

**BEFORE THE  
U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE  
INTERNET**

**HEARING ON FIRST SALE UNDER TITLE 17**

**TESTIMONY OF  
GREG CRAM  
ASSOCIATE DIRECTOR, COPYRIGHT AND INFORMATION POLICY  
THE NEW YORK PUBLIC LIBRARY**

**JUNE 2, 2014**



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Chairman Coble, Ranking Member Nadler, Members of the Subcommittee, my name is Greg Cram and I am the Associate Director of Copyright and Information Policy at The New York Public Library, Astor, Lenox and Tilden Foundations (“NYPL”) in New York City. I am the only copyright specialist working at a public library in the United States, which demonstrates NYPL’s commitment to engaging with copyright issues. My testimony is endorsed by the Library Copyright Alliance (“LCA”).<sup>1</sup>

NYPL is virtually unique in that it combines both a world-class research library and a network of community libraries. NYPL serves, without charge, a broad and diverse public ranging from toddlers to seniors, and from persons acquiring literacy skills to

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<sup>1</sup> LCA consists of three major library associations—the Association of Research Libraries (“ARL”), the American Library Association (“ALA”), and the Association of College and Research Libraries (“ACRL”)—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. LCA contributed to the development of this written testimony.

post-graduate scholars, many of whom may be unaffiliated with academic institutions. Serving close to 50 million users both in person and online, NYPL is one of the largest library systems in the country. Our 88 community branches located in Manhattan, Staten Island, and the Bronx circulate a collection of six million books, e-books, CDs and DVDs each year. Our research collection consists of more than 51 million items, including published books, archival materials, family photographs, sound recordings, and ephemera. NYPL's mission is to inspire lifelong learning, advance knowledge, and strengthen our communities. In addition to offering our users access to the materials in our collection, we further this mission by providing free services and other resources including computer access, classes, exhibitions, programming and more.

I appreciate the opportunity to testify today on the importance of the first sale doctrine to libraries and NYPL's support for the Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons*. I will also explain how the digital first sale issue should be viewed in the broader context of contractual restrictions on copyright exceptions.

## **I. THE IMPORTANCE OF THE FIRST SALE DOCTRINE TO LIBRARIES**

Section 106(3) of the Copyright Act grants the copyright owner the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by...lending."<sup>2</sup> However, the first sale doctrine, codified at Section 109(a) of the Copyright Act, terminates the copyright owner's distribution right in a particular copy "lawfully made under this title" after the first sale of that copy.<sup>3</sup> The House Judiciary Committee Report on the 1976 Copyright Act explains that under Section 109(a), "[a]

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<sup>2</sup> 17 U.S.C. § 106(3) (2012).

<sup>3</sup> 17 U.S.C. § 109(a) (2012).

library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.”<sup>4</sup> The first sale doctrine thus is critical to the operation of libraries: “[w]ithout this exemption, libraries would be unable to lend books, CDs, videos, or other materials to patrons.”<sup>5</sup> In short, the first sale doctrine is critical to one of the most basic library functions: lending books and other materials to the public.

### **A. Throughout American History, Libraries Have Promoted Democratic Values By Lending Books to the Public**

For almost 400 years, libraries in America have been lending books and other materials. In 1638, John Harvard bequeathed his collection of books to a newly established college in Cambridge, Massachusetts for the use of its faculty and students.<sup>6</sup> Benjamin Franklin in 1731 helped establish the Library Company of Philadelphia, which allowed its stockholders to borrow its books.<sup>7</sup> William Rind created a commercial circulating library in Annapolis in 1763, which rented books for a small fee.<sup>8</sup> By the end of the eighteenth century, many towns throughout the new nation had academic libraries, membership libraries, circulating libraries or church libraries.<sup>9</sup>

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<sup>4</sup> H.R. REP. NO. 94-1476, § 109, at 79 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5693.

<sup>5</sup> CARRIE RUSSELL, *COMPLETE COPYRIGHT: AN EVERYDAY GUIDE FOR LIBRARIANS* 43 (2004).

<sup>6</sup> MICHAEL HARRIS, *HISTORY OF LIBRARIES IN THE WESTERN WORLD* 173 (1999).

<sup>7</sup> *Id.* at 183-84. Benjamin Franklin explained his rationale for organizing a library: “by thus clubbing our Books to a common Library, we should, while we lik’d to keep them together, have each of us the Advantage of using the Books of all the other Members which would be nearly as beneficial as if each owned the whole.” BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 130 (Leonard W. Labaree ed., 1964).

<sup>8</sup> “In many ways more democratic than the subscription social libraries, the circulating libraries often allowed women to have books, featured reading rooms with long hours, and provided access to a variety of reading matter, including newspapers, popular pamphlets, and novels.” Dee Garrison, *Libraries*, in *ENCYCLOPEDIA OF THE UNITED STATES IN THE NINETEENTH CENTURY* (Paul Finkelman ed., 2001).

<sup>9</sup> HARRIS, *supra* note 6, at 202-03.

In 1800, Congress established the Library of Congress. President Thomas Jefferson appointed the first Librarian of Congress, and sold his private collection to the Library of Congress in 1815, after its collection burned during the British occupation of Washington, D.C., in the War of 1812.<sup>10</sup> Thomas Jefferson also articulated a vision of libraries across the country providing broad public access to books. In a letter to John Wyche, Jefferson stated that “I have often thought that nothing would do more extensive good at small expense than the establishment of a small circulating library in every county, to consist of a few well-chosen books, to be lent to the people of the county under regulations as would secure their safe return in due time.”<sup>11</sup>

During the first half of the nineteenth century, access to books increased. Apprentice libraries were established for the use of young men migrating to the cities to help them “train for the new factory system which had been brought about by the industrial revolution.”<sup>12</sup> Mercantile libraries developed for the use of merchants and law clerks. School districts began to invest in libraries for their students. By 1853, New York State had created school district libraries throughout the state with over 1,604,210 volumes.<sup>13</sup> Horace Mann urged Massachusetts to follow New York’s lead because he “saw the library as an essential contributor to the educational program of the school, as an

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<sup>10</sup> *Id.* at 196-97. The Library of Congress circulates materials to Supreme Court Justices, Members of Congress, thousands of Congressional employees, and other libraries (which can make the materials available to users within the library premises). *Interlibrary Loan*, LIBRARY OF CONG., <http://www.loc.gov/rr/loan/loanweb1.html> (last visited May 28, 2014).

<sup>11</sup> Letter from Thomas Jefferson to John Wyche (May 19, 1809), in THOMAS JEFFERSON: A CHRONOLOGY OF HIS THOUGHTS 223 (Jerry Holmes ed. 2002).

<sup>12</sup> JEAN KEY GATES, INTRODUCTION TO LIBRARIANSHIP 70 (1968).

<sup>13</sup> *Id.* at 79.

invaluable aid in continuing education and in self-improvement, and an indispensable part of the cultural life of the people.”<sup>14</sup>

In 1848, the Massachusetts legislature authorized the City of Boston “to establish and maintain a public library, for the use of the inhabitants....”<sup>15</sup> In the following decades, other public libraries were established, but the public library movement accelerated dramatically after 1881 through the philanthropy of steel magnate Andrew Carnegie. Carnegie said that “[t]here is not such a cradle of democracy upon the earth as the Free Public Library, this republic of letters, where neither rank, office, nor wealth receives the slightest consideration.”<sup>16</sup> Carnegie ultimately funded the construction of 1,679 public library buildings in 1,412 communities across the United States.<sup>17</sup>

NYPL was founded with this public mission in mind. In 1895, the Astor and Lenox libraries combined with the support of The Tilden Trust to “establish and maintain a free library and reading room in the city of New York....”<sup>18</sup> In 1901, NYPL contracted with the City of New York to operate 39 Carnegie-built public library buildings in

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<sup>14</sup> *Id.* at 80.

<sup>15</sup> *Founding Legislation*, BOSTON PUB. LIBRARY, <http://www.bpl.org/general/legislation.htm> (last visited May 28, 2014).

<sup>16</sup> Adam Arensen, *Libraries in Public Before the Age of Public Libraries: Interpreting the Furnishings and Design of Athenaeums and Other “Social Libraries,” 1800-1860*, in *THE LIBRARY AS PLACE: HISTORY, COMMUNITY, AND CULTURE* 74 (John Buschman & Gloria J. Leck, eds., 2007). “When mention is made of the dependence of a democratic society on an informed citizenry, the American public library usually comes to mind as the instrument which has had as its fundamental purpose the serving of this crucial need.” GATES, *supra* note 12, at 91. *See also* U.S. OFFICE OF EDUC., *PUBLIC LIBRARIES IN THE UNITED STATES OF AMERICA* iii (1876) (“[O]ur libraries will fulfill in every respect their high station as indispensable aids to public education, to the privilege and responsibility of instructing our American democracy.”).

<sup>17</sup> HARRIS, *supra* note 6, at 246-47.

<sup>18</sup> Will of Samuel J. Tilden (Apr. 23, 1884). For more information on the founding of NYPL, *see* The New York Public Library, *Introductory Statement*, BULLETIN OF THE NEW YORK PUBLIC LIBRARY, ASTOR, LENOX AND TILDEN FOUNDATIONS, Jan. 1897, at 3, available at <http://books.google.com/books?id=waNMAAAAYAAJ>.

Manhattan, Staten Island, and the Bronx. For the last century, NYPL has served a vital role in the intellectual fabric of American life. Today, NYPL provides free and open access to its physical and electronic collections of information as well as to its services for people of all ages, backgrounds and needs.

In the twentieth century, the federal government expanded its support of libraries far beyond the Library of Congress. During the Great Depression, the Works Progress Administration built 350 new libraries and repaired many existing ones.<sup>19</sup> In 1941, President Franklin Roosevelt issued a proclamation identifying libraries as “essential to the functioning of a democratic society” and “the great tools of scholarship, the great repositories of culture, the great symbols of the freedom of the mind.”<sup>20</sup> Congress enacted the Library Services Act of 1956 and the Library Services and Construction Act of 1964 to provide federal funding for library construction. Currently, the Institute of Museum and Library Services, an independent federal agency, administers the Library Services and Technology Act of 1996 and its 2003 reauthorization to allocate federal funding annually to libraries throughout the United States.<sup>21</sup>

#### **B. Americans Borrow Books and Other Materials From Libraries 4.4 Billion Times A Year**

Notwithstanding the spread of digital technology, millions of Americans check out books and other materials from libraries. The collections of the over 9,225 public libraries in the country contain 934.8 million materials of which 88.3 percent are printed

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<sup>19</sup> Byron Anderson, *Public Libraries*, in ST. JAMES ENCYCLOPEDIA OF POPULAR CULTURE 133 (Tom Pendergast & Sara Pendergast eds., 2000).

<sup>20</sup> PATTI CLAYTON BECKER, BOOKS AND LIBRARIES IN AMERICAN SOCIETY DURING WORLD WAR II: WEAPONS IN THE WAR OF IDEAS 49 (2005).

<sup>21</sup> See generally INSTITUTE OF MUSEUM AND LIBRARY SERVICES, <http://www.ims.gov> (last visited May 28, 2014).

materials, 5.7 percent are audio materials, 5.4 percent are video materials, and 1.6 percent are e-books.<sup>22</sup> For these 934.8 million materials, there were a total of 2.241 billion circulation transactions in 2009.<sup>23</sup> Per capita circulation grew by 26.1 percent between 2000 and 2009.<sup>24</sup>

The collections of 81,920 public school media centers contain 959 million books and 42.6 million phonorecords and audiovisual materials.<sup>25</sup> These materials were checked out 2.05 billion times during the 2007-08 school year.<sup>26</sup>

The collections of 3,689 academic libraries include 1.07 billion copies of printed materials, as well as 112 million phonorecords and audiovisual materials and 158 million e-books.<sup>27</sup> There were a total of 176 million circulation transactions for these materials in 2010.<sup>28</sup>

At NYPL, we have seen an increase in lending and use of the collection since 2008. In 2012, NYPL circulated 28 million items, an increase from 18 million items in 2008. This represents a 44 percent increase in circulation since 2008. All this library lending is enabled and protected by the first sale doctrine.

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<sup>22</sup> INSTITUTE OF MUSEUM AND LIBRARY SERVICES, PUBLIC LIBRARIES SURVEY FISCAL YEAR 2009 10 (2010).

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.*

<sup>25</sup> NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEPARTMENT OF EDUCATION, CHARACTERISTICS OF PUBLIC AND BUREAU OF INDIAN EDUCATION ELEMENTARY AND SECONDARY SCHOOL LIBRARY MEDIA CENTERS IN THE UNITED STATES: RESULTS FROM THE 2007–08 SCHOOLS AND STAFFING SURVEY 9 (2009).

<sup>26</sup> *Id.* at 14.

<sup>27</sup> NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, ACADEMIC LIBRARIES: 2010 FIRST LOOK 8 (2011).

<sup>28</sup> *Id.* at 4.

## II. AVOIDING THE PARADE OF HORRIBLES: WHY THE SUPREME COURT'S *KIR TSAENG* DECISION SHOULD NOT BE DISTURBED

The first sale doctrine in Section 109(a) applies only to “copies lawfully made under” Title 17. In an effort to prevent parallel imports, some rights holders had argued that this phrase means lawfully manufactured in the United States. The Second Circuit in *John Wiley & Sons v. Kirtsaeng*<sup>29</sup> agreed with publisher John Wiley & Sons that the first sale doctrine did not apply to copies of its textbooks printed with its authorization in Thailand. Thus, a student who imported these foreign-printed copies into the United States and sold them online infringed copyright.

By restricting the application of Section 109(a) to copies manufactured in the United States, the Second Circuit’s decision threatened the ability of libraries to continue to lend materials in their collections. Over 200 million books in U.S. libraries had foreign publishers. Moreover, many books published by U.S. publishers were actually manufactured by printers in other countries. Although some books indicated on their copyright page where they were printed, many did not. Libraries, therefore, had no way of knowing whether these books complied with the Second Circuit’s rule. Without the certainty of the protection of the first sale doctrine, librarians would have had to confront the difficult policy decision of whether to continue to circulate these materials in their collections in the face of potential copyright infringement liability. For future acquisitions, libraries would have been able to adjust to the Second Circuit’s narrowing of Section 109(a) only by bearing the significant cost of obtaining a “lending license” whenever they acquired a copy that was not clearly manufactured in the United States.

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<sup>29</sup> 654 F.3d 210 (2d Cir. 2011).

On March 19, 2013, by a 6 to 3 vote, the Supreme Court overturned the Second Circuit and ruled that the first sale doctrine applies to non-infringing copies, regardless of where they are made. This means that libraries throughout the United States could continue their existing purchasing and circulation practices with new confidence that they would not infringe copyright by doing so.

Writing for the majority, Justice Breyer closely examined the meaning of the five words “lawfully made under this title.” After reviewing the context of those words in Section 109(a) and the Copyright Act, the common law history of the first sale doctrine, the legislative history of Section 109(a), and the Court’s earlier decisions, Justice Breyer rejected the “geographical interpretation” of lawfully made under this title as meaning made in the United States. Instead, he found that the phrase meant manufactured in a manner that met the requirements of American copyright law, e.g., manufactured with the permission of the rights holder.

Reinforcing this interpretation was the “parade of horrors” that might ensue if the Court adopted the geographical interpretation. The first, and by far the most detailed, example Justice Breyer used was the potentially adverse impact on libraries.

The American Library Association tells us that library collections contain at least 200 million books published abroad (presumably, many were first published in one of the nearly 180 copyright-treaty nations and enjoy American copyright protection under 17 U.S.C. §104, see *supra*, at 10); that many others were first published in the United States but printed abroad because of lower costs; and that a geographical interpretation will likely require the libraries to obtain permission (or at least create significant uncertainty) before circulating or otherwise distributing these books. Brief for American Library Association et al. as Amici Curiae 4, 15–20.<sup>30</sup> Cf. *id.*, at 16–20, 28 (discussing limitations of potential defenses, including the fair use and archival exceptions, §§107–108). See also

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<sup>30</sup> The brief Justice Breyer refers to as the American Library Association brief is the brief submitted jointly by ALA, ARL, and ACRL, referenced above.

Library and Book Trade Almanac 511 (D. Bogart ed., 55th ed. 2010) (during 2000–2009 “a significant amount of book printing moved to foreign nations”).

How, the American Library Association asks, are the libraries to obtain permission to distribute these millions of books? How can they find, say, the copyright owner of a foreign book, perhaps written decades ago? They may not know the copyright holder’s present address. Brief for American Library Association 15 (many books lack indication of place of manufacture; “no practical way to learn where [a] book was printed”). And, even where addresses can be found, the costs of finding them, contacting owners, and negotiating may be high indeed. Are the libraries to stop circulating or distributing or displaying the millions of books in their collections that were printed abroad?<sup>31</sup>

The Court’s geographic interpretation of Section 109(a) results in an international exhaustion rule: the distribution right is exhausted regardless of where the first sale occurs, meaning that the rights holder cannot prevent the parallel importation of copies purchased abroad. This is the right rule for libraries and for American consumers, and Congress should not disturb it.

### **III. DIGITAL FIRST SALE**

Libraries are increasingly licensing electronic resources, from e-books in public libraries to databases of academic journals. The license sets the terms under which the library is permitted to make the content available to its users. Often the content is hosted on the server of the publisher or other intermediary, and the library is buying access to the server for its users. An authorized user might be able to download the content onto her computer or device, and digital rights management software will allow the content to reside there until it is automatically deleted in accordance with the license terms. For example, Overdrive provides many public libraries with access to e-books with the

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<sup>31</sup> *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351, 1364 (2013).

publishers' authorization. Currently, for most popular trade titles, a library contracts with vendors like Overdrive to enable users to check out a licensed title based on the print "one copy, one user" model. Libraries must license additional e-book files in order to lend to more than one user at the same time. Similar to the length of time a physical book is borrowed for, after a prescribed period, the e-book is automatically returned and becomes immediately available for digital check-out by another user. Other licenses might not allow digital download, but instead permit a user to print out a limited number of pages, e.g., a journal article. Other licenses permit users to access content only when the user is connected to the Internet, e.g., streaming access.

This obviously is a major shift from the traditional model where libraries bought physical copies of books and other materials, which they then lent to users pursuant to the first sale doctrine. This new model has certain advantages over the traditional model. Libraries do not need to repair torn pages or broken bindings, nor do they need to put the books on a physical shelf. Users get immediate access to materials once they are automatically returned, and, if the license permits, users can access the materials remotely.

At the same time, the new model has certain drawbacks. Under the old model, a book remained in the collection until the book physically wore out or the library chose to replace it. In contrast, under most current business terms applied by publishers to this new digital environment, a library can provide access to licensed content only so long as it has paid the appropriate license fee. As new digital content licensing models evolve, libraries will continue to evaluate licenses against their obligation to act responsibly with

taxpayer dollars and private funding.<sup>32</sup> Also, when libraries renew licenses, the terms of the renewal may be different than the previous license, adding some unpredictability as to what will be available from year-to-year.

Further, some current licensing models contain arbitrary circulation limits, and the libraries must re-license an e-book after a given period in order to maintain access. Thus, if the library wanted to retain a title for ten years, it would have to license the title ten times in addition to the annual licensing fee for electronic access. The library license rate for an e-book can be more expensive than its print counterpart, and sometimes more than ten times the consumer e-book price.<sup>33</sup> Some publishers (or authors who retained their copyright) do not license e-books to libraries at all, or restrict access to the publisher catalog through embargos or particular genres.

Moreover, if the publisher or content provider goes out of business, or decides to discontinue access to certain products because it is no longer profitable, the library might no longer be able to provide access to the content at all under the original terms of the license. This, of course, would have serious preservation consequences, leaving large holes in the cultural and scholarly record. Libraries preserve materials to prevent the loss of vital cultural, historical and scholarly resources so that generations of users to come

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<sup>32</sup> For smaller libraries, the cost differential between purchasing a physical item and licensing a digital file may be significant. According to one study, a public library on average purchases 59 hardcover copies each of the top 20 New York Times bestseller list titles (1,180 individual copies) at a total cost of \$2.4 million. The same public library spends \$1.2 million on 19 electronic copies of each of the same bestselling titles (380 individual copies). This represents a 55% increase in cost for the same titles. OCLC ONLINE COMPUTER LIBRARY CENTER, *THE BIG SHIFT: PUBLIC LIBRARY STRATEGIES FOR ACCESS TO INFORMATION IN ANY FORMAT 15* (2013), *available at* [http://www.oclc.org/content/dam/campaign-landing-pages/en/214936\\_the-big-shift.pdf](http://www.oclc.org/content/dam/campaign-landing-pages/en/214936_the-big-shift.pdf).

<sup>33</sup> See Douglas County Libraries Report, Price Comparison as of April 3, 2014 (Apr. 2014), <http://evoke.cvlisites.org/files/2014/04/DCL-Pricing-Comparison-4-3-14.pdf>.

are able to use them. If libraries are unable to access and preserve digital content, then libraries may not be able to fulfill their mission to protect the record of our cultural heritage for future readers and knowledge creators.

Libraries and publishers are working collaboratively to resolve digital transition issues. Although some publishers have been reluctant to license e-books to public libraries on reasonable terms, business models are evolving and experimentation is occurring. NYPL has taken an active role in encouraging publishers to responsibly re-enter the library market for e-books, and explore new ways to address their concerns and the needs of library users. In 2012, Tony Marx, the president of NYPL, offered NYPL as a pilot-testing lab for virtually any e-book distribution model any publisher wanted to test. These pilots helped both libraries and publishers understand how to work with new business models and how users engage with e-books. These partnerships are consistent with NYPL's role in providing access to content while promoting the discovery of new literature. Furthermore, consortia of libraries with a mission for preserving cultural heritage and the scholarly record have formed partnerships for digital preservation, starting with journal content, with each library taking responsibility for particular titles among its holdings. For example, NYPL was an early participant in Portico, a digital preservation service that operates in partnership with publishers to protect digital journals and other materials.<sup>34</sup>

At the same time, as progressively more content is licensed rather than sold, Congress needs to consider whether to prohibit the enforcement of contractual limitations on copyright exceptions in certain circumstances. Significantly, the suite of statutory

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<sup>34</sup> See generally PORTICO, <http://www.portico.org/> (last visited May 28, 2014).

instruments for amending the U.K. copyright law that will come into force on June 1, 2014, prohibit the “contracting out” of many exceptions in the research and education context.<sup>35</sup> Congress, therefore, needs to closely monitor the evolving digital marketplace to ensure that it is sufficiently competitive to provide widespread public access to works.

#### **IV. CONCLUSION: PROTECT FIRST SALE FOR PHYSICAL ITEMS AND MONITOR EVOLVING DIGITAL BUSINESS MODELS**

Throughout American history, libraries have played a fundamental role in promoting democratic values by providing access to information. By lending materials to users, libraries help users become informed citizens. Recognizing this important activity, U.S. copyright law protects the physical lending of material through the first sale doctrine. Attempts to limit the scope of the first sale doctrine, such as those contemplated in the *Kirtsaeng v. John Wiley & Sons* litigation, are very concerning to libraries. For licensed digital content, Congress should continue to monitor evolving business models to ensure that the public can continue to access content lent by libraries free of charge.

I would like to thank the Committee for holding this hearing and inviting NYPL to participate.

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<sup>35</sup> See, e.g., The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, <http://www.legislation.gov.uk/ukdsi/2014/9780111112755>.