

The Changing Nature of Books and the *Uneasy Case for Copyright*

Niva Elkin-Koren*

INTRODUCTION

Digital content is gradually taking over print. Newspapers are turning digital,¹ and the electronic book (“eBook”) market is the fastest-growing segment of the book industry.² In July 2010, Amazon.com announced that sales of eBooks for its eReader, the Kindle, outnumbered sales of hardcover books;³ six months later, Kindle books outsold paperbacks on Amazon.com.⁴ These figures do not include the downloading of public domain books, which contributes even more to the shift to digital books.

It is somewhat surprising that the book industry is undergoing a digital revolution only now. After all, text was one of the first formats to be digitized, even before music and movies. Digital technology penetrated the publishing industry decades ago, resulting in digitization of typesetting, design, and printing, as well as the management of stocks and supply.⁵ Electronic publishing enabled online retailers, such as Amazon.com, to offer shoppers a look inside a digital version

* Dean and Professor of Law, University of Haifa Faculty of Law; Director, The Haifa Center for Law and Technology. I thank Michael Birnhack and Michal Gal for their invaluable input. I also thank participants at the symposium, Celebrating the Fortieth Anniversary of Justice Breyer’s Article *The Uneasy Case for Copyright* (The George Washington University Law School, November 2010), and the conference on eBooks, A New Era of Law, Business and Society (Haifa University Faculty of Law, May 2011), for helpful comments. Zohar Idelson and Efrat Azulay provided excellent research assistance.

¹ See Eric A. Taub, *New E-newspaper Reader Echoes Look of the Paper*, N.Y. TIMES, Sept. 8, 2008, at C5 (describing e-ink screen technology and the emergence of the electronic newspaper).

² See Tina Jordan, *AAP Reports October Book Sales*, ASS’N AM. PUBLISHERS (Dec. 8, 2010), <http://www.publishers.org/press/11/> (reporting a 112.4% increase in eBook sales over the previous year, while other segments of the book industry either experienced decreased sales or only slightly increased sales).

³ See Claire Cain Miller, *E-Books Top Hardcovers at Amazon*, N.Y. TIMES, July 19, 2010, at B1. Not all books are offered in eBook format. Out of the millions of books offered by Amazon, only 630,000 were Kindle books as of July 2010. *Id.*

⁴ David Carnoy, *Amazon: Kindle Books Outselling Paperbacks*, CRAVE: THE GADGET BLOG FROM CNET (Jan. 27, 2011, 3:06 PM), http://news.cnet.com/8301-17938_105-20029839-1.html.

⁵ Mark Landler, *A Publishing Empire Takes the Digital Road*, N.Y. TIMES, Sept. 11, 1995, at D1 (recounting how Simon & Schuster, one of the largest publishing firms in America, started to use digital technology in the process of publishing).

of a book⁶ and enabled search engines such as Google to offer robust search opportunities in books. It was only in the past two years, however, that eBooks became a viable alternative to printed books and that the digital revolution finally reached the book industry.

eBooks offer more than a repackaged printed book. They are changing the nature of books as we know them and transforming the publishing and bookselling industries. While many booklovers are mourning the demise of the printed book, eBooks open up a new era, expanding the cultural, social, and economic possibilities related to books.

Copyright law, the legal regime mostly tied to the emergence of the printing press, may now come into question. Three hundred years ago, the Statute of Anne was adopted;⁷ this was the first copyright law actually tailored to address the book industry.⁸ Historically, publishers led the legal battles for adopting copyright laws that would enable them to obtain exclusive rights.⁹ Publishers have long argued that both the author and the investment of publishers in bringing a book to the market must be protected under copyright law.¹⁰ For many years, it was assumed that the interests of publishers and authors coincide, as publishers bear the cost and the risk involved in marketing a book.¹¹ With the rise of eBooks, the role of publishers is declining, and consequently the case for granting copyrights to publishers is weakening.¹²

Back in the 1970s, Justice Stephen Breyer, then a professor at Harvard Law School, questioned the economic justification for granting copyrights to publishers.¹³ In his seminal article, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, Breyer argued that copyright must be justified in a particular economic context and that technological changes may alter economic conditions, thus demanding a different legal policy.¹⁴ Breyer's article is an invitation to challenge the necessity of copyright in a changing technological environment. Applying Breyer's ap-

⁶ *Search Inside the Book: How it Works*, AMAZON.COM, <http://www.amazon.com/Search-Inside-Book-Books/b?ie=UTF8&node=10197021> (last visited July 14, 2011).

⁷ Copyright Act of 1709, 1710, 8 Ann., c. 19 (Gr. Brit.).

⁸ See AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 93–94 (1899).

⁹ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 292 (1970).

¹⁰ See *id.*

¹¹ *Id.*

¹² See *infra* notes 65–72 and accompanying text.

¹³ See Breyer, *supra* note 9, at 283–84.

¹⁴ *Id.* at 281.

proach to digital publishing demonstrates the role of copyright in shaping digital markets.

This Essay questions the wisdom and legitimacy of granting copyright to publishers as the book market enters the digital age. Part I describes the emergence of eBooks and the changing nature of book publishing in the twenty-first century. It discusses the special characteristics of digital books, the rise of user-generated content (“UGC”), and the introduction of new intermediaries. Part II revisits the justification for copyright protection in light of these changes, and discusses the implications of these changes on copyright.

I. BOOK PUBLISHING IN THE TWENTY-FIRST CENTURY

Although the book as an object, and book publishing, did not change significantly over the course of 300 years after the advent of the printing press, they have been completely transformed over the past forty years, and particularly in the past four years.¹⁵ As some developments are still unfolding, it is difficult to account for all of the ramifications of this transformation. However, some trends may be identified even at this preliminary stage.

eBooks and digital libraries are transforming print culture on various levels: they are changing the nature of books, altering the nature of their production and distribution, shaking the boundaries between the traditional players, and introducing new players to the scene. These aspects of digital books are discussed in more detail below.¹⁶

A. *The Changing Nature of Books*

For centuries, the printed book was the dominant medium for disseminating content. A published book is an artifact that conveys some meaning. As stated by Professor Adrian Johns, published books have fundamental characteristics on which we all reasonably rely:

We do not need to undertake investigatory work to confirm that its author does exist and that its text is authorized. No literary spy need be hired to ascertain that it was indeed made by its stated publisher and that its contents will be the same as those of another copy of the same book found in any other place.¹⁷

¹⁵ *Industry Off 2.8% in 2008, AAP Reports*, PUBLISHERS WKLY., Apr. 6, 2009, at 6 (documenting significant changes in the book industry in 2007 and 2008).

¹⁶ The terms “eBook” and “digital book” are used interchangeably in this Essay to describe a book published in a digital format.

¹⁷ ADRIAN JOHNS, *THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING*

A digital book is an artifact of a different kind: how it is published, how it is put to use, what uses are made available to readers, who can use it, and under what circumstances all differ from the printed book. An eBook could be an electronic version of a printed book or a book originally produced in a digital format—i.e., “born digital.” It offers readers a whole range of added value and has many advantages over the paper editions of books. eBooks are readily available. They are easy to search for and can be purchased instantly, without having to physically go to a bookstore or a library or wait for a delivery, and without paying for the shipping and handling. eBooks often enable additional features that enrich the reading experience, such as a built-in dictionary, translation functions, updates for textbooks, font enlargement, text-to-speech capabilities, search capability, hyperlinks, bookmarking, and annotation capability, in addition to audio and video illustrations that can be incorporated into the eBook.¹⁸

For those who prefer a tangible copy, eBooks can also be printed for less than the price of traditional new books using print-on-demand (“POD”).¹⁹ Users can efficiently store eBooks on portable devices, saving storage space and eliminating the need to carry around heavy volumes.²⁰ A growing business in Japan, for instance, offers book owners a service of converting their paper books into eBooks in order to save space on book shelves.²¹ Libraries also bear the significant cost of storing and using printed materials and therefore may consider migrating into digital form.²²

2 (1998) (arguing that these characteristics of books are not driven by the technological nature of the printing press, but rather are contingent and the result of a historical construction). This approach of social construction stands in sharp contrast to technological determinism, which views scientific and technological progress as evolving via internal logic with some strong intrinsic meaning.

¹⁸ See, e.g., *Kindle Wireless Reading Device*, AMAZON.COM, <http://www.amazon.com/dp/B0015T963C> (last visited July 14, 2011) (laying out the features of the Kindle eReader).

¹⁹ See *infra* Part I.B.

²⁰ eBooks are also environmentally friendly, as it is no longer necessary to cut down trees to make the paper and no longer necessary to use energy for shipping copies to distant points of sale.

²¹ As many as sixty companies provide scanning services, turning books into PDF files that are readable on various devices such as the iPad and the Kindle. See Yoshinori Eki & Pavel Alpeyev, *iPad Makes Space in Japan's Tiny Homes by Removing Bookshelves*, BLOOMBERG (Feb. 3, 2011, 10:00 AM), <http://www.bloomberg.com/news/2011-02-03/ipad-makes-space-in-japan-s-tiny-homes-by-removing-bookshelves.html>.

²² See generally Paul N. Courant & Matthew “Buzzy” Nielsen, *On the Cost of Keeping a Book*, in THE IDEA OF ORDER: TRANSFORMING RESEARCH COLLECTIONS FOR 21ST CENTURY SCHOLARSHIP 81 (Council on Library & Info. Res. ed., 2010), available at <http://www.clir.org/pubs/reports/pub147/pub147.pdf>.

eBooks are not simply a fancy package for buying and selling books. The digital format also changes the nature of books as we know them. eBooks deviate from print culture and offer an artifact that is completely different than the printed book. This Essay focuses on three features of digital books. The first is mediated reading, namely reading that requires the use of a reading device. The second feature is the hypertextuality of digital books, which increases the value of each book when it is connected to others. The third feature relates to the rise of new social practices surrounding writing and reading. These features are changing the book as an artifact, or if you wish, as a technology, and they may affect the way in which it is written, sold, and read. Therefore, eBooks may carry some important implications for copyright policy.

1. *Mediated Reading*

One typical feature of eBooks is that reading them always involves the use of a reading device.²³ Unlike printed books, eBooks cannot be read directly. Reading is always mediated by a device that converts the binary code into readable text. This device could be a multipurpose device like a tablet computer or a smartphone, or an eReader—an electronic device that is strictly designed for the purpose of reading digital books. The first eReader—the Kindle—was released by Amazon.com in 2007, and that was followed by the Nook, released by Barnes and Noble, and eventually by the iPad, released by Apple, in 2010.²⁴

Printed books are usually widely distributed as commercial products, and typically consumers are not required to undergo any approval process or to undertake any additional commitments before they can use the book.²⁵ The online purchasing of eBooks, however, often requires identification, and the eBook is subject to a license agreement, setting limits on the freedom to use the book in a certain

²³ Cf. Randal C. Picker, *The Mediated Book* 1 (John M. Olin Law & Econ., Working Paper No. 463, 2009) (arguing that mediated books “are fundamentally on-demand books, that is books that are produced at the time at which a consumer wants to see them”).

²⁴ For the Kindle, see David Pogue, *Books Pop Up, Wirelessly*, N.Y. TIMES, Nov. 22, 2007, at C1 (offering a critical view of the Kindle: “But the counterarguments are equally persuasive. Printed books are dirt cheap, never run out of power and survive drops, spills and being run over. And their file format will still be readable 200 years from now.”). For the iPad, see G.A. Fowler & Yukari Iwatanikane, *Apple’s Big Push: New Device Revives Classic Gadget Debate*, WALL ST. J., Jan. 28, 2010, at B6 (discussing the launching of the iPad as the introduction of the first multipurpose reading device).

²⁵ JOHNS, *supra* note 17, at 1 (“Readers of books are not usually required to endure any formal vetting or approval process before being permitted to read the book.”).

way (such as lending it, listening to it aloud, or selling the copy to others).²⁶ Some retailers tie the licensed use of the electronic book to a particular device, thereby limiting the freedom of book purchasers to read and store the eBook on a device of their choice.²⁷

The mediated nature of eBooks could tie content to hardware and may threaten access to books. One pressing issue is the lack of shared technical standards and the incompatibility of standards for eBooks.²⁸ There are plenty of eBook formats²⁹ and eBook readers. To enable reading, eReaders must be compatible both with the file format of the eBook and with the digital rights management

²⁶ See *Kindle: License Agreement and Terms of Use*, AMAZON.COM, http://www.amazon.com/gp/help/customer/display.html/ref=HP_left_sib?ie=UTF8&nodeId=200506200 (last updated Feb. 16, 2011) (setting forth the terms of use for the Kindle: “Use of Digital Content. Upon your download of Digital Content and payment of any applicable fees (including applicable taxes), the Content Provider grants you a non-exclusive right to view, use, and display such Digital Content an unlimited number of times, solely on the Kindle or a Reading Application or as otherwise permitted as part of the Service, solely on the number of Kindles or Other Devices specified in the Kindle Store, and solely for your personal, non-commercial use. Unless otherwise specified, Digital Content is licensed, not sold, to you by the Content Provider. The Content Provider may include additional terms for use within its Digital Content. Those terms will also apply, but this Agreement will govern in the event of a conflict. Some Digital Content, such as Periodicals, may not be available to you through Reading Applications. . . . Limitations. Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Digital Content or any portion of it to any third party, and you may not remove or modify any proprietary notices or labels on the Digital Content. In addition, you may not bypass, modify, defeat, or circumvent security features that protect the Digital Content.”).

²⁷ See, e.g., *Terms and Conditions*, APPLE, <http://www.apple.com/legal/itunes/us/terms.html#SALE> (last updated June 21, 2011) (setting forth the terms of use for iBookstore products: “(i) You shall be authorized to use the iBookstore Products only for personal, noncommercial use. . . . (ii) You shall be able to store iBookstore Products from up to five different Accounts at a time on certain iOS-based devices, such as an iPad, iPod touch, or iPhone. . . . (iii) You shall be able to store iBookstore Products on five iTunes-authorized devices at any time. . . . (iv) The delivery of iBookstore Products does not transfer to you any promotional use rights in the iBookstore Products or any rights to burn the iBookstore Products to disc. . . . (v) You shall be able to manually sync iBookstore Products from at least one iTunes-authorized device to devices that have manual sync mode, provided that the iBookstore Product is associated with an Account on the primary iTunes-authorized device, where the primary iTunes-authorized device is the one that was first synced with the device or the one that you subsequently designate as primary using iTunes.”).

²⁸ Cf. Margo E. K. Reder, *Case Study of Apple, Inc. for Business Law Students: How Apple’s Business Model Controls Digital Content Through Legal and Technological Means*, 26 J. LEGAL STUD. EDUC. 185, 205 (2009) (discussing Apple’s use of proprietary digital rights management technology that prevents other devices from using the Apple platform for music).

²⁹ See *eBook Formats*, MOBILE READ WIKI, http://wiki.mobileread.com/wiki/E-book_formats (last visited July 14, 2011) (listing the dozens of formats in which the eBooks can appear).

(“DRM”), which is used for managing the rights of the copyright holder of the eBook.³⁰

Yet, some formats of eBooks are incompatible with some eReaders.³¹ Most eBook readers only offer compatibility with their branded format. Kindle owners, for instance, can only read Kindle eBooks purchased on Amazon.com’s store.³² Retailers may also take a cross-device strategy. Amazon.com has released software applications that enable reading Kindle eBooks on Apple’s iPhone, the iPad, PC and Mac computers, and Android and BlackBerry cell phones.³³ Kindle-format eBooks, however, cannot be read on the Barnes and Noble Nook. Such tying of hardware and content may raise antitrust concerns.

The tying of eBooks to a particular device and the lack of shared standards may compromise the rights of eBook consumers. When the book is no longer an object that can be read without the aid of a specific device, it may fail to satisfy the legitimate expectations of book buyers to use the purchased copy of the eBook in conjunction with various reading devices, and also to be able to use that copy over time.³⁴ The absence of technical standards may also affect the durability of some works and their availability in the future as a result of disparities in the formats used at the time of production.³⁵ Old versions of eBooks may no longer be accessible as devices are upgraded, and the cost associated with switching from the old technological standard to the new platforms may increase.

³⁰ See Chris Meadows, *TeleRead E-book Primer Part Two: Formats*, TELEREAD (Oct. 25, 2010, 10:15 AM), <http://www.teleread.com/drm/teleread-e-book-primer-part-two-formats>.

³¹ Right now such compatibility exists only in iPhone, iPod Touch, and iPad, which are capable of running reader apps from different sources. See *id.*

³² See, e.g., *Kindle Wireless Reading Device*, *supra* note 18 (describing the limited content formats supported by the Kindle).

³³ Nick Bilton, *Amazon Releases Kindle App for Android Phones*, N.Y. TIMES BITS BLOG (June 28, 2010, 6:07 PM), <http://bits.blogs.nytimes.com/2010/06/28/amazon-kindle-app-now-available-for-android/?pagemode=print>.

³⁴ See Pogue, *supra* note 24. Obviously, not all expectations of consumers merit protection and the standard of reasonable expectations of consumers is a matter of judicial interpretation. See generally Natali Helberger & P. Bernt Hugenholtz, *No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law*, 22 BERKELEY TECH. L.J. 1061 (2007). Courts may consider the “normal use” of a product, namely the ability to continue to read a digital copy of an eBook on standard eReaders. Recently, the European Parliament adopted a Consumer Rights Directive requiring traders of digital content to inform consumers about “any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.” See Resolution on the Proposal for a Directive of European Parliament and of the Council on Consumer Rights, EUR. PARL. DOC. (P7_TA-PROV(2011)0293) 20 (2011) (provisional edition).

³⁵ See Pogue, *supra* note 24.

Another concern is DRM, which is often used for managing access to eBooks.³⁶ DRMs often set limits on the use of the eBook to a particular device, or disable the option to convert content into a different format.³⁷ DRMs may further limit the ability to cut and paste text, print the eBook, or transfer the eBook to another location, sometimes requiring online authorization by the vendor.

DRMs could also limit some privileges that book consumers previously enjoyed in the print world, such as the ability to freely read without surveillance, to annotate, or to loan and resell a book.³⁸ A striking example of the lack of consumers' control over their eBooks is the Orwellian *1984* saga, in which Amazon.com remotely removed purchased copies of George Orwell's book, *1984*, from Kindle due to some copyright concerns.³⁹ Following a public outcry, Amazon.com apologized⁴⁰ and later settled a class action brought against it for violating its terms of service by remotely deleting purchased copies of the book.⁴¹ However, the incident demonstrated the alarming power of online retailers to remotely control the collection of eBooks stored on an electronic device.

The shift to digital access may further enable publishers to restrict the number of readings, or, in the case of a library, to restrict the number of eBook checkouts a library can perform before it is required to pay again for the eBook.⁴² One example is the recent announce-

³⁶ See Meadows, *supra* note 30.

³⁷ *Id.*

³⁸ Some Barnes & Noble eBooks are lendable via their "LendMe" technology. However, the lending options are quite restricted: A Barnes & Noble eBook can only be lent once, for a nonextendable period of two weeks, and it can be lent only to another Nook device. Moreover, only some of the books are lendable, and the lender is unable to read the book during the loan period. See BARNES & NOBLE, NOOK: USER GUIDE VERSION 1.5, at 131 (2009–2010), available at http://images.barnesandnoble.com/pimages/nook/download/User_Guide_NOOK_v1_5.pdf. A similar arrangement is offered by Amazon.com. Amazon.com's lending options are not limited to the Kindle device, as long as the lending is done through the Kindle reading application. *Lending Kindle Books*, AMAZON.COM, www.amazon.com/gp/help/customer/display.html/ref=HP_left_cn?ie=UTF8&nodeId=200549320 (last visited July 14, 2011).

³⁹ Brad Stone, *Amazon Erases Two Classics from Kindle. (One is '1984.')*, N.Y. TIMES, July 18, 2009, at B1.

⁴⁰ Vindu Goel, *Amazon Chief Says Erasing Orwell Books Was 'Stupid,'* N.Y. TIMES BITS BLOG (July 23, 2009, 6:11 PM), <http://bits.blogs.nytimes.com/2009/07/23/amazon-chief-says-erasing-orwell-books-was-stupid>.

⁴¹ Eric Engleman, *Amazon Settles Lawsuit over Deleted Kindle Copy of '1984,'* TECH-FLASH (Sept. 30, 2009, 4:41 PM), http://www.techflash.com/seattle/2009/09/amazon_settles_lawsuit_over_deleted_1984.html.

⁴² See Joe Atzberger, *New OverDrive DRM Terms: "This Message Will Self-Destruct,"* ATZBLOG (Feb. 24, 2011), <http://atzberger.blogspot.com/2011/02/new-overdrive-drm-terms-this-message.html> (citing Memorandum from Steve Potash, CEO, OverDrive, to OverDrive Library

ment by HarperCollins, a major publishing company, that it is revising the lending terms of eBooks so that libraries will be licensed to circulate an eBook only twenty-six times before the license expires.⁴³ One could argue that these types of changes in license terms should be left to the market. Circulation limits may lower the demand for eBooks and publishers will be forced to respond. Some librarians even called on their colleagues to boycott publishers who engage in this practice.⁴⁴ Yet, such restrictions are likely to compromise the ability of libraries to perform their fundamental role in preserving and lending content. This may not only undermine the library profession, but may also abolish the rights of users to access content they have not purchased. This new power of eBook publishers may require further monitoring in order to secure the liberties of users in this new landscape.

A related issue is privacy and surveillance. eBook providers are capable of collecting and retaining detailed information about readers and reading habits. Information on purchasing habits was used by Amazon.com to enhance its innovative recommendation system, which tailors promotion strategies to particular consumers' preferences. eBooks easily track data, so as to monitor habits and details about the reader's preferences: what she likes to read, how often, for how long, and at what times. eBook providers can also track information related to the paragraphs that were highlighted and the annotations that were added by the reader.⁴⁵ This may turn the reading experience, which used to be intimate and private, into public knowledge.⁴⁶ This transition is not only a threat to privacy but also to free

Partners (Feb. 24, 2011)); see also Robert Darnton, *A Library Without Walls*, N.Y. REV. BOOKS BLOG (Oct. 4, 2010, 9:20 AM), <http://www.nybooks.com/blogs/nyrblog/2010/oct/04/library-without-walls/> (demonstrating some license restrictions in the electronic edition of *Alice's Adventures in Wonderland*, which was first published in 1865 and is therefore in the public domain: no text selections can be copied from the book, it cannot be read aloud, and the book cannot be lent or given to someone else).

⁴³ See Atzberger, *supra* note 42; see also Josh Hadro, *HarperCollins Puts 26 Loan Cap on Ebook Circulations*, LIBRARYJOURNAL.COM (Feb. 25, 2011), http://www.libraryjournal.com/lj/home/889452-264/harpercollins_caps_loans_on_ebook.html.csp.

⁴⁴ See Benedicte Page, *Fury over 'Stupid' Restrictions to Library eBook Loans*, GUARDIAN.CO.UK (Mar. 1, 2011, 12:44 PM), <http://www.guardian.co.uk/books/2011/mar/01/restrictions-library-ebook-loans>.

⁴⁵ See *infra* notes 62–63 and accompanying text.

⁴⁶ Similar concerns regarding the potential threats to the privacy of users under the Google Books Settlement were raised by the Center for Democracy and Technology. See Brief *Amicus Curiae* of the Center for Democracy & Technology in Support of Approval of the Settlement and Protection of User Privacy, *Authors Guild v. Google, Inc.*, No. 05 Civ. 8136(DC), 2009 WL 4434586 (S.D.N.Y. Sept. 4, 2009).

speech.⁴⁷ The awareness of such monitoring may interfere with the state of mind of liberty: the psychological freedom to read and learn according to our interests and passions, without fearing social, commercial, and sometimes even political consequences.⁴⁸

The mediated nature of eBooks may lower the remedial power of the market in those instances. One would expect that consumer demand would force online retailers to remove DRMs and increase compatibility of digital formats. However, the potential tying of hardware and content and the lack of shared standards threatens to stifle competition. The lack of shared and compatible standards is fragmenting the market and may lower competition among book retailers and eReader vendors, thereby threatening consumer welfare in the long run.⁴⁹ Indeed, a number of online intermediaries offer multiformat, DRM-free eBooks, which are distributed to major online retailers such as Barnes & Noble, Apple iBookstore, and mobile e-reading applications.⁵⁰ However, this may not provide a sufficient alternative to the existing portfolio of bestsellers provided by major retailers.

2. *Unbundling the Book*

The published book is embodied by a physical object, and is therefore constrained to the physical boundaries of that object. It binds together the printed text in a particular order within a single cover.

Digital books may create new value that goes beyond the physical boundaries of any particular cover. eBooks enable access to reading outside the book by using hyperlinks to other texts and multimedia.⁵¹

⁴⁷ NICOLE A. OZER, ACLU OF N. CAL., DIGITAL BOOKS: A NEW CHAPTER FOR READER PRIVACY 2–3 (2010), available at http://www.aclunc.org/issues/technology/asset_upload_file295_9047.pdf.

⁴⁸ Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH L.J. 1119, 1142–43 (2007) (arguing that the interests of information consumers are linked to the symbolic meaning of cultural artifacts, which fall outside the scope of consumer protection laws).

⁴⁹ See *supra* notes 28–37 and accompanying text.

⁵⁰ See, e.g., *How to Publish and Distribute Your eBook with Smashwords*, SMASHWORDS, http://www.smashwords.com/about/how_to_publish_on_smashwords (last visited July 14, 2011) (offering online publishing and distribution services to authors, publishers, and agents). O'Reilly eBooks, for example, are offered in several DRM-free formats: PDF, EPUB, .mobi, DAISY and Android.apk. Therefore, they can be used on any device. The text can be cut and pasted or printed. See *Books & Videos*, O'REILLY, <http://oreilly.com/ebooks> (last visited July 14, 2011).

⁵¹ On the impact of hypertext on legal research, see Marilyn J. Raisch, *Codes and Hypertext: The Intertextuality of International and Comparative Law*, 35 SYRACUSE J. INT'L L. & COM. 309, 311–13 (2008).

Electronic linking, which is one of the defining features of browsing materials on the web, is now introduced into the book sphere in a way that may transform our book-reading experience. The meaning of the text could now be shaped by other texts, photos, clips, and conversations so as to expand the reading experience while also interfering with the intimacy associated therewith.⁵² Digital books also enable reading across titles, thereby facilitating the evolution of new cultural formats and the study of various aspects of culture as they are reflected through massive numbers of books. The gigantic database of digitized books created by Google facilitates a new approach to accessing and studying information.⁵³ For instance, in an article recently published by *Science Magazine*, a team of researchers introduced a data-intensive approach (called “culturomics”) to the study of linguistic and cultural phenomena as reflected in books.⁵⁴ This approach uses quantitative inquiries and word searches in books to study phenomena like censorship, the adoption of new technologies, the evolution of grammar, scientific fame, and collective memory.⁵⁵ Such data opens up a wide variety of new research opportunities.

What makes these new opportunities particularly interesting is that the value of a book, its cultural significance, and its contribution to the promotion of knowledge are no longer constrained by the physical boundaries of the book cover.⁵⁶ The value of eBooks and digital text grows with the accumulation of a large number of books that can be linked to one another, read in the same environment, searched, edited, and analyzed with similar standards. The value of books lies increasingly within a cluster of books rather than a particular title.

Furthermore, eBooks enable the unbundling of the book in a way that may create new business models, such as the sale of separate chapters or smaller chunks of text. One example is the unbundling of textbooks. Textbooks are often a collection of works by different authors, or a compilation of materials originating from different sources. Unbundling textbooks may enable students to purchase only the

⁵² For further discussion of hypertextuality and meaning making from the perspective of critical thought, see George P. Landow, *What's a Critic to Do?: Critical Theory in the Age of Hypertext*, in *HYPER/TEXT/THEORY 1* (George P. Landow, ed. 1994).

⁵³ See Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1323–26 (2010) (describing examples of research that could be conducted because of such access).

⁵⁴ John Bohannon, *Google Opens Books to New Cultural Studies*, 330 SCIENCE 1600 (2010).

⁵⁵ See *id.*

⁵⁶ See generally *id.*

materials necessary for their courses and save the cost of purchasing the extra unnecessary materials. A digital textbook could also be updated on an ongoing basis, incorporating the accumulated knowledge of faculty and students.⁵⁷ Such flexibility may enable instructors to adjust the textbook to new scientific developments and to the ever-changing needs of training. This may further facilitate compliance with a recent U.S. federal law which aims at lowering the cost of higher education by requiring publishers to unbundle course materials so that students can avoid purchasing costly materials that they do not necessarily need.⁵⁸ These new opportunities for textbooks are challenging the boundaries of the book as a fixed and independent unit for organizing knowledge.

3. *Social Writing and Reading*

Digital networks are also changing our reading and writing habits. The writing of text has become more collaborative. Collaborative writing is nothing new—there have always been collaborative efforts in which people have jointly drafted a complete text from scratch, contributed ideas and small pieces of text, or modified and edited a text as part of a joint effort.⁵⁹ But digital networks promote collaborative production by dramatically lowering the cost of coordinating the efforts of a massive number of contributors.

Additionally, digital publishing reduces the cost of writing and self-publishing.⁶⁰ Amateur writers can join the writing scene and may collaborate in writing and editing text. Many new technological tools facilitate collaborative writing. It is through the creation of these types of tools that the technological context of collaborative writing is shifting radically. Wiki is a classic example of a digital text forum where all participants enjoy equal access and control over the docu-

⁵⁷ “Make It Your Own,” for instance, is a digital textbook-customization platform released by the open textbook publisher Flat World Knowledge, which enables professors to edit the content of textbooks and add new content subject to Creative Commons licenses. See *Make It Your Own*, FLATWORLD KNOWLEDGE, <http://www.flatworldknowledge.com/miyo> (last visited August 2, 2011).

⁵⁸ See Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, sec. 112, § 133(a), (c)(2), 122 Stat. 3078, 3107, 3109 (to be codified at 20 U.S.C. § 1015b(a), (c)(2)).

⁵⁹ See, e.g., BRUCE W. SPECK ET AL., COLLABORATIVE WRITING: AN ANNOTATED BIBLIOGRAPHY (1999).

⁶⁰ See, e.g., Jason Pinter, *Why I’m Self-Publishing*, THE DAILY BEAST (Mar. 24, 2011, 10:43 AM), <http://www.thedailybeast.com/blogs-and-stories/2011-03-24/barry-eisler-explains-self-publishing-decision.html> (interviewing Barry Eisler, a best-selling author of thriller novels, about his decision to forego a publisher and self-publish instead).

ment.⁶¹ Other systems, such as Google Docs, facilitate collaboration by authorized users, enabling different levels of authorization, multi-user editing in real time, and real-time communication among contributors.⁶²

The digital format may further expand the definition of writing, as it creates opportunities for incorporating additional formats into text and for telling stories using multiple formats—not simply illustrations and pictures, but also music and videos.⁶³ As books become multimedia, new types of collaboration among authors may occur.

Reading itself may become more dynamic and interactive (and, at times, even social), enabling readers to follow cross references and to review text from different sources simultaneously. While eBooks' standards somewhat replicate the intimate experience of reading a book alone, internet connectivity (e.g., WiFi) may enable access to books stored in the cloud and not on the device, and may allow readers to share the reading experience with others in real time. Readers can go in and out of the text, performing online searches for particular phrases, locations, or characters, or sharing their thoughts and experiences with other readers by annotating the text itself. This is especially noticed in textbooks and scholarly works.

Interactive reading enables readers to turn reading into a social experience. For instance, the “popular highlights” feature of Amazon.com highlights the passages that were highlighted by the greatest number of readers without revealing their identity. This type of information may focus the attention of readers on what the majority of readers selected as meaningful. The “Public Notes” feature further allows readers to share their highlights and notes with others.⁶⁴ Public annotations and highlights enable readers to share thoughts and per-

⁶¹ See Benjamin Mako Hill, Collaborative Literary Creation and Control: A Socio-Historic, Technological and Legal Analysis 44–45 (May 7, 2003) (unpublished manuscript), available at http://mako.cc/academic/collablit/writing/BenjMakoHill-CollabLit_and_Control.pdf (arguing that Wiki has radically changed collaborative writing as it “turns mass-publishing tools into mass-authoring tools”).

⁶² See Hala Skaf-Molli et al., *New Work Modes for Collaborative Writing*, in INTERNATIONAL CONFERENCE ON ENTERPRISE INFORMATION SYSTEMS AND WEB TECHNOLOGIES ES-IWT-07 (2007), available at <http://hal.inria.fr/docs/00/12/92/22/PDF/eiswt142.pdf> (discussing the various models of collaborative writing tools and their properties).

⁶³ Glynda A. Hull & Mark Evan Nelson, *Locating the Semiotic Power of Multimodality*, 22 WRITTEN COMM. 224, 225 (2005), available at <http://wcx.sagepub.com/content/22/2/224.full.pdf+html> (“multimodality can afford, not just a new way to make meaning, but a different kind of meaning”).

⁶⁴ Once a reader enables Public Notes, other readers can follow them as they read the same book. See *Amazon Kindle, Frequently Asked Questions*, AMAZON.COM, <https://kindle.amazon.com/faq#PublicNotes> (last visited July 14, 2011).

sonal experiences inspired by the reading, and also to engage in professional discussions and political debates. Such interactive features enable the sharing of opinions regarding the text from within the original text. This shift from a cultural discourse *about the text* (in book reviews, blogs, and online fora) to a conversation *inside the text*, may transform the reading experience and redefine the roles of authors and readers.

The ability to form communities around content transforms the rather isolated nature of reading into a social experience. From this perspective, the reading experience is viewed as a conversation—a flow of information established by a community rather than an isolated, individualistic experience.⁶⁵ Where writing and reading become more interactive, the ability to link books to other text and other forms of media may enhance the value that users may extract from each book.

As further discussed below, such communities are facilitated by online intermediaries, such as Amazon.com, Facebook and Google. This may create new business opportunities related to books. At the same time, however, these new intermediaries may pose new threats to privacy and competition.

B. *The Changing Nature of Book Publishing*

1. *Disintermediation: The Decline of Traditional Book Publishing*

Print culture, which evolved following the introduction of the printing press,⁶⁶ was composed of authors, publishers, and readers.⁶⁷ Digital books introduce new players to this playing field while at the same time shaking the boundaries between the more traditional players.

Digitization marks the declining role of publishers, or at the very least, the unbundling of the services traditionally provided by publishers. Book publishers, like record companies, are the victims of disintermediation. Publishers were experts in producing books,

⁶⁵ See, e.g., Ed H. Chi, *The Social Web: Research and Opportunities*, COMPUTER, Sept. 2008, at 88, 90, available at www.cs.panam.edu/~rfowler/csci6175_09/papers/5_Social-Web—Chi_Computer_2008.pdf (“SparTag.us is a social reading and annotation environment that lets users tag content within documents in simple one-click actions.” (citation omitted)).

⁶⁶ “Print Culture” was a term coined by Elizabeth Eisenstein to describe the culture emerging in Europe following the Gutenberg revolution and the introduction of the printing press. See ELIZABETH L. EISENSTEIN, *THE PRINTING REVOLUTION IN EARLY MODERN EUROPE* 1–92 (2000).

⁶⁷ Justice Breyer, for instance, describes a world of authors, publishers and buyers. See Breyer, *supra* note 9, at 281–82.

managing a stock, and distributing physical copies. But the eBooks era unbundles some of these traditional roles played by publishers. As books are finally separated from their physical boundaries and grow to represent more abstract commodities, the role of publishers in bringing the book to the readers is marginalized. One aspect is the production of a master copy of the book, and the printing of copies. Desktop publishing software enables authors to prepare print-ready copies of their books, and to make their works available online at minimal cost. Authors can easily engage in self-publishing. Indeed, self-publishing authors may still need assistance in editing, design, and marketing, but they can hire marketing and public relations specialists, as well as an editor and a book designer to format the manuscript and prepare a cover. Authors may also need to choose a format and pay for the conversion into an eBook.⁶⁸ Currently, publishers offer a “one stop shop” for all of these services. Yet, as search costs in the online environment go down, authors may seek to acquire these services for a competitive price from independent providers. It is difficult to see why a single publisher would have a particular advantage in providing all these services.

Another aspect of the changing nature of publishing is the production of copies. In online marketing it is no longer necessary to print a large volume of physical copies. Digital distribution, however, does not necessarily mean that physical books will cease to exist. Readers sometimes may prefer a printed copy. But printing does not have to be performed ahead of time. Digital printing eliminates the need to run the printing press once for all the copies of a book. Instead, POD makes it possible to print the exact number of books that are ordered at any given time. Consumers on Amazon.com are already given a choice between a printed version of the book that will be shipped to them, or a Kindle version that would be swiftly downloaded to an eBook reader of their choice. Bookstores might be able to offer consumers an opportunity to browse, touch, and read printed copies of books which are stored at the bookstore. Once a consumer makes her selection, the store may offer her the choice of receiving a digital copy or ordering a printed copy, which might be printed and bounded on the spot.

Given this new range of options, are publishers still necessary for managing risk? In the world of printed books, publishers were re-

⁶⁸ It has been suggested that these services are costly, yet not as costly as producing physical copies. See Rick Broida, *Burning Question: Why Do Ebooks Cost So Much?*, WIRED, Sept. 2010, at 72, 72.

quired to make risky investments in printing large editions of books, without being certain in advance of the commercial potential of a particular title. Publishers had to develop expertise in assessing the risk involved, as well as in acquiring the funding for financing the book production. eBooks, by contrast, can be offered indefinitely, without ever going “out of print” and without risking the expenditure of overprinting and not adequately selling. For those who want a printed version, there will always be POD. Consequently, the function of publishers in managing large stocks and inventories and in allocating risk is declining.

The role of publishers as gatekeepers is also decreasing. Gatekeeping was important when book publishing involved large, risky investments, given the high uncertainty regarding the commercial potential of a particular author.⁶⁹ The selection for publication was also a sign of quality, the theory being that if someone was willing to risk their money (or reputation) on the success of the book, it would surely be worthy of purchase.⁷⁰ Indeed, the term “self-publication” is often used in a derogatory manner to describe publishing at the author’s expense and to indicate that the book was not selected for investment by any of the established publishing houses.⁷¹ But, the economic logic of online distribution provides incentives to make everything available.⁷² The rise of UGC and self-publishing technologies makes many more works available to the public.⁷³

The quality of books is still a valid consideration in the eBook era. Although it may be costless to post online, it nevertheless might be expensive to select what to read. Publishers in the print world provided a signaling function, indicating a certain quality that was tied to the reputation of the publishing house. Potential readers, who had often relied on the publishing house as a proxy for quality, may now seek alternative mechanisms to assist them in making their reading selection. The online environment offers several peer-based alternatives to publishers’ selection, such as ratings by peers, recommendations on social networks, book reviews, or fee-based rating and review

⁶⁹ See Lev Grossman, *Books Gone Wild: The Digital Age Reshapes Literature*, TIME (Jan. 21, 2009), <http://www.time.com/time/magazine/article/0,9171,1873122,00.html>.

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² *Id.*

⁷³ See Picker, *supra* note 23, at 12 (“Gatekeepers need not filter out as many works from the public if the gatekeepers can instead rely on the public to sort after the fact. Digital production and distribution [facilitates] that.”).

services.⁷⁴ Such alternative mechanisms may further weaken the signaling function of publishers.

2. *Reintermediation: The Rise of New Intermediaries*

eBooks and online publishing not only undermine the role of traditional publishers, but also introduce new players to this scene. Traditional publishers are being displaced by new online intermediaries. This process of reintermediation of book publishing, and the growing role of new intermediaries, is further described below.

Traditionally, publishers were responsible not only for the process of producing a final manuscript and the printed copies, but also for the distribution and marketing of books.⁷⁵ The marketing of eBooks is taking a different shape in the online environment. It may even turn out to be more competitive than the printed book market, as eBooks are competing for the limited attention span of online users, up against many types of arts and entertainment available online, such as music, videos, games, and news.⁷⁶ Online marketing is not necessarily the province of traditional book publishers, and they may lack the necessary expertise and competitive edge.⁷⁷ New intermediaries in the online environment may come into play: online retailers, search engines and online aggregators, social media platforms, communication carriers, ISPs, and device manufacturers might all play a role in bringing together authors and their readers.

Online intermediaries facilitate access to eBooks in a variety of ways. Major distributors of eBooks are online retailers, such as iTunes and Amazon.com.⁷⁸ Access to digital content is also provided by communication carriers, such as mobile phone companies.⁷⁹ Communication carriers increasingly integrate content offerings into their communication packages. Another model is access by peers to social media such as Facebook, where content, and references to content,

⁷⁴ For instance, in October 2010, Scholastic launched a new social networking site called YouAreWhatYouRead.com, which lets readers build online profiles based on the five books that shaped their lives. *See* YOU ARE WHAT YOU READ, <http://youarewhatyouread.scholastic.com> (last visited July 28, 2011).

⁷⁵ *See* Grossman, *supra* note 69.

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *See, e.g.*, Miller, *supra* note 3.

⁷⁹ *See, e.g.*, Stephen Lawson, *AT&T Rolls Out Digital Content Delivery System*, PCWORLD (June 25, 2008, 10:44 AM), http://www.pcworld.com/businesscenter/article/147506/atandt_rolls_out_digital_content_delivery_system.html.

become available in a social setting. Amazon.com's recommendation system is an early example of using peer reviews and recommendations for selecting new books.⁸⁰ Facebook is of course the ultimate internet gateway based on peers, performing a wide range of functions, from technical enabling to social facilitation.⁸¹ It even interfaces with books, allowing a user to see what her peers read and how they review the books.⁸² Finally, there is access by search—where digital content posted by users is identified and located with the assistance of a search engine. Access by search is the model offered by Google Book Search (“GBS”) initiative in which Google has scanned millions of books from major research libraries in order to make them searchable online.⁸³

It is still unclear whether some of these rising intermediaries will eventually replace publishers. Some of these players are already offering attractive alternatives for online publishing to independent authors.⁸⁴ At the same time, however, it is plausible that traditional publishers will reinvent themselves and assume new roles in the digital environment. As the role of publishers in book publishing is declining and new intermediaries are rising, it is necessary to take a closer look at the legal implications of this game-changing development. What makes these new intermediaries interesting in the context of the current discussion is the fact that their business models do not necessarily rely on the sale of copies, and therefore these models are less dependent on copyright.⁸⁵

II. IMPLICATIONS FOR COPYRIGHT POLICY

The rise of digital books may require a reexamination of our legal policies that regulate the book market, primarily copyright law and antitrust. Is copyright still necessary? What role does it play in the eBooks environment?

⁸⁰ *Recommendations*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=13316081> (last visited July 4, 2011).

⁸¹ FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited July 4, 2011); see also Facebook, TOPTENREVIEWS, <http://social-networking-websites-review.toptenreviews.com/facebook-review.html> (last visited July 4, 2011).

⁸² See *How It Works*, GOODREADS, http://www.goodreads.com/about/how_it_works (last visited July 4, 2011).

⁸³ Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227, 250 (2009).

⁸⁴ See, e.g., Pinter, *supra* note 60.

⁸⁵ See *infra* notes 118–36 and accompanying text.

One of the first economic analyses of copyright for books is Justice Stephen Breyer's 1970 article.⁸⁶ Breyer explored what would happen if copyright protection were abolished.⁸⁷ He offered a thorough economic analysis of copyright protection based on the data available at the time, examining the necessity of copyright given the changing economies of book publishing and the introduction of software.⁸⁸

Breyer's article opened the door for challenging the necessity of copyright in a changing technological environment.⁸⁹ Applying Breyer's approach to the changing landscape of book publishing in the twenty-first century may highlight the major transformation of digital production and distribution, as well as assist in identifying the role of copyright in this emerging environment. The following discussion revisits Breyer's analysis in light of the changing role of publishers in the digital era. It then critically examines the necessity of copyright protection for facilitating the emerging business models of new eBooks intermediaries.

A. *The Uneasy Case for Copyright to Book Publishers*

The economic rationale of copyright for publishers may be summarized as follows: the initial publisher bears the high costs of publication, including editorial costs, printing-plant fees, promotion, royalties to authors, and especially the risk involved in making upfront investments where the potential commercial success of the book is highly speculative.⁹⁰ In the absence of copyright, a copier could make copies and sell a published book at a lower cost.⁹¹ That is because the copier is saving the cost of producing the original book, which was

⁸⁶ See generally Breyer, *supra* note 9.

⁸⁷ Breyer applies the cost-benefit analysis to explore the following questions: "Would abolition seriously threaten book production? Which books would it threaten the most, and why? What is to be gained from abolition? Who would benefit, and how?" *Id.* at 291.

⁸⁸ Aware of the limitations of the cost-benefit analysis, which cannot be precise as there are not enough facts available to make exact quantitative estimates, Breyer insists that "one can identify the sources of benefit and loss, estimate whether the amounts involved are significant, and draw approximate conclusions about whether copyright protection seems sufficiently valuable to justify not only retaining it, but also extending its scope." *Id.* at 292 (emphasis added).

⁸⁹ The article was published during the early days of the software industry when the first buds of digital technology were cropping up. Breyer's article is also one of the first theoretical articles that explicitly makes room for technology and questions the necessity of copyright where the changing economies of book publishing, and later of software, challenge the fundamental justification for awarding copyright to publishers. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1350 n.25 (1989).

⁹⁰ See Breyer, *supra* note 9, at 294–95.

⁹¹ *Id.* at 294.

incurred by the initial publisher.⁹² The initial publisher, who must sell at a higher price in order to recover these costs, will therefore be out-priced.⁹³ This is likely to diminish the incentives to invest in the publication of new titles.⁹⁴ The exclusive rights to reproduce and distribute copies of the book enable the initial publisher to stop the distribution of cheap copies and secure future sales.

Breyer concludes that the elimination of copyright would likely result in lower prices, wider distribution, elimination of substantial transaction costs, and a reduction in the market power of publishers.⁹⁵ As Breyer states, “[t]o abolish copyright protection would allow publishers to compete in the production and sale of an individual title.”⁹⁶ According to Breyer, the decline in revenues of the initial publisher due to competition might be offset in a way that would keep her profits sufficiently high and maintain incentives to invest in publishing books.⁹⁷ One such countervailing force is the lead time of the initial publisher, which enables publishers to sell a sufficient number of copies before they face competition.⁹⁸ Another countervailing force discussed by Breyer is the threat of retaliation—namely, the fear on the part of the copying publisher that she will not be able to recoup the (lower) cost of copying and distributing the original, as the initial publisher will sell copies below the copier cost.⁹⁹ Furthermore, copyright would be unnecessary if other means of sustaining publishers’ revenue were undertaken, such as prior funding by the government or by buyers.¹⁰⁰

⁹² A key for understanding the threat that unrestrained copying poses to book publishers’ revenues is the notion of the cost advantage of the copying publisher. The initial publisher incurs many costs that the copying publisher does not bear: the cost of editing the book, printing-plant fees, promotion and overhead costs, and royalty payments to authors. *Id.*

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See id.* at 313, 316, 318.

⁹⁶ *Id.* at 293.

⁹⁷ *See generally id.* at 299–308 (discussing various ways to sustain the revenue of publishers).

⁹⁸ *See id.* at 299–300.

⁹⁹ *See id.* at 300–01.

¹⁰⁰ *Id.* at 302, 306–07. Breyer envisions groups of buyers that may contract to buy books in advance. *Id.* at 302–03. Breyer further predicts several problems in achieving such a solution to the incentives problem of publishers: the high administrative cost of organizing the group of buyers, the need to delegate buying decisions to a small number of people, and the concern that publishers may require buyers to pay for books in advance. *Id.* at 303.

In the digital environment, however, the cost of communicating, coordinating and raising funds from large groups of unorganized individuals is relatively low. The first author to experiment with direct sales of eBooks for upfront payment was Stephen King, who announced in 2000 that he would publish a new book, *The Plant*, in up to ten installments, subject to an honor

The real force of Breyer's article is in arguing that copyright must be justified in a particular economic context and that technological changes may modify the economic conditions, thereby undermining the economic justification for copyright law and requiring us to re-think some of our legal policies.¹⁰¹ Back in the 1970s, Breyer argued that the cost advantage of the copier was greater than in previous generations, as nineteenth-century copiers still had to bear the cost of composing type for printing.¹⁰² He also predicted that computers would reduce the cost of copying and inventory by enabling the printing of books "on demand."¹⁰³

The digitization of books is changing this economic reality. The lead time and the threat of retaliation described by Breyer as securing incentives for publishers, even in the absence of copyright, might be offset in the digital age. The ease of digital copying and mass distribution actually shortens and oftentimes diminishes the lead time of publishers, as digital copying is made possible within seconds of the release of the original eBook.¹⁰⁴ Additionally, absent copyright, copiers face minimal risk, as the cost of digital copying and distribution are negligible.¹⁰⁵

Overall, the economics of digital distribution suggests that copyright protection should be strengthened to secure the publishers' return on their investment. Yet, as discussed above, the role of traditional publishers in the online environment is changing, and therefore calls for a fresh analysis of the interests and risks in this emerging market. Online distribution facilitates new methods for funding eBooks that are not necessarily dependent upon the exclusive sale of copies, which lies at the heart of the print culture and copyright law. The next Section further discusses the implications of digital publishing for copyright law.

system. David D. Kirkpatrick, *Stephen King Sows Dread in Publishers with His Latest E-Tale*, N.Y. TIMES, July 24, 2000, at C1. King asked readers to pay one dollar for each installment downloaded. *Id.* He promised to release the next installment only if at least seventy-five percent of the readers complied. *Id.* Following the success of the first installment, the experiment was eventually suspended after only forty-six percent of the downloads were paid for. *Id.*

¹⁰¹ See generally Breyer, *supra* note 9.

¹⁰² See *id.* at 299.

¹⁰³ See *id.*

¹⁰⁴ See Picker, *supra* note 23, at 11.

¹⁰⁵ Breyer argues that this effect is stronger for trade books than textbooks (where the initial investment required is high—and the expected return is over years and not weeks—such that a copier can wait to see which book is a best seller and does not need to make risky investments). See Breyer, *supra* note 9, at 299, 309–11.

B. *The Uneasy Case for Copyright in the eBooks Era*

Ironically, even though it is much easier to copy eBooks, the economic justification of copyright as necessary for securing incentives to publishers is weakened in the digital books environment. This weakening is due to the transformation of book culture and the introduction of new players: self-published authors and online intermediaries. Does copyright law serve the needs of the emerging players in the eBooks environment? As discussed further below, in this environment copyright law is no longer an ideal solution to the problem of incentives that it was initially designed to resolve.

One relevant issue is the rise of UGC and self-published authors. Historically, the emergence of copyright was led by publishers who argued that not only the author, but also the publisher's considerable investment in bringing a book to the market, must be protected.¹⁰⁶ The rise of independent book publishing and self-published authors is challenging the economic logic of publishing.¹⁰⁷ Authors may engage in independent book publishing for a variety of reasons, from self expression to gaining political power, or simply for fun and pleasure. These motivations may not aim at selling copies of the book, but rather at achieving a wide readership or making an impact.¹⁰⁸ Here the interests of authors and profit-maximizing publishers do not always coincide. For instance, academic authors may wish to promote the dissemination of knowledge to the public to maximize the public exposure to their academic writings, and to increase their academic impact in order to achieve a promotion.¹⁰⁹ If the book is priced too high, it is likely to become available only to a limited group of potential readers.

Moreover, the economic threshold for publishing an eBook is much lower. Compared with print, publishing eBooks is more effi-

¹⁰⁶ Note that Breyer's analysis of copyright is also focused on publishers and not on authors. *Id.* at 292. See also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) (assuming that the interests of authors and publishers are identical).

¹⁰⁷ See *supra* notes 64–66 and accompanying text.

¹⁰⁸ Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 THEORETICAL INQUIRIES L. 309, 318–22 (2011).

¹⁰⁹ Letter from Pamela Samuelson, Richard M. Sherman Professor of Law & Info., Univ. of Cal., Berkeley, Sch. of Law, to Denny Chin, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Jan. 27, 2010), available at http://thepublicindex.org/docs/amended_settlement/Samuelson_supplemental_objection.pdf (arguing, among other things, that the settlement lacks sufficient constraints on price increases); see also Pamela Samuelson, *Academic Author Objections to the Google Book Search Settlement*, 8 J. ON TELECOM. & HIGH TECH. L. 491, 501 (2010) (arguing that academic authors are committed to maximizing access to knowledge).

cient. Some of the cost of producing an eBook remains the same as producing a physical copy, such as editing, cover design, ISBN, interior layout and design, marketing and promotion. Nonetheless, the production of eBooks saves on the cost of print runs, storage, and shipping copies to bookstores.¹¹⁰ The need to compensate authors may remain the same, although the split between publishers and authors may change to reflect the lower cost of production and distribution and the lower risk.¹¹¹ Overall, the production of eBooks reduces the cost of publishing. Consequently, digital publishing is no longer tied up in the substantial investment required for printing a large number of paper copies in advance and managing an inventory that may not be sold. Therefore, unlike industrial publishing, self-publishing is less dependent upon a firm business model that secures a financial return for each investment.¹¹² Authors may still need to pay for editorial and marketing services, but these costs are significantly lower than those involving typesetting and the printing press.

At the same time, generating profits is also a major motivation for individual authors, both professional and amateur. There are currently several business models available for digital content that enable individual authors and professional publishers of eBooks to generate profits.¹¹³ The question is whether those alternative revenue streams require a copyright regime.

Copyright law grants owners exclusive control over the preparation and distribution of copies of the book.¹¹⁴ But a legal right to control copies may no longer prove useful for the digital environment. One reason for the weakening of copyright is that a legal right against unauthorized copying is no longer effective in digital markets. It is difficult to detect and enforce against massive infringements by indi-

¹¹⁰ Motoko Rich, *Math of Publishing Meets the E-Book*, N.Y. TIMES, Mar. 1, 2010, at B1.

¹¹¹ See *supra* notes 65–67 and accompanying text.

¹¹² See Niva Elkin-Koren, *User-Generated Platforms*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY* 111, 124 (Rochelle C. Dreyfuss, Harry First & Diane L. Zimmerman eds., 2010).

¹¹³ A report by the Organization for Economic Cooperation and Development identifies several models for monetizing User Generated Content: charging viewers for services (for example, pay-per-item or by a subscription fee), advertising, “licensing of content and technology to third parties,” and “selling goods and services to the community (monetizing the audience for online sales).” SACHA WUNSCH-VINCENT & GRAHAM VICKERY, DIRECTORATE FOR SCI., TECH. & INDUS., ORGANISATION FOR ECON. CO-OPERATION & DEV., PARTICIPATIVE WEB: USER-CREATED CONTENT 24–27 (2007), available at <http://www.oecd.org/dataoecd/57/14/38393115.pdf>. These models are often employed by intermediaries which facilitates access to UGC. *Id.*

¹¹⁴ See Breyer, *supra* note 9, at 281 n.3.

vidual users.¹¹⁵ Enforcement is particularly costly for individual authors engaging in the distribution of UGC. Individuals often lack the legal expertise and the administrative support that are necessary for copyright-enforcement strategy.

Another reason is the shift from copies to access. In digital markets, the sale of copies is no longer the sole mechanism for generating profits from books. Distribution methods such as streaming enable online providers to facilitate access without granting the end users control over copies. This arrangement releases providers from the need to worry about piracy.¹¹⁶ The shift from physical copies to online access is already underway in the music and film industries. Digital piracy has forced the music and film industries to move away from the sale of records, CDs, and DVDs, and explore new revenue sources, including streaming services such as Spotify¹¹⁷ and free access sponsored by advertising on sites such as YouTube.¹¹⁸

Yet, such distribution methods may not be ideal for eBooks. The recently launched Google Bookstore offers readers limited access to eBooks saved on the cloud.¹¹⁹ It is still unclear, however, whether this type of access will sufficiently replace the need to own a copy. Reading often requires access to the content for a long period of time. Control over a digital copy might also be necessary to enable annotation, quotations, and linking to other works. Readers may wish to own their copy of the book in order to secure a space for their personal reflections and interactions with the text.

A third reason for the weakening of copyright in digital markets is the rise of business models that do not require exclusive control over copies. eBooks may enable users to control a digital copy while at the same time facilitating real-time advertising.¹²⁰ With the intro-

¹¹⁵ See, e.g., Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 38 (2004) (noting that more than sixty million customers were exchanging music over peer-to-peer networks in the United States, in violation of copyright); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543–47 (illustrating the shockingly large number of copyright infringements a single person might unwittingly commit during a single day).

¹¹⁶ The use of streaming as a remedy for piracy assumes that users cannot capture the stream. Yet technological protective measures alone provide only a limited solution to unauthorized copying because they all are ultimately subject to circumvention.

¹¹⁷ See SPOTIFY, <http://www.spotify.com/int/new-user/> (last visited July 4, 2011).

¹¹⁸ See YOUTUBE, <http://www.youtube.com> (last visited July 4, 2011).

¹¹⁹ Google eBooks does not offer users control over a digital copy; instead, it allows users to read eBooks online or download the eBook to a cache for offline reading. See *Google Books Terms of Service*, GOOGLE, <http://www.google.com/googlebooks/tos.html> (last visited July 4, 2011).

¹²⁰ Picker argues that the intermediation of books creates advertising opportunities, mak-

duction of eBooks, the content of books is no longer fixed in print, and it can be updated easily.¹²¹ eReaders are equipped with online connectivity to facilitate new purchases and updates.¹²² These features may also enable new schemes of advertising delivered over time, or any time the eBook is read.¹²³ Authors may incorporate advertisements into their content for a share in the revenues.¹²⁴ Advertisements could be integrated into the content downloaded from an online retailer, or they could be transmitted in real time.

Business models based on advertising are less dependent on the legal right to control copies, and do not necessarily require the restriction of unauthorized copying. Distribution by online intermediaries, such as search engines and social networks, depends on traffic; content enables intermediaries to attract more users and to benefit from selling users' eyeballs to advertisers. Intermediaries could share advertising revenue with eBook authors. Advertising services, such as Google AdSense, automatically deliver targeted ads to blogs and personal homepages, sharing the collected revenues from advertising with the hosting website.¹²⁵

These business models are likely to survive even without copyright. In order to secure the rights of authors to a share in the commercial revenues extracted from their books it may suffice to simply define a legal right to receive compensation: a fixed share from any commercial use. A copyright, which grants authors exclusive rights over the reproduction and distribution of their books, may no longer be necessary.

The business model that closely resembles current practices of selling copies is the online retail stores. This model was introduced by Apple in the iTunes Store, the online music retail store established in 2003.¹²⁶ iTunes' success was based on the low, flat-rate pricing pol-

ing it possible to fund the publication of books based on a mixture of advertising and pay-per-copy fees. See Picker, *supra* note 23, at 2.

¹²¹ See *id.* at 12.

¹²² See *id.* at 4.

¹²³ See *id.* at 12.

¹²⁴ Revver—a video-sharing website that hosts user-generated content—for instance, enables users to share videos with targeted ads and track them as they spread across the web. See REVVER, <http://revver.com/about/> (last visited July 4, 2011).

¹²⁵ See *AdSense Overview*, GOOGLE, <http://www.google.com/adsense/support/bin/static.py?hl=en&page=guide.cs&guide=29574&from=29574&rd=2> (last visited July 4, 2011).

¹²⁶ The iTunes store also offers Apps (applications such as games, maps, and movies) for the iPad, iPod Touch, and iPhone. Developers can decide which price they want to charge for apps, and get to keep seventy percent of the purchase price. See *iOS Developer Program*, APPLE <http://developer.apple.com/programs/ios/distribute.html> (last visited July 28, 2011).

icy—selling at ninety-nine cents per song—and the large volume of sales.¹²⁷ Similar models have evolved for eBooks. Amazon.com, for instance, offers authors and publishers the ability to independently publish their books directly to Kindle applications. Amanda Hocking, a self-published author who was listed in *USA Today*'s eBooks Best-sellers List, has become a symbol of the new business opportunities for independent (“indie”) publishing.¹²⁸ The twenty-six-year-old self-published author has sold over two million copies of her books at \$0.99–\$2.29 each, keeping 70% of the revenue from her sales.¹²⁹ Selling large volumes of eBooks at low prices increases the income to authors and online retailers.¹³⁰ Furthermore, the lower costs involved in producing an eBook may enable authors to keep a larger percentage of the sales proceeds.

It is unclear whether copyright protection is still sufficiently valuable in this context. Traditional copyright law prohibits the creation of copies without authorization and therefore typically requires users to purchase a copy. But enforcing copyrights might be too cumbersome for indie publishers. Self-published authors are likely to lack the legal knowledge required for designing a licensing strategy and, more importantly, are unlikely to have the financial resources required for enforcing copyright.¹³¹ The cost of copyright enforcement against illegal downloading is likely to be prohibitively high, especially given the negligible fee charged for each copy.¹³² Thus, legal rights against uncensored copiers, which were absolutely essential for commercial pub-

¹²⁷ See John Markoff, *New Economy: Apple's Success with iPod May Presage the Ascendancy of Hardware Over Software*, N.Y. TIMES, Jan. 19, 2004, at C4. Pricing policy has changed in the past two years, after iTunes removed the DRMs from songs distributed in the online music store. See Brad Stone, *Want to Copy iTunes Music? Go Ahead, Apple Says*, N.Y. TIMES, Jan. 7, 2009, at B1.

¹²⁸ See Carol Memmott, *Authors Catch Fire with Self-Published E-Books*, USA TODAY (Feb. 9, 2011, 12:46 PM), http://www.usatoday.com/life/books/news/2011-02-09-ebooks09_ST_N.htm.

¹²⁹ See Julie Bosman, *A Successful Self-Publishing Author Decides to Try the Traditional Route*, N.Y. TIMES, Mar. 24, 2011, at C3; Memmott, *supra* note 128.

¹³⁰ Hocking sold eleven different novels at low prices. The large volume of sales created significant income. Large volume could also be created by taking advantage of the long-tail online phenomenon. The “long tail” concept was introduced by Chris Anderson, Editor-in-Chief of *Wired Magazine*, to describe the sale of a large number of objects, each of which enjoys limited popularity, but together form a significant volume. See CHRIS ANDERSON, *THE LONG TAIL* (2006).

¹³¹ See Elkin-Koren, *supra* note 112, at 128–29.

¹³² *Id.*

lishers, are no longer sufficient nor necessary in the world of digital self-publishing.¹³³

Copyright enforcement is also unlikely to serve the interests of online eBook retailers. Under the current business model, online retailers provide a commercial distribution platform for independent sellers and charge per download. The concern is that, if users can obtain a free copy elsewhere, online retailers may lose the purchase and suffer a loss. However, the growing market share of the iTunes Store since it was launched in 2003 demonstrates that it is possible to sell billions of songs even when people can download these songs for free. Charging a low price for copies may weaken the motivation of users to obtain illegal copies and avoid payment.¹³⁴ In the absence of copyright, competition among retailers is likely to focus on aspects such as the technical support provided, the shopping experience, the size of the catalogue, and the compatibility with other products and services.

Moreover, increasingly, content provided by online retailers is becoming a supplement to hardware.¹³⁵ In fact, some online retailers, such as Amazon.com and Apple, may wish to subsidize content in order to create demand and drive the sales of hardware.¹³⁶ However, the cross-subsidization of content by vendors of hardware may raise new concerns related to competition.¹³⁷

Similarly, online intermediaries may create added value for books. As suggested above, online intermediaries present new opportunities by offering an added value created by clusters of books that could be hyperlinked, enabling search within books and across titles, and facilitating social interaction. Search engines are capable of providing such services. Social media platforms also facilitate communities around content. Social networks attract users not only by offering access to the content created by their peers, but also by producing a social context.¹³⁸ The platform's economic value arises from a network of connected users, and it generates revenue by maintaining an engaged community of creative participants. Even if books are not

¹³³ See generally *id.*

¹³⁴ Price reduction was one of the mechanisms used by right holders in the music industry against illegal copying. See Stone, *supra* note 127.

¹³⁵ See *id.*

¹³⁶ See *infra* notes 146–50 and accompanying text.

¹³⁷ See *infra* notes 138–39 and accompanying text.

¹³⁸ For the social network, “the community of users constitutes its main generative asset; the stronger the community becomes, the higher the value for the enterprise.” See Elkin-Koren, *supra* note 112, at 118.

turned into an independent service, they could be incorporated into new services.

C. Competition Concerns in eBooks Markets

The inquiry into the role of copyright in the eBook market should not be confined to its effect on incentives for authors and publishers. In order to fully understand the role of copyright in the digital environment, one must examine how it structures the market for eBooks and shapes relationships among the different players. As further discussed in this Section, strong copyright may raise new competition concerns in the emerging market of eBooks.

New intermediaries raise concerns regarding the competitiveness and openness of future information markets. They are subject to economies of scale and therefore tend to gain a dominant market power. In the absence of competition, eBooks might end up being too expensive. But competition in the market for eBooks may have other important implications that go beyond the price of eBooks.¹³⁹ Online intermediaries, which facilitate access to eBooks, are able to combine some control over content with the means to collect and process personal data regarding the users. The shift to digital content affects access to knowledge and may have far-reaching implications for privacy, free speech, political freedom, research, and development.¹⁴⁰ Competition is not only the best way to promote progress in this context by increasing the number of books and their availability at a reasonable price, it is also the best way to secure human rights and free speech in the digital environment.¹⁴¹

Access to eBooks is technically controlled either by DRMs or by the reading device, which enables control of a variety of issues related to the digital copy: who can use it, what users can do with it, and what data is collected on the users.¹⁴² eBooks and eReaders should therefore compete not only for price, but also for the level of connectivity,

¹³⁹ See Devon Thurtle, Comment, *A Proposed Quick Fix to the DMCA Overprotection Problem That Even a Content Provider Could Love . . . or at Least Live With*, 28 SEATTLE U. L. REV. 1057, 1083 (2005).

¹⁴⁰ See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 Hous. L. Rev. 1013, 1042–44 (2007); Hannibal Travis, *Of Blogs, eBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1545–46 (2007).

¹⁴¹ See generally Thurtle, *supra* note 139, at 1083 (describing how the lack of interoperability among eReaders undermines competition, and advocating a technical fix that would increase competition and thus expand access to eBooks).

¹⁴² See *supra* Part I.A.1.

functionality, privacy, and use restrictions. In the absence of competition, eBooks might end up too expensive, limiting use to a particular device or format, and might limit the types of use available to consumers.

Competition in the market for eBooks should facilitate diversity in books and applications for eBooks by enabling developers and self-published authors to distribute their content under fair terms. Competition should further enable online intermediaries—such as online retailers, search engines, and social networks—to provide added value to books and develop supplementary services.

The threat to competition is particularly acute in digital markets. The eBooks market consists of four layers: hardware, software, distribution, and content. Contrary to paper books, eBooks require a reading device and therefore involve a layer of hardware and software. The hardware—either multipurpose devices such as tablet computers and smartphones, or eBook readers such as Kindle—must be compatible with an eBook format. The combination of hardware and software will affect the functionality of an eBook and what users will be able to do with it: whether they can transfer it, whether they can read in private free of monitoring, and whether they can copy, print, or listen to it. The need to use compatible hardware and software makes eBooks vulnerable to becoming locked in by technical standards.¹⁴³ The level of competition in the eBooks market will depend on the ability of vendors to use content, application, and hardware together.

At the distribution level, access to eBooks is facilitated by a variety of online intermediaries: online retailers such as Amazon.com and Apple, search engines such as Google, and ISPs and social networks. These new gateways to eBooks combine some control over the content with powerful capabilities of collecting personal data on users. A strong network effect gives advantages to large-scale intermediaries that attract the most traffic by users on a global scale.¹⁴⁴ Economies of

¹⁴³ See *supra* Part I.A.1.

¹⁴⁴ WUNSCH-VINCENT & VICKERY, *supra* note 113, at 1, 42. Competition is further weakened as megaplatforms converge and crosslink to one another, thereby giving users added value by enabling them to make their output in one social media input on partnering social media. Such convergence creates new barriers to entry and makes it even more difficult for new applications to penetrate the market. Another issue affecting the level of competition among platforms is “stickiness,” which depends on users’ switching costs. If users are able to transfer valuable assets, such as personal contacts, social graphs, personal histories, and original content to another facility, they can more easily switch their social media platform. If these assets cannot be transferred to another platform, users might find themselves locked into a particular platform.

scale, the rising cost of large-scale exposure, and the need to operate globally across international borders further reduce competition and lead to domination by a small number of megaplatforms.¹⁴⁵ Consequently, online intermediaries may raise serious concerns regarding the competitiveness and openness of future information markets.

At the content level, digital books, with new search and hyperlink capabilities, become more valuable as they are linked to other books.¹⁴⁶ Some business models which are based on providing added value, such as search capabilities or the ability to share comments, may also take advantage of access to a large number of books.¹⁴⁷ Providers of eBooks may gain a strong competitive advantage by offering a comprehensive collection of digital books.

The increased dependency on reading devices, the rise of new intermediaries, and the increased value of comprehensive book collections may affect competition in the market for eBooks. Taken together, these features of eBooks may concentrate economic and cultural control in the hands of a few dominant players.

Copyright in books may enable publishers to shape the eBook market at all layers. Consider the following example: Amazon.com first released the Kindle in 2007.¹⁴⁸ In order to create demand for its eReaders, Amazon.com had to offer books in a digital format. To stimulate further demand, Amazon.com sought to sell eBooks at a discount.¹⁴⁹ Therefore, it bought eBooks for Kindle from publishers at \$12.00 to \$13.00 and offered them for sale to consumers at \$9.99, taking a loss in order to gain a market share for its Kindle.¹⁵⁰ When Apple introduced the iPad in January 2010, it was anticipated that with more competition, there would also be a reduction in the price. Indeed, the release of the iPad and competition from Barnes & Noble, Borders, and Sony pushed down the price of eReaders. But the introduction of the iPad only increased the price of eBooks. Apple sold

¹⁴⁵ Cf. *id.* at 42–43.

¹⁴⁶ See *supra* Part I.A.2.

¹⁴⁷ This was recently recognized by Judge Chin of the U.S. District Court for the Southern District of New York when he denied approval of the Amended Settlement Agreement (“ASA”) between Google and the Authors Guild. See *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136(DC), 2011 WL 986049, at *12 (S.D.N.Y. Mar. 22, 2011). Judge Chin noted that the ASA “would give Google a de facto monopoly over unclaimed works.” *Id.*

¹⁴⁸ Jessica Shambora, *Kindle Sparks Excitement for E-Books*, CNNMONEY (Feb. 9, 2009, 10:24 AM), <http://money.cnn.com/2009/02/06/technology/ebooks.fortune/index.htm>.

¹⁴⁹ *Id.*

¹⁵⁰ Joseph Galante, *Publishers Seek More Control of E-Book Prices (Update3)*, BLOOMBERG (Feb. 2, 2010, 4:07 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=AJgJZ9GUWtfk>.

eBooks at \$14.99.¹⁵¹ The reason was copyright. The publishers, who hold the copyright in the vast majority of books, refused to license eBooks to Amazon.com unless it complied with the higher retail price Apple was charging.¹⁵² The publishers argued that a lower price for eBooks might diminish sales of paper books, and might also devalue the prestige of books.¹⁵³ In response, Amazon.com posted an announcement calling on consumers to boycott eBooks with the publishers' fixed price.¹⁵⁴

In this eBooks price war, copyright was used to tie together content and hardware, to the detriment of consumer welfare.¹⁵⁵ Such lock-in is precisely what enabled iTunes to become dominant in the market for music distribution. As long as copyright holders can prevent the publication of their books in eBook format, competition in the market will be limited.¹⁵⁶

Copyright holders may further affect the design of eReaders and its functionalities. For instance, the Authors Guild objected to the introduction of a text-to-speech feature by Amazon.com in the Kindle 2, which enabled users to listen to the text as it was read aloud.¹⁵⁷ It

¹⁵¹ Ken Auletta, *Publish or Perish: Can the iPad Topple the Kindle, and Save the Book Business?*, NEW YORKER, Apr. 26, 2010, at 24–25.

¹⁵² *Id.* at 24.

¹⁵³ See Rich, *supra* note 110.

¹⁵⁴ In an open letter to customers, Amazon.com called on Kindle users to “vote with their purchases” against publishers looking to set prices for electronic editions. *Amazon Goes into Battle with Publishers Over eBook Prices*, GUARDIAN.CO.UK (Oct. 15, 2010, 3:10 PM), <http://www.guardian.co.uk/books/2010/oct/15/amazon-battle-publishers-e-book-prices>.

¹⁵⁵ The impact of the eBooks price wars was actually quite similar to a recent amendment to the French law forcing eBook publishers to fix the price of eBooks. This legislation, enacted in October 2010, fixed the price for eBooks in order to protect smaller booksellers. Loi 2011-590 du 26 mai 2011 relative au prix du livre numérique [Law 2011-590 of May 26, 2011 on the Price of Digital Books], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 28, 2011, p. 9234, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024079563&fastPos=1&fastReqId=188551743&categorieLien=id&oldAction=RechTexte>. Prior to this amendment, eBooks were not included under the 1981 French law that prohibited the sale of books for less than five percent below the cover price. The new amendment aims at protecting smaller booksellers and French publishers from online retailers such as Amazon, Apple, and Google.

¹⁵⁶ An alternative rule that would simply entitle authors to a fixed share of any commercial use may have a different outcome. In the absence of copyright, once a book is published, anyone is free to distribute the book in a digital format subject to the payment of royalties.

¹⁵⁷ The Authors Guild feared that the introduction of a read-aloud feature would compete with the market for audio books. The Guild argued that this feature violates copyright. See *E-Book Rights Alert: Amazon's Kindle 2 Adds "Text to Speech" Function*, AUTHORS GUILD (Feb. 12, 2009), <http://www.authorsguild.org/advocacy/articles/e-book-rights-alert-amazons-kindle-2.html>.

argued that this feature constituted copyright infringement.¹⁵⁸ Ultimately, Amazon.com was forced to give authors and publishers the option to decide whether to enable the feature.¹⁵⁹

Another example that demonstrates how copyright may shape competition is the Google Book Scanning (“GBS”) project. In 2004, Google commenced the immense project of scanning books pursuant to collaboration agreements with several major research libraries.¹⁶⁰ Google has scanned more than twelve million books.¹⁶¹ The scanned copies were delivered to the participating libraries and the electronic database of books was made available for online search.¹⁶² In 2005, the Authors Guild and five publishers brought a class action against Google in the Southern District of New York, alleging copyright infringement for scanning copyrighted books.¹⁶³ The parties announced a settlement in 2008,¹⁶⁴ but the approval of the Amended Settlement Agreement (“ASA”) was recently denied by the court.¹⁶⁵

The mass digitization of books that were not born digital involves two major costs: the cost of scanning the books and the cost of copyright clearance.¹⁶⁶ Google sought to rely on the exclusive right of copyright holders to gain a dominant position in the digital book market. In fact, the settlement granted Google a license to make scanned books available in digital format, thereby making it very difficult for any company to compete in the foreseeable future.¹⁶⁷ The court recognized the concern over this attempt. In denying approval of settle-

¹⁵⁸ *Id.* The claim that the text-to-speech function violates copyright, however, is controversial. *See id.*

¹⁵⁹ Brad Stone, *Amazon Backs Off Text-to-Speech Feature in Kindle*, N.Y. TIMES BITS BLOG (Feb. 27, 2009, 6:51 PM), <http://bits.blogs.nytimes.com/2009/02/27/amazon-backs-off-text-to-speech-feature-in-kindle/>.

¹⁶⁰ Joseph O’Sullivan & Adam M. Smith, *All Booked Up*, OFFICIAL GOOGLE BLOG (Dec. 14, 2004, 9:34 AM), <http://googleblog.blogspot.com/2004/12/all-booked-up.html>.

¹⁶¹ Joab Jackson, *Google: 129 Million Different Books Have Been Published*, PCWORLD (Aug. 6, 2010, 4:20 PM), http://www.pcworld.com/article/202803/google_129_million_different_books_have_been_published.html.

¹⁶² *Id.*

¹⁶³ *See* Band, *supra* note 83, at 234–35.

¹⁶⁴ *See* Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05 Civ. 8136(DC), 2011 WL 986049 (S.D.N.Y. Oct. 28, 2008).

¹⁶⁵ *Authors Guild, Inc.*, No. 05 Civ. 8136(DC), 2011 WL 986049, at *1 (S.D.N.Y. Mar. 22, 2011).

¹⁶⁶ Other costs include system maintenance, digital storage, sustainable digital preservation, and migration to new formats. For further discussion of the cost of digital books, see ROGER C. SCHONFELD ET AL., COUNCIL ON LIBRARY & INFO. RES., THE NONSUBSCRIPTION SIDE OF PERIODICALS: CHANGES IN LIBRARY OPERATIONS AND COSTS BETWEEN PRINT AND ELECTRONIC FORMATS (2004), available at <http://www.clir.org/pubs/reports/pub127/pub127.pdf>.

¹⁶⁷ *Authors Guild, Inc.*, No. 05 Civ. 8136(DC), 2011 WL 986049, at *6.

ment, the court held, *inter alia*, that Google would have the right to make complete copies of orphan works and use them for both display and nondisplay purposes under the ASA, but that competitors that attempted to do the same might be liable for statutory damages.¹⁶⁸ The court concluded that “Google’s ability to deny competitors the ability to search orphan books would further entrench Google’s market power in the online search market.”¹⁶⁹

A finding of fair use or a compulsory license in the GBS copyright lawsuit would have opened the door for competition by other companies, national libraries, and even individuals and nongovernmental organizations engaging in crowdsourcing of books.

CONCLUSION

Promoting progress in the digital era may require a more sophisticated understanding of the new book industry. In many cases copyright in this environment does not secure incentives but simply protects a particular business model that is no longer viable. We have seen that the role of publishers in publishing books and bringing together authors and their readers was marginalized. Publishers will have to reimagine their core mission and reinvent book publishing for the twenty-first century. At the same time, however, policymakers will have to redesign copyright law to facilitate these emerging markets. Book publishers currently own the copyright in the vast majority of copyrighted books. Copyright protection lasts for life plus seventy years after the death of the author, and consequently the rights of publishers are likely to shape the market for eBooks and digital libraries in years to come. Moreover, shelf life for books is much longer than other types of entertainment content, which are often more trendy and susceptible to changes in fashion. Books that are out of print may still be relevant to many readers. Strong copyright in this large portfolio of books would enable publishers to determine the future of digital libraries and the terms of access to digital books. The need to acquire prior consent for digitizing books under the current copyright regime creates a serious impediment to any initiative to digitize large volumes of books by libraries and national archives.

We have further seen that online intermediaries facilitate book publishing and that new business models do not necessarily rely on copyright protection. Copyright law in this environment plays a key

¹⁶⁸ *Id.* at *38.

¹⁶⁹ *Id.* at *37.

role in sustaining the monopoly power of publishers and concentrating economic and cultural power in the hands of new intermediaries. Copyright in such circumstances not only enables publishers to retain a dominant role in the market for books, but may also allow platforms to gain dominance by relying on the exclusive rights of publishers.

The challenge for copyright law in the eBook era is to remove impediments to competition and to make sure that the device and content markets each stand on its own. Competition is not only the best way to promote progress—by increasing the number of books and the availability of books at a reasonable price—it is also the best way to secure human rights and free speech in the digital environment.