

# E-book Buying v. Licensing: A Multi-Layered Legal Perspective



## The 1<sup>st</sup> New Jersey E-Summit

New Jersey State Library, LibraryLinkNJ and the NJLA Reference Section

Eatontown, NJ

July 14, 2011

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LibraryLaw.com

# Legal Disclaimer

- Legal information
- **Not** legal advice!



# TOPICS

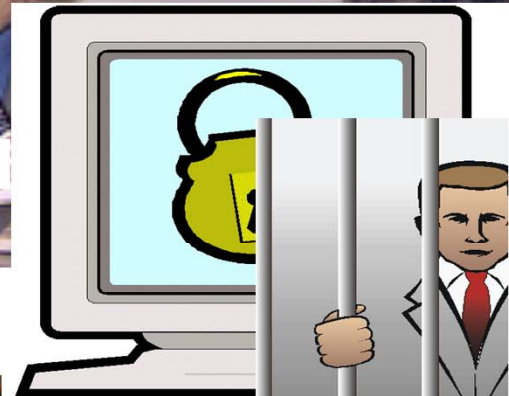
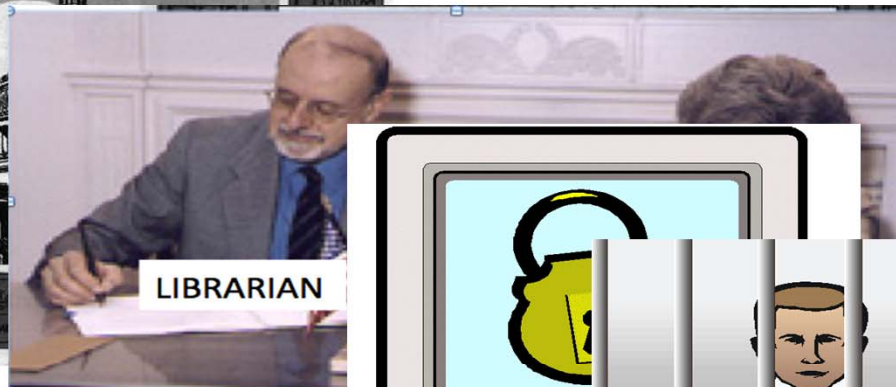
Layers of Control – Licenses et al

Rising Issues: Accessibility, Privacy

Possible legal futures



# Layers of Control

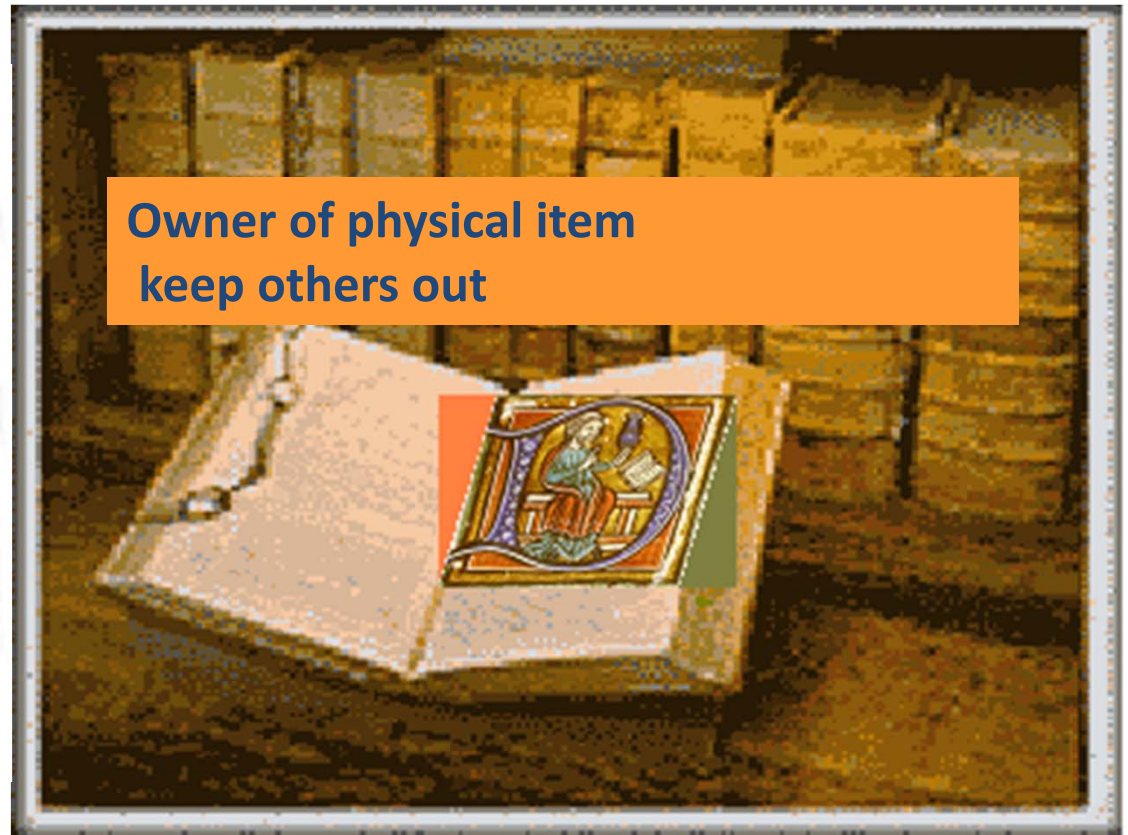


Are we



# Physical Control – Lock it down

**P**hysical



Owner of physical item  
keep others out

# COPYRIGHT – Legal controls on content

P  
C  
L  
E  
D  
opyright



Authors generally sign © over to publishers

# COPYRIGHT RIGHTS AND PENALTIES

May not **reproduce or distribute** without rights holder authorization

...unless specific copyright exception or fair use

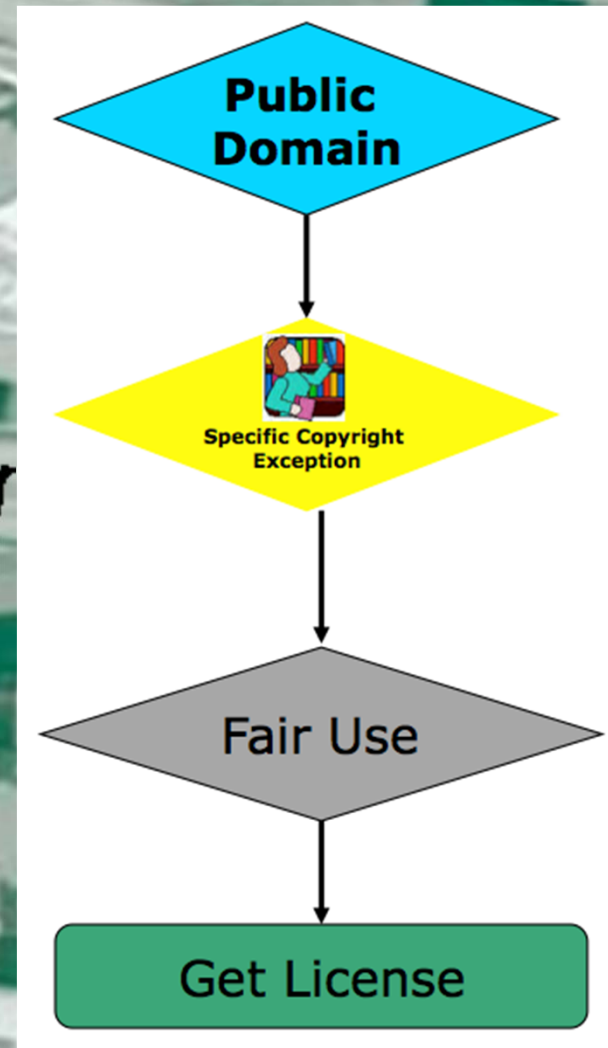
\$750 - \$30,000 per infringement



BACKLIST (pre 1987 or so) – Digital rights likely remain with author

*New York Times Co. v. Tasini*, [533 U.S. 483 \(2001\)](#);

[Random House, Inc. v. Rosetta Books](#), 283 F.3d 490 (2d Cir. 2002) (not entirely conclusive)



**June 29, 2011**

## **What libraries can do when they buy an ebook**

When a library buys (*not* licenses) a copy of an ebook, it is subject to the same copyright restrictions and allowances as when the library buys a hardback copy. It has no more legal right to make 10 copies of *Wikileaks and the Age of Transparency*, to lend out to 10 patrons simultaneously, than if it had bought the hardback.

### **Copyright Restrictions**

The library may not make multiple copies to sell or lend. It may not make derivative works, such as translations or movies. These are exclusive rights granted by law to the copyright owner. [17 U.S.C. Sect. 106](#)

Allowances: The library may make copies for preservation, replacement, and to fulfill user requests, provided it abides by the conditions set forth specifically for libraries in [17 U.S.C. Sect. 108](#). Libraries may lend one copy of a purchased ebook to one user at a time, under Fair Use. (See "Lending library ebooks").

Additionally, the library may make limited copies or distributions as permitted by copyright law under the limitations and exceptions set forth in [17 U.S.C. Sect. 107 - 122](#).

**Copyright Penalties:** \$750-\$30,000 per title. \$150,000 if willful infringement is shown. If a library can show it had reasonable grounds for believing it's copying or distribution was fair use, it can go to \$0. [17 U.S.C. Sect. 504\(c\)](#).



# So... What is Copyright FIRST SALE?



**Loan books**

**Sell used books**

(specific exception at 17 U.S.C.  
Sect. 109)



# Don't take for granted!

## First Sale Doctrine in United States

### Established PLR Schemes

	<u>Since</u>	<u>Calculated on</u>
AUSTRALIA	1974	copies based
AUSTRIA	1977	loans based
BELGIUM	2006	loans based
CANADA	1986	copies based
CZECH REPUBLIC	2006	loans based
DENMARK	1947	copies based
ESTONIA	2004	loans based
FAROE ISLANDS	1988	copies based
FINLAND	1963	government grants
FRANCE	2006	copies purchased
GERMANY	1972	loans based
GREENLAND	1993	copies based
HUNGARY	2008	loans based

Not true everywhere! Public Lending Right = libraries pay authors when books are loaned



# Digital First Sale?

Outdated law.

Rights triggered when  
*copy is made*, even if  
original is deleted.\*



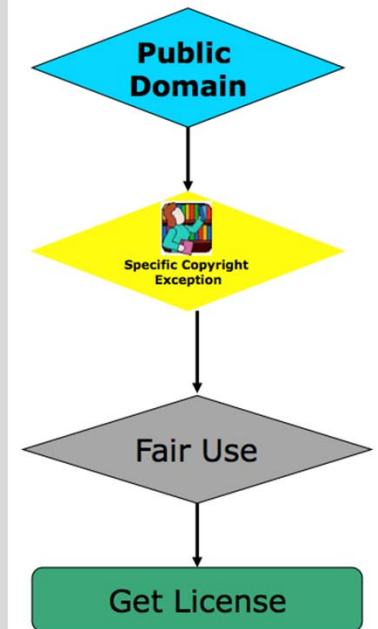
\*may make FAIR USE argument, depending on circumstances

# Fair Use Argument to allow library loans

- Purpose – nonprofit societal role

*Libraries recognized in law – may lend software, make preservation and interlibrary loan copies...*

- Nature of titles – varies
- Amount – whole book but disappearing
- Market Effect - each usable copy paid for once



# License – *Private Agreements* control content

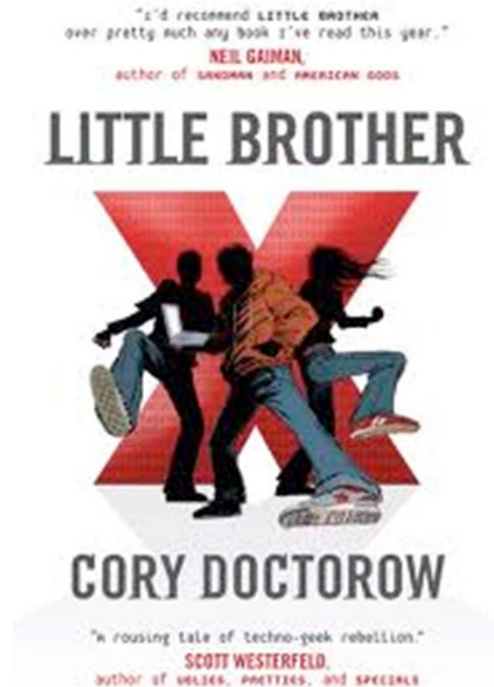
P  
C  
L  
E  
D  
License



# Real Example: Cory Doctorow's story



Doctorow © [Jonathan Worth](#), n.d. Some Rights Reserved.  
<http://tinyurl.com/2eaeqxs>



Physical book – (what's that?)

Copyright – Doctorow/Random House  
OK with free downloads

License – Doctorow wanted to allow “anything that is permitted by your local copyright law.” No.

Vendors insisted on Digital Rights Management (DRM)

**Doctorow's First Law:** Any time someone puts a lock on something that belongs to you, and won't give you a key, they're not doing it for your benefit.

[www.publishersweekly.com/pw/by-topic/columns-and-blogs/cory-doctorow/article/44012-doctorow-s-first-law.html](http://www.publishersweekly.com/pw/by-topic/columns-and-blogs/cory-doctorow/article/44012-doctorow-s-first-law.html)

# Encryption and DIGITAL LOCKS ... (back to self help)

P

C

L

**E**ncryption and Digital Rights Mgmt  
**D** (DRM)



# DRM Removal – Is it Legal?



- Everything
- Images
- Videos
- News
- More

Any time

ebooks drm



Search

ebooks drm

ebooks drm **removal**

ebooks drm **free**

**borders** ebooks drm

**amazon** ebooks drm

About 759,000 results (0.18 seconds)

[Advanced search](#)

It would be ... if it weren't for the **DMCA**



# Fifth Layer: Digital Millennium Copyright Act

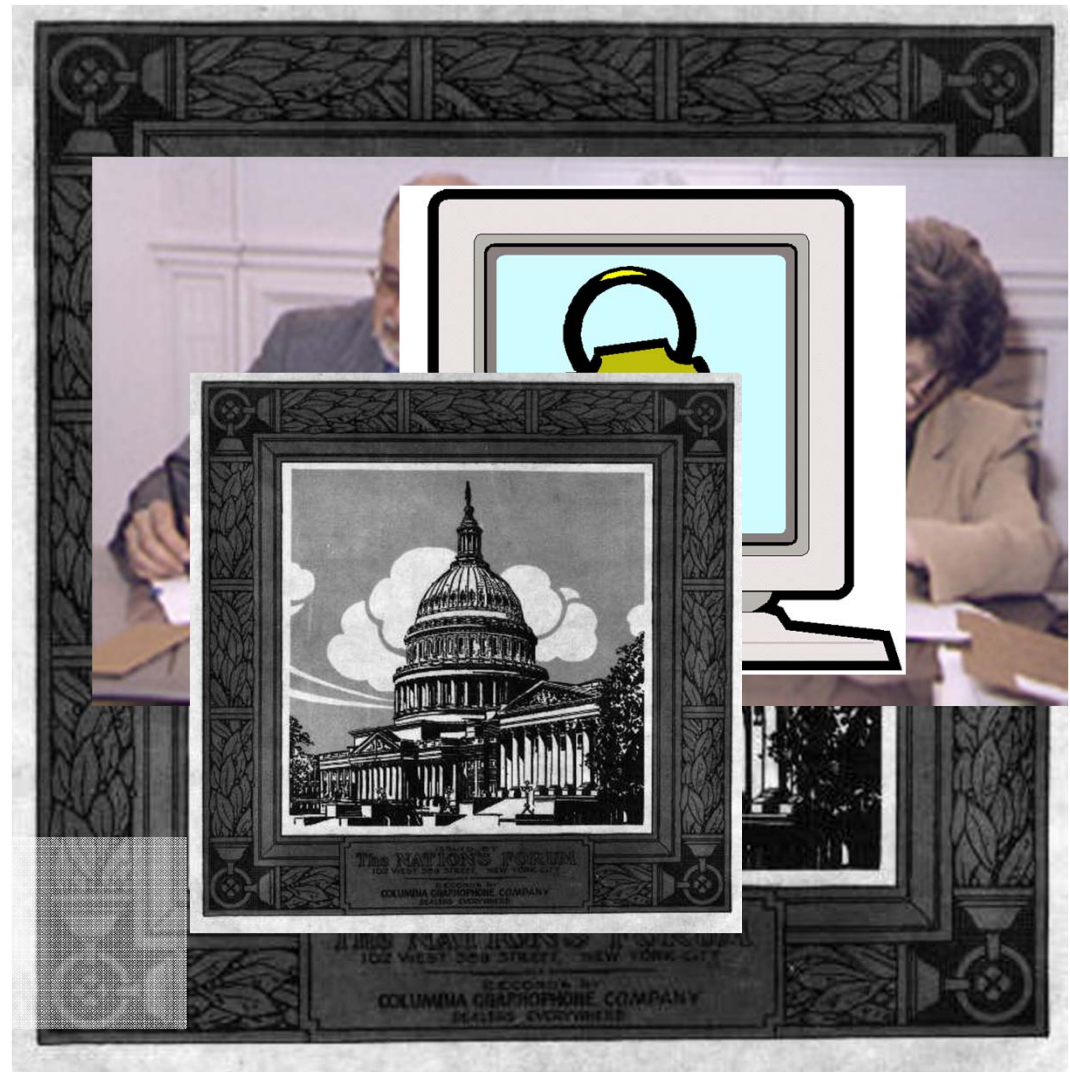
P

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DMCA



**DMCA: law that *criminalizes* tampering with digital locks**

## 1998 Digital Millennium Copyright Act **DMCA**

2001 Dmitry Sklyarov arrested at Defcon conference after speech on hacking Adobe eBooks DRM

2002 Acquitted. No intent to violate law.



# Legal to Tamper\*

issued by Librarian of Congress July 26, 2010 – expire in 3 yrs

Ebook controls on read-aloud functions

... when all existing editions block  
accessibility

Cell phone apps interoperability



\*For conditions, see [www.loc.gov/today/pr/2010/10-169.html](http://www.loc.gov/today/pr/2010/10-169.html)

\*\*Still illegal to sell *tampering tools*

# REVIEW: Content Controls



**P**hysical Ownership

Attribution-NonCommercial-NoDerivs 2.0 Generic

**C**opyright

**L**icenses and agreements

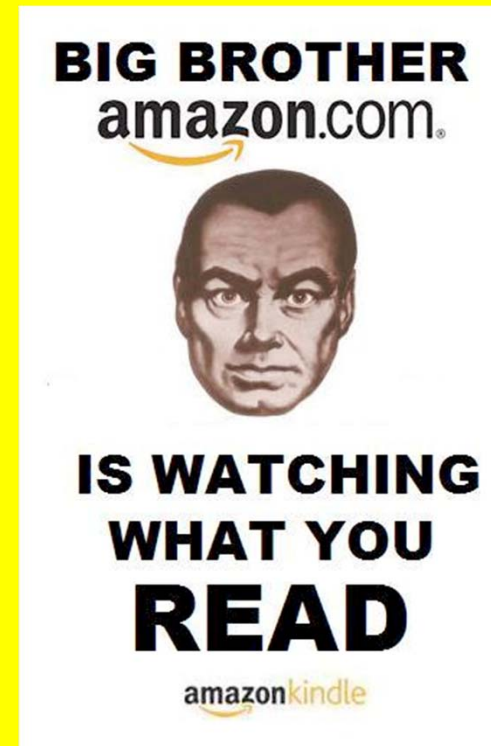
**E**ncryption and Digital Rights

Management

**D**igital Millennium Copyright Act  
(DMCA)



# Rising Issues: Accessibility, Privacy



# Disability Access at Universities

## Department of Justice settlements

“We acted swiftly on the complaints we received from the National Federation of the Blind about the use of the Amazon Kindle”

“... we will continue to make sure other institutions nationwide are aware of their accessibility obligations.”

Arizona State University and others agree not to use inaccessible e-readers

[www.ada.gov/arizona\\_state\\_university.htm](http://www.ada.gov/arizona_state_university.htm)

*National Federation of the Blind and American Council of the Blind v Arizona State University*



Thomas E. Perez  
Assistant Attorney General remarks  
June 10, 2010  
[tinyurl.com/adakindle](http://tinyurl.com/adakindle)

# Library Lessons: Evaluate Accessibility

The screenshot shows a web browser displaying a blog post on TUAW (The Unofficial Apple Weblog). The page title is "The iPad could be the best mobile accessibility device on the market" by David Winograd, dated June 1st, 2010. The article discusses the history of accessibility in GUI-based computing, from early character recognition systems to the introduction of the iPad in 2010. It mentions that the iPad was found to be highly accessible and possibly the best mobile device on the market for disabled users. The page includes a search bar, navigation links (Main, Mac, iPhone, iPad, Video, Photos, App Reviews, TUAW App, About Us, Tip Us), and a "Send Feedback" link. There are also advertisements for American Express and a "Tip of the Day" section.

Choose accessible readers

or

choose titles that library already has in accessible format (including print)

Remember: OKAY to remove DRM *if* no accessible copies on the market

**Reading Rights Coalition**

We represent **30 million** Americans who cannot read print

Stay up to date with [readingrights.org](http://readingrights.org)

Evaluates Kindle 3

[Log in / Sign](#)



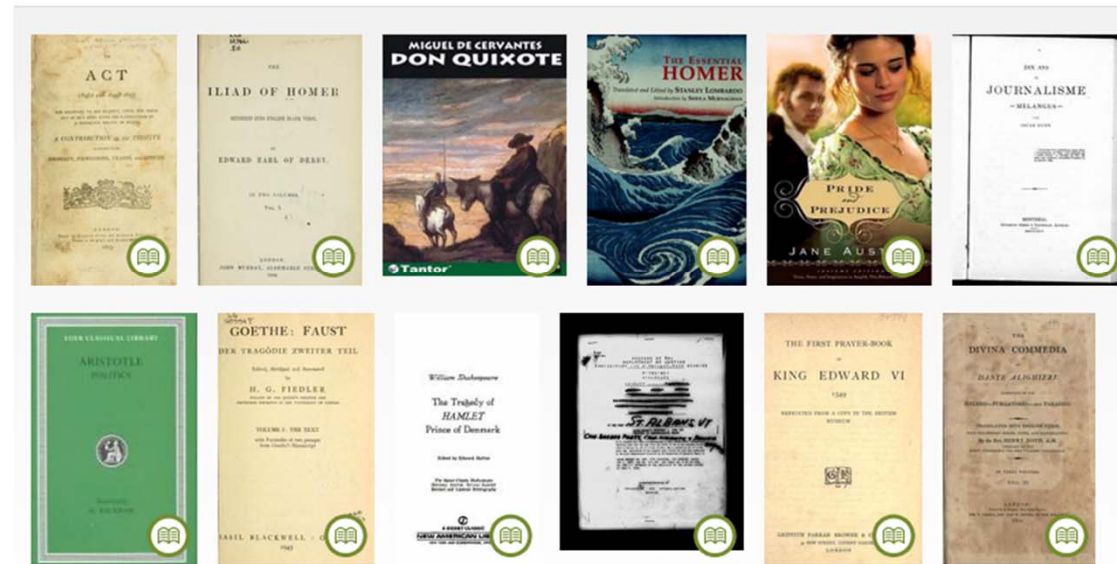
One web page for every book.

[SUBJECTS](#)    [ADD A BOOK](#)          Only show eBooks    [More search options](#)

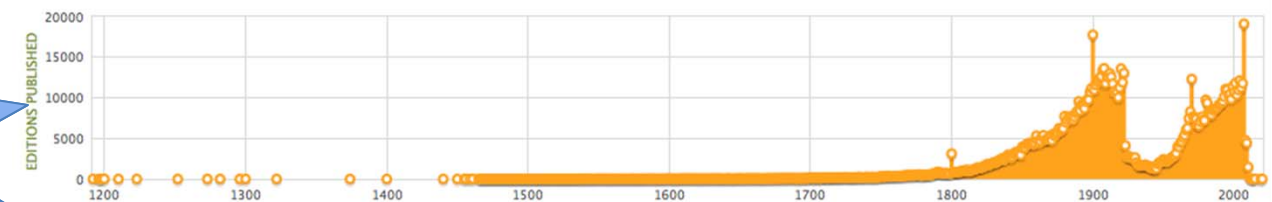
[AUTHORS](#)    [RECENTLY](#)    [ABOUT US](#)

**Accessible book** 785,525 works / [1,078,835 ebooks](#) published between 1192 & 2020.

Sort by: [# of Editions](#) | [Most Recent Publish Date](#)



**Publishing History** This graph charts editions published on this subject. Click to view a single year, or drag across a range.



2 million DAISY  
150,000  
modern  
ebooks

## DAISY format

National Library Service for the Blind and Physically Handicapped (NLS) users qualify.

[http://openlibrary.org/subjects/accessible\\_book](http://openlibrary.org/subjects/accessible_book)



# Privacy: Librarian as holy confidant



Photo by Chester Liu, used with permission

“A librarian's **sacred duty** is to the library patron. When you speak with a librarian, it is similar to speaking with a holy person.”

Eric Kaufman, “Firm Librarians: How They Enrich Your Experience,” *New York Law Journal* (June 5, 2000).

# Kindle – Popular Highlights

The screenshot shows the Amazon Kindle interface. At the top, there's a navigation bar with the Amazon Kindle logo, user account information (Hello, Sallie), and a search bar. Below the navigation bar, there's a section titled "Most Highlighted Passages of All Time" with a "What's this?" link. The list contains six entries, each with a book cover, a highlighted passage, the number of users who highlighted it, and a link to the book on Amazon.com.

Rank	Book Title	Author	Highlighted by	Passage
1.	Outliers: The Story of Success	Malcolm Gladwell	2287 Kindle users	...the more money they made the next day on the streets. Those three things—autonomy, complexity, and a connection between effort and reward—are, most people agree, the three qualities that work has to have if it is to be satisfying. It is not how much money we make that ultimately makes us happy between nine and five. It's whether our work fulfills us.
2.	Cutting for Stone	Abraham Verghese	1571 Kindle users	"I hope one day you see this as clearly as I did in Kerala. The key to your happiness is to own your slippers, own who you are, own how you look, own your family, own the talents you have, and own the ones you don't. If you keep saying your slippers aren't yours, then you'll die searching, you'll die bitter, always feeling you were promised more. Not only our actions, but also our omissions, become our destiny." AFTER GHOSH LEFT...
3.	The Last Lecture	Randy Pausch	1553 Kindle users	Be the First Penguin EXPERIENCE IS what you get when you didn't get what you wanted. That's an expression I learned when I took a sabbatical at Electronic Arts, the video-game maker. It just stuck with me...
4.	The Shack	William P. Young	1517 Kindle users	That will only lead you to false notions about me. Grace doesn't depend on suffering to exist, but where there is suffering you will find grace in many facets and colors." Actually, that's a relief.
5.	Outliers: The Story of Success	Malcolm Gladwell	1389 Kindle users	Even Mozart—the greatest musical prodigy of all time—couldn't hit his stride until he had his ten thousand hours in. Practice isn't the thing you do once you're good. It's the thing you do that makes you good. The other interesting thing about that ten thousand hours, of course...
6.				

Reader Privacy Acts

California – protect reader records

SB 445 (library users including cloud services)

SB 602 (commercial)

# Possible Legal Futures



GOOGLE BOOKS – Parties due back in court July 19

Legislative proposals to allow:  
digitization for preservation, indexing  
“orphan works” available after diligent search

Possible **Extended Collective Licensing** (e.g.  
Norway)  
libraries pay annual or per-use fees

FAIR USE LENDING MODEL (OPENLIBRARY.ORG)

DIGITAL PUBLIC LIBRARY OF AMERICA (DPLA)

# SUMMARY

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