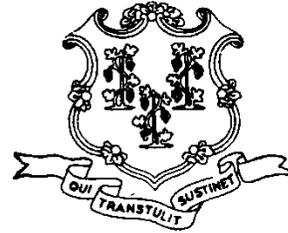# Department of Consumer Protection

Report to the General Assembly's General Law Committee pursuant to Special Act 13-10, "An Act Concerning a Study Regarding the Availability of Electronic Books to Users of Public Libraries"

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<div align="center">**DEPARTMENT OF CONSUMER PROTECTION**</div>

<div align="center">Report to the General Assembly's General Law Committee pursuant to Special Act 13-10, "An Act Concerning a Study Regarding the Availability of Electronic Books to Users of Public Libraries"</div>

Executive Summary

On June 6, 2013, Governor Malloy signed into law Special Act 13-10, which provides for the Department of Consumer Protection ("DCP" or "Department") to conduct a study "regarding the availability of electronic books to users of public libraries in this state." The Special Act further provides that DCP's study should include, at a minimum: "(1) a survey of whether and how book publishers and third-party electronic book distributors sell, license or otherwise make electronic books available to users of public libraries in this state, (2) what problems, if any, exist with current practices regarding the availability of electronic books to users of public libraries in this state, and (3) recommendations to increase the availability of electronic books to users of public libraries in this state."[1]

In conducting its study, the Department sought input from a wide range of entities involved in the electronic-book ("e-book") market, including libraries, publishers and distributors. The Department also consulted with the State Librarian, sought legal guidance from the Attorney General's office and conducted independent research by, among other things, reading industry news reports and analyzing survey data regarding trends in the e-book marketplace.

The following study is divided into three sections, corresponding to the areas of inquiry set out in the Special Act. Specifically, the study discusses the following points in greater detail:

- **Whether and How Electronic Books are Made Available to Public Libraries**
    - This section discusses how e-book transactions differ from traditional book sales and how those differences have important implications under copyright law that are at the foundation of the current tension between book publishers and public libraries.
    - This section also discusses trends in e-book availability at public libraries.

- **Problems with Current Practices**
    - This section discusses the value of libraries to society and the public policy implications of limited e-book availability at libraries.

- **Recommendations to Increase Availability of Electronic Books to Library Users**
    - In this section, the Department analyzes three options for increasing e-book availability at public libraries and the benefits and costs of each, including: (i) creating a state-wide e-book distribution platform that would enable the State's libraries to expand and better

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[1] Connecticut Special Act No. 13-10, § 1 (2013).

manage their e-content collections and enhance their negotiating position when dealing with publishers or other owners of e-content; (ii) enhancing the financial resources available to libraries in order to enable them to purchase more e-books; and (iii) taking a "wait and see" approach as current trends suggest greater e-book availability at libraries may occur without government intervention.

o The Department considered recommending legislation to mandate e-book access, or specific terms of dealing, but ultimately concluded that such recommendations were not warranted at this time due concerns of federal preemption and concerns about interfering with a market that was still in flux.

I. Whether and How Electronic Books are Made Available to Public Libraries

An e-book is an electronic version of a book that can be read on a computer, smart phone, tablet or other device that is designed for the purpose of reading books electronically, or that includes an application for that purpose. Assessing the availability of e-books to public libraries requires two distinct inquiries. First, there is the issue of whether e-books are literally available to public libraries. Today, and to a greater extent in the not too distance past, some e-books were not available to public libraries on any terms. For these titles, even a library with a large budget and willingness to accept restrictive terms, e-books were unavailable. Second is the more complicated issue of whether the price and other terms of acquisition are such that e-books are economically unavailable to public libraries. Literal and economic unavailability of e-books are of legitimate concern to libraries and their patrons. As such, both are encompassed in the Department's study.

A. Legal Distinction Between Physical Book Sales And E-Book Acquisitions

To understand why e-books present unique availability concerns for libraries, it is necessary to first understand the differences in how traditional books and e-books are sold. These differences have important implications under copyright law and set the stage for the current tension between publishers and libraries with regard to e-book availability.

A consumer purchasing a traditional book can go online or to a bookstore and purchase a physical copy of the book they want at which point they own that copy of the book. An electronic book, by comparison, does not have its own physical manifestation apart from its electronic coding. The electronic code that makes up the digital content must be downloaded onto a device from which it can be accessed and read by the user. The purchaser or licensee of digital content, therefore, does not own a physical copy of a book; rather, they have the right to view or use the book's content in accordance with the terms of the license or sale agreement they accepted. The distinction between owning a physical copy of a book and acquiring a digital copy of a book carries important legal consequences under copyright law.

Recently published books are copyright protected. As a general rule, the copyright lasts for the life of the author plus an additional 70 years.[2] Thus, virtually every book on the best seller list, or otherwise in high demand, is copyright protected. Copyright infringement occurs when a copyrighted work is, among other things, reproduced or distributed without the copyright owner's permission.[3] Codified in the copyright law, however, is a concept commonly referred to as the "first sale doctrine." The first sale doctrine provides that an individual who owns a copyrighted work "is entitled, without the authority of the copyright owner, to sell or otherwise dispose of . . . that copy."[4] This means that the owner of a traditional book has the legal right to dispose of their copy of the book as they see fit. The owner, for example, can lend their copy to others or resell it. As long as the owner does not make unauthorized reproductions of the book, and further distribution is limited to the copy purchased, there is no copyright infringement.

The first sale doctrine has not been extended to digital rights because the purchaser of digital content does not "own" a physical copy of the work that was purchased. Rather, the purchaser has only the rights conveyed as part of the license or sale agreement. A consumer who purchases an e-book through Amazon, for example, is only purchasing the right to view the e-book on their Kindle device (or other designated devices) and that right is subject to the "Kindle Store Terms of Use" which, among other things, limits the number of devices onto which the e-book can be downloaded and the extent to which it

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[2] 17 U.S.C. § 302(a).
[3] 17 U.S.C. § 501(a). There is a limited exception for "fair use" of the material, which is not relevant for present purposes.
[4] 17 U.S.C. § 109(a).

can be shared with others.[5]   This limitation is consistent with the copying prohibition of copyright law since downloading an e-book onto a different device necessarily results in the unauthorized copying of the work.[6] The same analysis would prevent a library from purchasing an e-book from an online store and lending it to others as it would with a physical book under the first sale doctrine.

The United States Copyright office has explained the reason for treating digital works differently than physical works with regard to the first sale doctrine, even in situations where the original copy is deleted at the time of a digital transmission, thusly:

> Physical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work. Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner's market, no longer exists in the realm of digital transmissions. The ability of such "used" copies to compete for market share with new copies is thus far greater in the digital world.[7]

The differing rights that accompany the sale of a physical book compared to an e-book have important implications for libraries. In the world of physical books, if a publisher is unwilling to sell its books to a library, or is unwilling to sell its books on terms acceptable to the library, the library can go to the retail market and purchase a copy of the book the same way any other consumer could purchase the book. Pursuant to the first sale doctrine, the library could then lend or resell its copy without running afoul of the copyright laws. Going to the retail market is a viable option for libraries because the product offered at retail – a physical copy of a book – is the same as the product being sought by the library. For this reason, it is not possible for a physical book to be either literally or economically unavailable to libraries.

The situation with regard to e-books is quite different. For e-books, the terms of sale acceptable to a retail consumer are different than the terms acceptable to a library. Most consumer e-book agreements place restrictions on the number of devices onto which the book can be downloaded and the extent to which the purchaser can lend the book to others. Such restrictions are incompatible with the library's mission of making every book it owns available to any patron who wants to borrow it. As a result, if a library and publisher cannot reach acceptable terms, the library cannot turn to the retail market as an alternative. A vibrant e-book presence in libraries, therefore, requires different arrangements between publishers and libraries that fit the library model.

B. Trends in E-book Availability at Public Libraries

The availability of e-books at public libraries is not a simple binary issue. It is certainly true that virtually any library seeking to offer e-books has an opportunity to do so. A recent survey of Connecticut libraries conducted by the Connecticut eBook Task Force, for example, found that 93% of responding

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[5] *See Kindle Store Terms of Use*, Amazon (last updated Sept. 6, 2012), http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950.
[6] See *e.g. Capitol Records, LLC v. ReDigi, Inc.,* 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013).
[7] United States Copyright Office, Library of Cong., DMCA Section 104 Report (2001), 82-83, http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

libraries offered e-book access to their patrons.[8] Furthermore, about a third of the respondents had access to five thousand titles or more and over half had access to twenty five hundred titles or more.[9]

A meaningful assessment of e-book availability, however, requires an analysis of which books are available and on what terms. This entails a two-part inquiry: (i) to what extent are the e-books desired by patrons literally available to public libraries; and (ii) are the terms of e-book license or sale agreements such that e-books are economically available to public libraries. These two components of e-book availability - literal and economic availability – are discussed in greater detail below.

1. Literal E-Book Availability

In thinking about e-book availability at libraries, it is important to consider not just the total number of e-books available, but the total number of titles demanded by patrons that are available. In this regard, although there are countless book publishers, not to mention many self-published authors, the most popular titles are generally published by the top five publishers: Hachette, HarperCollins, Macmillan, Penguin Random House, and Simon & Shuster. Combined, these publishers have an approximate two-thirds share of the U.S. consumer book publishing market[10] and have published the overwhelming majority of best-selling e-books.[11] Significantly, best-sellers are a key driver of library traffic and are estimated in some studies to account for 80% of library lends.[12]

Meaningful e-book availability at public libraries, therefore, is dependent on libraries reaching acceptable terms with these market leaders. This is not to say that other book publishers are not important or will not be impacted by any legislative mandates, but only that the success of libraries is most dependent on arrangements with these publishers. Moreover, the concern of publishers that library circulations will cannibalize retail sales is most pronounced for these market leaders as they have the most sales at risk. As such, the availability of e-books from the top publishers is the focus of this study.

With regard to literal e-book availability by the top publishers, the trend has been towards increased availability. The chart below sets out the status of each publisher's current and historic policy with regard to licensing e-books to libraries.

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[8] Connecticut eBook Task Force (2013), *eBook Survey,* Unpublished survey results (hereinafter cited as "Connecticut eBook Survey") at Q7.
[9] *Id.* at Q10.
[10] American Library Association, *Frequently Asked Questions Regarding E-books and U.S. Libraries* (last visited Jan. 23, 2014), http://www.ala.org/transforminglibraries/frequently-asked-questions-e-books-us-libraries.
[11] *See* Jeremy Greenfield, *Retailers Sink Ebook Best-Seller Prices to Lowest Levels Ever With Holiday Discounting*, Digital Book World (Dec. 11, 2013), http://www.digitalbookworld.com/2013/retailers-sink-ebook-best-seller-prices-to-lowest-levels-ever-with-holiday-discounting/.
[12] David Vinjamuri, *The Wrong War Over eBooks: Publishers vs. Libraries*, Forbes (Dec. 11, 2012), http://www.forbes.com/sites/davidvinjamuri/2012/12/11/the-wrong-war-over-ebooks-publishers-vs-libraries/.

E-books Available to Public Libraries in Connecticut[13]				
	2012		2013	
Publisher	Available	Limitations on Titles	Available	Limitations on Titles
Hachette	Yes	Only titles from 2010 and earlier.	Yes	None[14]
HarperCollins	Yes	None	Yes	None
Macmillan	No	N/A	Yes	Limited number of backlist titles.
Penguin*	No[15]	N/A	Yes	None[16]
Random House*	Yes	None	Yes	None
Simon & Schuster	No	N/A	No[17]	N/A

* Penguin and Random House merged in 2013. Their policy with regard to e-book availability at libraries, however, continues to diverge and, therefore, their status is reported separately.

As illustrated above, in 2012, three publishers did not make their e-books available to public libraries at all and one only made them available on a limited basis. By 2013, all but one of the major publishers were offering at least some e-books to public libraries in Connecticut and only one was limiting the availability to older titles. Moreover, the one publisher not licensing e-books to Connecticut libraries has launched a pilot program in New York so it is moving in a direction of providing greater library access. This trend of greater e-book availability was recently acknowledged in a November 2013 post to the American Libraries online magazine, where the author observed that "[b]etween September 2012 and this report, we've gone from 30% to 80% availability of ebook titles to libraries."[18]

2. Economic E-book Availability

The increased availability of e-books at public libraries in a literal sense indicates that the market is moving in a positive direction. This does not, however, fully resolve the availability concerns of public libraries. Rather, as more e-books become available to libraries, the area of concern is shifting from literal availability to economic availability. As the American Libraries online magazine noted, after observing the increase in available titles: "two areas remain dismal: price and ownership."[19]

Public libraries, like virtually all other entities, must work within a limited budget. As a result, e-books are only realistically available to libraries if the price and other terms are such that it is economically sensible to purchase e-books in light of the opportunity costs to the library. The two most significant factors in analyzing the cost of an e-book are the price and ownership rights. Other important

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[13] Unless otherwise noted, information on the status of each publisher's relationship with libraries can be found at American Library Association, *Frequently Asked Questions, supra* note 10; *and* Urban Libraries Council, *Briefing Paper: Libraries, Publishers and Public Access to E-Books,* (last visited Jan. 23, 2014), http://www.urbanlibraries.org/filebin/pdfs/eBook_Briefing_Paper_4pps.pdf.

[14] In May 2013, Hachette announced that all of its e-book titles would be available to libraries at the same time as their release as print editions. Prior to that time, only a selection of titles published before April 2010 were available. Matt Enis, *Hachette to Sell Frontlist Ebook Titles to Libraries*, The Digital Shift (May 1, 2013), http://www.thedigitalshift.com/2013/05/ebooks/hachette-to-sell-frontlist-ebook-titles-to-libraries/.

[15] Prior to 2012, Penguin made e-books available to libraries through Overdrive. Penguin discontinued that relationship in February 2012. Later in 2012, Penguin dipped its toes back into the library e-book market with a pilot program in New York City. *See* Larra Clark, *Penguin Revisits Library Pilot Terms,* American Libraries Magazine (Mar. 27, 2013), http://americanlibrariesmagazine.org/e-content/penguin-revisits-library-pilot-terms.

[16] Penguin initially had a 6 month embargo on new titles, but removed that restriction in April 2013. *See Id.*

[17] In 2013, Simon & Shuster launched a pilot program with a select group of New York public libraries whereby it is making its e-books available to the libraries chosen for the pilot.

[18] James LaRue, *DCL Ebook Report for November 2013*, American Libraries Magazine (Nov. 6, 2013), http://ht.ly/qCQmW.

[19] *Id.*

factors for libraries relate to the functional convenience of e-book borrowing and the resources required to support such borrowing. These other factors include the availability of meta-data and the simplicity (or lack of simplicity) in downloading an e-book.

In terms of price, with physical books, the calculation is relatively simple. The library pays a set price for the book, which is heavily influenced by retail prices[20], at which point the library owns the book and can lend it out until the book deteriorates or patrons lose interest. If a book becomes too worn, it typically will not be repurchased since patrons primarily demand newly released books. [21] To the extent the book is in reasonably good shape when demand diminishes, the library can resell the book, thereby recouping a fraction of its cost. In fact, used book sales are a valuable revenue stream for many public libraries. In Connecticut, for example, libraries earn several hundred thousand dollars annually from used book sales.[22]

With e-books, the analysis is more complicated. First, because the first sale doctrine has not been applied to e-content, publishers can set different prices for consumers and libraries. As a result, it may cost a library several times more to acquire an e-book than for a consumer to purchase the same book. This is particularly true for the top-selling books. The below chart, which is made available online by the Douglas County Library, illustrates the disparate pricing to libraries and consumers for the most popular books.[23]

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[20] In many instances, the price is below retail levels as libraries often obtain bulk discounts.
[21] *See* James LaRue, *The Last One Standing,* Public Libraries Online (April 25, 2013), http://publiclibrariesonline.org/2013/04/the-last-one-standing/ (Observing that "most library materials aren't discarded because of condition; they're discarded because they are no longer in demand").
[22] Eric Hansen, *Friends of CT Libraries Book Sales Figures*, December 21, 2013, Email.
[23] For a copy of the chart, *see* James LaRue, *DCL Ebook Report for January 2014*, American Libraries Magazine (Jan. 8, 2014), http://www.americanlibrariesmagazine.org/blog/dcl-ebook-report-january-2014.

Douglas County Libraries Report
Pricing Comparison as of January 3, 2014

	BOOKS				EBOOKS				
	Library Pricing		Consumer Pricing		Library Pricing		Consumer Pricing		
	Baker & Taylor (1)	Ingram (2)	Amazon	Barnes & Noble	Overdrive	3M	Bilbary	Amazon	Barnes & Noble
Fiction (NYTimes)									
1 Sycamore Row	$16.04	$15.92	$14.87	$16.08	$85.00	$85.00	$12.99	$6.49	$6.49
2 Doctor Sleep	$16.62	$16.50	$15.00	$16.99	$19.99	*	$14.99	$7.99	$7.99
3 Command Authority	$16.59	$16.47	$16.90	$17.23	$18.99	$18.99	*	$6.06	$6.49
4 The Goldfinch	$16.62	$16.50	$15.41	$16.66	$90.00	$90.00	$14.99	$7.50	$14.99
5 Inferno	$16.59	$16.47	$15.38	$16.82	$85.00	$85.00	$14.99	$6.49	$6.49
6 Cross My Heart	$16.07	$15.95	$14.50	$16.11	$87.00	$87.00	$13.99	$7.50	$14.99
7 Takedown Twenty	$15.51	$15.40	$14.00	$16.27	$84.00	$84.00	$13.99	$6.49	$6.49
8 Gods of Guilt	$15.51	$15.40	$16.13	$16.45	$84.00	$84.00	*	$11.39	$11.99
9 First Phone Call from Heaven	$13.84	$13.74	$12.83	$14.03	$19.99	$19.99	$16.99	$8.49	$8.49
10 The Longest Ride	$14.96	$14.85	$13.87	$15.16	$81.00	$81.00	$12.99	$6.49	$12.99
11 King and Maxwell	$15.51	$15.40	$15.55	$15.86	$84.00	$84.00	$14.99	$8.99	$13.49
12 Innocence	$15.51	$15.40	$15.99	$16.31	$84.00	$84.00	*	$6.49	$6.49
13 The Husband's Secret	$14.38	$14.27	$13.33	$14.59	$16.99	$16.99	$12.99	$5.99	$11.99
14 Fifty Shades of Grey	$9.57	$9.41	$9.57	$10.04	$47.85	$47.85	$10.17	$4.99	$7.99
15 Dark Witch	$10.20	$10.03	$8.73	$9.23	$12.99	$12.99	$9.99	$4.99	$4.99
Non-Fiction (NYTimes)									
1 Things that Matter	$15.51	$15.40	$16.80	$16.96	$84.00	$84.00	$12.99	$10.91	$10.91
2 Killing Jesus	$15.51	$15.40	$14.00	$15.73	*	*	$12.99	$6.49	$10.99
3 Lone Survivor	$15.51	$13.79	$22.08	$22.30	$38.00	$38.00	$8.99	$3.99	$7.99
4 David and Goliath	$16.07	$15.95	$15.95	$15.95	$87.00	$87.00	$14.99	$7.50	$14.99
5 George Washington's Secret Six	$15.48	$15.37	$14.35	$16.63	$16.99	$16.99	$12.99	$10.91	$10.91
Children's Middle Grade (NYTimes)									
1 Wonder	$8.86	$8.79	$8.21	$8.88	$15.99	$15.99	$9.99	$7.59	$7.99
2 Rush Revere and the Brave Pilgrims	$11.07	$10.99	$11.44	$11.55	$14.99	*	$10.99	$5.99	$11.99
3 Frozen	$2.99	$2.94	$4.99	$4.99	*	*	*	$3.80	$3.99
4 I Even Funnier	$11.50	$7.69	$7.78	$7.85	$42.00	$42.00	*	$7.39	$7.39
5 Flora and Ulysses	$14.21	$9.89	$10.12	$10.32	$17.99	$18.89	$12.32	$9.17	$10.45
Young Adult (NYTimes)									
1 The Book Thief	$11.07	$9.36	$7.21	$7.35	$12.99	$12.99	$10.17	$4.99	$4.99
2 The Fault in our Stars	$9.97	$9.89	$8.99	$9.99	$16.99	$16.99	$10.99	$3.99	$5.49
3 Looking for Alaska	$10.52	$8.95	$5.99	$9.99	$12.99	$12.99	$9.99	$3.99	$7.99
4 Paper Towns	$10.52	$9.89	$5.99	$9.99	$12.99	$12.99	$9.99	$5.69	$5.69
5 The Perks of Being a Wallflower	$8.40	$8.26	$7.86	$8.01	$13.99	*	$10.20	$6.99	$8.49

source: 1/12/14 issue NYTimes (combined print & ebook: fiction & non-fiction)

* Not available for sale   Douglas County Libraries is the public library of Douglas County, Colorado, headquartered in Castle Rock, CO.

In addition to higher prices, the fact that libraries do not own physical copies of the e-books they acquire means that there are other disruptions to how libraries ordinarily buy and lend books. Most significantly, libraries do not typically receive e-books directly from the publisher. Rather, an electronic distributor hosts the electronic content and serves as an intermediary in the relationship between the publisher and library. A serious concern for publishers, which necessitates the use of a distributor, is protecting e-books from piracy. This is not a unique concern – the music and movie industries have similarly grappled with how to make e-content available without enabling pirated copies that cannibalize legitimate sales. Distributors serve the important role of providing a platform from which library patrons can borrow a book in a manner that publishers have confidence is sufficiently secure so as not to create an undue risk of piracy.

This service, however, is not costless. Thus, in addition to the per-book price that a library must pay for each e-book, libraries must also pay a fee to the distributor. In Connecticut, for example, libraries pay tens of thousands of dollars each year for distributor services.[24] Moreover, distributor fees are not static; some libraries have seen significant price increases over the course of a few years.[25] Also, because the library does not own the e-books, if a library switches distributors, the e-books it purchased from the first distributor will not necessarily be available with the new distributor.[26] Due to the cost of acquiring e-books and maintaining a relationship with one or more distributors, an increasing percent of

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[24] Eric Hansen, *Libraries' eBook Platform Fees*, December 21, 2013, Email.
[25] *See* LaRue, *supra* note 21.
[26] *Id.*

library budgets will need to be dedicated to e-content. These higher costs will be exacerbated by the fact that e-books cannot be resold, which means that as libraries and patrons increase their use of e-books, the revenue stream to libraries from used book sales will be at risk.

A second significant implication of libraries not owning the e-books they acquire is that the rights to the book may have a temporal limitation, after which the library must decide whether to repurchase the rights to the book. In fact, among the top publishers that make their e-books available to public libraries in Connecticut, only two grant the library enduring rights to the books and those publishers generally have higher prices.[27] In addition to the higher costs and temporal limitations of e-books, the lack of ownership also impacts the ability of libraries to engage in interlibrary loans. Interlibrary loans are arrangements whereby libraries loan books to one another for the benefit of their respective patrons. With physical books, engaging in interlibrary loans is straight-forward as the only hurdle is the logistics of physically transporting and tracking a book from one library to another. With e-books, the situation is more complicated because each e-book only exists on the platform of the distributor. The ability to engage in interlibrary loans, therefore, is typically limited to situations where the two libraries have an arrangement with a common distributor and the agreement with the distributor and publisher permit such loans. Thus, an unrestricted ability to engage in interlibrary loans is another important value for libraries that is complicated by the nature of e-book transactions.

Other features of e-book transactions that require adjustments to how libraries loan books relate to the ease with which patrons can discover and access an e-book. One significant factor in this regard is metadata, which is data that "provides information about other data."[28] Examples of e-book metadata include the book's title, author, a brief plot summary or the cover image. The availability of metadata allows a library to integrate an e-book into its catalog in a way that enables patrons to discover the book. Obtaining sufficient metadata is not currently an area of concern for libraries, but it is an important feature of such transactions that should not be overlooked. Another feature of e-book transactions that is worth noting is that an e-book can technically be downloaded and read by an unlimited number of readers simultaneously. Such a situation could, in theory, allow a library to purchase only one copy of a popular book and make that copy available to all patrons immediately and without a wait, thereby obviating the need for those who are anxious to read the book to purchase it. For this reason, it is not surprising that virtually all e-book arrangements, particularly for mainstream content, allow only one user per license to borrow the book at a time. [29] This restriction parallels the limitation of physical books and does not appear to be a source of serious controversy.

As a counterbalance to the higher costs and other adjustments required of libraries that offer e-books, the electronic format does provide certain advantages. E-books, for example, do not get lost, misplaced, torn or otherwise worn out. Also, the library requires fewer resources to loan e-books as the check-out, return and re-shelving process are automated and can be done remotely. On the other hand, a certain amount of library resources are required to assist users in locating and downloading e-books. According to the Connecticut e-Book Survey, about half of libraries receive daily or weekly requests for help downloading e-books and another 18% receive such requests on a monthly basis.[30]

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[27] Information regarding the e-book licensing policies of the top publishers can be found at *Big Six Publishers and Library Lending,* American Libraries Magazine *(last updated Oct. 17, 2013),* http://www.americanlibrariesmagazine.org/sites/americanlibrariesmagazine.org/files/content/Big%20Six%20Ebook%20Terms%20revised%20101713.pdf;

[28] *Merriam Webster Online Dictionary,* 2014, http://www.merriam-webster.com/dictionary/metadata (accessed January 27, 2014)

[29] Some academic books, or similar resources, are sold on a subscription basis such that multiple, simultaneous users are permitted.

[30] *Connecticut eBook Survey*, *supra* note 8, at Q35.

II. Problem with Current Practices

The problem with current practices is that the unavailability of the first sale doctrine to e-content has led to a shift in the balance of power between publishers and libraries. As a result, publishers can, and have established library e-book prices that are often higher than consumer prices and terms of use that are more restrictive than exist for physical books. At the same time, library budgets have remained static (or decreased relative to inflation) and there is no expectation of significant increases in the near future.[31] The differences in price and ownership rights between physical books and e-books, therefore, represent real opportunity costs for libraries, which must choose between purchasing one e-book, which it may have to repurchase after a year or two, and purchasing several physical books, which the library not only owns indefinitely, but which can be resold when patron demand slows.

With the increasing adoption of e-books, and other digital content, the pressure on libraries to acquire an attractive e-book collection will grow. As a result, without change, libraries will soon be confronted with the Hobson's choice of either maintaining an e-book collection that satisfies patron needs and expectations or continuing with the many other important programs and services people have come to expect from their library. Either way, citizens will lose out. Moreover, the most vulnerable citizens will suffer the most.

To fully appreciate why library exclusion from meaningful participation in the e-book market is problematic, it is necessary to understand the important role of libraries to their communities and how that role is becoming more vital as digital content rapidly seeps into virtually every aspect of daily life.

A. Libraries Promote Important Public Values

Libraries reflect the value society places on having a place within the community where people of all ages and incomes can visit, for free, for their information needs and for educational, cultural and social programming. The value of libraries is evident from the fact that libraries, in one form or another, have been around almost as long as civilization itself. Evidence of libraries dates back to the third millennium B.C. with hundreds of thousands of clay tablets having been found in what was once Mesopotamia.[32] In Connecticut, Scoville Memorial Library in Salisbury, Connecticut prides itself on being "America's first publicly funded library."[33] The library began in 1771, seventeen years before Connecticut became a State, with an offer by Richard Smith to import 200 books from London if enough citizens would subsidize the purchase.[34] Given the importance of libraries, it is not surprising that other States and towns also pride themselves on having the nation's first public library.[35]

Libraries have withstood the test of time because they are constantly evolving to meet the needs of their time and of the communities they serve. Today's libraries offer much more than a collection of books (or clay tablets). A library is a place you can go to hear interesting speakers, learn new skills, discover new authors and obtain help conducting research or finding a job. Libraries also offer countless programs for people of all ages: from reading groups for toddlers and young children, to book and chess

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[31] Meredith Schwartz, *The Budget Balancing Act: LJ's Budget Survey Shows Modest Improvement, and Signs of More to Come*, Library Journal (Jan. 9, 2013), http://lj.libraryjournal.com/2013/01/funding/the-budget-balancing-act-library-budgets-show-modest-improvement-and-signs-of-more-to-come/ (noting that "[s]ince 2008, library budgets have remained essentially flat: minor seesawing from year to year has added up to a 0.7 percent increase. Inflation in the same period has increased 6.9 percent, meaning that in comparable dollars libraries have 6.2 percent less spending power.").

[32] Sean O'Connor, *Libraries in the Ancient World: Mesopotamia and Persia,* Examiner.com (October 14, 2010), http://www.examiner.com/article/libraries-the-ancient-world-mesopotamia-and-persia.

[33] Scoville Memorial Library, *Home Page*, http://www.scovillelibrary.org (accessed January 27, 2014).

[34] Scoville Memorial Library, About Us: *History,* http://www.scovillelibrary.org/aboutus.htm#history (accessed January 27, 2014).

[35] *See e.g.* Town of Franklin Massachusetts Official Website, *History of the Franklin Public Library*, http://www.town.franklin.ma.us/Pages/FranklinMA_Library/libraryhistory (accessed January 27, 2014) (Claiming that the first public library was formed in 1790 in Franklin Massachusetts with a collection of books donated by Dr. Benjamin Franklin).

clubs for older kids, to computer training courses and tax assistance programs for adults and seniors. At the Hartford Public Library, for example, the services for adults include: assistive technology, health access, ex-offender services, literacy services, passport services, tax preparation help, voter and election information, small business services, museum passes, community programs, classes and workshops and computer classes.[36] The library also offers services for kids, teens and parents, not to mention services related to immigration and citizenship, jobs and careers and nonprofits.

Aside from the many programs and services library's offer, the library's core function of providing public access to books and periodicals cannot be understated. It is through libraries that our society realizes the democratic ideal of having a place where "Americans can access the information they need – regardless of age, education, ethnicity, language, income, physical limitations or geographic barriers."[37] By serving as an outlet for free content, libraries increase the ability of all people to access books, thereby promoting literacy, creativity, and learning. It is well-recognized that increased reading proficiency is positively correlated with many important societal values such as increased job opportunities and increased civil engagement.[38]

Even for those who can, and do, purchase books, the opportunity to borrow books necessarily makes reading more affordable. For some people, the availability of library books may mean reading four books a month instead of two. For others, it may mean discovering a new author or trying a book in a genre outside their comfort zone without price being a deterrent. Whatever the reason, as a matter of economics, when the cost of reading decreases, the amount of reading that occurs can be expected to increase. This is likely to be most true for those who can least afford to purchase books and for whom life may already be presenting obstacles that could, in part, be overcome through better education and learning opportunities.

It is not only pleasure reading or general knowledge opportunities that increase from library borrowing; libraries also enable in-depth research and educational pursuits that may otherwise be unaffordable. Significant educational or research projects could depend on access to hundreds or even thousands of books, which would make most such projects too costly to pursue if every source had to be purchased rather than borrowed. Moreover, most research books do not have a significant market outside of libraries, which means fewer such books would exist without the expectation of library sales. The availability of popular books and programming at libraries enables libraries to continue to succeed and maintain public support, which is necessary so that they can also purchase the myriad of obscure, less mainstream books that enable individualized interests to be pursued.

B. Libraries Remain Essential in the Digital Age

As information becomes digitized and moves online, the role of the library is becoming more important, not less important. In a national poll, almost as many people identified free access to computers and the internet as a "very important" service of libraries as book borrowing (77% and 80% respectively).[39] And, almost half of all library users used a library computer or wireless network to connect to the internet.[40] These library resources were used for a wide-range of activities – everything

[36] Hartford Public Library website, http://www.hplct.org/library-services/adults (accessed January 27, 2014).

[37] American Library Association, http://www.ala.org/advocacy/access (accessed January 27, 2014).

[38] National Endowment for the Arts, *To Read or Not to Read: A Question of National Consequence,* Research Report #47 (November 2007), 16 - 20, http://arts.gov/sites/default/files/ToRead.pdf.

[39] Kathryn Zickuhr, Lee Rainie and Kristen Purcell, *Library Services in the Digital Age,* Pew Internet (January 22, 2013), http://libraries.pewinternet.org/2013/01/22/library-services/.

[40] Samantha Becker, Michael D. Crandall, Karen E. Fisher, Bo Kinney, Carol Landry and Anita Rocha, *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries,* Institute of Museum and Library Services (2010), at 1, http://impact.ischool.washington.edu/documents/OPP4ALL_FinalReport.pdf.

from finding work, applying to college, and obtaining government benefits to more routine activities such as connecting with friends, reading the newspaper or planning a family outing.[41] Libraries can also be a place of last resort for people impacted by natural disasters who need to search for housing or FEMA aid.[42]

Importantly, libraries also play a prominent role in bridging the digital divide. A library is a place you can go to use a computer if you cannot afford one, are unfamiliar with the technology or need a faster connection. As a recent study observed, "[b]ut for libraries, millions of Americans would not have reliable Internet access in a digital age when a connection is often needed to complete school assignments, apply for jobs, or secure government services."[43] Among those living below the poverty line, 44% used a public library's computer and internet connection and, of those, 61% between the ages of 14 and 24 used these resources for educational reasons, and 54% of economically disadvantaged seniors used the library computers for health or wellness needs.[44] Even for those who can afford high-speed internet access at home, libraries play an important role of providing training and support for those in need of assistance. The level of assistance needed in this regard is not inconsequential; two-thirds of library computer users sought help from library staff when going online or using the computer.[45]

As the modern era moves towards increased offerings of online services and e-content, the effects of the digital divide will grow. Already, many organizations promote deals and services that can only be found online.[46] Even within government, there is an increasing recognition that the most efficient and cost-effective way to convey information and provide services is over the internet. The Connecticut Department of Consumer Protection, for example, encourages its licensees to renew their licenses online and encourages consumers to verify a license, permit or registration before hiring a contractor. All of this can be done twenty-four hours a day, seven days a week through the Agency's website. Likewise, many other government agencies in Connecticut, and throughout the country, provide important information and services through their websites. Libraries enable organizations to expand the reach of these online opportunities by providing a means for those who lack a computer, or who are uncomfortable with the technology, to participate. The value of libraries for obtaining government services is already extensive and can be expected to grow.

According to a comprehensive study of library users nationwide:

> More than 26 million people used public library computers to get government or legal information or to access government services. Of these, 58 percent downloaded a government forms, such as Social Security paperwork, tax forms, and Medicare enrollment documents. Nearly half of these people wound up submitting a government form using a library computer. When it came to government services, the vast majority who sought help from government officials over a library's Internet connection (84 percent) reported they received the help they were seeking.[47]

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[41] *Id.* at 3.

[42] *Id.* at 3-4.

[43] *Id.* at 2.

[44] *Id.*

[45] *Id.* at 4-5.

[46] *See* Susan Crawford, *The New Digital Divide,* The New York Times Sunday Review (Dec. 3, 2011), http://www.nytimes.com/2011/12/04/opinion/sunday/internet-access-and-the-new-divide.html?pagewanted=all&_r=0 ("As our jobs, entertainment, politics and even health care move online, millions are at risk of being left behind.").

[47] Becker et al., *supra* note 40, at 4.

C.   Access to E-Books is Essential to Maintaining the Library's Vital Role in the Community

Today, more than internet access and computer training are needed for libraries to meet modern digital demands. E-books are becoming the preferred format for many readers, particularly for readers who want portability and speedy access to content. [48] Moreover, readers of e-books are generally more avid readers than the general population and the availability of e-content increases the time they devote to reading.[49] As a result, it is likely that digital content will eventually become the primary format for books and other information.

The surge in e-book popularity is a relatively recent phenomena and there continues to be an upward trajectory in e-book adoption. In 2002, for example, e-books accounted for only 0.05% of trade publishing revenue.[50] By 2012, e-books accounted for almost one-fourth of trade publishing revenue, with the largest increases occurring in 2009 - 2011.[51] In July 2010, Amazon announced that, for the first time, its quarterly sales of e-books exceeded its sale of hardback books and, by April 2011, e-book sales surpassed hardcover and paperback sales.[52] Reader surveys tell a similar story; between December 2011 and November 2012, the percent of people who read an e-book the previous year jumped from 16% to 23% while the number who read a printed book fell from 72% to 67%.[53] Likewise, the number of Americans who own a tablet or e-book reader increased from 6% in May 2010 to 33% in November 2012.[54] The growth in e-readership cuts across demographics in terms of age, race/ethnicity, income and education level.[55]

Not surprisingly, as the popularity of e-books has grown, so has the expectation that this format will be available at the local library. In 2011, OverDrive, the leading distributor of e-books to libraries, reported that it experienced 1.6 billion book and title catalog page views in 2011, which was up 130% from 2010.[56] In fact, "pretty much every metric measuring ebook demand at public libraries showed at least a 100 percent increase from 2010."[57] A survey of public libraries showed the same trend. According to a 2012 survey from the Library Journal, more than 79 percent of public library respondents reported experiencing a "dramatic increase in demand for e-books."[58]

The importance of having e-books at libraries is not simply a matter of convenience or consumer preference.   Excluding libraries from popular e-content will further the digital divide as those unable to afford to buy books will be excluded from a wide-range of e-content and of a delivery platform that is increasingly popular. As Barbara Stripling, the American Library Association ("ALA") President, explained, when asked why it was important for libraries to have access to e-book versions of best

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[48] Lee Rainie, Kathryn Zickuhr, Kristen Purcell, Mary Madden and Joanna Brenner, *The Rise of E-Reading*, Pew Internet (April 4, 2012), http://libraries.pewinternet.org/2012/04/04/the-rise-of-e-reading/.

[49] *Id.*

[50] Jeremy Greenfield, *Ebook Growth Slows in 2012 to "Only" 41%; What Does it Mean for the Publishing Industry?,* Forbes (April 11, 2013), http://www.forbes.com/sites/jeremygreenfield/2013/04/11/ebook-growth-slows-in-2012-to-only-41-what-does-it-mean-for-the-publishing-industry/.

[51] *Id.*

[52] Claire Cain Miller and Julie Bosman, *E-Books Outsell Print Books at Amazon*, New York Times (May 19, 2011), http://www.nytimes.com/2011/05/20/technology/20amazon.html?_r=0.

[53] Lee Rainie and Maeve Duggan, *E-book Reading Jumps; Print Books Reading Declines,* Pew Internet (December 27, 2012), http://libraries.pewinternet.org/2012/12/27/e-book-reading-jumps-print-book-reading-declines.

[54] *Id.* (the earlier survey was of readers 18 and older whereas the 2012 survey was of adults 16 and older).

[55] *Id.*

[56] OverDrive, *Ebook Discovery and Sampling Skyrocketing at Public Libraries,* News Release (Jan. 19, 2012), http://www.overdrive.com/News/eBook-Discovery-and-Sampling-Skyrocketing-at-Public-Libraries/.

[57] PublicLibraries.com, *Public Libraries Experience Massive Growth in Ebook Checkouts* (Jan. 19, 2012), http://www.publiclibraries.com/blog/public-libraries-experience-massive-growth-in-ebook-checkouts/.

[58] OCLC, *The Big Shift: Public Library Strategies for Access to Information in Any Format* (2013), at 1, http://www.oclc.org/content/dam/campaign-landing-pages/en/214936_the-big-shift.pdf.

sellers, "[w]hen some people can read these best-sellers and others can't, it marginalizes those people. These books are a literary touchstone and everyone deserves to have a chance to be a part of that."[59]

It will not just be pleasure reading that is impacted. Schools are beginning to migrate towards the use of laptops and e-readers. In Connecticut, a few towns have already begun switching from traditional textbooks to tablets, such as iPads, for their students.[60] The results for schools that have made this switch have been positive in terms of increasing student engagement, enabling more individualized instructions and raising student test scores.[61] Moreover, providing tablets to all students helps to "level the playing field" for students who do not have a computer or internet access at home.[62] It can be expected, therefore, that, over time, more schools will adopt these technologies and become more reliant on digital content and lesson plans. As a result, it will be increasingly important that all students, and their parents, have a place they can go to learn how to use e-readers and to obtain e-content. Already, many parents, particularly those in households earning less than $50,000, say they are "very likely" to take advantage of classes at their library on how to use or download content to e-readers.[63] As tablets and e-readers become more common in classrooms across the State, that number can be expected to grow. Access to e-books, therefore, is necessary to sustain the long-standing role of the library as a place that promotes reading and educational opportunities for all people and libraries should be supported in their efforts to purchase such books.

VI.   Recommendations

A straight-forward mechanism for increasing "the availability of electronic books to users of public libraries" would be the passage of a law mandating the terms and conditions that publishers must abide by when dealing with libraries. The Department, however, does not recommend pursuing this path at this time. Such mandates would be difficult to accomplish due to the potential for federal preemption under the copyright laws.[64] In addition, the Department is not confident that it could recommend appropriate terms and conditions at this point because the market is still developing. Moreover, market interference of this sort by the government should generally be a measure of last resort, not first resort.

Rather than recommending the passage of a law mandating terms of dealing, therefore, our recommendations are aimed at closely observing the market to determine whether and when government intervention may be the best solution and, in the interim, arming libraries with tools and resources that would enhance their opportunities for obtaining e-books. Specifically, DCP recommends that the legislature consider:

- Investing in a State run e-book distribution platform so as to provide the State's libraries with greater flexibility in acquiring and managing their e-content and increased negotiating power when dealing with publishers or other owners of e-content;
- Exploring mechanisms to increase the availability of funds to State libraries to address the added expenses of maintaining an adequate e-book collection; or

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[59] Jeremy Greenfield, *What's New With Libraries and Ebooks? In Conversation with The American Library Association*, Forbes (Oct. 3, 2013), http://www.forbes.com/sites/jeremygreenfield/2013/10/03/whats-new-with-libraries-and-ebooks-in-conversation-with-the-american-library-association/.

[60] Peter Marteka, *High Hopes for iPads in Classrooms,* The Hartford Courant (Sept. 25, 2012), http://articles.courant.com/2012-09-25/community/hc-ipads-in-classroom-0920-20120924_1_ipads-students-and-teachers-social-sciences.

[61] *Id.*

[62] Danielle Paquette, *Kindle E-Readers Have Had Big Impact at Clearwater High,* Tampa Bay Times (Jan. 5, 2013), http://www.tampabay.com/news/education/k12/kindle-e-readers-have-had-big-impact-at-clearwater-high/1269193.

[63] Carolyn Miller, Kathryn Zickuhr, Lee Rainie and Kristen Purcell, *Parents, Children, Libraries, and Reading*, Pew Internet (May 1, 2013), http://libraries.pewinternet.org/2013/05/01/parents-children-libraries-and-reading/.

[64] *See Orson, Inc. v. Miramax Film Corp.,* 189 F.3d 377 (3d Cir. 1999) (state law placing restrictions on exclusive first-run movie licensing preempted by copyright law).

- Taking a "wait-and-see" approach as current trends suggest that increased e-book availability may occur without governmental intervention.

A. Investing in a State-Wide E-book Distribution Platform

The most forward-thinking and sustainable option the legislature could pursue to increase e-book availability at public libraries is to make a significant State-wide investment in the creation of an e-book distribution platform that could be shared by libraries in the State. There are several library systems throughout the country that are already experimenting with library-owned and managed distribution platforms – most prominently is the Douglas County library system in Denver, Colorado.[65] If Connecticut were to pursue this course, therefore, it would not be in unchartered territory; rather it would have the opportunity to learn and build-upon the experiences of others.

Creating a State library-owned platform has several advantages. First, by creating an in-house system, the libraries could design a platform that would best meet their needs by, for example, creating a single user interface for all patrons and simplifying the process for engaging in interlibrary loans. Furthermore, if the State's libraries shared a distribution platform, they could potentially consolidate their purchasing power and thereby strengthen their position when negotiating with publishers. Even if this did not result in better prices immediately, by prioritizing their e-book spending, the State's libraries could exert pressure on publishers to reevaluate how they deal with libraries; this could be particularly effective if Connecticut spending priorities were in line with spending priorities of library or government-run distribution systems elsewhere. In its purchasing, for example, Douglas County library gives preference to publishers that will sell directly to the library and, where a third-party distributor must be used, they give preference to distributors that allow the library to own the content.[66]

Long-term, a library-controlled e-book platform could create countless other opportunities for the State's libraries to expand their offerings and more fully embrace the possibilities presented by e-content. Our libraries, for example, could become more active in identifying and promoting the books of small publishers, particularly those that feature local authors. In this regard, it is worth noting that almost 90% of new content is being offered by entities other than the top publishers.[67] Thus, although content by the top publishers is necessary to meet current patron demand, that may not always be the case. This has been the experience of the Douglas County Library system where the need to add content to the library-run distribution system prompted the libraries to expand beyond their "myopic focus" on the top publishers and begin meeting with small, independent publishers.[68] As a result of those efforts, the library system is able to offer tens of thousands of e-books that are offered by small publishing companies.[69]

Another potential opportunity for the State's libraries, if they owned their own distribution platform, would be to expand their services to support local authors, academics or others who are not associated with a large publishing house, by not only purchasing their books, but by creating a publishing platform. Again, Douglas County has been at the forefront in thinking through these possibilities and has already

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[65] Claire Martin, *'Douglas County Model' Gives Libraries New E-Book Leverage,* The Denver Post (Nov. 21, 2013), http://www.denverpost.com/news/ci_24567880/douglas-county-model-gives-libraries-new-e-book (Other library systems exploring this approach include libraries in California, Kansas, Washington state and Alaska).

[66] *See* LaRue, *supra* note 21.

[67] *Id.*

[68] *Id.*

[69] Hector Tobar, *Public Libraries and 'Big Six' Publishers Fight Over E-books,* Los Angeles Times (Aug. 6, 2013), http://articles.latimes.com/2013/aug/06/entertainment/la-et-jc-public-libraries-and-big-six-publishers-fight-over-ebooks-20130805 (indicating that the Douglas County system offers about 40,000 titles using "self-published books and books from 900 small publishing companies.").

"been talking to some local historians and film producers to investigate what other content [they] might gather and disseminate."[70] The industry is still in its infancy so the range of possibilities is still being explored and there will inevitably be an evolution in the technology and interests of patrons that will drive the future products and services that are offered. By creating a State-owned distribution platform, however, Connecticut can assure itself that it has the flexibility and control to offer a robust e-content collection that is best-suited for Connecticut patrons.

To be sure, there are challenges that need further thought before moving forward with this endeavor. It would likely cost several hundred thousand dollars to create and maintain a system comparable to the Douglas County System. This would include costs for IT, legal, labor and content.[71] Once built, however, operating costs could be borne by participating libraries who are already paying tens of thousands of dollars a year to current platform operators. Because the State will run its own platform, these access fees are likely to be below current levels, thereby freeing up some local library resources for other library priorities. Significantly, Connecticut may be able to further reduce some of its costs, relative to the initial firms exploring this path, by building upon the experience and resources of those organizations. The Marmot Library Network, which provides service to 22 libraries in Colorado, for example, makes its programing code available to others.[72]

Another challenge the libraries would have to confront with a shared system is reaching agreement among themselves on the features of the system and the amount that each library would have to contribute to the ongoing costs of maintaining the system and acquiring content. In addition, there is some uncertainty as to whether libraries would be able to reach an agreement with the top publishers that would permit the publisher's books to be distributed through the State system. This has been the experience of other library run systems. In this event, the State's libraries would have to either forego offering electronic books from the top publishers or would have to continue using (and paying for) third-party distributors. Moreover, even if the top publishers agree to permit their books to be hosted on Connecticut's platform, there is no guarantee that Connecticut would achieve significantly better prices than what other libraries across the country are obtaining through third party distributors.

Despite these challenges, a State-owned e-book distribution platform can reduce e-book costs, empower libraries to have more control of content and enhance library bargaining ability. In addition, it would put Connecticut at the forefront of a movement that may revolutionize the way libraries deliver content to their patrons. Of course, because of these challenges, moving forward with a State-owned distribution platform would require commitment to a serious planning process. An important first step would be to designate the responsible agency to design a system that will be successful and to provide adequate resources to undertake that process. Arizona recently embarked on this path and has made its consultant report, which provides an overview of the critical elements to a library-owned distribution plan, available online at http://www.azlibrary.gov/extension/documents/pdf/DAZLebookReportFinalpublic.pdf.

B.   Increase Library Funding

A second option for increasing the availability of e-books at public libraries is to simply increase funding to libraries so that they can afford to purchase more e-books. Libraries are much more than a static repository of shared books. They are constantly evolving institutions that serve essential public needs. In fact, although Americans disagree on many things, there is overwhelming agreement on the

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[70] *See* LaRue, *supra* note 21.

[71] *DAZL Report: Arizona State Libraries,* Carson Block Consulting (2012), 32-34,
http://www.azlibrary.gov/extension/documents/pdf/DAZLebookReportFinalpublic.pdf.

[72] *Id.* at 17-18.

value to a community of having a vibrant library. In a recent nationwide poll of people over sixteen, 95% agreed that "the materials and resources available at public libraries play an important role in giving everyone a chance to succeed" and that "libraries are important because they promote literacy and a love of reading."[73] Today, one of the most significant public needs served by libraries is the need to dampen the impact of the digital divide. While the gap between the wealthiest and poorest citizens has always existed, the reality is that it is increasing every year.[74] Moreover, higher paying job opportunities often require familiarity with computers and the internet. In fact, many job applications themselves must be submitted online. Those living in households that cannot afford a computer (or tablet), let alone high-speed internet access, are at an increasing disadvantage in school and in the job market. This disadvantage will only grow with our society's growing dependence on computers and e-content. Acquiring e-content, therefore, is the next stage in the evolution of libraries as a place that provides up-to-date content and training for all people.

The advantages to increasing library funding ear-marked for e-book access are straight-forward. Libraries serve an important public function so providing more funding to libraries will increase their ability to serve that function in a critical and emerging area, particularly at a time when the need is growing but budgets are otherwise remaining static. The disadvantage is the obvious opportunity cost involved in providing more funds to one institution as any such funding would come from somewhere else, which would involve a shift in spending priorities.

We have considered an alternative that would create a special fund for the purchase of e-books that would be funded by an assessment on book publishers, from which they could be exempt if they made their e-books available to libraries on reasonable terms. This alternative is appealing because libraries would get either reasonable economic access from publishers or funds with which to purchase more content. As a practical matter, however, imposing an assessment specific to publishers, would invite serious legal challenges under the First Amendment.[75]

  C. <u>Wait and See Approach</u>

In addition to the other recommendations, there is a benefit to taking a "wait-and-see" approach before considering regulatory impositions. There can be little doubt that e-books are becoming an essential part of any modern library collection. Currently, however, the situation is not so imminently dire that immediate action is necessarily required. First, the overwhelming majority of Connecticut libraries – over 90% – are lending e-books to their patrons and over half have 2500 or more titles in their collection.[76] Thus, Connecticut is not facing a situation where libraries are completely foreclosed from the market. Furthermore, library budgets are not currently being overwhelmed by e-book purchases. According to the E-Task force survey, few libraries spend more than 10% of their materials budget on e-books and most are spending 5% or less.[77] Finally, while consumer demand for e-books is growing, e-books still represent a small portion of overall library circulations. For the previous year, the overwhelming majority of Connecticut libraries estimated that no more than 10% of their circulation was attributable to e-books and only 1% estimated that more than 25% of their circulation were e-books.[78] No

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[73] Kathryn Zickuhr, Lee Rainie, Kristen Purcell and Maeve Duggan, *How Americans Value Public Libraries in their Communities*, Pew Internet (Dec. 11, 2013), http://libraries.pewinternet.org/2013/12/11/libraries-in-communities/.

[74] Emily Alpert Reyes, *U.S. Wealth Gap Grew During Recession, Stanford Report Finds*, Los Angeles Times (Jan. 13, 1014), http://www.latimes.com/business/money/la-fi-mo-wealth-gap-inequality-grew-20140112,0,7259559.story#axzz2roKxLPtr

[75] *See Minneapolis Star & Tribune v. Minn. Comm'r of Revenue Servs.,* 460 U.S. 575 (1983) (fee imposed on the press or a select group of publishers is constitutionally suspect and subject to strict scrutiny under the First Amendment); *see also Ark. Writers' Project v. Ragland,* 481 U.S. 221 (1987).

[76] *Connecticut eBook Survey*, *supra* note 8, at Q7 and Q10.

[77] *Id.* at Q41.

[78] *Id.* at Q16.

library estimates that e-books account for the majority of circulations.[79] This is, in part, due to the fact that many people are not yet aware that libraries lend e-books. According to a national survey, as of November 2012, only 31% of the public was aware that e-books could be borrowed from the library.[80] Even among those who could be expected to take an interest in finding out about the availability of e-books at their library, many were unsure of the situation, including 58% of library card holders, 53% of tablet owners and 48% of owners of e-book reading devices.[81]

Nonetheless, limited e-book availability will be increasingly problematic for libraries as more consumers purchase e-readers and develop a preference for the electronic format. Already, the overwhelming majority of Connecticut libraries are predicting that e-book usage will increase this year and the rest predict usage will stay the same; no library expects e-book usage to decrease.[82] Similarly, nationwide trends indicate that e-book borrowing at libraries represents a small, but growing, segment of circulations.[83] Moreover, although an unawareness of e-book availability at libraries is dampening demand, it is not the primary contributor to limited e-book circulations. Rather, the most common factors thought to hinder e-book circulations relate to limited availability, particularly for popular titles. Specifically, in the Connecticut eBook Survey, the most frequently cited factors for low e-book circulations were: limited title availability (70%), long wait time for e-books (64%) and popular titles not available for library purchase (61%).[84] A recent nationwide survey also indicated that about half of adults believe libraries should offer a broader selection of e-books.[85] Libraries, therefore, are appropriately concerned about how limited e-book access will impact their ongoing ability to meet patron expectations, particularly as the public discovers that e-books can be borrowed from libraries.

Publishers, however, are also correct that the industry is in its infancy and business models are still evolving. Any time there is a major change in technology, or with regard to legal rights, a period of adjustment is to be expected. Here, the industry is responding to both types of change. Importantly, however, current trends suggest that e-book availability at public libraries is improving. As discussed earlier, over the past year, each of the top publishers, to the extent they were not making all of their e-book titles available to public libraries already, has moved in that direction. Furthermore, prices and terms of use continue to fluctuate as publishers experiment with different business models. Moreover, the concerns of publishers, which have made them hesitant to offer e-books to libraries on terms comparable to physical books, are not frivolous. In particular, given the relative newness of e-books, it is not unreasonable for publishers to want to assess whether e-book borrowing may cannibalize e-book sales to a greater extent than has been historically true with regard to physical books. This concern by publishers is particularly pronounced for new releases, which is why some publishers have experimented with business models that delay the sale of new releases to libraries – the thought is that the delay in being able to borrow a popular book will incentivize people to purchase the book instead. Similar arrangements exist in the movie industry whereby new releases cannot be rented until a set period of time after debuting in theatres.

Although not unreasonable, the concerns of publishers may ultimately prove to be unwarranted. In particular, there is a long-history of traditional books and library borrowing co-existing. Publishers, however, have offered several theories for why e-books at libraries may pose a greater threat than

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[79] *Id.*

[80] Rainie and Duggan, *supra* note 53.

[81] Kathryn Zickuhr, Lee Rainie, Kristen Purcell, Mary Madden and Joanna Brenner, *Libraries, Patrons, and E-books,* Pew Internet (June 22, 2012), at 5, http://libraries.pewinternet.org/files/legacy-pdf/PIP_Libraries_and_Ebook_Patrons%206.22.12.pdf.

[82] *Connecticut eBook Survey*, *supra* note 8, at Q17.

[83] Rainie and Duggan, *supra* note 53.

[84] *Connecticut eBook Survey*, *supra* note 8, at Q32.

[85] Carolyn Miller, Kathryn Zickuhr, Lee Rainie and Kristen Purcell, *Parents, Children, Libraries, and Reading*, Pew Internet (May 1, 2013), http://libraries.pewinternet.org/2013/05/01/parents-children-libraries-and-reading/.

physical books. First, with a physical book, there is "friction" in the transaction.[86] To borrow a physical book, the patron must visit the library to borrow the book and then make a second trip to return the book. Moreover, patrons incur a fee for every day they are late with the return. With an e-book, the process of borrowing the book is simply a matter of logging onto a computer and visiting the library website, which links to the e-book platform. The consumer does not have to return the book; it is automatically removed from the e-reader at the appropriate time and, thus, there are no late fees. Publishers, therefore, are understandably worried that, because logging into a library website takes no more effort than visiting an online book store – the consumer simply has to type a different address into their browser – this process will "potentially turn[] e-book buyers into e-book borrowers."[87] Furthermore, physical books become worn and, thus, a book borrowed at the library is generally degraded relative to a new book purchased at a store. An e-book, by contrast, is the exact same whether downloaded from a retail site such as Amazon or a library vendor such as Overdrive. Moreover, the wear and tear on a physical book means that heavily borrowed books will have to be replaced periodically, which is not the case with e-books.[88]

Even if publishers are correct that e-book borrowing poses a unique threat to e-book sales, that threat may be outweighed by the value of libraries in promoting reading and creating a forum for new authors to gain exposure. The reason for this is that library patrons are also significant book purchasers. And, books and authors discovered at the library are often later purchased by the borrower. According to a *Library Journal* executive editor: "Our data show that over 50 percent of all library users report purchasing books by an author they were introduced to in the library."[89] Importantly, the role of libraries in promoting book sales will not evaporate with the migration towards e-books. Rather, e-book readers generally have a preference for purchasing books rather than borrowing them. Specifically, 54% of print readers and 61% of e-book readers prefer to purchase their books.[90] Likewise, a survey of 75,000 library patrons found that people who borrow e-books from their library purchase an average of 3.2 books per month. Moreover, slightly more than half said they would consider purchasing books discovered on the library website and thirty-five percent claim to have purchased a book after borrowing it as an e-book.[91]

In addition to the traditional role of libraries in promoting reading and book sales, the move towards online services creates new opportunities for partnering between libraries and publishers. Readers of e-books, for example, are more likely than the general population to look to others for book recommendations,[92] which is a role libraries are well suited to serve. Libraries, therefore, could potentially stimulate interest in a book by offering reader advisories or by incorporating book reviews by staff or other readers into the library catalog. Libraries could more directly promote e-book sales by adding a "buy-it" link to their catalog so patrons could purchase a book discovered at the library or even access a publisher's entire catalog (including books not in the library catalog). The Douglas County Library system experimented with offering a "buy-it" link for certain titles and, in less than two weeks, they reportedly had over 650 click-throughs.[93] In a recent survey, the majority of library directors indicated that

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[86] Friction refers to attributes that prevent the transaction from being smooth or seamless. For a discussion of why publishers view e-book borrowing as having less "friction" than traditional book borrowing, s*ee* Vinjamuri, *supra* note 12.
[87] Julie Bosman, *Publisher Limits Shelf Life for Library E-Books,* The New York Times (March 14, 2011), http://www.nytimes.com/2011/03/15/business/media/15libraries.html.
[88]*Id.* Libraries, however, suggest that publishers have overstated the frequency with which physical books are actually replaced since demand for most books diminishes before there is a need for a replacement. *See* LaRue, *supra* note 21.
[89] *See* LaRue, *supra* note 21.
[90] Rainie *et al, supra* note 48.
[91] Michael Do Groote, *E-book Battles: Fighting For Public Library Access to E-books Helps Publishers*, Desert News (Jan. 6, 2013), http://www.deseretnews.com/article/865568955/E-book-battles-Fighting-for-public-library-access-to-e-books-helps-publishers.html?pg=1.
[92] Rainie *et al, supra* note 48.
[93] *See* LaRue, *supra* note 21.

their libraries "currently offer or are planning to offer a 'buy-it' option from their online public access catalogs."[94]

Finally, it is important to remember that libraries are major book purchasers. It has been estimated that libraries account for about $1.8 billion of sales a year for publishers, which amounts to about 10 percent of total sales and 40 percent of children's book sales.[95] Moreover, library purchases include not only best-sellers, but a wide range of titles, including books that are rarely, if ever, borrowed. Thus, as publishers learn more about the impact of e-book borrowing at libraries, it may turn out that any loss of sales attributable to the borrowing of popular e-books is made up for by the purchase of less well known books, particularly to the extent the library is introducing avid readers to a new author and thereby promoting sales of a book that consumers may otherwise never have tried.[96] Ultimately, if the benefits of library lending truly outweigh the risk of lost sales, publishers can be expected to accommodate the libraries in a way that serves both their interests.

An advantage to taking a "wait and see" approach is that it allows the market an opportunity to work. As a general rule, consumers are best served by a well-working market. And, there are legitimate reasons to conclude that the market may soon reach a balance that results in an appropriate level of e-book availability at public libraries. A "wait and see approach", however, does carry some risk. Later intervention could result in the market becoming cemented in a way of doing business that is contrary to the public interest. Government intervention at that later time could be more disruptive. Moreover, to the extent the market does not increase the availability of e-books to public libraries on its own, "waiting" will necessarily increase the amount of time that library patrons are deprived of e-books. The severity of any such impact will, of course, depend on how long the legislature chooses to wait.

Importantly, a wait and see approach should not be viewed as an excuse to do nothing. If, after a period of time, the market settles on an equilibrium that results in e-books being literally or economically unavailable to libraries, legislative action should be considered. At that time, the results of current publisher experimentation will be better understood and the impact of limited e-book availability on library patrons will be more pronounced. As a result, a more comprehensive assessment of the economic and public policy implications of limited e-book availability at libraries will be possible and any appropriate regulatory solution can be developed with more confidence that it will be tailored and effective.

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[94] OCLC, *supra* note 58, at 18.
[95] *See* LaRue, *supra* note 21.
[96] *See* Vinjamuri, *supra* note 12.