works,”¹⁶ a concept echoing the constitutional foundation of the law. Libraries serve as a principal conduit to give the public access to copyright protected works, especially those that the public can neither afford nor would ordinarily encounter.¹⁷ Reference books are an example: a patron would not likely purchase an entire set of encyclopedias to be able to read an article on a topic of interest, but the patron would come to the library to share access to this work with other members of the public.

Authors are not generally the party who controls a work’s access to the public, however. In reality, an author usually sells or exclusively licenses his copyright to a publisher (when the author is not the publisher itself) in exchange for royalties or flat fee payments. From the point of transfer, the publisher may exercise all rights as if it stands in the shoes of the author.¹⁸

2d 1051, 1054 (N.D. Cal. 2002) (holding that computer software whose possession but not ownership had been transferred was not subject to first sale doctrine).

12. Basmajian, 600 F. Supp. at 442.
13. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 579 (2003).
14. *Hotaling v. Church of Jesus Christ of Latter Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997) (holding that a library that puts a work into its collection distributes the copy to the general public).
15. Reese, *supra* note 13, at 588.
16. *Stewart v. Abend*, 495 U.S. 207, 228 (1990).
17. Reese, *supra*, note 13, at 584.
18. 17 U.S.C.A. § 201(d)(2) (West 2007). “Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by § 106, may be transferred . . . and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.”

Publishers, however, find public access highly offensive. Many publishers do not wish to allow public access since such access, they posit, negatively influences the publisher's bottom line.¹⁹ In fact, one large publishers's organization considers libraries to be the primary threat to their livelihood.²⁰ They claim that every item checked out of a library deprives a publisher of a potential sale of that work, and seek new paradigms to exact additional payment for use by library patrons,²¹ notwithstanding any minimal use that a patron may make of the work such as the encyclopedia example, *supra*. However, the right to vend or control the subsequent alienation of a given work ends with its first sale,²² so for about the last century publishers were not very successful in limiting libraries from purchasing and sharing physical copies of the publishers' works²³ – until audiovisual publishers took a cue from computer software publishers and started licensing, rather than selling, their works.²⁴

The sale or licensing of audiovisual materials aptly demonstrates the dilemma facing both publishers and libraries. Under the mistaken assumption that every interlibrary loan is a lost sale, some video/DVD (hereinafter video) producers quietly changed their library sales strategy from outright sales – as are made to consumers in the marketplace – to strict licensing.²⁵ A simple Google search of the phrase “not for sale to schools” or “not for sale to libraries” will reveal many publishers (mostly of audiovisual items) that will only license their materials to schools or libraries.²⁶ Some essentially rent the

19. Gasaway, *supra* note 4, at 272.

20. See, generally, Linton Weeks, *Pat Schroeder's New Chapter*, THE WASHINGTON POST, February 7, 2001 at C1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A36584-2001Feb7>.

21. *Id.*

22. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908). This case, considered the harbinger of first sale doctrine, held that copyright law cannot restrict alienation of protected property in the absence of privity of contract.

23. The Copyright Act of 1909 only controlled the right to vend a work, and not to loan it, so publishers could not prevent libraries from loaning any purchased work.

24. Arnold Lutzger, *Inter-library Lending and Online School System Union Catalogs: A Lesson in Copyright Liability*, 19 AIME NEWS, Fall 2005, at 1, 1-2.

25. Posting of Chuck Hamaker to <http://www.library.yale.edu/~llicense/ListArchives/0204/msg00082.html> (Apr. 24, 2002, 6:33AM) (discussing the problems a library has with hidden licensing).

26. See, e.g., Student Home Learning System, http://home.fog-ware.com/products/educational/student_home_learningsystem.htm (last visited Feb. 16, 2007) (indicating no sales to schools or libraries); Affluenza: The All-consuming Epidemic, http://www.simpleliving.org/~simpleli/osCommerce/catalog/product_info.php?cPath=40&products_id=673 (last visited Feb. 16, 2007) (indicating no sales to libraries).

materials by imposing a term limitation on the items, as well.²⁷ The risk of this Hobson's choice – license under our terms or you may have no access at all – is a perversion of the constitutional purpose of copyright by depriving the public and non-profit researchers of access to potentially important information. Essentially the contract vitiates the overarching constitutional purpose of copyright. Certainly such a contract is, by definition, unconscionable.

Through licensing, a copyright holder may exact concessions via contract with the vendee in which the vendee relinquishes some or all of their statutory fair use rights.²⁸ A recent action against a school district library consortium is a case in point.²⁹ A group of approximately 160 school libraries pooled their electronic catalog records into one database, called a "union catalog."³⁰ A union catalog has no copyrighted works within the database; it is simply a listing of authors, titles, and subjects of works held in the various school libraries comprising the consortium. When a library patron seeks information on a topic for which his home library has no available resources, the librarian searches the listings in the union catalog and requests a loan of an appropriate item. The supplying library checks out the material to the requesting library and sends the actual work (or a copy of the work, if it meets certain photocopy guidelines) to the requesting entity to be used by the requesting patron.³¹ A group of audiovisual producers threatened legal action against the consortium on the theory that the producers's works listed in the catalog as "available" for loan had been distributed in violation of a valid

27. Lutzger, *supra* note 24, at 2.

28. Janet Brennan Croft, *Interlibrary Loan and Licensing: Tools for Proactive Contract Management*, 42 JOURNAL OF LIBRARY ADMINISTRATION, No. 3/4 2005, at 41, 42.

29. *See, generally*, Lutzger, *supra* note 24, at 1-4.

30. "Union catalog — A list of the holdings of all the libraries in a library system, or of all or a portion of the collections of a group of independent libraries, indicating by name and/or location symbol which libraries own at least one copy of each item. When the main purpose of a union catalog is to indicate location, the bibliographic description provided in each entry may be reduced to a minimum, but when it also serves other purposes, description is more complete." JOAN M. REITZ, ONLINE DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE (2006), <http://lu.com/odlis/>.

31. "Interlibrary loan (ILL) — When a book or other item needed by a registered borrower is checked out, unavailable for some other reason, or not owned by the library, a patron may request that it be borrowed from another library by filling out a printed interlibrary loan request form at a service desk, or electronically via the library's Web site. Some libraries also accept ILL requests via e-mail or by telephone, usually under exceptional circumstances. Materials borrowed on interlibrary loan may usually be renewed on or before the due date.

Interlibrary loan is a form of resource sharing that depends on the maintenance of union catalogs." JOAN M. REITZ, ONLINE DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE (2006), <http://lu.com/odlis/>.

license agreement.³² According to one United States Court of Appeals, simply listing works in a library catalog and indicating they are available for circulation is sufficient to meet the statutory definition of distribution.³³ Subsection (d) of § 109 states that first sale doctrine does not “unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.”³⁴ In other words, their theory held that libraries could no longer share audiovisual materials among one another (and perhaps even with their patrons, depending on the specific license agreement) because the producers would not *sell* a videocassette or DVD to a library as they would sell it to a consumer. The producers would only license the video to libraries with the express intent that the library could not share with other libraries.³⁵

If licensing is allowed to trump the first sale doctrine and other fair uses, libraries as the public has become accustomed to them may cease to exist. Licensing changed the basic structure of information access. Reese explains that the economic result of the first sale doctrine is lower prices for copyright protected goods unfettered by restrictive pricing schemes.³⁶ Naturally, publishers find that downward price pressure because of aftermarket goods or free library access is a situation they hope to avoid. Every used book sold or library loan is a new book unsold, in their opinion. However, in a strictly economic analysis, first sale maintains a balance in the market that more closely tracks an item’s true worth. Rebecca Tushnet explained:

In bringing consumers’ interests into the analysis, we should not forget that intermediate institutions like schools and libraries are major markets for copyright owners and, therefore, major sources of copyrighted works for many consumers. . . . [L]ibraries and schools generally have opinions about what a good source is and what patrons should be reading, even when they also enable access. At the same time, these intermediaries often serve to mitigate the strict wealth discrimination imposed by the direct market for copyrighted works, allowing people to read and to watch far more copyrighted works than they could pay for themselves.³⁷

32. Lutzger, *supra* note 24, at 1-2.

33. *Hotaling v. Church of Jesus Christ of Latter Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997) (holding that a library that puts a work into its collection distributes the copy to the general public).

34. 17 U.S.C.A 109(d) (West 2006).

35. Lutzger, *supra* note 24, at 1-2.

36. Reese, *supra* note 13, at 585.

37. Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 981 (2006).

Following Tushnet's premise, loans from libraries are not lost sales that might be made to consumers. Certainly some of the loans from a library are to patrons who would not be able to purchase or be interested in purchasing the item being loaned due to limited value, limited funds, or limited duration of interest, yet publishers still view library activities as the print and video-cassette versions of filesharing.³⁸ Libraries counter the publishers's argument saying they are the last "buffers against total control of the flow of information by large-scale content owners."³⁹ Since promotion of education and information sharing is an underlying foundation of copyright law,⁴⁰ publishers would be hard-pressed to make a case denying that access to their copyright-protected works serves a public good.

Ray Patterson and Stanley Lindberg describe seven competing policies contained within the constitutional copyright clause as interpreted beginning in the 19th century, including promoting learning, preservation of the public domain, and protection of the author.⁴¹ Patterson and Lindberg believe there is also an implied right of public access that emanates from the promotion of learning, since one must have access to previous scholarship in order to learn the lessons of prior knowledge.⁴² They equate this right of public access to a quid pro quo in exchange for the limited monopoly granted via a copyright.⁴³ Copyright during the period described in the Patterson-Lindberg text required publication in order to secure the rights protected by copyright.⁴⁴ Following the 1976 revision of copyright law, an author did not need to publish his work in order to gain copyright rights.⁴⁵ Nevertheless, Patterson and Lindberg maintain that the obligations inherent in the law have not changed over the years.⁴⁶ The Supreme Court grants deference to a copyright owner's rights, but emphasizes the root of the right as service in the public interest.⁴⁷ "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimu-

38. *Id.* at 981-82.

39. *Id.* at 982.

40. U.S. Const. art. I, § 8, cl. 8.

41. L. RAY PATTERSON & STANLEY LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USER'S RIGHTS* 49-52 (1991).

42. *Id.* at 69.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 71 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), *Sony Corp. v. Universal Studios*, 464 U.S. 417 (1984), *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), and *Mazer v. Stein*, 347 U.S. 201 (1954)).

47. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-76 (1994).

late [the creation of useful works] for the general public good.”⁴⁸ The Court also recognizes that private gain must “ultimately serve the cause of promoting *broad public availability* of literature, music and other arts.”⁴⁹

Making copyrighted works available to the public is fundamental to the grant of copyright. One way that the public may avail itself of protected works is through libraries.⁵⁰ Relying on the right of first sale, libraries share their holdings with those within their service areas.⁵¹ Shared access – spreading the cost of access to works across a broad community – makes information available to many who would not or could not afford to purchase works simply for the purpose of access.⁵² The right of first sale has been critical to libraries since 1978 (effective date of the 1976 copyright act) when copyright owners gained the right to control loans, as well as sales, leases, and rentals, of their protected works.⁵³ Prior to 1978, copyright owners could only control how a work was sold, and since libraries *loan* works rather than sell them, copyright owners had no effective copyright control over their works held in libraries.⁵⁴ Thus, until 1978, a copyright owner did not have the ability under copyright law to prevent a library from loaning a physical copy of a book or an audiovisual work to a patron of the library, or to another library for that library’s patron.

III. INTERLIBRARY LOAN

Libraries do not loan materials only to patrons who live in their service areas. In an effort to provide the most effective service for their patrons, and with an understanding that no library can possibly afford or house everything that all its patrons might possibly request, libraries enter reciprocal borrowing agreements with neighboring and regional libraries to share works. This concept, known as interlibrary loan, involves “one library lending its materials to another library – not the traditional patron / library relationship, but transactions between libraries. A library may loan the material itself, or it may send copies.”⁵⁵ ILL may be distinguished from its cousin, document delivery, by the cost of the loan: commercial document delivery services provide photocopies of requested documents at a price to the user that includes a

48. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (superseded by statute) (holding that playing the radio for the benefit of restaurant customers was not an infringement of the right of public performance).

49. *Id.* (emphasis added).

50. Reese, *supra* note 13, at 588.

51. *Id.* at 588-90.

52. *Id.* at 589.

53. *Id.* at 590 n.44.

54. *Id.*

55. LOIS C. GILMER, *INTERLIBRARY LOAN: THEORY AND MANAGEMENT* xvii, Libraries Unlimited 1994.

royalty, while interlibrary loan comprises physical loan of the requested item or a photocopy made under a specific exemption in United States copyright law.⁵⁶ Once an ILL item has been sent to the requesting library, the receiving library makes the borrowed materials available to a requesting patron, under whatever conditions the lending library stipulates.⁵⁷

Interlibrary loan is an expanding function of libraries of all types. Public libraries alone loaned 19.5 million items to other libraries in fiscal year 2001.⁵⁸ Academic libraries loaned 9.2 million items to other libraries during the 2002 academic year.⁵⁹ Using public libraries as a representative sample, LIBRARY JOURNAL's budget report for fiscal year 2004 showed that per capita circulation (of book and non-book materials) rose, but fiscal support for several previous years has been sluggish.⁶⁰ At the same time, book and audiovisual prices are soaring, and periodical prices have climbed exponentially.⁶¹ With rising prices and falling budgets, libraries must sacrifice less demanded materials to close the gap. When patrons come to a library seeking information on topics that are not included within the collection of that library, perhaps because the library hasn't purchased items on that topic or because the material the library owns is already checked out to another patron, the library seeks alternative sources to fill the need. Libraries turn to a known source to meet the needs of their patrons: other libraries. However, ILL is the choice of last resort, after local collections and subscription-access databases have been exhausted in looking for an item.⁶² Delays in ILL delivery and competition for access to scarce materials makes ILL a poor substi-

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56. Mary E. Jackson, *Measuring the Performance of Interlibrary Loan Operations in North American Research and Academic Libraries*, <http://www.arl.org/access/performance/ifla96-paper.stm> (last visited Jan. 1, 2007). This paper only considers interlibrary loan of physical materials. Copying of materials for loan is covered in the CONTU guidelines.
 57. ALA: Interlibrary Loan Code for the United States, <http://www.ala.org/ala/rusa/rusaprotocols/referenceguide/interlibrary.htm> (last visited Feb. 4, 2007). The document was prepared by the Interlibrary Loan Committee, Reference and User Services Association (a division of the American Library Association) in 1994, and revised in 2001.
 58. BOWKER ANNUAL LIBRARY AND BOOK TRADE ALMANAC 456 (Dave Bogart ed., 50th ed. 2005).
 59. THE WHOLE LIBRARY HANDBOOK 4: CURRENT DATA, PROFESSIONAL ADVICE, AND CURIOSA ABOUT LIBRARIES AND LIBRARY SERVICES 8 (George M. Eberhart ed., 2006).
 60. Norman Oder, *LJ Budget Report: Tipping Point*, in BOWKER ANNUAL LIBRARY AND BOOK TRADE ALMANAC, *supra* note 58 at 476, 476.
 61. Evan St. Lifer, *Average Book Prices 2004: Stop the Insanity*, SCHOOL LIBRARY JOURNAL (March 2004), available at <http://www.schoollibraryjournal.com/article/CA386702.html>.
 62. Donna Nixon, *Copyright and Interlibrary Loan Rights*, JOURNAL OF INTER-LIBRARY LOAN, DOCUMENT DELIVERY & INFORMATION SUPPLY 55, 57 (2003).

tute for library-owned materials. Nixon reports on a 1998 survey that found the average cost of an ILL transaction was \$28.00 and took ten days.⁶³ Patrons generally use ILL only for niche research topics and to fill gaps when online aggregators drop access to sources on which a library has depended for the benefit of its patrons.⁶⁴

Despite the delays and frustrations of locating desired materials, interlibrary loan is hardly an isolated practice. In the United States in 2005, there were almost 23,000 public, academic, Armed Forces, governmental and special libraries.⁶⁵ Public school libraries totaled over 93,000 media centers.⁶⁶ In 1987, a National Center for Education Statistics identified approximately 760 library consortia in the United States.⁶⁷ Most college, public, and university libraries belong to at least one network or consortium, and many school libraries do, as well. Many libraries belong to more than one.⁶⁸ The Library of Congress (LOC), itself, spearheaded growth in interlibrary lending through its National Union Catalog, growing out of the LOC's catalog card printing program beginning in 1901.⁶⁹ By the close of 2006, at least twenty-six states had statutes establishing, requiring, or endorsing library consortia for resource sharing.⁷⁰ The statutes require libraries to participate in reciprocal agreements and union catalogs. Typical requirements for public libraries include this language from Pennsylvania:

(2) lend materials free of charge on a reciprocal basis to all types of libraries in this Commonwealth.

(3) Provide interlibrary loans to residents of the library's direct service area free of charge.⁷¹

Similar requirements apply to school library systems, as demonstrated by this statutory language from New York:

63. *Id.*

64. *Id.* at 57-58.

65. THE WHOLE LIBRARY HANDBOOK 4, *supra* note 59, at 3.

66. *Id.*

67. *Id.* Library consortia exist to share resources, both in an interlibrary loan context, and in the area of shared services such as professional development or cataloging.

68. *Id.*

69. GILMER, *supra* note 55, at 4.

70. The following states have statutes that mandate or endorse some form of interlibrary cooperative agreements: Alaska, California, Colorado, Connecticut, Iowa, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, North Carolina, North Dakota, New Hampshire, New Jersey, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, and Washington.

71. PA. STAT. ANN. tit. 24 § 4303.3 (Lexis 2006).

(ii) No plan of service shall be approved unless it provides a method by which members of the school library system are obligated to permit the interlibrary loan of books and materials to other members of the school library system and to members of other systems with which the school library system has reciprocal interlibrary loan agreements, except for materials not loaned within a participating district or school.⁷²

Multitype library systems are addressed in this Minnesota statute, typical of this type:

Subdivision 1. Library service. The state shall, as an integral part of its responsibility for public education, support the provision of library service for every citizen, the development of cooperative programs for the sharing of resources and services among all libraries, and the establishment of jointly operated library services at a single location where appropriate.

Subd. 3. Library resources. The department may provide for any library in the state, books, journals, audiovisual items, information services or resource materials it deems appropriate and necessary and shall encourage the sharing of library resources and the development of interlibrary cooperation.⁷³

Each of the statutes excerpted above is either format neutral (e.g. “materials”) or it specifically endorses the interlibrary lending of audiovisual materials in particular.

Notwithstanding the statutory directives, publishers fear the use of digital or electronic versions of their works in educational and library contexts because of the ease with which those items may be copied.⁷⁴ They assert that licensing is “critical to the practical exercise of copyright ownership,” and that the development of many new educational products demonstrate the robust nature of the marketplace.⁷⁵ However, traditional library purchasing has relied on straightforward sales to trigger the protections of the first sale doctrine.⁷⁶ Unadvertised licensing when purchasing generates a virtual adhesion contract. Libraries order the videos or DVDs in the same manner they have

72. N.Y. COMP. CODES R. & REGS. tit. 8, § 90.18(c)(2)(ii) (2006).

73. MINN. STAT. § 134.31 (1, 3) (2005). The statutory language here identifying “education” refers to the general educational function of libraries in general, not libraries in academic institutions in particular.

74. Heather Florence, *Copyright reform and licensing practice*, 557 PLI/PAT 123, 252 (1999) (discussing rights owners’ objections to fair use of digital media in distance learning courses).

75. *Id.* at 248-49.

76. *See* Gasaway, *supra* note 4, at 270.

always used to order books — looking at printed or online catalogs that make no mention of licensing — and receive standard appearing videos in consumer-type packaging.⁷⁷ No negotiation of licensing terms takes place, and no “meeting of the minds” is achieved.⁷⁸ Yet the library may not interlibrary lend these videos, even on a limited basis to a library in its own district, city, or system, because by ordering the video they are held to have impliedly agreed to refrain from doing those things that libraries are formed to do.

Because so much information exists only in video format — from documentaries to instructional videos to entertainment films that create a significant amount of the popular culture — libraries have increased their collections of these materials. Nevertheless, no library could possibly afford to collect every item its patrons might one day request. When the patron request cannot be filled locally, the home library turns to its colleagues through which it has agreed to exchange materials via interlibrary loan.

IV. THE COPYRIGHT-ILL INTERFACE

Despite public interest in having local libraries broker transactions between patrons and distant libraries holding materials unavailable locally, statutes that demand the exchange of taxpayer-purchased materials between libraries serving a state’s citizens, and federal steps to facilitate such trading, nothing within current copyright law specifically addresses physical lending of audiovisual materials between libraries. The first sale doctrine codified in § 109(a) allows the owner of a lawfully made copy (or phonorecord) of a work to sell or otherwise dispose of that single physical entity without prior permission of the copyright owner.⁷⁹ A library may lend a work it owns, imposing any terms of loan that it chooses.⁸⁰ Nevertheless, if a work is not *owned* by the library, but is instead licensed, the privileges of § 109 still apply, but an action lies in breach of contract between the parties.⁸¹ The library may not have violated copyright law, but it has broken a contract with the copyright owner, and the damages are just as real.

Copyright owners (primarily publishers) interpret the right to control distribution in the most restrictive way possible so that ultimate users would have to purchase rather than borrow materials. Since an interlibrary loan patron may quite easily make a copy of the audiovisual item borrowed, publish-

77. On the catalog and information portion of the websites maintained by the producers in the BOCES case, at least four of the plaintiffs had no mention of loan license terms on their websites or online order forms. In some cases, order forms offer broadcast licenses or digital server licenses, but do not mention site or term licenses as alleged.

78. Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 Vill. L. Rev. 13, 37 (2003).

79. 17 U.S.C.A. § 109(a) (West 2007).

80. *Id.* at note (Effect on Further Disposition of Copy or Phonorecord).

81. *Id.*

ers advance the idea that they have the right to control conventional interlibrary lending as well as electronic and photocopy varieties.⁸² Through the Copyright Clearance Center, a publishing rights organization, publishers incorrectly claim that print interlibrary loan requires transactional reporting, despite the protections afforded through § 108.⁸³

Section 108 of United States copyright law governs reproduction and distribution within the library context, granting libraries limited rights to copy materials for interlibrary loan, among other library privileges.⁸⁴ However, reproduction and distribution are shackled together in this context, except for one subsection, (g)(2), in which library interlibrary loan agreements of original copies or reproductions are endorsed unless they “have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution [does so] in such aggregate quantities as to substitute for a subscription to or purchase of such work.”⁸⁵ In other words, interlibrary loan of physical copies *or* reproductions is exempt under this clause as long as the loans are not in sufficient quantity to substitute for the library purchasing a copy of the work. The key issue, still unresolved or litigated, is how much is sufficient quantity to substitute for library purchasing?

Library lending is seldom a litigated matter. Case law involving § 108(g)(2) is limited to a single case totally unrelated to libraries, with the rule being applied only by reference in another rule.⁸⁶ The majority of the

82. Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 988 (2006).

83. Copyright Clearance Center, Transactional Reporting Service – Copyright.com (2007), <http://www.copyright.com/ccc/do/viewPage?pageCode=ac7-n>.

84. 17 U.S.C.A. § 108 (West 2007). Included within this section are library rights: (subsection b) to create analog copies of unpublished materials for archival and research purposes, including deposit in other libraries to guard against physical calamity at the original institution; (subsection c) to make analog copies of a work that is damaged, deteriorating, lost, or stolen, but only if the library has determined that it cannot purchase a replacement at a reasonable cost; (subsection d) to make copies of articles and small excerpts of works requested by patrons or via interlibrary loan, as long as certain procedural standards are met; (subsection e) to make complete copies of a work that is out-of-print as long as an unused copy cannot be purchased at a fair price, and other procedural standards are met. Subsection f grants immunity to libraries for several types of patron requested copying as long as procedures are followed, and subsection g allows unrelated incidents of single copies provided the library does not engage in systematic reproduction or distribution of anything described in subsection d.

85. 17 U.S.C.A. § 108(g)(2).

86. *T.B. Harms Co. v. JEM Records, Inc.*, 655 F. Supp. 1575, 1578 (D.N.J. 1987) (mentioning § 108(g)(2) as referred to in § 501 regarding importation of sound recordings).

scant library case law involves photocopying for interlibrary loan purposes. *Williams & Wilkins v. United States*, the significant case in this realm, was rendered prior to the enactment of the current copyright statute, and an equally divided Supreme Court, without comment, affirmed the lower court ruling.⁸⁷ In finding that the National Library of Medicine's (NLM) photocopying of medical journal articles for interlibrary loan was fair, the Court of Claims in its appellate function considered that blocking photocopying of all academic journal articles would seriously hamper the progress of medical science.⁸⁸ The court was loath to decide the balance of fair use against reimbursement in the case, and urged Congress to revise the law to address modern practice, all the while having to decide the case based on a law written before the technologies involved were created.⁸⁹ The court relied heavily on legislative reports to discern the intent of Congress in applying fair use to the practice of photocopying for interlibrary loan, and cited Supreme Court cases emphasizing that public interest is the overarching tenet of copyright law.⁹⁰ The court noted that the periodical publisher does not show substantial harm from the practice of interlibrary loan photocopying, while at the same time the trial record does show significant potential harm if the photocopying were halted.⁹¹ In dicta, the court takes notice of the fact that library photocopying had widespread acceptance by publishers until shortly before the lawsuit began, and that federal laws setting up the National Library of Medicine specifically endorsed making photocopies for interlibrary loans.⁹² The holding in the case allowed the interlibrary photocopying to continue, though it emphasized that the ruling applied only to this particular situation and urged Congress to clarify this area in future legislation.⁹³ The court's analysis of the intent of copyright law remains an oft-cited discussion. In a long and caustic dissent, Chief Judge Cowen supported the thesis that copyright ownership is secondary to public benefit.⁹⁴ Ultimately, the details about library photocopying became moot when Congress passed the Copyright Act of 1976. The section now codified at § 108(d) enumerates current limits on library photocopying.⁹⁵

87. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *superseded by statute* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2546.

88. *Id.* at 1356.

89. *Id.* at 1360.

90. *Id.* at 1352 (citing *Mazer v. Stein*, 347 U.S. 201, 249 (1954); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)).

91. *Id.* at 1359.

92. *Id.* at 1356.

93. *Id.* at 1362.

94. *Id.* at 1371-72.

95. 17 U.S.C.A. § 108(d).

While § 108(d) gives an overarching permission to make copies for interlibrary loan, § 108(f) restricts that same exemption. Subsection (d) says:

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

- (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
- (2) the library [displays appropriate notice].⁹⁶

Subsection (f) continues the thread:

(f) Nothing in this section—

...

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.⁹⁷

Subsection (4) becomes internally inconsistent when faced with a license that requires a library to relinquish fair use rights.

Subsection (g) concludes the discussion applicable to interlibrary lending:

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, that *nothing in this clause prevents a library or archives from participating in inter-*

96. *Id.*

97. *Id.* § 108(f).

*library arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.*⁹⁸

Prior to the enactment of this statutory language, however, librarians who had to deal with interlibrary lending and photocopying cried for interpretation of what limits were appropriate under this proposed wording. The call was answered by the Committee on New Technological Uses of Copyrighted Materials, or CONTU.⁹⁹ Established by Congress, CONTU made recommendations about copyright issues surrounding photocopying and other emerging technology issues.¹⁰⁰ The key element in their discussions was to define the phrase “such aggregate quantities” ultimately incorporated in § 108(g)(2).¹⁰¹ In addition, the panel formulated a set of guidelines that, while not incorporated into the statutory language itself, formed a significant portion of the legislative record of this portion of the Act. The major publisher, library, and author organizations agreed to abide by the guidelines defining “aggregate quantities” and “systematic reproduction” set forth in the report.¹⁰² The guidelines present only guidance in determining minimum quantities. As with all use of copyrighted material, standard fair use principles delineated in § 107 may be applied if they will yield a more generous result.¹⁰³ Libraries fall back on the fair use guidelines if the limits set out in § 108 don’t yield sufficient leeway to accomplish the purpose.¹⁰⁴ However, most libraries apply the guidelines as ceilings on copying for interlibrary loan rather than floors.¹⁰⁵

The CONTU guidelines provide specific interpretation of what the statutory phrase “such aggregate quantities as to substitute for a subscription to or purchase of the work” means.¹⁰⁶ While § 108(g)(2) is not medium specific, the CONTU guidelines focused on the only material that was regularly subject to photocopying at the time the new copyright act was passed: print,

98. *Id.* § 108(g) (emphasis added).

99. Bartow, *supra* note 78, at 32.

100. CONTU Guidelines on Photocopying under Interlibrary Loan Arrangements, <http://www.cni.org/docs/infopols/CONTU.html> (last visited Feb. 15, 2007).

101. *Id.*

102. *Id.*

103. GILMER, *supra* note 55, at 79-80.

104. *Id.*

105. Shelly Warwick, *Copyright for Libraries, Museums, and Archives: the Basics and Beyond* in LIBRARIES, MUSEUMS, AND ARCHIVES: LEGAL ISSUES AND ETHICAL CHALLENGES IN THE NEW INFORMATION ERA 235, 245 (Tomas A. Lipinski, ed., 2002).

106. GILMER, *supra* note 55, at 80.

and primarily periodicals. Only periodicals published within five years of the request¹⁰⁷ and any non-periodical material during its term of copyright protection¹⁰⁸ are tracked under the guidelines. The requesting library is responsible for keeping all records of its requests, and identifying the copyright compliance status of the request.¹⁰⁹ A library has copied "sufficient quantities" of a given work to substitute for ownership when 1) if a periodical, the library requests six copies from the periodical title within one calendar year, or 2) if another type of work other than a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work not dealing with news, the library requests six copies of excerpts from the work within its term of copyright protection.¹¹⁰ Notice of the copyright status of the item must appear on all copies.¹¹¹ The limits and procedures detailed in the guidelines enable librarians uniformly to track periodical photocopy and other copy requests. Since the guidelines establish the necessary quantity of video excerpt copy loans that would substitute for ownership, the Committee set a benchmark of understanding that audiovisuals would be eligible for inter-library loan.

A single case involves interlibrary loan of video, but may be distinguished from the current discussion because it involved copies of video programs rather than loan of purchased copies of the works.¹¹² A New York BOCES¹¹³ taped educational television programs off the air and listed the programs in its catalog of films as available for loan to the various schools comprising the BOCES.¹¹⁴ When a school would request a copy of a program, the BOCES office duplicated the requested program onto a tape provided by the requesting school, and delivered the copy through its regular delivery schedule.¹¹⁵ Because the date of the case precedes the Kastenmeier guidelines on off-air taping for educational use,¹¹⁶ the court ruled on a re-

107. *Id.*

108. CONTU, *supra* note 100.

109. GILMER, *supra* note 55, at 80.

110. *Id.* .

111. *Id.* at 81.

112. *Encyc. Britannica Educ. Corp. v. Crooks*, 447 F. Supp 243, 246 (W.D.N.Y. 1978).

113. *Id.* at 245. BOCES stands for Board of Cooperative Educational Services. These regional entities provide support services, including library support services, for public and non-public schools within their service areas.

114. *Id.* at 246.

115. *Id.*

116. H.R. Rep. No. 97-495, at 8-9 (1984), *reprinted in* UNITED STATES COPYRIGHT OFFICE, CIRCULAR 21, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS, 22, 22 (1995) (establishing use and retention limits for programs taped from broadcast television stations when used in schools).

quested injunction prohibiting this practice using the fair use provisions of § 107.¹¹⁷ The court compared the video copying of entire movies by the BOCES to the limited copying found to be fair use in *Williams & Wilkins*, and found the BOCES had likely exceeded fair use on the factors of substantiality of copying and effect of copying on the copyright owner's market.¹¹⁸ The plaintiffs presented evidence of significant decline in licensing revenue during the period of the taping, and the court found that it had made the requisite prima facie case to receive preliminary relief.¹¹⁹ Licensing became a key element under the new copyright regime of the 1976 act, because publishers now had the right to control lending of lawfully owned copies, but first sale limited that right. To defend against what publishers saw as wholesale piracy by libraries lending their works, they had to come up with a better plan.

a. *License vs. First Sale*

To curtail what publishers believe is an unfair use of their works and a serious impact on their profit margins, publishers of computer software (initially), audiovisual materials (more recently), and print works (an emerging area) have turned to licensing – shrinkwrap, express, or implied – to protect their products from library lending. Two amendments to United States copyright law, the Record Rental Amendment of 1984¹²⁰ and the Computer Software Rental Amendments Act of 1990,¹²¹ prohibit renting *owned* computer software or sound recordings under the assumption that the rentee would copy and retain the program in lieu of purchase. An exception in the amendment (codified at § 109(b)(2)(A)) allows non-profit libraries to lend records and software as long as a Register of Copyright specified notice is attached to the package.¹²² To bypass this loophole, computer software companies switched to shrinkwrap¹²³ or clickwrap¹²⁴ licensing to restrict how li-

117. Encyc. Britannica, 447 F. Supp. at 248 n.2.

118. *Id.* at 251.

119. *Id.* at 252.

120. Record Rental Amendment of 1984, 17 U.S.C.A. § 109(b) (West 2007).

121. Computer Software Rental Amendments Act of 1990, 17 U.S.C.A. § 109(b) (West 2007).

122. 17 U.S.C.A. § 109(b)(2)(A).

123. A shrink-wrap license is "a license printed on the outside of a software package to advise the buyer that by opening the package, the buyer becomes legally bound to abide by the terms of the license." BLACK'S LAW DICTIONARY 938 (8th ed., digital, 2004).

124. A click wrap license is "an electronic version of a shrink-wrap license in which a computer user agrees to the terms of an electronically displayed agreement by pointing the cursor to a particular location on the screen and then clicking. Point-and-click agreements usu[ally] require express acceptance only once but may include a clause providing for a user's ongoing acceptance of any changes

braries and end-users could distribute and use the software.¹²⁵ Buoyed by court cases holding shrinkwrap licenses valid,¹²⁶ publishers of all types of materials embarked on a plan to supplant the first sale doctrine that has kept libraries in business for over 200 years¹²⁷ to meet the information needs of millions of patrons who would have no other means of access to these materials.

Licensing and copyright jointly acknowledge that a work of authorship has value as the intellectual property of the creator.¹²⁸ However, copyright relies upon negotiated, statutory rules vetted through an open congressional process allowing all economic interests to be heard.¹²⁹ Copyright law development considers the constitutional objectives established for the limited monopoly granted by a copyright.¹³⁰ In contrast, licensing considers only the market, which is a flawed system in which a few large companies coerce a diverse group of consumers who are often unable to negotiate one-on-one for favorable terms.¹³¹ Okerson believes that

. . . [u]sers (their institutional aggregators being the libraries) already have *something*, so what they seek from publishers is an incentive to transcend statutory obligations and privileges to a different relationship. One way publishers can seek to influence this negotiation, of course, is by pursuing litigation to enforce their own copyright privileges in a way that encourages the public to think of copyright as a restricted and less advantageous umbrella compared to what a possible license agreement might provide.¹³²

to the agreement's terms, whether or not the user is notified of the changes." BLACK'S LAW DICTIONARY 1195 (8th ed., digital, 2004).

125. *Step-Saver Data Systems, Inc. v. Wyse Tech.*, 939 F.2d 91, 96 n.7 (3d Cir. 1991).

126. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (upholding a shrinkwrap license for consumer software) and *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (upholding a license requiring arbitration contained within a box holding a mail-order computer), *but see Kloczek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (rejecting arbitration provision contained in license packed in computer box).

127. EDWARD EDWARDS, *FREE TOWN LIBRARIES, THEIR FORMATION, MANAGEMENT, AND HISTORY IN BRITAIN, FRANCE, GERMANY, & AMERICA* 271 (1869).

128. Ann S. Okerson, *Buy or Lease? Two Models for Scholarly Information at the End (or the Beginning) of an Era*, DAEDALUS; JOURNAL OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES, Fall 1996, at 55, available at: <http://www.library.yale.edu/~okerson/daedalus.html>.

129. *Id.*

130. *Id.*

131. *See generally id.*

132. *Id.*

By aggressively litigating their rights under copyright, publishers can make it appear that potentially unconscionable licensing terms are far better than the alternative for a litigation-averse library interested in a given work for its patrons.¹³³ The “my way or the highway” philosophy of license rather than sale defeats the overriding purpose of copyright, and ultimately restricts the sales of materials targeted for the library market. It is a lose-lose proposition.

b. Shrinkwrap licensing of video

If video programs held in libraries are subject to shrinkwrap licensing limiting lending provisions for libraries under the first sale doctrine, an analysis of the state of the law involving shrinkwrap licenses is informative. Virtually all the case law involving shrinkwrap licensing centers on computer software. As early as 1986, so-called “box top licenses” were applied to sales of computer software.¹³⁴ In an early case on this issue, the Third Circuit, after a thorough analysis of both the common law of contracts and the Uniform Commercial Code section 2-207 Battle of the Forms provision, found that a box top license was not binding against a commercial consumer because the two parties never came to a complete agreement on terms, as required by common law contract.¹³⁵ In addition, the court held that when the parties engaged in several transactions in which one party repeatedly included terms to which the other did not assent, simply because the non-accepted terms were repeated in the transactions the plaintiff could not apply a course of performance argument.¹³⁶

The significant case in this area is *ProCD, Inc. v. Zeidenberg*,¹³⁷ a case in which an end-user bought a CD-ROM of compiled telephone book data at a low single-user, non-commercial price, but claimed fair use when he used the software in a for-profit business that supplied the data at a price far below what ProCD charged for-profit customers.¹³⁸ The package purchased by Zeidenberg contained a shrinkwrap license plainly identified on the outside of the box as contained within, and the terms of the license appeared on the screen when the program ran.¹³⁹ Finding that Zeidenberg had violated the terms of the license, the court reasoned that copyright does not apply in this

133. *Id.*

134. *Step-Saver Data Systems, Inc. v. Wyse Tech.*, 939 F.2d 91, 94-95 (3d Cir. 1991) (holding that license printed on software package did not become part of purchase contract).

135. *Id.* at 103.

136. *Id.*

137. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding that shrinkwrap licenses are enforceable unless the terms of the license are objectionable under standard principles of contract).

138. *Id.* at 1450.

139. *Id.*

situation because federal preemption on the topic of copyright does not interfere with private transactions in intellectual property.¹⁴⁰ In addition, the court held that shrinkwrap licenses are enforceable against consumers unless the terms of the contract are not within the bounds of contracts in general, for reasons such as illegality or unconscionability.¹⁴¹ Since the appellant had never argued that the contract was either illegal or unconscionable, the court made no ruling on these theories.¹⁴² The court did acknowledge that preemption by copyright law was not ruled out in some possible situations involving licensing contracts.¹⁴³

Shortly after the *ProCD* decision, the same court upheld a shrinkwrap contract in a non-profit situation.¹⁴⁴ In *Hill v. Gateway 2000*, the 7th Circuit ruled that a consumer was bound by a license enclosed in a computer box, even if the consumer never read or accepted the license.¹⁴⁵ Strongly supporting its own *ProCD* ruling, the court impatiently dismissed all arguments distinguishing *Hill* from *ProCD*, including that Zeidenberg was selling the data obtained and the Hills were not.¹⁴⁶ The court found that the difference was not significant in either case, since for both merchants and consumers, a vendor may propose a contract that is formed when the purchaser receives and inspects the goods.¹⁴⁷ The court placed the blame for the contract squarely on the shoulders of the consumer when it stated, "the Hills knew before they ordered the computer that the carton would include *some* important terms, and they did not seek to discover these in advance."¹⁴⁸

Not all circuits subscribe to the *ProCD-Hill* rationale, however. A United States district court arrived at a different conclusion in a case with facts very similar to *Hill*.¹⁴⁹ Plaintiff Klocek also purchased a computer with which he was dissatisfied, and Gateway insisted that the claim be sent to arbitration in accordance with terms and conditions included within the computer packaging. Additionally, Gateway had mailed the terms and conditions

140. *Id.* at 1454-55.

141. *Id.* at 1449.

142. *Id.*

143. *Id.* at 1455.

144. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (reaffirming the ruling in *ProCD* in a non-profit context).

145. *Id.* at 1148.

146. *Id.* at 1150.

147. *Id.*

148. *Id.*

149. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (holding that license included in computer box was not binding on consumer because consumer did not bargain for the terms).

within a customer magazine.¹⁵⁰ Because the transaction was one in goods and transactions in goods are governed in the jurisdiction by the Uniform Commercial Code, the court discussed at length the time when the contract was actually formed, to determine if the terms were material to contract formation or were a proposal for additional terms.¹⁵¹ Following a highly critical discussion of *Hill* and *ProCD*, the court concluded that U.C.C. section 2-207 may apply to cases that involve a single form, as well as exchanges of conflicting forms.¹⁵² After rejecting the 2nd Circuit pronouncement that the vendor is "master of the offer," the court found that according to fundamental principles of contract Kloeck was the offeror, and Gateway accepted his offer by agreeing to ship or actually shipping the computer.¹⁵³ Under 2-207, a consumer offeror is not bound by any differing terms and conditions proposed by the offeree, unless the offeree expressly conditioned its acceptance on the offeror's (in this case Kloeck's) acceptance of those different or additional terms.¹⁵⁴ Noting a split in the circuits on this conditional acceptance, the *Kloeck* court found that Gateway met the test of neither group's standard.¹⁵⁵ Since Kloeck was not a merchant, the court found that the additional terms in the shrinkwrap contract did not apply unless Kloeck had expressly agreed to the additional terms, and such assent cannot be manifested by silence or mere failure to object.¹⁵⁶

Following these cases, libraries are in choppy waters when borrowing or lending licensed videos. If the license limits the ability of the library to lend the video, libraries in circuits following *ProCD* must not make the loans or list the videos in their catalogs, while libraries in circuits following *Kloeck* may freely do both because the shrinkwrap license does not apply. A library requesting a video for a patron may need to determine in what circuits the libraries in its consortium reside before wasting time routing a request through those locations where shrinkwrap video licenses will be upheld. However, if a license may be considered a form of ownership for qualification under the first sale doctrine, the shrinkwrap license may be irrelevant if copyright law can preempt state contract law on this point, as indicated in *ProCD*.¹⁵⁷

150. *Id.* at 1335.

151. *Id.* at 1337-38.

152. *Id.* at 1339.

153. *Id.* at 1340.

154. *Id.*

155. *Id.* at 1341 n.12.

156. *Id.* at 1342 (citing *Brown Mach. v. Hercules, Inc.*, 770 S.W.2d 416, 421 (Mo. Ct. App. 1989) (clarifying who is an offeror and who is an offeree)).

157. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).

c. Ownership

Essential to qualification for library first sale exemptions in audiovisuals is ownership of the items loaned. While Nimmer asserts that copyright owner objection to library circulation is unusual,¹⁵⁸ the presence of shrinkwrap licenses restricting library circulation on a growing facet of library collections would counter that assumption. To qualify for a first sale doctrine defense, the "material ownership" of the copyrighted item must be transferred from the copyright owner.¹⁵⁹ Nevertheless, the copyright owner retains all copyright rights except distribution once the material object has been transferred to another.¹⁶⁰ "Transfer" of a copy, however, is not a clear concept. The *Columbia Pictures Indus. v. Redd Horne* case was the first significant case involving first sale and videocassettes¹⁶¹. Finding that a video store offering in-store showings in cubicles had not transferred "material ownership" of the videos for the purposes of first sale, the court explained that the rental facility maintained dominion and control over the cassettes since they were not allowed to leave the premises and store personnel actually ran the tape players.¹⁶² The court equated rental with "disposition" of the videocassette.¹⁶³ If rental and leasing are similar in that both temporarily transfer possession to another, the *Redd Horne* holding would be favorable to library "ownership" of licensed video.

In a case involving licensing of computer software, the Court of Appeals for the Federal Circuit, disagreed with a Ninth Circuit ruling holding that a licensee was not an "owner" for the purposes of § 117(a),¹⁶⁴ a section of copyright law that permits an owner of a computer program to make or authorize making copies or adaptations as long as the copies or adaptations are essential to the use of the program.¹⁶⁵ The § 117 exemption bypasses the default § 106 limitations on reproduction and adaptation in much the same

158. 2-8 Nimmer on Copyright § 8.13 (Matthew Bender 2006).

159. *Columbia Pictures Indus. v. Redd Horne*, 749 F.2d 154, 159 (3d Cir. 1984) (holding that viewing videocassettes in a store did not transfer "material ownership" to the rentee because the merchant maintained physical dominion and control over the cassettes).

160. *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63-64 (3d Cir. 1986).

161. *Redd Horne*, 749 F.2d at 159.

162. *Id.* at 160.

163. *Id.* (discussing that defendants did not "sell, rent, or otherwise dispose of the video cassette" in their video display business, to qualify the showing as the responsibility of the customer under the first sale doctrine).

164. *MAI Sys. Corp. v. Peak Computer, Inc.* 991 F.2d 511, 519 n.5 (9th Cir. 1995) (holding that a licensee could not be an "owner" of computer software for the purposes of § 117).

165. 17 U.S.C.A. § 117(a)(1) (West 2007).

way that the first sale doctrine limits the right of distribution.¹⁶⁶ The court discussed the differences between ownership of a copyright and ownership of a copy:

Plainly, a party who purchases copies of software from the copyright owner can hold a license under a copyright while still being an "owner" of a copy of the copyrighted software for purposes of § 117 [limiting rights of copyright owners of computer software]. We therefore do not adopt the Ninth Circuit's characterization of all licensees as non-owners.¹⁶⁷

The court ultimately found that the defendants in the case were not owners of this software because their licensing agreements "severely limit[ed] the rights of the [defendants] with respect to the . . . software in ways that are inconsistent with the rights normally enjoyed by owners of copies of software."¹⁶⁸ The court relied on the specific wording in § 109 that discusses computer software and limits use in situations of direct or indirect commercial advantage using the term "person in possession" rather than "owner."¹⁶⁹

A recent Second Circuit case examined the definition of "owner" in detail as part of an analysis of copyright infringement via misappropriation of computer software created by an outside developer.¹⁷⁰ Delving into the legislative history of § 117, the court distinguished the initial proposed language "rightful possessor of a copy" from "owner."¹⁷¹ The court dismissed arguments that the term "owner" limits the rights under § 117 to those who possess title, by pointing out that "rightful possessor" could apply to a bailee, or others in temporary possession, probably too broad an interpretation to suit Congress.¹⁷² The *Krause* court also noted that possession of formal title would likely be an inconsistency under state definitions of title possession that vary across the country.¹⁷³ Citing *Nimmer*, the court noted that what constitutes ownership of a copy is subject to state law interpretation.¹⁷⁴ If such were the case, two identical uses in two different locales could result in

166. 17 U.S.C.A. § 106.

167. *DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999) (holding that merely single payments and unlimited duration do not indicate ownership transfer for the purposes of the first sale doctrine).

168. *Id.* at 1361.

169. *Id.*

170. *Krause v. Titleserv, Inc.*, 402 F.3d 119, 120 (2nd Cir. 2005).

171. *Id.* at 122.

172. *Id.* at 123.

173. *Id.*

174. *Id.* (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.08[B][1]).

widely differing legal results.¹⁷⁵ The court concludes its analysis of ownership by declaring, “[t]he presence or absence of formal title may of course be a factor in this inquiry, but the absence of formal title may be outweighed by evidence that the possessor of the copy enjoys sufficiently broad rights over it to be sensibly considered its owner.”¹⁷⁶ The *Titleserv* court used factors such as paying substantial consideration for the programs, program customizations, the fact that the programs were stored on Titleserv’s servers, and that Titleserv was free to discard or destroy its copies at any time to determine that Titleserv had sufficient “incidents of ownership” to satisfy the requirements of § 117.¹⁷⁷ While ownership is key to the first sale defense, applying the *Titleserv* definition of ownership might mitigate in favor of allowing libraries limited interlibrary loan rights of licensed media.

V. A PROPOSAL TO REINCORPORATE PUBLIC ACCESS TO COPYRIGHTED MATERIALS

In looking at the issues of licensing and ownership, it becomes apparent that since computer software and database shrinkwrap licenses are upheld in the majority of circuits, and shrinkwrap licenses on audiovisual materials have crept into publisher-to-library transactions, if print publishers jump on the bandwagon there will be little opportunity for the general public to access materials beyond the collections of their local libraries. Even minimal uses, certainly within fair use, for which a library could not justify the expenditure of scarce resources can be prohibited when the possessing library is bound by license not to lend. This result was not the intent of the founding fathers in creating the copyright clause in the Constitution, nor was it within the mind of Congress when copyright law was last revised in 1976. In fact, library circulation was specifically reserved through special clauses in amendments to restrict rental of records and computer software.¹⁷⁸ Interlibrary cooperation was reserved in the library exemptions in § 108.¹⁷⁹ By using state contract law to bypass the constitutional and legislative intent of copyright, producers are employing their limited monopoly in an unlimited fashion.

A. Restrict the Protections to a Choice of Copyright or Contract, But Not Both

The expansion of take-it-or-leave-it licensing in audiovisuals has created a slippery slope of disregard for the constitutionally mandated founda-

175. *Id.* at 123.

176. *Id.* at 124.

177. *Id.*

178. Record Rental Amendment of 1984, 17 U.S.C.A. § 109(b) (West 2007) and Computer Software Rental Amendments Act of 1990, 17 U.S.C.A. § 109(b) (West 2007).

179. 17 U.S.C.A. § 108(g)(2).

tion of copyright law. The erosion of access rights by the application of shrinkwrap or clickwrap licensing, first to computer software, then to audiovisuals, and prospectively to print works, serves to reduce public access to works protected by copyright, and results in less scientific and educational uses of copyright protected materials in places where users cannot afford, personally or through their library proxies, to pay for information on a per-use basis. Clearly, through statutory application in a majority of the states, and federal directives to the Library of Congress and the National Library of Medicine, there is a general expectation that libraries will share the materials they hold.¹⁸⁰ By allowing producers to protect themselves with the favorable aspects of copyright through federal law, and divest themselves of the unfavorable aspects of copyright law through state contract law, producers have effectively avoided the constitutional expectation of "promoting the progress of Science and the Useful Arts" in favor of a more lucrative model. This model radically tips the expected balance of the rights of the copyright owner with the rights of the copyright consumers in favor of the owners. They hold all the cards: they have the content, they control the market price, and they can refuse to allow a consumer to utilize the information in the work in the way the consumer needs to access the information. While patent owners possess similar rights, their rights exist for a small fraction of the rights of a copyright owner.¹⁸¹ Allowing a copyright owner to wield virtually unlimited rights in many cases for over a century under a combination of contract *and* copyright is contrary to the purpose and intent of copyright.

There are several ways to serve both the right of the copyright owner to vend copies of a protected work and to allow public access to the information within in a manner that can serve the progress of science and the useful arts. To serve the public interest in this arena, enforcement of U.C.C. contracting rules in a way that would restrain a library from doing what libraries are statutorily bound to do could be statutorily limited, either through modification of state contract law or by action in federal copyright law such as has been applied to records and computer software lending of owned copies.¹⁸² Recommendations similar to the CONTU suggestions affecting photocopying and lending of print materials could be applied to physical lending of audiovisuals. Alternatively, the § 109 first sale provisions could be easily amended to accomplish the same purpose. As a radical solution, producers could be offered a choice to protect their works through state law contracting, or through federal law copyright protection, but not both. With federal copyright law protection would come the obligation to allow reasonable public access under first sale. Under the contract law option, courts would apply U.C.C. § 2-207 to transactions between libraries and suppliers in a way that

180. See note 70, *supra*.

181. 35 U.S.C.A. § 154(a)(2) (West 2007) (identifying the term of most patents to be 20 years).

182. See note 176, *supra*.

makes sense based on historical purchasing patterns. The succeeding sections will address each option, in turn.

B. Section 108 Adjustments

Subsection (i) of § 108 generally removes audiovisuals (except news reports) from the reproduction and distribution permissions of the section.¹⁸³ Subsections (b) (making preservation copies of unpublished works for off-site storage), (c) (making preservation copies of published works in obsolete formats), and (h) (making copies of out-of-print works in the last 20 years of their copyright term) do apply to audiovisual materials, but are not significant in an interlibrary loan analysis.¹⁸⁴ To enable § 108 to permit audiovisual interlibrary loan under the same rules as print works, revision would be required for sections (a) and (i). Currently, subsection (a) limits the scope of § 108 to reproduction and distribution of that same copy. There is no independent permission to distribute original works under interlibrary loan agreements apart from the general provisions of first sale. Modification of subsection (a) to say (new text in italics): “. . . to distribute such copy or phonorecord, *or to loan the original*, under the conditions specified by this section, . . .” would put interlibrary lending under the same restrictions as photocopying for interlibrary loan. To complete the textual adjustment, subsection (i) would need to remove the reference to audiovisual works as exempt from the provisions of § (a). Essentially this would apply the CONTU guidelines to physical interlibrary lending of audiovisuals.¹⁸⁵

By restricting interlibrary lending of audiovisual originals to the limits imposed by CONTU, typical loans of audiovisuals could be accomplished without depriving producers of outright sales or licenses, a hallmark of the “such aggregate quantities as to substitute for . . . purchase of such work.”¹⁸⁶ The process of maintaining ILL records is already in place in consortium libraries, and if differing aggregate amounts or coverage periods should be agreed, adapting to the process would require minimal disruption of services and staff. Situations that would meet a CONTU-like requirement would include libraries that must preview a video before purchase but the producer does not allow previews. The prospective purchaser could borrow a copy from an interlibrary loan partner to make the assessment as long as the requesting library has not met its yearly quota of requests for that particular title. In this case, the producer might make an additional sale because of the interlibrary loan, or would not lose a sale if the prospective purchaser found the material to be inappropriate for their projected needs since the sale would not take place in that event, anyway. Additionally, if the requesting library

183. 17 U.S.C.A. § 108(i).

184. *Id.*

185. CONTU, *supra* note 100.

186. 17 U.S.C.A. § 108(g)(2).

has exceeded its yearly allotment, the library would need to purchase a copy of the video or make some licensing arrangement.

Another type of loan appropriate under this rule modification could be a medical researcher who is preparing a paper on surgical techniques. Often, surgeons document evolving surgical techniques via video. Without access to the video program, the researcher might not be able to complete a full assessment of the state of the art, but that school might not have further use for a potentially very expensive video of doubtful use to others in its community. Since the library would not otherwise purchase the video, no actual sale is lost, yet the progress of science is advanced by access to the information contained within the video. Sometimes a library finds they have repeated need for a given program and must request it multiple times. Just as with non-periodical print works addressed in the CONTU guidelines, when a trigger point is reached, the requesting library would be expected to purchase a copy of the program or pay a licensing fee. Full implementation of audiovisual ILL provisions would necessitate adjustments to the CONTU guidelines to add audiovisuals to the recordkeeping mandates. The American Library Association in 1998 drafted a set of guidelines that would cover interlending of audiovisuals,¹⁸⁷ but the advent of licensing rather than sale made the guidelines moot as far as most video was concerned. The guidelines could be a starting point in discussions on limits and responsibilities of parties since they differ from the CONTU assignment of similar terms.¹⁸⁸

Currently the Register of Copyright has appointed a committee on revisions to § 108 in light of changes wrought by the Digital Millennium Copyright Act (DMCA).¹⁸⁹ Library participants are primarily concentrating on the copying provisions of § 108 related to digital materials as regulated through the DMCA, however they acknowledge that the provisions of § 108(i) are not adequate to deal with multimedia materials such as books that contain supplementary materials on CD.¹⁹⁰ For example, the book may be available for interlibrary loan under first sale doctrine, but the software CD enclosed in the book may be restricted from circulation by clickwrap license. Nevertheless, the response documents primarily discuss various means of copying to accomplish interlibrary loan rather than the simple physical lending that is

187. *See, generally*, VIDEO ROUND TABLE, AMERICAN LIBRARY ASSOCIATION, GUIDELINES FOR THE INTERLIBRARY LOAN OF AUDIO VISUAL FORMATS (1998), <http://www.ala.org/ala/vrt/pubguidelines/guidelinesinterlibrary.htm>.

188. *See, e.g., id.* The guidelines do not have a requirement that records be kept of how many times an individual title has been requested.

189. Library of Congress, About the Section 108 Study Group, <http://www.loc.gov/section108/study.html> (last visited March 3, 2007).

190. *See, generally*, Draft statement: ALA and ARL Response to the Section 108 Study Group Regarding Interlibrary Loan and Other Copies for Users (January 17, 2007) (on file with author).

prohibited by license in audiovisuals.¹⁹¹ The library groups ultimately recommend deletion of subsection (i),¹⁹² the effect of which would not harm the proposed adjustments in subsection (a), *supra*, since they will accommodate physical lending of all formats. Removing subsection (i) in its current state would heighten the fears of content owners that libraries would engage in wholesale copying of video materials. Since many libraries don't loan video out of fear of loss or damage, allowing loans of copies would likely not find any support from producers.

C. Section 109 Adjustments

A statutory adjustment to the § 109 first sale doctrine could accomplish the same goal – to permit non-profit interlibrary lending of audiovisuals – if Congress prefers to maintain § 108 to govern copying for interlibrary loan and direct patron requests. Subsection (b)(1)(A) incorporates the Computer Software Rental Amendment Act and the Record Rental Amendment Act into the first sale doctrine.¹⁹³ Both acts restrict the rental, disposal, or lending of those media by lawful owners/possessors of copies if there is “direct or indirect commercial advantage.”¹⁹⁴ The subsection specifically precludes action against a non-profit library or non-profit educational institution for rental, lease or loan of records the organization owns.¹⁹⁵ Also included in this subsection is a provision permitting a non-profit library or non-profit educational institution to transfer possession of a lawfully made copy of a computer program from one non-profit educational institution to another, or to its faculty, staff, or students, by clarifying that such transfer does not meet the definition of “rental, lease, or lending for direct or indirect commercial purposes” as defined in that subsection.¹⁹⁶ The text differentiates between the “owner” of a record and a “person in possession of a particular copy” of a computer program,¹⁹⁷ implying that since most computer programs are licensed and not sold, mere possession of a lawful copy is sufficient to qualify for the protections of the section. A similar application to audiovisuals could release videos for physical ILL.

By adding “audiovisual” to the section relating to computer programs, analog and digital video would be available for lending in the same way computer programs are exempt under this section. To assuage the fears of

191. *Id.*

192. *Id.*

193. Record Rental Amendment of 1984, 17 U.S.C.A § 109(b) (West 2007); Computer Software Rental Amendments Act of 1990, 17 U.S.C.A. § 109(b) (West 2007).

194. 17 U.S.C.A. § 109(b)(1)(A).

195. *Id.*

196. *Id.*

197. *Id.*

computer copyright owners, a subsection addresses specific notifications a lending institution must affix to the software packaging before loan. The relevant portion of § 109 reads:

(2)(A) Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.¹⁹⁸

To accommodate the interlibrary lending of audiovisuals under this subsection, adding "or audiovisual" after "computer" would require a similar notification to patrons not to retain or copy the material loaned. Much the same as the self-service copying provision of § 108(f), if the library notifies the patron of the need for caution in using copyright protected works through the affixed notices, the library would not be responsible for end-user copyright infringement.

D. Clarification of "Ownership" for Purposes of First Sale

Along with the adjustments to § 109(b)(1)(A) and (b)(2)(A), clarification of the requirements of "owner" under the first sale doctrine would significantly ease the burden of libraries pulled in two directions by license and state or federal statutory mandate. Section 109 clearly defends the need of libraries to perform the public access function inherent in copyright when it directs the Register of Copyright to report on the effect of the Computer Software Rental Amendments Act on the rights of copyright owners "while providing non-profit libraries the capability to fulfill their function."¹⁹⁹ Key to the issue is the concept of ownership sufficient to qualify for the protections of the first sale doctrine, for without that ability libraries have no function to fulfill. The discrepancy between enforceable shrinkwrap licenses as interpreted in the 7th Circuit²⁰⁰ and those held unenforceable in the 5th and 10th Circuits,²⁰¹ results in conflicting standards regarding ownership. Conflicting standards result in fractured understanding of legal expectations ("Can we claim first sale or not?") A clear definition of ownership established either through the Supreme Court, or through an amendment to copyright law, would make enforcement of and compliance with current law a

198. 17 U.S.C.A. § 109(b)(2)(A).

199. 17 U.S.C.A. § 109(b)(2)(B).

200. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) and *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

201. *See Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) and *Vault, Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 269-270 (5th Cir. 1988) (holding that state law permitting contract terms preventing application of 17 U.S.C. § 117 is preempted to the extent that it conflicts with copyright law).

more predictable situation. Incorporating a *Titleserv* type definition of ownership into the law, in which functional ownership is adequate to garner the protections of first sale, would establish sufficient rights for libraries to support education and individual research while preventing casual possessors such as bailees from having “sufficient incidents of ownership”²⁰² to qualify for the same protections. The inherent frustrations of ILL, such as pass-through expense and significant delay in receiving material, will weed out those who seek a quick copy in favor of those who honestly seek the information contained within the audiovisual material.

In the first Supreme Court case involving the first sale doctrine, *Bobbs-Merrill v. Straus*, Justice Day in writing for the Court comments:

The copyright statutes ought to be reasonably construed, with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.²⁰³

Limiting “ownership” of video to those who hold title to the physical entity so that content owners may employ common law contract to avoid the statutory doctrines of fair use and first sale deprives the general public of access to a substantial body of information that would further the constitutional purpose of copyright law. Justice Day reiterates that purpose when he describes the title of the first copyright act, passed during the first session of Congress in 1790: “An Act for the Encouragement of Learning . . .”²⁰⁴ If ownership is construed to eliminate first sale and/or fair use through common law contract principles in non-negotiable licensing, libraries as we know them will no longer be the institutions of learning upon which many in society depend.

VI. CONCLUSION

In providing print and audiovisual resources to their patrons at little or no cost, non-profit libraries support education from cradle to grave.²⁰⁵ Congress and the courts recognized the value and power of libraries and interlibrary sharing by enacting and enforcing statutory provisions to protect ILL from the self-serving attempts of copyright owners to achieve absolute power over their works. Justice Souter acknowledged the ubiquity of ILL in his dissent in *United States v. Am. Library Ass’n*: “Among other things, the plurality’s reasoning ignores the widespread utilization of interlibrary loan sys-

202. *Titleserv*, 402 F.3d, at 124.

203. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908).

204. *Id.* at 347.

205. See, generally, Kathleen Blake Yancy, *The “people’s university”: our public libraries as sites of lifelong learning*, CHANGE, Mar.-Apr. 2005, http://www.findarticles.com/p/articles/mi_m1254/is_2_37/ai_n13794989.

tems. With interlibrary loan, virtually any [material] is effectively made available to a library's patrons."²⁰⁶ When content owners retain "limitless and unconditional copyrights, the information flowing fluidly through the 'fountains of fair use' that non-profit libraries represent will quickly evaporate."²⁰⁷ Allowing content owners effectively to invalidate a carefully tailored and balanced scheme of federal copyright protections through unilaterally imposed and frequently undisclosed licenses on computer software, audiovisuals, and potentially even books means that public access to information is at the whim of those who own the copyright in the expression. Through licensing, content owners can literally obliterate fair use of the ideas and information — both held to be unprotectable by copyright — contained within. Clickwrap and shrinkwrap licenses may be unnoticed or discarded in unpacking, and libraries may find themselves violating contracts totally unknown to them. Smaller, poorer libraries and their constituencies will fall further behind when content owners reclaim works after a term of years, or decide to charge for information on a per use model that the libraries's budgets cannot afford. They will have no choice but to drop access to these materials. Without the ability to borrow physical copies of materials under a first sale rationale from other library partners, despite the costs and delays, the digital divide will become a chasm of vast proportions, separating the information haves from the have-nots. A slippery slope of licensing accelerates greed as it expands from computer software, to audiovisuals, to books, and it threatens the constitutional grounds for the existence of copyright. State licensing laws nibble, then gulp, their way through their encroachment into federal areas.

By balancing the equities now, some semblance of equilibrium may be restored. Libraries that would never have purchased a given audiovisual item can borrow that item for a requesting patron. If the library exceeds minimal ILL limits, it would pay royalties or purchase the materials, in the same manner that has worked successfully for paper copies for almost thirty years. Libraries were trusted with the duty to accurately record and report their ILL transactions in print, and the process works effectively. The same can apply to audiovisual materials in which is recorded so much of our modern record of achievement. With appropriate adjustments, copyright law can accommodate both information creators and information consumers, but there must be a fair and open understanding of the needs of both sides of the transaction, and a view that extends beyond the pockets of the copyright owners.

206. *United States v. Am. Library Ass'n*, 539 U.S. 194, 235 (2003) (Souter, J., dissenting).

207. Bartow, *supra* note 78, at 127.