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Effective Reader Privacy for Electronic Books: A Proposal

Jennifer Elmore

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Effective Reader Privacy for Electronic Books: A Proposal

by
JENNIFER ELMORE*

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I. Introduction

Privacy advocates have warned that “the real danger is the gradual erosion of individual liberties through automation, integration, and interconnection of many small, separate record-keeping systems, each of which alone may seem innocuous, even benevolent, and wholly justifiable.”¹ With the recent advent of electronic readers, such as the Kindle and Nook, came a new market

* Juris Doctor Candidate 2012, University of California, Hastings College of the Law. The author would like to thank Professor Ben Depoorter for his advice and guidance.

1. *About the Privacy Rights Clearinghouse*, PRIVACY RIGHTS CLEARINGHOUSE, https://www.privacyrights.org/about_us.htm (last visited January 23, 2011).

for electronic books.² These new devices carry a much greater potential for invasion of reader privacy than previously possible because of their unique ability to track private reader information. Samuel Warren and Louis Brandeis' 1890 statement, that "numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops,'"³ accurately portrays the privacy threat of electronic readers. In the United States, the reading habits of those who read traditional paper-bound books are heavily protected,⁴ while readers of electronic books are given little to no privacy protection.⁵ For example, almost every state has library confidentiality laws and other laws protecting reader privacy;⁶ however, many electronic books permit others to track information such as which books have been purchased, how often a book is read, and more.⁷ This note explores this issue and proposes a solution to correct this gap in privacy protection.

The United States has a lengthy history of protecting reader privacy.⁸ These protections are rooted separately in the Bill of Rights, federal laws, and state laws.⁹ The Supreme Court,¹⁰ as well as state legislatures,¹¹ have advocated reader privacy and established its importance. However, readers of electronic books do not enjoy the same privacy protections as traditional book readers.¹² Electronic book retailers can—and do—keep detailed records of personal information including the purchasing and reading activities of their customers which have traditionally been off-limits.¹³

2. Nicole A. Ozer, *Digital Books: A New Chapter for Reader Privacy*, ACLU OF N. CAL. (2010), http://www.aclunc.org/issues/technology/asset_upload_file228_9996.pdf (last visited October 20, 2011).

3. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

4. *State Privacy Laws Regarding Privacy Records*, AM. LIBRARY ASS'N (2011), <http://www.ala.org/ala/aboutala/offices/oif/ifgroups/stateifchairs/stateifcinaction/stateprivacy.cfm> (last visited March 1, 2011).

5. Ozer, *supra* note 2.

6. AM. LIBRARY ASS'N, *supra* note 4.

7. Ozer, *supra* note 2.

8. Ozer, *supra* note 2.

9. HELEN R. ADAMS ET AL, PRIVACY IN THE 21ST CENTURY 1 (2005).

10. *United States v. Rumely*, 345 U.S. 41, 57 (1953) (Douglas, J., concurring).

11. AM. LIBRARY ASS'N, *supra* note 4.

12. Ozer, *supra* note 2.

13. Cindy Cohn, *E-Book Buyers Guide to E-Book Privacy*, ELEC. FRONTIER FOUND. (2010), <http://www EFF.ORG/deeplinks/2010/12/2010-e-book-buyers-guide-e-book-privacy> (last visited January 24, 2011).

Part II of this note discusses the history of reader privacy in the United States. Part III analyzes the rise of e-readers and current e-reader company privacy policies, and gives an overview of the Electronic Communications Privacy Act of 1986 (“ECPA”). Part IV contains two solutions to provide more privacy protection for readers of electronic books: amendment of the ECPA and education for consumers concerning privacy and digital readers. This note argues that the ECPA has not been sufficiently amended to address these new technologies and provides suggestions on how the ECPA should be amended to give electronic books the same privacy protections afforded to traditional books. This note advocates three policies that should be adopted: 1) only information vital to the operation of the electronic reader should be tracked by an electronic book company, 2) no information tracked by electronic book companies should be used for any commercial purpose, and 3) no information tracked should be disclosed without a search warrant or court order. This note also argues that the education of consumers concerning digital reader privacy is extremely important and privacy law would benefit from the addition of mandatory disclosure policies.

II. History of Reader Privacy in the United States

This section provides a brief history of the seminal Supreme Court decisions concerning reader privacy and an overview of current privacy protections for readers of traditional books in libraries and bookstores. Many libraries and bookstores have legislative protections as well as additional policies to protect readers of traditional books.

A. The Supreme Court and Reader Privacy

In 1953, the Supreme Court asserted, “Once the government can demand of a publisher the names of the purchasers of his publications . . . [f]ear of criticism goes with every person into the bookstall . . . [and] inquiry will be discouraged.”¹⁴ In *U.S. v. Rumely*, the government sought to compel a bookstore owner to disclose the names of customers who purchased political books.¹⁵ The bookstore owner refused, and in a concurring opinion, Justice Douglas concluded that it was unconstitutional to convict him for not providing the government this type of information.¹⁶ Justice Douglas

14. *United States v. Rumely*, 345 U.S. 41, 57 (1953) (Douglas, J., concurring).

15. *Id.* at 42 (majority opinion).

16. *Id.* at 58 (Douglas, J., concurring).

explained, “If [a reader] can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, book stores, and homes of the land.”¹⁷ Douglas’ concern was that:

Some will fear to read what is unpopular, what the powers-that-be dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged. The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and subject to investigation . . . But that will be minor in comparison with the menace of the shadow which government will cast over literature that does not follow the dominant party line.¹⁸

The Supreme Court upheld reader privacy again in 1965.¹⁹ Section 305(a) of the Postal Service and Federal Employees Salary Act of 1962 required anyone who wanted to receive “Communist political propaganda” to submit a request to the Post Office.²⁰ The Supreme Court struck this statute down as being unconstitutional, noting that the statute was too much of a deterrent from obtaining the reading materials.²¹ The rationale was that because an individual had to affirmatively request to receive the “Communist political propaganda,” this statute violated the First Amendment.²² The Supreme Court noted:

This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as “communist political propaganda.” The regime of this Act is

17. *Id.*

18. *Id.* at 57–58.

19. *Lamont v. Postmaster General of the United States*, 381 U.S. 301, 307 (1965).

20. *Id.* at 307.

21. *Id.*

22. *Id.*

at war with the “uninhibited, robust, and wide-open” debate and discussion.²³

B. Libraries and Reader Privacy

In addition to a history of defending reader privacy in the courts, the United States has a long-standing background of legislative protection.²⁴ These protections are in the form of state library privacy statutes, which are strengthened by American Library Association (“ALA”) policies on privacy and individual library privacy policies.²⁵ In most states, the strongest form of library reader privacy protection is in the form of state library privacy laws.²⁶ These laws exist in forty-eight states and in the District of Columbia.²⁷ In the two states that do not have laws, there are attorney general’s opinions upholding reader privacy.²⁸ Although some state laws cover all or most libraries, others do not extend to private libraries.²⁹ For example, in California, library records of publically funded libraries must “remain confidential and shall not be disclosed to any person, local agency, or state. . . .”³⁰

However, even in instances where no law protects reader privacy in libraries, the libraries themselves often have a code of ethics, practices, and policies that requires confidentiality.³¹ Privacy advocates have noted that “librarians recognize that privacy is essential to the exercise of free speech, free thought, and free association and, therefore, essential to democracy. Without privacy, the right of every citizen to seek out and receive information anonymously; free from any government interference, is meaningless.”³²

The American Library Association also endorses policies and laws that support reader privacy.³³ These policies include “The Code

23. *Id.*

24. AM. LIBRARY ASS’N, *supra* note 4.

25. Adams, *supra* note 9, at 47.

26. Adams, *supra* note 9, at 48.

27. *Privacy: An Interpretation of the Library Bill of Rights*, AM. LIBRARY ASS’N (June 19, 2002), <http://www.ala.org/Template.cfm?Section=interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=88625>.

28. Adams, *supra* note 9, at 48.

29. CAL. GOV’T CODE § 6267 (Deering 2011).

30. *Id.*

31. Adams, *supra* note 9, at 52–54.

32. Adams, *supra* note 9, at ix.

33. *Freedom to Read Statement*, AM. LIBRARY ASS’N (2004), <http://www.ala.org/ala/aboutala/offices/oif/statementspols/ftirstatement/freedomreadstatement.cfm> (last modified June 30, 2004).

of Ethics of the American Library Association,” “The ALA Policy on Confidentiality of Library Records,” “Policy Concerning Confidentiality of Personally Identifiable Information about Library Users,” and “Privacy: An Interpretation of the Library Bill of Rights.”³⁴ In its Freedom to Read Statement, the ALA declares that the freedom to read is “essential to our democracy” and “continuously under attack.”³⁵ It also advocates that “every American community must jealously guard the freedom to publish and to circulate, in order to preserve its own freedom to read.”³⁶

C. Bookstores and Reader Privacy

In addition to legislative protections in libraries, a couple of states also have bookstore reader privacy laws.³⁷ For example, Michigan’s law states that anyone engaged in the business of selling at retail . . . books or other written material . . . shall not disclose to any person, other than the customer a record . . . that indicates the identity of the customer.”³⁸

In several instances, courts have also decided that bookstore records should be protected. For example, federal investigators attempted to obtain Monica Lewinsky’s bookstore records in *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*³⁹ The U.S. District Court for the District of Columbia explained that Lewinsky “persuasively alleged a chilling effect on [her] First Amendment rights,” and held that the government could not gain access to her records because they lacked both the compelling interest and reasonable relation to the investigation that was required.⁴⁰

III. Analysis

A. The Rise of E-readers

While traditional paper books have a long history of protection from government intrusion, the emergence of digital technology revolutionized not only the way people read, but also the way that reading was perceived. The earliest digital library began in 1971

34. Adams, *supra* note 9, at 52–53.

35. AM. LIBRARY ASS’N, *supra* note 33.

36. AM. LIBRARY ASS’N, *supra* note 33.

37. See MICH. COMP. LAWS ANN. § 445.1712 (West 2011).

38. *Id.*

39. *In re Grand Jury Subpoena to Kramer-books & Afterwords, Inc.*, 26 MED. L. REP. 1599, 1599 (D.C. Cir. 1998).

40. *Id.* at 1601.

when Michael Hart created Project Gutenberg in an effort to digitize and distribute electronic books.⁴¹

Yet it was not until the new millennium that Sony and Amazon began to sell small devices popularly known as “e-readers” to read electronic books.⁴² Amazon’s popular e-reader, the Kindle, was unveiled in the United States in 2007.⁴³ Barnes and Noble’s e-reader, the Nook, was released in 2009.⁴⁴ And in 2010, Apple launched their iPad, a tablet computer that was marketed as an e-reader in addition to its other capabilities.⁴⁵ Most recently, in 2010, Google introduced its electronic bookstore.⁴⁶ In that same year, Amazon announced that the sale of electronic books surpassed sales figures for traditional books.⁴⁷ The CEO of Amazon noted that this was exceptional because the company had been selling traditional books for fifteen years, while it had been selling electronic books for less than three years.⁴⁸

Because of the popularity of these devices, the technology has been quickly advancing. Most e-readers today are thinner and lighter than a traditional hardcover book, yet they can hold thousands of digital books.⁴⁹ Many electronic readers also use “e-ink,” a technology heralded as superior to the traditional LCD screens like those used in computers.⁵⁰ E-ink is not backlit, does not cause eye strain, gives better battery life, and makes the screen more closely

41. Project Gutenberg Mission Statement, PROJECT GUTENBERG, <http://www.gutenberg.org/wiki/Gutenberg>About> (last modified Nov. 3, 2008, 8:00 PM).

42. Matthew Humphries, *Amazon to Release Kindle E-Book Reader*, GEEK.COM (Sept. 7, 2007, 8:00 AM), <http://www.geek.com/articles/gadgets/amazon-to-release-kindle-e-book-reader-2007097/>.

43. *Id.*

44. Charlie Sorrel, *Barnes and Noble’s Kindle Killing Dual Screen Nook E-Reader Leaked*, WIRED (Oct. 20, 2009, 8:19 AM), <http://www.wired.com/gadgetlab/2009/10/barnes-nobles-kindle-killing-dual-screen-nook-e-reader-leaked/>.

45. Doug Gross, *Apple iPad to Be Released April 3*, CNN (Mar. 5, 2010, 5:12 PM), http://article.cnn.com/2010-03-05/tech/ipad.apple.release_1_ipad-tablet-style-computer-wifi?_s=PM:TECH.

46. Julie Bossman, *Google Opens Doors to E-Bookstore*, N.Y. TIMES, Dec. 6, 2010, <http://www.nytimes.com/2010/12/07/business/media/07ebookstore.html?ref=barnesandnobleinc>.

47. Claire Cain Miller, *E-Books Top Hardcover at Amazon*, N.Y. TIMES, July 19, 2010, http://www.nytimes.com/2010/07/20/technology/20kindle.html?_r=1.

48. *Id.*

49. Amazon Kindle, AMAZON.COM, http://www.amazon.com/gp/product/B002Y27P3M/ref=nav_swm_kindle_20110108?pf_rd_p=1286504302&pf_rd_s=nav-sitewide-msg&pf_rd_t=4201&pf_rd_i=navbar-4201&pf_rd_m=ATVPDKIKX0DER&pf_rd_r=0CS77QZ3XE4ANYRYP6XT (last visited January 24, 2011).

50. *Id.*

resemble the pages of a book.⁵¹ Many consumers report that the ease of carrying a small device with thousands of books has caused them to read more than ever before.⁵²

However, despite these many benefits, these devices have proven detrimental to privacy. Electronic books are capable of being tracked in a way that was formerly impossible with traditional books.⁵³ Which pages a reader looks at, how long the pages are examined, and which books were purchased are just a few of the private facts that companies can access.⁵⁴ Privacy advocates have cautioned that the consumer data industry is increasing while consumers remain powerless to control how their personal data is used.⁵⁵ Company privacy policies are nonnegotiable and provide little to no privacy protection for consumers. If a consumer does not want a company to collect their personal data, including which books they have purchased and which pages they have read, their only choice is to forego reading digital books—a choice that is becoming more and more difficult with the increasing popularity of digital books.

B. Electronic Reader Privacy Policies

None of the privacy protections currently in place for traditional books exist for electronic books. Instead, without laws to guide or restrain them, each company that sells electronic readers or books has the latitude to write its own privacy policy.⁵⁶ The problem with allowing each company to police itself is that companies have an incentive to collect information from consumers for commercial or advertising purposes.⁵⁷ Enabling advertisements to target specific consumers is extremely valuable to companies.⁵⁸ The ease with which companies can collect this information, combined with the economic incentive, creates a dangerous situation for reader privacy.

This section describes some of the privacy policies of the most popular electronic reader companies and explains why they are ineffective. Although individuals may assume that privacy policies are maintained for consumer protection, many of the policies

51. *Id.*

52. *Id.*

53. Ozer, *supra* note 2.

54. Ozer, *supra* note 2.

55. Daniel J. D'Amico, *Daniel Solove, The Digital Person: Technology And Privacy In The Information Age*, 1 J.L. ECON. & POL'Y 537, 538, (2005).

56. Amazon Kindle, *supra* note 49.

57. Ozer, *supra* note 2.

58. Ozer, *supra* note 2.

described below mainly serve to protect the company's interests and do not sufficiently protect readers.

1. *Amazon and the Kindle's Privacy Policy*

Amazon.com sells the Kindle, a popular electronic reading device, and has a selection of over 950,000 electronic books.⁵⁹ Amazon's privacy policy states that they may collect four types of data: information that individuals give them, automatic information, e-mail communications information, and information from other sources.⁶⁰ The information that Amazon collects from other sources may include anything from a consumer's credit history report to account information and page views obtained from companies such as Target.com.⁶¹ In general, Amazon's privacy policy allows them to share this information with affiliated businesses that Amazon does not control, third-party service providers, promotional offers, business transfers, and any other entity when Amazon believes the release of information is "appropriate . . . to comply with the law," enforce their Conditions of Use, or "protect the rights, property, or safety of Amazon.com, Amazon's users, or others."⁶² Amazon currently tracks all searches for products conducted from the electronic reader and online, and connects that information to an individual's Amazon account.⁶³ Amazon also logs which books have been purchased, which books have been loaded on an individual's Kindle, which books have been deleted, which pages are read, and even what highlighting or annotations an individual has made.⁶⁴ Amazon's privacy policy allows them to share this information with civil litigants, law enforcement, and internally within Amazon without a consumer's consent.⁶⁵ Although this policy is not particularly unusual, it is harmful to consumers because it allows Amazon to give personal information to third parties without requiring a subpoena or court order. Allowing reader information to be given to third parties

59. Kindle Wireless Reading Device, AMAZON.COM, http://www.amazon.com/gp/product/B002Y27P3M/ref=s9_simh_gw_p349_d0_i1?pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-2&pf_rd_r=08D9ZKDCANZK1WK213P4&pf_rd_t=101&pf_rd_p=470938631&pf_rd_i=507846 (last visited January 24, 2011).

60. Amazon.com Privacy Notice, AMAZON.COM, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_cn?ie=UTF8&nodeId=468496 (last visited January 24, 2011).

61. *Id.*

62. *Id.*

63. *Id.*

64. Cohn, *supra* note 13; Ozer, *supra* note 2, at 5.

65. Cohn, *supra* note 13.

without a subpoena or court order directly contradicts library and bookstore laws and policies that prohibit this type of disclosure. In addition, users cannot delete their search or purchase history.⁶⁶

2. *Barnes and Noble and the Nook's Privacy Policy*

Barnes and Noble's Nook is another popular electronic reader on the market.⁶⁷ The bookstore sells more than two million electronic books and has two versions of their reader—an e-ink device, and an LCD color reader.⁶⁸ Barnes and Noble's privacy policy is more cryptic than Amazon's, and it is uncertain whether the company keeps records of searches, can monitor reading, and more.⁶⁹ The company uses vague terms, and claims to collect a consumer's personal information "to provide you with superior customer service" and "to administer [its] business."⁷⁰ Yet, in their privacy policy, Barnes and Noble claims to follow the principles of "clarity," "security," and "integrity."⁷¹ However, like Amazon, Barnes and Noble's privacy policy allows the company to disclose this information to civil litigants, law enforcement, and within their own company without the consumer's consent.⁷² Although consumers may gain a false sense of protection from terms such as "security" and "integrity," this vague policy with cryptic principles only protects Barnes and Noble because it can construe the policy in its favor and collect and disseminate any information at its discretion.

3. *Apple and the iPad's Privacy Policy*

In addition to the Kindle and the Nook, Apple's iPad can also be used to read electronic books purchased in Apple's bookstore app, iBooks, although it has the capability to perform other functions as well.⁷³ The iPad tracks searches performed, book purchases, and more.⁷⁴ Apple can also share this information with law enforcement,

66. Cohn, *supra* note 13.

67. Cohn, *supra* note 13.

68. Nook, BARNESANDNOBLE.COM, <http://www.barnesandnoble.com/nook/index.asp> (last visited January 24, 2011).

69. Cohn, *supra* note 13.

70. Barnes & Noble Privacy Policy, BARNESANDNOBLE.COM, <http://www.barnesandnoble.com/help/cds2.asp?PID=25556&cds2Pid=28412> (last modified Apr. 18, 2011).

71. *Id.*

72. Cohn, *supra* note 13.

73. iBooks, APPLE.COM, <http://itunes.apple.com/us/app/ibooks/id364709193?mt=8> (last visited January 24, 2011).

74. Cohn, *supra* note 13.

civil litigants, and internally within their company.⁷⁵ They also can disclose tracked information to third parties without a customer's consent.⁷⁶ Apple's privacy policy states that they may give personal information to "strategic partners that work with Apple to provide products and services, or that help Apple market to customers."⁷⁷ Apple also states that they share personal information with service providers and "others" for litigation, government use, or other entities if Apple determines "that for purposes of national security, law enforcement, or other issues of public importance, disclosure is necessary or appropriate."⁷⁸

4. *Google Books' Privacy Policy*

While Amazon, Barnes and Noble, and Apple are book suppliers and electronic reader developers, Google only distributes books.⁷⁹ Google began selling electronic books in 2010.⁸⁰ Soon Google was involved in a lawsuit concerning copyright, privacy, and other concerns.⁸¹ In 2010, a settlement was reached, but in 2011 the court denied approval of the settlement.⁸² Google currently states on its website that the decision is "clearly disappointing" but that it will "review the court's decision and consider [its] options."⁸³

Despite the lawsuit, Google's current privacy policy for Google Books allows Google to keep records of search queries, pages an individual has looked at, books purchased, and any annotations or notes that an individual has written in the book.⁸⁴ Google uses cookies to identify the user's browser, and also tracks an individual's operating system, browser, and IP address.⁸⁵ However, Google Books' policies may be in flux due to the lawsuit.

75. Cohn, *supra* note 13.

76. Cohn, *supra* note 13.

77. Privacy Policy, APPLE.COM, <http://www.apple.com/privacy/> (last updated June 21, 2010).

78. *Id.*

79. Google Opens Doors to E-Bookstore, N.Y. TIMES, DEC. 6, 2010 <http://www.nytimes.com/2010/12/07/business/media/07ebookstore.html?ref=barnesandnobleinc>.

80. *Id.*

81. Diane Bartz, *Google's Books Plan Hailed, Reviled; No Ruling*, REUTERS (Feb. 18, 2010), <http://www.reuters.com/article/2010/02/18/us-google-books-idUSTRE61H40220100218>.

82. *Id.*

83. Google Books Settlement Agreement, BOOKS.GOOGLE.COM, <http://books.google.com/googlebooks/agreement/> (last updated Mar. 22, 2011).

84. Ozer, *supra* note 2.

85. Google Books Privacy Policy, GOOGLE BOOKS, <http://books.google.com/googlebooks/privacy.html> (last visited January 24, 2011).

5. *Other Electronic Devices and E-books*

Amazon, Barnes and Noble, Apple, and Google are not the only companies who create electronic readers or electronic books.⁸⁶ Besides the Kindle, Nook, and iPad, other electronic readers include the BeBook Neo, the Sony Reader, the Kobo eReader, the Alex eReader, and more.⁸⁷ Yet most of these electronic readers and books also have relaxed privacy standards, especially when compared to traditional book privacy laws and ethical standards.

C. History of the Electronic Communications Privacy Act

In 1986, Ronald Reagan was president,⁸⁸ popular singer Lady Gaga was born,⁸⁹ “Walk Like an Egyptian” was a number-one hit song,⁹⁰ and the internet was not yet invented.⁹¹ It was during this same year that Congress enacted the ECPA.⁹² This statute currently protects the privacy of electronic communications.⁹³

The Fourth Amendment of the Constitution protects Americans from unlawful search and seizure.⁹⁴ At the time it was enacted, it was primarily meant to protect citizens’ papers and property that were kept at home.⁹⁵ Today, the world is very different, with millions of people putting their private information online. Notions of privacy in the home and traditional letters may seem outdated to millions of people who have grown up in an age where sixty-three percent of adults use the internet.⁹⁶ The Supreme Court has since accepted that

86. E-Book Reader Review, TOPTENREVIEWS.COM, <http://ebook-reader-review.toptenreviews.com/> (last visited January 24, 2011).

87. *Id.*

88. Ronald Reagan, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/ronaldreagan> (last visited March 1, 2011).

89. Lady GaGa: Biography, T.V. GUIDE, <http://www.tvguide.com/celebrities/lady-gaga/bio/294098> (last visited February 15, 2011).

90. 1986 in Music, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/1986_in_music (last modified Oct. 19, 2011, 1:26 AM).

91. Achal Oza, Note, *Amend the ECPA: Fourth Amendment Protection Erodes as E-mails Get Dusty*, 88 B.U. L. REV. 1043, 1056 (2008).

92. Deidre Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1564 (2004).

93. *Id.* at 1557–58.

94. Matthew Lawless, *The Third Party Doctrine Redux: Internet Search Records and the Case For a “Crazy Quilt” of Fourth Amendment Protection*, 2007 UCLA J.L. & TECH. 2, 8 (2007).

95. Mulligan, *supra* note 92, at 1598.

96. Mulligan, *supra* note 92, at 1572.

the Fourth Amendment protects individuals, not property.⁹⁷ This idea became fundamental to extending Fourth Amendment type protections to electronic communications.⁹⁸

Although the Fourth Amendment protects Americans from unlawful searches and seizures, it soon became clear that this concept was difficult to apply to newly emerging technologies.⁹⁹ With the creation of the Internet, many new technologies were automatically denied Fourth Amendment protection because application of the third party doctrine meant that information submitted to third parties, such as Internet service providers, was not given Constitutional protection.¹⁰⁰ The third party doctrine states that if an individual knowingly exposes information to a third party, this information does not receive Fourth Amendment protection because that individual assumed the risk that the third party would disclose the information to law enforcement.¹⁰¹ Congress quickly realized that it was important to update privacy protections for emerging technologies because the Fourth Amendment protects individuals, not just tangible property.¹⁰²

In order to fix this problem and ensure privacy protections for new electronic communications, Congress enacted the Electronic Communications Privacy Act.¹⁰³ The ECPA provided statutory Fourth Amendment-like protections for new, rapidly developing technology.¹⁰⁴ The ECPA created three statutes: the Wiretap Act, the Pen Register statute, and the Stored Communications Act.¹⁰⁵ Although the ECPA gave electronic communications greater statutory privacy protection, the statute has recently been greatly criticized for being outdated, poorly written, confusing, and not strong enough to protect user privacy in emerging technology.¹⁰⁶

97. Lawless, *supra* note 94, at 8.

98. Lawless, *supra* note 94, at 8.

99. Mulligan, *supra* note 92, at 1561–62.

100. Lawless, *supra* note 94, at 8.

101. Lawless, *supra* note 94, at 8.

102. Mulligan, *supra* note 92, at 1577.

103. Katherine A. Oyama, Note, *Cyberlaw: E-Mail Privacy After United States v. Councilman: Legislative Options for Amending the ECPA*, 21 BERKELEY TECH. L.J. 499, 499.

104. Oza, *supra* note 91, at 1056.

105. Mulligan, *supra* note 92, at 1598.

106. Mulligan, *supra* note 92, at 1598.

IV. Proposal

A. Proposal to Amend the Electronic Communications Privacy Act

To correct the deficiencies in the ECPA, it would be beneficial to insert an additional section to protect reader privacy for electronic books. Electronic books are an electronic form of communication, but are no different from traditional books except in their format—they are read on an electronic screen instead of paper. This difference in format does not justify the difference in the laws and in the electronic reader and electronic bookstore companies' ethical standards. There are three important ideas that should be incorporated into the ECPA: 1) only information vital to the operation of the electronic reader should be tracked by an electronic book company, 2) information tracked by electronic book companies should not be used for any commercial purpose, and 3) information tracked should not be disclosed without a search warrant or court order.

First, the privacy policies of large electronic book companies are currently not protecting electronic books in the way that traditional books are protected. Companies such as Amazon, Barnes and Noble, and Google are tracking much more information than is necessary for the companies' vital operations. In a traditional book, it is virtually impossible to track which books an individual has purchased, which pages an individual has read, what notes the individual has written in their book, and what portions an individual has highlighted in their book, how many times a book is read, and even how long a reader spends on each page. In order to track this information, one would have to hire a private investigator to follow an individual around. Even this drastic step, however, would not provide all of the information that electronic book companies have access to. Many individuals purchase books, make annotations, and read their books in the privacy of their own home, where even heavy surveillance would not be able to reach.

Much of the information these companies collect is not vital to the companies' operations. Information vital to a company's operations should be defined as "any information or data that without which, the company would not be able to operate reasonably efficiently or effectively." If any collected information is not vital to company operations, it should not be collected or stored. Additionally, even if data collected is vital to an operation, it should be deleted as soon as the data is no longer necessary. Vital data should be secured so that only specified company employees have the ability to view the data,

and only for the specific purpose of operating the company reasonably efficiently or effectively.

Second, many companies have an incentive to collect private information from individuals because they use it for advertising and other commercial purposes. Any private information collected from consumers should not be used to financially benefit a company in any way. This means that data should not be collected for any commercial or advertising purposes. To allow otherwise would be too much of an incentive to collect consumers' private information from electronic devices in order to benefit the company. Data collected from electronic reading devices is different from data collected on a typical website because an individual reading a digital book is not electing to provide information to the company—they are simply exercising their freedom to read. The need to protect this freedom to read is ingrained in America's history and is emphasized by Supreme Court opinions, legislative protections for traditional books, and library policies. Thus, reading a digital book should not be treated the same as surfing the internet or making an online purchase. An individual may choose to give a company personal information in exchange for using its website, but privacy should not have to be sacrificed in order to read a digital book.

Third, information tracked should not be disclosed without a search warrant or court order. Currently, many electronic book companies can disclose the private information that they collect to civil litigants, law enforcement, and within their companies. Yet bookstores and libraries have laws and ethical policies that prohibit this kind of disclosure. The ability to purchase, borrow, or read books without fear of disclosure is essential to the United States and ingrained in the nation's history. The American Library Association expresses this idea:

Private groups and public authorities in various parts of the country are working to remove or limit access to reading materials, to censor content in schools, to label "controversial" views, to distribute lists of "objectionable" books or authors, and to purge libraries. These actions apparently rise from a view that our national tradition of free expression is no longer valid; that censorship and suppression are needed to counter threats to safety or national security, as well as to avoid the subversion of politics and the corruption of morals. We, as individuals devoted to reading and as librarians and publishers

responsible for disseminating ideas, wish to assert the public interest in the preservation of the freedom to read.¹⁰⁷

This freedom to read is what both laws and company policies should protect for all electronic books and readers.

With these additional laws and policies, electronic readers will gain the same level of protection that traditional books have.

B. Proposal to Educate Consumers about Digital Reader Privacy

Although amending the ECPA to provide greater privacy protections for digital books would be ideal, educating consumers about digital reader privacy is also extremely important. Companies' privacy policies may be lengthy and difficult for an average person to understand. A typical consumer probably does not understand what kind of data is being collected, how long their data is being kept, or how their data is being used when they purchase or read a digital book. For example, an individual may believe that annotations are completely private when companies can, in fact, view any annotation. Additionally, individuals may believe that book purchase records can be permanently deleted when in fact, they cannot.

Just as libraries have ethical policies in place and strive to inform patrons about their privacy rights,¹⁰⁸ companies should embrace better, more ethical policies to educate the public about privacy concerns. Transparency and honesty in privacy policies should be valued and emphasized by politicians and consumers. Consumers should hold companies accountable by only purchasing digital books from ethical, responsible companies, and by avoiding companies with unclear, confusing, or deceptive privacy policies.

Privacy advocates have noted that it is important for library staff to proactively inform library patrons of their privacy rights.¹⁰⁹ In this same way, in order to educate individuals, corporations should proactively emphasize what types of data are being collected and how the collected data is being used. However, many companies may resist informing and educating consumers because they have no incentive to do so. Unlike non-profit libraries, a for-profit company may not be persuaded to provide information to educate consumers. Leaving privacy policies vague and unclear does not harm the company, and most consumers will remain unaware of privacy

107. AM. LIBRARY ASS'N, *supra* note 33.

108. Adams, *supra* note 9, at 95–96.

109. Adams, *supra* note 9, at 96.

concerns. Because of this, it would be helpful to implement a mandatory disclosure policy requiring a company to clearly and unambiguously disclose exactly which information is being collected, who the information may be given to, and why the information is collected and used before a consumer purchases a digital reader or book. Educating consumers will allow individuals to better understand how reading digital books affects their privacy and may inspire consumers to lobby for ECPA amendment.

V. Conclusion

The United States has a long history of protecting reader privacy for traditional books in the Supreme Court, library state laws and policies, and bookstore state laws and policies.¹¹⁰ The Supreme Court has upheld reader privacy several times and held that it is unconstitutional to compel a bookstore owner to provide the names of customers who purchased political books or require registration at the Post Office in order to receive “Communist political propaganda.”¹¹¹ In addition, many libraries and bookstores have state laws that prohibit them from disclosing records without a search warrant or other protections.¹¹² Even without laws to protect reader privacy, many libraries have policies to keep records confidential.¹¹³

When electronic books emerged, these privacy protections did not apply to them, so companies created their own privacy policies.¹¹⁴ Amazon, Barnes and Noble, and Sony are just a few of the popular electronic reader manufacturers.¹¹⁵ Unfortunately, many of their policies allow these companies to track private information such as which pages have been read and what notes the reader has written in the book.¹¹⁶

In order to correct this problem, laws and policies should be changed to protect consumer privacy. In the 1980s, Congress realized that new electronic communications were not being fully protected under the Fourth Amendment.¹¹⁷ Congress sought to better protect these new technologies, and enacted the ECPA, a groundbreaking

110. *Rumley*, 345 U.S. at 42; AM. LIBRARY ASS’N, *supra* note 5; *see generally* Ozer, *supra* note 2.

111. *Lamont*, 381 U.S. at 307.

112. AM. LIBRARY ASS’N, *supra* note 5.

113. Adams, *supra* note 9, at 52–54.

114. AMAZON.COM, *supra* note 60.

115. TOPTENREVIEWS.COM, *supra* note 86.

116. Ozer, *supra* note 2.

117. Oza, *supra*, note 91, at 1055.

statute designed to ensure privacy for electronic communications.¹¹⁸ However, this statute was enacted in 1986, and rapidly changing technology has made the ECPA outdated.¹¹⁹ The ECPA needs amending in order to better protect the privacy concerns related to new technologies such as electronic books.

In amending the ECPA, it would be important to include provisions that allow only information vital to the operation of the electronic reader to be tracked by an electronic book company, no information tracked by electronic book companies to be used for any commercial purpose, and no information tracked to be disclosed to a third party without a search warrant or court order. Additionally, companies should educate consumers about digital book privacy—either of their own volition or through a mandatory disclosure policy. With these protections in place, both traditional and electronic books would have secure privacy protections and every American would have the freedom to read any publication without fear, regardless of whether it is unpopular or controversial. As the ALA states, “Every American community must jealously guard the freedom to publish and to circulate, in order to preserve its own freedom to read.”¹²⁰

118. Oza, *supra*, note 91, at 1055.

119. Mulligan, *supra* note 92, at 1598.

120. AM. LIBRARY ASS'N, *supra* note 33.