

## AMAZON.COM'S ORWELLIAN GAFFE: THE LEGAL IMPLICATIONS OF SENDING E-BOOKS DOWN THE MEMORY HOLE

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Then, with a movement which was as nearly as possible unconscious, he crumpled up the original message and any notes that he himself had made, and dropped them into the memory hole to be devoured by the flames.

What happened in the unseen labyrinth to which the pneumatic tubes led, he did not know in detail, but he did know the general terms. As soon as all the corrections which happened to be necessary in any particular number of the *Times* had been assembled and collated, that number would be reprinted, the original copy destroyed, and the corrected copy placed on the files in its stead. This process of continuous alteration was applied not only to newspapers, but to books, periodicals, pamphlets, posters, leaflets, films, sound tracks, cartoons, photographs—to every kind of literature or documentation which might conceivably hold any political or ideological significance. Day by day and almost minute by minute the past was brought up to date.<sup>1</sup>

### I. INTRODUCTION

On Friday July 14, 2009, as users of the Kindle, the Amazon.com (Amazon) e-book reader, powered up their devices, something startling happened. Purchased copies of George Orwell's *1984* and *Animal Farm* disappeared from Kindle e-book libraries.<sup>2</sup> Amazon had discovered that MobileReference.com, the company selling the Orwell books on the Kindle Store website, did not have rights to sell the

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<sup>1</sup> GEORGE ORWELL, 1984 39–40 (1950).

<sup>2</sup> Brad Stone, *Amazon Erases Two Classics from Kindle (One is 1984)*, N.Y. TIMES, July 18, 2009, at B1, available at 2009 WLNR 13725953.

works.<sup>3</sup> Reacting as any conscientious, law-abiding corporation would, Amazon immediately removed the unlicensed content from the Kindle Store.<sup>4</sup> Unfortunately, it also went a step further. In the hopes of fending off any possible liability, Amazon reached into users' Kindle devices and deleted the e-books directly from the Kindles of all who had purchased them.<sup>5</sup>

Although Amazon e-mailed users after the deletion and refunded the purchase price, users and commentators alike were outraged.<sup>6</sup> One privacy advocate described the incident as "the functional equivalent of Barnes & Noble . . . using a crowbar or lock pick to break into your home or business, then stealing back a previous physical book purchase, replacing it with the equivalent value in cash."<sup>7</sup> Kindle users sounded off on discussion boards; one user rather vividly stated, "Amazon offered a product, which I legally purchased, and had in my possession, until their electronic burglar stole it from me."<sup>8</sup> Amazon's Chief Executive Officer, Jeff Bezos, apologized to users and called the company's "solution" to the problem "stupid, thoughtless, and painfully out of line with [Amazon's] principles."<sup>9</sup> In early September 2009, Amazon reached out to affected

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<sup>3</sup> Bobbie Johnson, *Why Did Big Brother Remove Paid-for Content from Amazon's Kindle?*, THE GUARDIAN (July 22, 2009), <http://www.guardian.co.uk/technology/2009/jul/22/kindle-amazon-digital-rights>.

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

<sup>5</sup> *Id.*

<sup>6</sup> Brad Stone, *Amazon Faces a Fight Over Its E-Books*, N.Y. TIMES, July 27, 2009, at B3, available at 2009 WLNR 14392434; see also Jon Garon, *Amazon's Next Kindle Class Action Suit*, ENT. & ENTREPRENEURSHIP (July 20, 2009, 10:55 PM), [http://lawbizbooks.com/blog4/2009/07/amazons\\_next\\_kindle\\_class\\_acti.html](http://lawbizbooks.com/blog4/2009/07/amazons_next_kindle_class_acti.html).

<sup>7</sup> Thomas Claburn, *Amazon Says It Will Stop Deleting Kindle Books*, INFO. WEEK (July 17, 2009), [http://www.informationweek.com/news/personal\\_tech/drm/showArticle.jhtml?articleID=218501227](http://www.informationweek.com/news/personal_tech/drm/showArticle.jhtml?articleID=218501227) (quoting e-mail from Lauren Weinstein, Privacy Advocate, to Interesting People mailing list).

<sup>8</sup> r0b0d0c, Comment to *Amazon Pulled a Book from My Kindle Library . . . What in the World?*, KINDLEBOARDS (July 16, 2009, 8:20:28 PM), <http://www.kindleboards.com/index.php/topic,11406.25.html>.

<sup>9</sup> Jeffrey P. Bezos, *An Apology from Amazon*, KINDLE DISCUSSION FORUM, AMAZON.COM (July 23, 2009, 12:16 PM), [http://www.amazon.com/tag/kindle/forum/ref=cm\\_cd\\_ef\\_tft\\_tp?\\_encoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdThread=Tx1FXQPSF67X1IU&displayType=tagsDetail](http://www.amazon.com/tag/kindle/forum/ref=cm_cd_ef_tft_tp?_encoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdThread=Tx1FXQPSF67X1IU&displayType=tagsDetail).

This is an apology for the way we previously handled illegally sold copies of 1984 and other novels on Kindle. Our "solution" to the problem was stupid, thoughtless, and painfully out of line with our principles. It is wholly self-inflicted, and we deserve the criticism we've received. We will use the scar tissue from this painful mistake to help make better decisions going forward, ones that match our mission. With deep apology to our customers, Jeff Bezos.

*Id.*

users in an effort to right the wrong and stave off potential lawsuits<sup>10</sup> by offering them either a thirty-dollar gift certificate or a legal replacement of the deleted book.<sup>11</sup>

While the apology may have been sincere and the replacement offer the best remedy for a poorly handled situation, the incident itself raises numerous legal issues related to purchasing digital content and the implications of this type of technology. These issues have largely been ignored as technology companies, publishers, and authors concentrate on copyright infringement, the “hacking” of e-book readers, ownership rights to literary works in the digital format, and determining the appropriate pricing and royalties scheme for e-books.<sup>12</sup> While all admittedly important questions, the sheer power that Amazon wielded in deleting user-purchased content deserves a more careful examination. The fact that technology has developed to the point where consumer products constantly communicate with internet service providers, or are “tethered” as Professor Jonathan Zittrain would describe it,<sup>13</sup> should raise serious red flags as companies like Amazon use this connectivity to actually remove user-purchased content from devices. Consumers deserve protections from, and notice of, what is at risk when using modern technological devices like the Kindle—protection that our current law does not provide.

This Comment should serve as a cautionary tale for zealous technology enthusiasts. It uses the Kindle debacle to demonstrate both the inherent dangers in allowing technology companies to control consumer use of their products and the lack of recourse available

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<sup>10</sup> One lawsuit was filed prior to the September replacement offer and then subsequently settled. Complaint, *Gawronski v. Amazon.com*, No. 2:09-cv-01084-JCC (W.D. Wash. Jul. 31, 2009) [hereinafter Complaint]; Stipulated Settlement & Proposed Order of Dismissal, *Gawronski v. Amazon.com*, No. 2:09-cv-01084-JCC (W.D. Wash. Jul. 31, 2009) [hereinafter Stipulated Settlement]. The claims alleged will be discussed in detail. See *infra* note 50 and accompanying text.

<sup>11</sup> Chad Berndston, *Amazon's Orwell Apology Can't Quite Erase Kindle Black Mark*, CHANNELWEB (Sept. 8, 2009), <http://www.cnn.com/retail/219501636jsessionid=N0JN342JHTJDNQE1GHOSKH4ATMY32JVN>.

<sup>12</sup> See, e.g., Martyn Daniels, *eBook Pricing*, BRAVE NEW WORLD (Apr. 5, 2009), <http://bookseller-association.blogspot.com/2009/04/ebook-pricing.html>; Matt Frisch, *Digital Piracy Hits the E-Book Industry*, CNN TECH (Jan. 1, 2010), <http://www.cnn.com/2010/TECH/01/01/ebook.piracy/>; Patricia Resende, *Hacker Breaks Kindle's Proprietary E-Book Protection*, CIO TODAY (Dec. 23, 2009), [http://www.cio-today.com/news/Hacker-Break-Kindle-s-E-Book-Limits/story.xhtml?story\\_id=11300DWZ2N6I&full\\_skip=1](http://www.cio-today.com/news/Hacker-Break-Kindle-s-E-Book-Limits/story.xhtml?story_id=11300DWZ2N6I&full_skip=1); Motoko Rich, *Plot Twist for Familiar Works: Who Owns the E-Book Rights?*, N.Y. TIMES, Dec. 13, 2009, at A1, available at 2009 WLNR 25107841.

<sup>13</sup> JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 101 (2008); see also *infra* Part V.

through our legal system to remedy any resulting harm. The technology that enables remote access to user content raises the possibility that such technology may be used not only to remove, but also to surreptitiously edit content stored on users' devices and effectively censor electronic publications in quite the fashion described by George Orwell in *1984*.<sup>14</sup> This is important because of the explosive growth of the Kindle and similar devices. Most of America's readers may soon be subject to such tampering. To prevent this type of technological transgression from occurring in the future, legislative and regulatory action is necessary now.

Part II of this Comment will explain exactly what the Kindle is, how the technology works, and what happened when the Orwell e-books were deleted. Part II will also discuss the one lawsuit that was filed in response. Part III will assess the various claims that affected Kindle users could raise: whether Amazon has breached its Terms of Use Agreement; whether Amazon could be held liable in tort for

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<sup>14</sup> *1984* depicts, in essence, a "negative utopia." See generally ORWELL, *supra* note 1. The story takes place in Oceania in the year 1984, and it follows the life of Winston Smith, a low-ranking government official in the Party. Winston is disillusioned by the Party and its leader, "Big Brother," which function as a totalitarian regime, controlling every aspect of his daily life. Wherever he turns he is confronted with images of Big Brother and the slogan "Big Brother is watching you." "Telescreens" are everywhere, even in Winston's own home, so the Party can watch him at all times. The Party implemented its own language called Newspeak, aimed at preventing political rebellion by eliminating all words related to it. The "thought police" persecute, or more accurately vaporize, those who so much as have a rebellious thought, or commit "thoughtcrime," the worst crime in Oceania.

The Party controls all sources of information, and it prohibits individuals from keeping any records of their past. Winston himself works at the Ministry of Truth, where his job is to constantly update and alter historical records, newspapers, and all printed media to fit the current Party agenda and to portray Big Brother in the best light. As a result, the citizens of Oceania are completely unaware of their pasts and believe what the perpetually revised histories tell them to believe—whatever the Party finds it useful for them to believe. A telling Party slogan found throughout the novel is "Who controls the past, controls the future: who controls the present controls the past." Winston attempts to break free from Party control—he writes his rebellious thoughts in a diary, begins to piece together the lies that the Party has instructed him to "revise" printed history to reflect, and even falls in love (which is strictly prohibited). But in the end, he is caught by the thought police. He is tortured and his spirit broken. As a result, Winston becomes a Party drone with an eerie adoration for Big Brother.

Throughout the novel, Orwell warns of the dangers of a government with absolute power. He stresses the role that technology can play in enabling oppressive governments to monitor and control their citizens. Finally, Orwell emphasizes the importance of the past, of a tangible truth about what happened before, as it frames the way people look at the present. *1984* demonstrates that when technology is used to wipe out the past, it becomes an extremely powerful and dangerous tool, one that can oppress an entire nation without its knowledge. See generally ORWELL, *supra* note 1.

trespass to chattels or conversion; and whether Amazon could be held liable under the federal Computer Fraud and Abuse Act. Part III will also evaluate what damages, if any, affected users could hope to collect if they successfully brought claims against Amazon. Part IV will discuss the disconnect between the general public's perception of owning digital media, the realities of licensing agreements, and whether, in light of this "Orwellian" incident, enough is being done to protect consumers' interests. Part IV will also consider whether regulatory intervention on the part of the Federal Trade Commission may provide protection to consumers. Finally, Part V will address the future implications of this type of technology.

## II. THE KINDLE AND THE MYSTERIOUS E-BOOK DISAPPEARANCE

Amazon is the global leader in e-commerce.<sup>15</sup> A *Fortune* 500 company, Amazon began as an online bookseller but has since expanded into a variety of consumer goods provided to a variety of international markets.<sup>16</sup> In November of 2007, Amazon expanded its business even further by releasing its own consumer product—the first generation Kindle e-book reader.<sup>17</sup> The Kindle is marketed as a "digital reading device."<sup>18</sup> In essence, it is a handheld, internet-enabled device that is capable of downloading digital copies of books and displaying them on a black-and-white "paper-like" screen with the appearance and readability of printed-paper.<sup>19</sup> For the avid reader and technology enthusiast, the benefits of the Kindle are numerous. Slimmer than the average magazine and lighter than a typical paperback, the Kindle is capable of storing 1,500 books at a time—a virtual, portable library.<sup>20</sup> Moreover, in addition to hundreds of thousands of available books, the Kindle also offers subscriptions to newspapers, magazines, and blogs.<sup>21</sup> Because the device utilizes Amazon's Whis-

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<sup>15</sup> *About Amazon*, AMAZON.COM, [http://www.amazon.com/Careers-Homepage/b/ref=amb\\_link\\_5763692\\_1?ie=UTF8&node=239364011&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_s=left-4&pf\\_rd\\_r=1H95X9QBZP09DH8T1AW8&pf\\_rd\\_t=101&pf\\_rd\\_p=465323111&pf\\_rd\\_i=239365011](http://www.amazon.com/Careers-Homepage/b/ref=amb_link_5763692_1?ie=UTF8&node=239364011&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=left-4&pf_rd_r=1H95X9QBZP09DH8T1AW8&pf_rd_t=101&pf_rd_p=465323111&pf_rd_i=239365011) (last visited Jan. 14, 2010).

<sup>16</sup> *Id.*

<sup>17</sup> Nilay Patel, *Kindle Sells Out in 5.5 Hours*, ENGADGET (Nov. 21, 2007), <http://www.engadget.com/2007/11/21/kindle-sells-out-in-two-days>.

<sup>18</sup> *Kindle Wireless Reading Device*, AMAZON.COM, [http://www.amazon.com/Wireless-Reading-Display-International-Generation/dp/B0015T963C/ref=sa\\_menu\\_kdp2i3?pf\\_rd\\_p=328655101&pf\\_rd\\_s=left-nav-1&pf\\_rd\\_t=101&pf\\_rd\\_i=507846&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_r=1AM92V4G6XZHYNHJBKMX](http://www.amazon.com/Wireless-Reading-Display-International-Generation/dp/B0015T963C/ref=sa_menu_kdp2i3?pf_rd_p=328655101&pf_rd_s=left-nav-1&pf_rd_t=101&pf_rd_i=507846&pf_rd_m=ATVPDKIKX0DER&pf_rd_r=1AM92V4G6XZHYNHJBKMX) (last visited Oct. 22 2009) [hereinafter *Kindle Wireless Reading Device*].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

pernet cellular-network technology, users can access the virtual Kindle store anywhere,<sup>22</sup> and purchased content is automatically and wirelessly “delivered” to the device.<sup>23</sup>

Amazon allows third-party companies to publish digital content for the Kindle and sell it directly to users through the Kindle Store.<sup>24</sup> MobileReference.com is one such third-party seller, and it offered both *1984* and *Animal Farm* for sale on the Kindle Store website.<sup>25</sup> According to an Amazon spokesperson, the actual Orwell rights-holder contacted Amazon and informed it that MobileReference.com did not have the rights to sell the Orwell titles.<sup>26</sup> Upon receiving this information from the rights-holder, Amazon removed the e-books from both the Kindle Store and customers’ devices, and refunded the purchase price.<sup>27</sup>

While Amazon responded to the situation swiftly, it did not initially inform consumers why their e-books had been deleted.<sup>28</sup> Annoyed consumers were notified by e-mail that the purchase price of the books had been refunded, but no explanation was given.<sup>29</sup> After numerous inquiries, Amazon responded to one consumer that, “[a]lthough a rarity, publishers can decide to pull their content from the Kindle store.”<sup>30</sup> Amazon answered another Kindle user’s request

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<sup>22</sup> While the Kindle was initially only available in the United States, in October of 2009, Amazon expanded the Kindle market to include numerous foreign countries. Joseph Galante, *Amazon.com Unveils Overseas Version of Kindle Reader (Update3)*, BLOOMBERG.COM, (Oct. 7, 2009), <http://www.bloomberg.com/apps/news?pid=20601103&sid=afYqQJ7AQNY0>; see also *Kindle Wireless Reading Device*, *supra* note 18.

<sup>23</sup> *Kindle Wireless Reading Device*, *supra* note 18.

<sup>24</sup> *Welcome to the Digital Text Platform*, AMAZON.COM, <https://dtp.amazon.com/mn/signin?ie=UTF8&ld=AZKindleMakeM> (last visited Sept. 12, 2009).

<sup>25</sup> Johnson, *supra* note 3.

<sup>26</sup> Stone, *supra* note 2.

<sup>27</sup> *Id.*

<sup>28</sup> See *Mysterious George Orwell Refunds*, KINDLE DISCUSSION FORUM, AMAZON.COM, [http://www.amazon.com/tag/kindle/forum/ref=cm\\_cd\\_pg\\_newest?%5Fencoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdPage=1&cdSort=oldest&cdThread=Tx1QUPINLUY4Q5M&displayType=tagsDetail](http://www.amazon.com/tag/kindle/forum/ref=cm_cd_pg_newest?%5Fencoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdPage=1&cdSort=oldest&cdThread=Tx1QUPINLUY4Q5M&displayType=tagsDetail) (last visited Sept. 9, 2009).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at July 16, 2009, 12:49 PM (comment by Caffeine Queen). The confused Kindle user posted the entire response Amazon gave her when she inquired as to why she had received a refund, which was as follows:

The Kindle edition books *Animal Farm* by George Orwell. Published by MobileReference (mobi) & Nineteen Eighty-Four (1984) by George Orwell. Published by MobileReference (mobi) were removed from the Kindle store and are no longer available for purchase. When this occurred, your purchases were automatically refunded. You can still locate the books in the Kindle store, but each has a status of not yet avail-

to keep his copy of *1984* without any real explanation and stated, “unfortunately we won’t be able to offer any additional insight or action on these matters.”<sup>31</sup> Finally, on July 17, 2009, Amazon e-mailed all affected users explaining that the books had been deleted because MobileReference.com lacked the rights to sell them.<sup>32</sup>

A media firestorm ensued. Angry Kindle users and commentators voiced their discontent, seizing upon the ironic analogy between Amazon’s behavior and Orwell’s “Big Brother,” the Party leader who ordered the destruction of all literary material contrary to the Party message by sending it down the “memory hole” in *1984*.<sup>33</sup> Two such angry Kindle users responded by filing suit and requesting class certification to represent all affected Kindle users.<sup>34</sup> Both plaintiffs were disturbed by the disappearance of *1984*, but Justin Gawronski had a particularly compelling story.

Mr. Gawronski, a high school student, was using the Kindle to complete a summer homework assignment in which he was required to read and reflect on *1984*.<sup>35</sup> He used the Kindle’s notation capabilities to add notes to specific portions of the book as he read.<sup>36</sup> One day in July, when Mr. Gawronski powered on his Kindle to continue his assignment, *1984* vanished before his eyes.<sup>37</sup> While he was still able to access his notes, they were useless without the pages and spe-

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able. Although a rarity, publishers can decide to pull their content from the Kindle store.

*Id.*

<sup>31</sup> Complaint, *supra* note 10, at 7.

<sup>32</sup> *Id.* While MobileReference.com lacked the right to produce or sell Orwell’s works as e-books, a question may exist as to who does. Surely Harcourt, Inc., which appears to own the original copyright, has claimed them. See ORWELL, *supra* note 1. Sonia Brownell Orwell, however, apparently renewed the copyright in 1977. *Id.* As e-books are increasing in popularity, legal battles are brewing between publishers, authors, and authors’ estates as to who owns the electronic rights to older titles. Rich, *supra* note 12. Many authors have argued that their publishing contracts, signed long before the e-book innovation, do not speak to e-book rights, and therefore, the authors themselves may sell the rights to their works in digital form. *Id.* Publishers, as would be expected, vehemently disagree even though most traditional publishers have only explicitly included e-book rights in contracts in the last fifteen years. *Id.*

<sup>33</sup> See, e.g., Claburn, *supra* note 7; Johnson, *supra* note 3; r0b0d0c, Comment to *Amazon Pulled a Book from My Kindle Library . . . What in the World?*, KINDLEBOARDS (July 16, 2009, 07:53:45 PM), <http://www.kindleboards.com/index.php/topic,11406.25.html>.

<sup>34</sup> Neetal Parekh, *Kindle Lawsuit, Digital Rights Go Courtroom*, TECHNOLOGIST, FINDLAW (Aug. 4, 2009, 8:44 AM), <http://blogs.findlaw.com/technologist/2009/08/kindle-lawsuit-digital-rights-go-courtroom.html>; Complaint, *supra* note 10.

<sup>35</sup> Complaint, *supra* note 10, at 5–6.

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.* at 5.

cific paragraphs in the book to which they referenced.<sup>38</sup> Not only did Mr. Gawronski suffer the loss of the copy of *1984* he had purchased, but he also “lost” his homework assignment, which he alleged he had to recreate as a result.<sup>39</sup>

The complaint that followed alleged numerous causes of action.<sup>40</sup> Among other things, the complaint sought a declaratory judgment that Amazon had violated its Terms of Use Agreement in deleting users’ books.<sup>41</sup> The goal of the suit was clear: to force an admission that Amazon’s action in deleting users’ purchased content was outside the scope of its terms.<sup>42</sup> Prior to responding to the complaint, Amazon offered affected users the option to receive replacement copies of the deleted books or thirty dollar gift certificates, which, in effect, admitted some level of wrongdoing while simultaneously eliminating any potential damages claim that Kindle users could allege.<sup>43</sup> A few weeks later, Amazon was successful in settling the Gawronski suit.<sup>44</sup>

The settlement itself is interesting. The suit was settled for \$150,000 for the plaintiffs’ attorneys’ fees, a portion of which was to be donated to charity.<sup>45</sup> The plaintiffs themselves did not recover a cent.<sup>46</sup> Amazon did agree that it would not remotely delete purchased content from devices in the United States, except in a few stipulated circumstances:

- (a) the user consents to such deletion or modification; (b) the user requests a refund for the Work or otherwise fails to pay for the Work . . . ; (c) a judicial or regulatory order requires such deletion or modification; or (d) deletion or modification is reason-

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<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.* Because Mr. Gawronski’s harm was unusual, whether the plaintiffs would have succeeded in obtaining class certification in this suit is questionable. To address the issue, the complaint attempts to create three different classes: a class of all Kindle owners; a class of all Kindle owners who had an Orwell book deleted from their Kindle; and a third class of Kindle owners who, like Mr. Gawronski, had purchased an Orwell book and had made notes, annotations, or highlights that were rendered useless by the deletion. *Id.* at 8. It is hard to imagine that a significant number of users fall into the same category as Mr. Gawronski.

<sup>40</sup> See Complaint, *supra* note 10, at 10–15; see also *infra* Part III.

<sup>41</sup> Complaint, *supra* note 10, at 10–11.

<sup>42</sup> *Id.* In addition to the declaratory judgment, the complaint sought restitution, damages, litigation expenses, and any injunctive relief necessary to protect the plaintiffs’ interests. *Id.*

<sup>43</sup> Berndston, *supra* note 11.

<sup>44</sup> Stipulated Settlement, *supra* note 10.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.*



ably necessary to protect the consumer or the operation of a Device or network through which the Device communicates.<sup>47</sup>

While perhaps a small victory for the plaintiffs, the settlement leaves the legal issues surrounding this technological capability unanswered. Moreover, although Amazon agreed to stop deleting users' purchased content, based on the conditions set forth in the settlement, Amazon still retains broad discretion in choosing when to delete content in the future. Its technological capability to delete has not been disabled. Moreover, many other popular technological devices are also designed to allow their corporate creators to manipulate users' content in much the same way,<sup>48</sup> such as the BlackBerry, the iPhone, the iPod touch, the iPad, the Sidekick, the Tivo, and other popular "smart" devices.<sup>49</sup> This same scenario surely could, and likely will, occur in other contexts. As devices become "smarter" and many tangible things become digitized, it is increasingly important to understand what kind of recourse the law provides and consider what legal developments are necessary to provide adequate relief to harmed consumers and disincentives for companies to impermissibly access, edit, or delete consumers' purchased content.

### III. THE RECOURSE AVAILABLE TO AFFECTED USERS

Amazon's actions appear questionable under a variety of legal theories; however, there are significant hurdles that may prevent the application of current law to intangible property. Because the Gwronski case settled, these issues were left unanswered and may remain unanswered until another technology mogul oversteps its bounds in an effort to control users' smart device digital content.

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<sup>47</sup> *Id.* at 4.

<sup>48</sup> See, e.g., Nick Wingfield, *iPhone Software Sales Take Off: Apple's Jobs*, WALL ST. J., Aug. 11, 2008, at B1 ("Apple raised hackles in computer-privacy and security circles when an independent engineer discovered code inside the iPhone that suggested iPhones routinely check an Apple Web site that could, in theory trigger the removal of the undesirable software from the devices. Mr. Jobs confirmed such a capability exists . . .").

<sup>49</sup> "Smart" is a term generally used to describe devices or products that operate with the use of computer programs and are enabled to access the internet and network with other devices. See Jean Braucher, *When Your Refrigerator Orders Groceries Online and Your Car Dials 911 After an Accident: Do We Really Need New Law for the World of Smart Goods?*, 8 WASH. U. J.L. & POL'Y 241, 241 (2002).

A. *Has Amazon Breached Its Terms of Use Agreement?*

The Gawronski suit raised contract and tort claims as well as state and federal statutory claims.<sup>50</sup> The most obvious, perhaps, is that Amazon's actions constituted a breach of its Terms of Use Agreement. While a breach of contract claim appears to be a straightforward means of recovery, potential plaintiffs are unlikely to receive any meaningful compensation unless they commence a class action and obtain class certification. This exemplifies the failings in our current law's ability to protect consumers.

Upon purchasing a Kindle, the buyer agrees to the "Amazon Kindle License Agreement and Terms of Use" and is bound upon first use of the product.<sup>51</sup> With respect to digital content, the agreement states that

Upon your payment of the applicable fees set by Amazon, Amazon grants you the non-exclusive right to keep a permanent copy of the applicable Digital Content and to view, use, and display such Digital Content an unlimited number of times, solely on the Device or as authorized by Amazon as part of the Service and solely for your personal, non-commercial use. Digital Content will be deemed licensed to you by Amazon under this Agreement unless otherwise expressly provided by Amazon.<sup>52</sup>

The plain language of this provision suggests that for valuable consideration, in the amount paid for the content, Amazon "grants" users the right to keep a permanent copy of the content purchased. Therefore, by removing the permanent copies of *1984* and *Animal Farm*, Amazon arguably breached this express contractual term.

The agreement does state that "Amazon reserves the right to modify, suspend, or discontinue the Service at any time" and will not be liable to users if it exercises that right.<sup>53</sup> "Service," however, is defined as "the wireless connectivity, provision of digital content, software and support, and other services and support that Amazon provides Device users."<sup>54</sup> The definition includes only *providing* digital content; it does not include the power to alter or delete digital content. So while Amazon reserved the right to discontinue the Kindle "Service" at any time, and has disclaimed liability for such an action, that does

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<sup>50</sup> See Complaint, *supra* note 10, at 10–15.

<sup>51</sup> *Kindle (U.S. Wireless) License Agreement and Terms of Use*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200144530&> (last visited Aug. 28, 2010) [hereinafter *Amazon Terms of Use Agreement*].

<sup>52</sup> *Id.* (emphasis added).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (emphasis added).

not suggest that it can take purchased content away from users in the process. In fact, nowhere in the Terms of Use Agreement is Amazon's ability to alter or delete users' purchased content mentioned.<sup>55</sup>

Because Amazon potentially breached its contract, Amazon may rely on its Disclaimer of Warranties to avoid liability.<sup>56</sup> The question thus becomes whether the disclaimer actually protects Amazon from what appears to be a blatant violation of its contractual terms.<sup>57</sup> Article II of the Uniform Commercial Code (U.C.C.), the model code that governs commercial transactions in goods,<sup>58</sup> states that any affirmation of a fact or a promise that relates to the goods or any description of the goods made by the seller that becomes a "part of the basis of the bargain creates an express warranty that the goods shall conform" to the affirmation, promise, or description.<sup>59</sup> In stating that it "grants" users the right to keep a "permanent copy," Amazon likely has expressly warranted to provide permanent copies of digital content. Section 2-316 of the U.C.C. states that "[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever rea-

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<sup>55</sup> *Id.*

<sup>56</sup> The disclaimer of warranties states the following:

You expressly acknowledge and agree that use of the service, device, digital content, and software is at your sole risk. Except for the one-year limited warranty, the service, device, digital content and software are provided "as is" with all faults and without warranty of any kind and Amazon and its suppliers and licensors disclaim all warranties, express or implied, including, but not limited to, the implied warranties of merchantability, fitness for a particular purpose, accuracy, quiet enjoyment and non-infringement of third-party rights. No oral or written information or advice given by Amazon or an authorized representative of Amazon shall create a warranty. The laws of certain jurisdictions do not allow the disclaimer of implied warranties. If these laws apply to you, some or all of the above disclaimers, exclusions or limitations may not apply to you, and you may have additional rights.

*Id.*

<sup>57</sup> See *Amazon Terms of Use Agreement*, *supra* note 51.

<sup>58</sup> The Kindle, a "smart" device, is a hybrid product—a tangible good to which computer-like capabilities and internet service is attached. Braucher, *supra* note 49, at 241. Professor Braucher has argued that Article II of the U.C.C. should govern the sale of smart devices because its provisions are sufficient to address "issues of contract formation, warranties, performance standards, and damages." *Id.* at 242. The article does note, however, that the U.C.C. provisions are currently inadequate to address the specific issues of transferring intangible property and intangible property use restrictions. *Id.* While this approach certainly has not been adopted in every jurisdiction (nor for that matter has the entirety of the U.C.C.), this Comment will use Article II to illustrate the possible outcome of a breach of contract claim in this case.

<sup>59</sup> U.C.C. § 2-313(2)(a)–(b) (2005).

sonable as consistent with each other.”<sup>60</sup> Applying that provision here, and construing the two terms as consistent with one another, would suggest that Amazon’s disclaimer of all express and implied warranties does not negate its express warranty to provide permanent copies of the digital content. Therefore, Amazon potentially breached its Terms of Use Agreement.

If Amazon did breach its Terms of Use Agreement, the question that remains is what damage, if any, have Kindle users suffered. As a result of Amazon’s actions, Kindle users lost the ability to use and read the e-book they had purchased. Users could perhaps request specific performance, seeking to have the e-book returned to the Kindle, or some measure of compensatory damages. Under the U.C.C., a buyer’s compensatory damages for breach with respect to delivered goods are “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.”<sup>61</sup> Here, because the book was in effect taken back without permission, that difference would amount to the price of the e-book itself, which ranged from ninety-nine cents to approximately ten dollars<sup>62</sup>—a miniscule amount, hardly worth the time, cost, and effort of seeking a judicial remedy. This exemplifies why class certification would be imperative in this type of case because an individual affected user stands to lose more than he or she could possibly gain by bringing suit alone. A class-action suit would spread the litigation costs amongst possible claimants, mitigate the amount of effort each individual would need to expend, and likely command more effort on the part of the corporate defendant to reach a suitable remedy for all of its users. Conversely, individual users hoping to vindicate their rights would personally bear the costs of litigation and, even if successful, recover next to nothing by way of compensatory damages.

Moreover, while the cost of the lost book is the proper measure of damages here, Amazon refunded users the purchase price of the e-books and offered users replacement books or thirty dollar gift certificates, which amount to more than the cost of the lost e-book.<sup>63</sup> Therefore, Amazon has extra-judicially compensated affected users, which the Gawronski settlement noted as a reason the plaintiffs felt class certification would no longer be successful.<sup>64</sup> In light of this, a

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<sup>60</sup> *Id.* § 2-316.

<sup>61</sup> *Id.* § 2-714(2).

<sup>62</sup> See Complaint, *supra* note 10, at 5–6.

<sup>63</sup> Berndston, *supra* note 11.

<sup>64</sup> Stipulated Settlement, *supra* note 10, at 3.

breach of contract claim, while perhaps theoretically possible, would not produce any meaningful result for plaintiffs.

*B. Could Amazon Be Liable for Trespass to Chattels?*

While a contract claim may not provide an adequate remedy, tort claims are better suited for this type of corporate transgression. Unlike a contract claim, plaintiffs who succeed on a tort-based claim may be able to recover compensatory and punitive damages.<sup>65</sup> Faced with minimal compensatory damages, a punitive-damages award could serve both to compensate users and deter companies like Amazon from meddling with user-purchased content. The issues become whether a plaintiff could prove that Amazon's actions warrant a punitive-damages award, and whether the applicable law provides for such a remedy.

Recently, the traditional tort of "trespass to chattels" has seen a revival in the cyberspace context.<sup>66</sup> The *Restatement (Second) of Torts*, section 217,<sup>67</sup> states that trespass to a chattel may be committed by "intentionally, (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another."<sup>68</sup> To intermeddle is to "intentionally bring[] about physical contact with the chattel,"<sup>69</sup> that is both unauthorized and substantial.<sup>70</sup> The requisite intent is to intermeddle purposefully, but

[i]t is not necessary that the actor should know or have reason to know that the intermeddling is a violation of the possessory rights of another, and thus it is immaterial that the actor intermeddles with the chattel under a mistake of law or fact that has led him or

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<sup>65</sup> RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

<sup>66</sup> See Laura Quilter, *The Continuing Expansion of Cyberspace Trespass to Chattels*, 17 BERKLEY TECH. L.J., 421, 421 (2002).

<sup>67</sup> While the *Restatement (Second) of Torts* is not law but rather a secondary authority, this Comment will use it to illustrate how tort claims could play out in the Kindle case.

<sup>68</sup> RESTATEMENT (SECOND) OF TORTS § 217 (1965). This discussion centers on trespass to chattels committed by using or intermeddling with the chattel of another because a dispossession of a chattel that results in the complete destruction of that property is considered conversion. See *infra* note 100 and accompanying text. The comments to the *Restatement* state that a dispossession that qualifies as a trespass to chattels is one in which the actor interferes with the possessory rights of the possessor and is liable for at least nominal damages. § 222 cmt. a. In contrast, a conversion occurs when the actor exercises dominion and control over the chattel to a degree that so seriously interferes with the other's possessory right that the actor may be required to pay for the full value of the chattel. *Id.*

<sup>69</sup> § 217 cmt. e.

<sup>70</sup> See Quilter, *supra* note 66, at 425.

her to believe that one is the possessor of it or that the possessor has consented to the actor dealing with it.<sup>71</sup>

Substantial uses that are sufficient to subject one to liability for intermeddling require impairment to the condition, quality, or value of the chattel.<sup>72</sup> Moreover, the plaintiff need not own the chattel to bring a trespass to chattels claim; possession is sufficient.<sup>73</sup> Finally, although both privilege and consent are defenses, liability will still be imposed on an actor who exceeds the bounds of the privilege or consent granted.<sup>74</sup>

As cyberspace technology proliferates, the trespass to chattels claim has come to be used to combat internet “spam” e-mail.<sup>75</sup> *Hotmail Corporation v. Van\$ Money Pie Inc.* is a spam e-mail case that parallels the Kindle situation in that the trespasser is claimed to have exceeded the limits of a terms of service agreement, which resulted in trespass.<sup>76</sup> Hotmail alleged that the defendants, certain persons/companies with Hotmail e-mail accounts, trespassed on Hotmail’s computer network and e-mail system, resulting in harm to its business reputation and goodwill.<sup>77</sup> The defendants used Hotmail e-mail accounts to send unauthorized spam messages, which violated the Hotmail Subscriber Service Agreement.<sup>78</sup> The Service Agreement explicitly prohibited subscribers from using the e-mail service to send unsolicited spam.<sup>79</sup> The court held that a claim for trespass to chattels “lies where an intentional interference with the possession of personal property has proximately caused injury,” and it concluded that, in exceeding the Service Agreement and trespassing on Hotmail’s

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<sup>71</sup> § 217 cmt. c.

<sup>72</sup> *Id.* § 218.

<sup>73</sup> RESTATEMENT (SECOND) OF TORTS § 895(1) (1979) (“[O]ne who is otherwise liable to another for harm to or interference with land or a chattel is not relieved of the liability because a third person has a legally protected interest in the land or chattel superior to that of the other.”). This is extremely relevant in the digital-media context because users are often purchasing licenses, as opposed to full ownership rights. For example, while the Kindle users owned their Kindle devices, they purchased only non-exclusive licenses to possess and view a permanent copy of the Orwell books. *Amazon Terms of Use Agreement*, *supra* note 51.

<sup>74</sup> RESTATEMENT (SECOND) OF TORTS § 218 cmt. c (1965).

<sup>75</sup> *See, e.g.,* *Hotmail Corp. v. Van\$ Money Pie Inc.*, No. C 98-20064 JW, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998); *Intel Corp. v. Hamidi*, 114 Cal Rptr. 2d 244 (Cal. Ct. App. 2001).

<sup>76</sup> *Hotmail Corp.*, 1998 WL 388389, at \*2-7.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at \*2.

computer system, the defendants had caused cognizable harm to Hotmail.<sup>80</sup>

Analogous reasoning can be applied here. By deleting the Orwell books from users' Kindles without authorization, Amazon exceeded its Terms of Use Agreement, which resulted in trespass to users' devices. The Terms of Use Agreement made no mention of Amazon's ability to delete content, nor did it reserve Amazon's right to do so.<sup>81</sup> Kindle users suffered harm, the loss of the book each purchaser desired, which arguably diminished the value of the Kindle itself. The purpose of the Kindle is to enable users to purchase and view desired digital content. By deleting users' content without consent, an action outside the scope of the Terms of Use Agreement, Amazon "intermeddled" with its users' Kindles, which resulted in cognizable harm.

Recovery for trespass to chattels in the form of intermeddling is generally limited to the cost of the actual harm suffered.<sup>82</sup> Therefore, the usual measure for damages is not the market value of the chattel, but the amount by which the market value of the chattel has been diminished.<sup>83</sup> Alternatively, some courts have allowed damages amounting to the cost of repair of the chattel, or both the diminished value and repair costs.<sup>84</sup> This raises the interesting question of how to quantify the diminished value of the Kindle as a result of the e-book deletion.

In the Kindle case, recovery for diminished value or repair would not likely amount to a more favorable recovery than breach of contract damages.<sup>85</sup> If the court were to award repair costs, users could recover the cost of the book that they purchased, which would be equal to the cost of "repairing" the damage to their devices that resulted from the book's deletion. Similarly, the cognizable dimi-

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<sup>80</sup> *Id.* at \*7 (quoting *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 (Cal. Ct. App. 1996)).

<sup>81</sup> See *Amazon Terms of Use Agreement*, *supra* note 51. Admittedly, this is not completely analogous to the *Hotmail* case. Whereas here the Terms of Use Agreement failed to make mention of any power to reach into users' devices, *see id.*, in the *Hotmail* case, the Service Agreement expressly prohibited spam e-mail solicitation. Arguably, however, acting outside the scope of the agreed terms implicitly amounts to "exceeding" those terms.

<sup>82</sup> RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965).

<sup>83</sup> DAN B. DOBBS, 1 DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 5.13(1) at 836 (2d ed. 1993). This may also be referred to as the "before and after rule" because the plaintiff will recover the value of the chattel immediately before the harm, less the value of the chattel after the harm. *Id.* at 836–37.

<sup>84</sup> *Id.* at 838.

<sup>85</sup> See *supra* note 61 and accompanying text.

nished value of the Kindle is also the value of the e-book content that was lost, which would be measured by the purchase price of that content. Therefore, under either measurement of damages, users could only hope to recover the minimal cost of the lost book—an amount that Amazon has already paid out to all affected users.<sup>86</sup>

The only way affected users could recover more substantially is with a punitive damages award. The Supreme Court has stated that punitive damages may be awarded in actions for trespass and all other torts based on the defendant's degree of culpability.<sup>87</sup> Courts have awarded punitive damages in spam cases where the spammer's actions were deemed willful and wanton.<sup>88</sup> In one such case, *Tyco International, Inc. v. Does*, the court held the defendants liable for punitive damages, even though the plaintiffs failed to establish any compensatory damage.<sup>89</sup> While the spam attack on the computer system in *Tyco* was unsuccessful, and thus did not result in damage, the court found that the defendants acted "willfully, with fraud and malice" and were therefore liable for punitive damages.<sup>90</sup> The court noted that punitive damages were important to deter future computer hackers, particularly in light of the fact that no compensatory damages for a failed attack were awarded that could otherwise serve the deterrent function.<sup>91</sup>

If the *Tyco* reasoning is successfully applied in the Kindle context, affected users may actually have some hope for a substantial recovery. As in the *Tyco* case, virtually no compensatory damages would be awarded because Amazon has already reimbursed users for more than the cost of the book. A strong public policy argument could be made that punitive damages are necessary to deter this type of behavior in the future, both from Amazon and other smart device manufacturers and service providers. While deterrence is a lofty goal, whether Amazon may be liable for punitive damages would depend largely on the state of mind required for such an award in the jurisdiction in which a suit is brought. State laws use a variety of "abstract and condemnatory terms" to describe the appropriate state of mind

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<sup>86</sup> See *supra* note 63 and accompanying text.

<sup>87</sup> *Molzof v. United States*, 502 U.S. 301, 306 (1992).

<sup>88</sup> See, e.g., *Am. Online, Inc., v. Nat'l Health Care Disc., Inc.*, 174 F. Supp. 2d 890, 902 (N.D. Iowa 2001).

<sup>89</sup> *Tyco Int'l, Inc. v. Does*, No. 01 Civ. 3865 (RCC) (DF), 2003 U.S. Dist. LEXIS 25136, at \*11 (S.D.N.Y. Aug. 29, 2003).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*



for punitive damages.<sup>92</sup> Definitions range from malicious, as necessary under the law of New York and applied in *Tyco*, to reckless, oppressive, evil, wicked, guilty of wanton or morally culpable conduct, or flagrant indifference to the safety of others.<sup>93</sup> The *Restatement (Second) of Torts* states that punitive damages may be awarded “for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”<sup>94</sup> It also stresses the deterrent function punitive damages are meant to serve.<sup>95</sup>

In the *Tyco* case, the defendant acted with a wrongful or evil motive, intending to overload the plaintiff’s computer server and cause it to crash.<sup>96</sup> In the Kindle episode, no one would contend that Amazon acted with wrongful motive, but Amazon did act intentionally, with the knowledge that its actions would deprive those Kindle users who had purchased an Orwell book of their purchased content. Its actions can be characterized, as described by the *Restatement*, as both “outrageous” and indifferent to its users’ rights. While recovery through punitive damages would be contingent upon applicable state law, a court embracing the *Restatement* definition, or a similar standard, could reasonably grant a sizeable punitive damages award because Amazon acted intentionally and knowingly in “intermeddling” with users’ Kindles.<sup>97</sup>

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<sup>92</sup> DOBBS, *supra* note 83 at §3.11(2), 468.

<sup>93</sup> *Id.*

<sup>94</sup> RESTATEMENT (SECOND) OF TORTS § 908(2) (1979). The restatement comments go on to state that

[p]unitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence. And they are not permitted merely for a breach of contract. When, however, the plaintiff has a right in the alternative to sue for a breach of contract or for a tort, the fact that his act or omission amounts to a breach of contract does not preclude the award of punitive damages if the action is brought for the tort and the tort is one for which punitive damages are proper.

*Id.* at cmt. b.

<sup>95</sup> *Id.* § 908(1).

<sup>96</sup> *Tyco*, 2003 U.S. Dist. LEXIS 25136 at \*11.

<sup>97</sup> The Supreme Court has held that the ratio of punitive damages to compensatory damages should not ordinarily exceed a “single-digit ratio,” but a higher ratio may be appropriate where “a particularly egregious act has resulted in only a small amount of economic damages.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996). As noted, any punitive-damage award would be contingent on the controlling law in the applicable jurisdiction. See *infra* note 142 (noting that Washington law may preclude any punitive damages award against Amazon).

C. *Could Amazon Be Held Liable for Conversion?*

Amazon's actions could also be characterized as conversion, providing affected users with another possible tort-based claim. Conversion may arguably be a more appropriate tort claim than trespass to chattels because Amazon's deletion resulted in a permanent dispossession of purchasers' e-books. The *Restatement* defines conversion as "an intentional exercise of dominion or control over a chattel, which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."<sup>98</sup> The remedy for conversion is, in essence, a forced judicial sale of the chattel for its full value—when the defendant satisfies the judgment, title passes to him.<sup>99</sup> If an intangible object such as an e-book (as opposed to the Kindle itself) is a chattel, then the unauthorized deletion, or "dispossession," of the e-book constitutes conversion.<sup>100</sup> Three basic elements must be met for a conversion claim: (1) a plaintiff has ownership or possession of the personal property, (2) a defendant has dispossessed the plaintiff of that property in a manner that is inconsistent with the plaintiff's property rights, and (3) damage results.<sup>101</sup> A conversion occurs when "the actor has exercised such dominion and control over the chattel, and has so seriously interfered with the other's right to control it, that in justice he should be required to buy the chattel."<sup>102</sup>

Conversion can be committed in a variety of ways, including dispossessing another of a chattel or destroying or significantly altering a chattel.<sup>103</sup> As with the trespass to chattels claim, the actor must act with the intent to exert control over the chattel; however, mistakenly believing that one has the privilege to exercise control does not relieve the actor of liability.<sup>104</sup> Moreover, a plaintiff need not own the chattel to bring a claim for conversion, and it is immaterial "that one

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<sup>98</sup> RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965).

<sup>99</sup> § 222A cmt. c.

<sup>100</sup> See § 222A cmt. a.

<sup>101</sup> § 222A.

<sup>102</sup> *Id.* The *Restatement* goes on to list what factors are considered in making this determination:

- (a) the extent or duration of the actor's control, (b) that actors intent to assert a right inconsistent with the other, (c) the actor's good faith, (d) the extent or duration of the interference with the other's right to control, (e) the harm done to the chattel, (f) the inconvenience and expense caused to the other.

§ 222A(2).

<sup>103</sup> *Id.* § 223(a)–(b).

<sup>104</sup> § 223 cmt. b.

in possession of the chattel is not entitled to retain possession against a third-party or has obtained possession wrongly.”<sup>105</sup> Thus, it would not matter that the e-book sold was unlicensed.

Conversion, as a descendent of trover,<sup>106</sup> was traditionally limited to tangible property to provide remedies against the finders of lost goods who refused to return them.<sup>107</sup> As notions of personal property evolved and tangible documents began to be used to represent intangible rights, conversion was expanded to include the intangible rights represented by such documents, a concept called “merger.”<sup>108</sup> Under the merger doctrine, the intangible property represented in a tangible document is considered so completely merged with the document that conversion of the document is treated as conversion of the intangible property.<sup>109</sup> This concept applied to documents such as stock certificates, promissory notes, and savings bank bonds.<sup>110</sup> While the *Restatement* has not explicitly embrace extending conversion to intangible property not represented by a tangible document, the comments do not rule out further expansion of the doctrine.<sup>111</sup>

Today, courts applying the law of both California and New York have recognized the conversion of intangible property in the form of

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<sup>105</sup> *Id.* § 224A cmt. a–b.

<sup>106</sup> Trover was an old common law tort designed to fill the gap left by actions in trespass, which involved the wrongful taking of property. William Prosser, *The Nature of Conversion*, 42 CORNELL L.Q. 168, 169 (1957). Trover allowed a possessor to recover lost goods (or their value) from a finder who did not return them but instead used them himself or disposed of them to someone else. *Id.* The plaintiff would allege that he possessed certain goods, which he lost, and that the defendant found those goods, and converted them to his own use. *Id.*

<sup>107</sup> Courtney W. Franks, Comment, *Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of Kremen v. Cohen*, 42 HOUS. L. REV. 489, 498 (2005).

<sup>108</sup> RESTATEMENT (SECOND) OF TORTS § 242(1) (1965) (“Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.”). The *Restatement* goes even further to state that “[o]ne who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document itself is not converted.” § 242(2). Therefore, if a stockholder’s shares are “converted,” but he remains in possession of his stock certificate, the fact that the certificate only represents the intangible stock and does not constitute the actual “right” would not prevent him from substantiating a claim (even though the physical certificate has not been converted). This concept could pave the way for a large-scale expansion of the conversion claim to the digital intangible property context.

<sup>109</sup> § 242 cmt. a.

<sup>110</sup> § 242 cmt. b.

<sup>111</sup> § 242 cmt. f (“The process of extension has not, however, necessarily terminated; and nothing that is said in this section is intended to indicate that in a property case liability for intentional interference with some other kind of intangible rights may not be found.”).

electronic data.<sup>112</sup> In *Kremen v. Cohen*, the Ninth Circuit, applying California law, found a domain-name registrar liable for converting the plaintiff registrant's domain name.<sup>113</sup> In the early 1990s, domain names were available for free on a first-come, first-serve basis.<sup>114</sup> The plaintiff, Mr. Kremen, seized upon this opportunity and registered "sex.com."<sup>115</sup> Meanwhile, alleged swindler, Stephen Cohen, while serving jail time for impersonating a bankruptcy lawyer, also saw the lucrative potential of "sex.com."<sup>116</sup> Upon being released from prison, Cohen wrote to the defendant domain-name registrar pretending to be an agent of the plaintiff's company and stated that the company intended to abandon the domain name.<sup>117</sup> The registrar accepted the letter and subsequently transferred the domain name from the Plaintiff to Cohen.<sup>118</sup> Cohen then fled the country and turned the name into a lucrative porn empire.<sup>119</sup>

While the facts of the case are both bizarre and amusing, the court's analysis provides insight into the application of conversion to intangible property. The court considered the situation analogous to a corporation giving away shares of stock after receiving a forged letter, a circumstance that would most certainly constitute conversion under the merger doctrine.<sup>120</sup> It stated that "it would be a curious jurisprudence that turned on the existence of a paper document rather than electronic one. Torching a company's file room would then be conversion, while hacking into its mainframe and deleting its data

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<sup>112</sup> See, e.g., *Kremen v. Cohen*, 337 F.3d 1024, 1035 (9th Cir. 2003); *Thyroff v. Nationwide Mut. Ins. Co.*, 864 N.E.2d 1272, 1272-73 (N.Y. 2007). It is noteworthy, however, that many jurisdictions have yet to address this issue, and a few courts have refused to extend conversion to this context. See, e.g., *In re TJX Cos. Retail Sec. Breach Litig.*, 527 F. Supp. 2d 209 (D. Mass. 2007) (applying Massachusetts law, the court held that the law would not recognize claims for conversion based on the acquisition of intangible computer data); *Famology.com Inc., v. Perot Sys. Corp.* 158 F. Supp. 2d 589 (E.D. Pa. 2001) (applying Pennsylvania law, the court found that a conversion action could not be brought for the misappropriation of a domain name because it did not constitute tangible property). The fact that some jurisdictions have expressly refused to recognize a conversion of intangible property could preclude future plaintiffs who fall victim to corporations repossessing digital content from making a claim.

<sup>113</sup> *Kremen*, 337 F.3d at 1035.

<sup>114</sup> *Id.* at 1026.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Kremen*, 337 F.3d at 1027.

<sup>120</sup> *Id.* at 1035.

would not.”<sup>121</sup> Of particular significance, the court reasoned that while Mr. Cohen, the third-party forger, was the guilty party, it was not unreasonable to bring a claim for conversion against the domain-name registrar even though it had not knowingly dispossessed the plaintiff of his domain name.<sup>122</sup> This conclusion is paramount in the Kindle case because, while Amazon was not guilty of the underlying offense—intentionally selling unlicensed e-books—under this interpretation, it could still be liable for conversion for taking those unlicensed e-books from the users who purchased them. Moreover, Amazon appears even more culpable than the defendant in *Kremen v. Cohen* because it did not accidentally deprive its users of their purchased content but, rather, intentionally removed the content from their devices.

Courts have also recognized claims for the conversion of electronic data and files stored on computers, which is perhaps most analogous to the Kindle case. In *Thyroff v. Nationwide Mutual Insurance Co.*, the Court of Appeals of New York, in response to a certified question from the Second Circuit, held that a cause of action for conversion applies to certain electronic computer records and data.<sup>123</sup> The court stated, “We cannot conceive of any reason in law or logic why this process of virtual creation should be treated any differently from production by pen on paper or quill on parchment. A document stored on a computer hard drive has the same value as a paper document kept in a file cabinet.”<sup>124</sup> In *Thyroff*, the plaintiff was hired as an insurance agent for Nationwide and, pursuant to an agreement, leased a computer system from Nationwide for use in his work.<sup>125</sup> The plaintiff stored customer files in the system and used the computer for personal e-mail and other personal data storage.<sup>126</sup> Each day, Nationwide automatically backed-up all the information on the plaintiff’s computer system.<sup>127</sup> Upon terminating the plaintiff’s employment, Nationwide blocked his access to the computer system, which left him unable to retrieve any of his personal data or customer information.<sup>128</sup> After receiving the New York Court of Appeals’ answer

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<sup>121</sup> *Id.* at 1034.

<sup>122</sup> *Id.* at 1035.

<sup>123</sup> *Thyroff v. Nationwide Mut. Ins. Co. (Thyroff II)*, 864 N.E.2d 1272, 1272–73 (N.Y. 2007).

<sup>124</sup> *Id.* at 1278.

<sup>125</sup> *Id.* at 1272.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1272.

to the certified question, the Second Circuit held that Nationwide's action amounted to a conversion.<sup>129</sup> It was not persuaded that Nationwide owned all the records on the computer simply because it owned the computer system itself, and it noted that the lease agreement did not contain any language to suggest that ownership rights would be transferred to Nationwide when personal property was saved to the system.<sup>130</sup> The court posited, "Had Nationwide leased Thyroff a filing cabinet into which Thyroff placed his personal property, such as a camera, Nationwide would not contend that it could seize Thyroff's camera when it reclaimed its filing cabinet. The instant situation is no different."<sup>131</sup>

Applying the *Thyroff* reasoning to the Kindle case is telling because, much like Nationwide, Amazon backs-up Kindle users' data, and the Kindle software is not "owned" by users.<sup>132</sup> Kindle users, however, paid valuable consideration for the non-exclusive right to permanent copies of the Orwell books, which were stored on their Kindles. The Amazon Terms of Use Agreement, much like the lease agreement at issue in *Thyroff*, is devoid of language to suggest that by virtue of placing content on the Kindle, the content is owned by Amazon or that Amazon has a right to repossess or delete user content.<sup>133</sup> Therefore, applying the logic of the Second Circuit, it appears that a claim for conversion could stand in this case.<sup>134</sup>

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<sup>129</sup> *Thyroff v. Nationwide Mut. Ins. Co. (Thyroff I)*, 460 F.3d 400, 404–05 (2d Cir. 2006).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> See *Kindle Wireless Reading Device*, *supra* note 18; see also *Amazon Terms of Use Agreement*, *supra* note 51.

<sup>133</sup> See *Amazon Terms of Use Agreement*, *supra* note 51.

<sup>134</sup> It appears that the conversion claim alleged in the Gawronski suit had a chance for success. The Amazon Terms of Use Agreement states that Washington law applies to all disputes, and the suit was filed in the Western District of Washington. See *Complaint*, *supra* note 10; *Amazon Terms of Use Agreement*, *supra* note 51. In *Compana, LLC v. Aetna, Inc.*, the Western District of Washington was presented with the alleged conversion of domain names. No. C05-0277L, 2006 WL 829111, at \*3 (W.D. Wash. Mar. 27, 2006). While the court found that the claim failed as a matter of law, it appeared to implicitly acknowledge that a properly pleaded claim for conversion in this instance would be recognized under Washington law. *Id.* The claim failed because the defendant alleged that the plaintiff never had possession of the domain names at issue and because the plaintiff failed to provide evidence to show that the defendant "willfully interfered with any of its chattel." *Id.* Therefore, it appears that the court readily considered the domain names "chattels" for the purposes of the conversion claim, and would be willing to entertain a conversion claim in a situation where the plaintiff can plead sufficient facts to show possession of the intangible property at issue.

While conversion is plausible, as the claims already discussed have demonstrated, no hope exists for collecting additional compensatory damages. One who has converted the chattel of another is liable for the full value of the chattel—the amount that Amazon has already paid to all affected users.<sup>135</sup> The only hope for recovery again lies with punitive damages, which have been awarded for the conversion of intangible property where willful and wanton conduct is exhibited.<sup>136</sup> In *Northeast Iowa Ethanol, L.L.C. v. Global Syndicate International, Inc.*, the court, applying Iowa law, stated that “willful and wanton disregard” includes intentional acts in disregard of known or obvious risk, accompanied by an indifference to the consequences.<sup>137</sup> In deleting users’ purchased content, Amazon did act with disregard to the effect that such a deletion would have on consumers and appeared indifferent to the consequences.

Perhaps even more representative of the Kindle situation, however, is a case in which the court awarded punitive damages for the mistaken repossession of a vehicle. In *Adams v. Ford Motor Credit Co.*, the court affirmed a jury award of punitive damages for the conversion of an automobile and the personal effects within it.<sup>138</sup> The defendant argued that punitive damages were unwarranted because it had not acted maliciously.<sup>139</sup> The court, however, rejected the argument on the grounds that punitive damages could be awarded if the conversion was committed in “known violation of one’s rights and in violation of the law.”<sup>140</sup> It reasoned that, because the jury had found for the plaintiff on the conversion claim, the defendant’s actions were a violation of the law and the plaintiff’s rights, and warranted punitive damages.<sup>141</sup>

Applying that reasoning here, punitive damages may be reasonable for a successful conversion claim. If a court were to find that Amazon wrongfully converted the e-books, then it follows that its actions were a violation of the law and the affected users’ rights, and

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<sup>135</sup> RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965).

<sup>136</sup> See, e.g., *Northeast Iowa Ethanol, L.L.C., v. Global Syndicate Int’l, Inc.*, 247 F. App’x 849, 850–51 (8th Cir. 2007) (awarding damages for the conversion of \$3.8 million belonging to the plaintiff); *United States v. Arora*, 860 F. Supp. 1091, 1101 (D. Md. 1994) (awarding punitive damages for the conversion of stem cell research).

<sup>137</sup> *Northeast Iowa Ethanol, L.L.C.*, 247 F. App’x at 850–51 (quoting *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000)).

<sup>138</sup> 556 F.2d 737, 741 (5th Cir. 1977).

<sup>139</sup> *Id.* at 739.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

punitive damages could be awarded.<sup>142</sup> Moreover, as discussed with respect to the trespass to chattels claim,<sup>143</sup> a hefty punitive-damages award would serve to deter this type of Big Brother<sup>144</sup> behavior in the future.

*D. Does Amazon's Conduct Constitute a Violation of the Computer Fraud and Abuse Act?*

The plaintiffs in the Gawronski suit also alleged that Amazon's actions were a violation of the federal Computer Fraud and Abuse Act (CFAA). Enacted in 1984, the CFAA was designed to address computer crime, particularly fraud and the abuse of computer use and access, both physically and through the internet.<sup>145</sup> Section 1030(a)(5)(A) of the CFAA states that a person who "knowingly causes the transmission of a program, information, code or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer" or who "intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage" shall be punished pursuant to § 1030(c), which provides both civil and criminal penalties.<sup>146</sup> Whether Amazon's e-book deletion constitutes a violation of the CFAA will largely turn on the interpretation of the statutory terms "computer," "without authorization," and "loss."

The threshold question for the claim is whether smart devices like the Kindle are "computers" within the scope of the statute. A "computer" is defined as "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, . . . but such term does not include an automated typewriter or typesetter, a portable hand held

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<sup>142</sup> The punitive-damages analysis is, of course, contingent on the law of the applicable jurisdiction. In the Kindle case specifically, Amazon has included a forum-selection clause in its Terms of Use Agreement, which requires all lawsuits to be filed in Washington state. See *Amazon Terms of Use Agreement*, *supra* note 51. Washington has a particularly stringent punitive-damages policy that prohibits punitive damages unless specifically authorized by statute. *Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589, 590-91 (Wash. 1996). Therefore, while punitive damages are reasonably arguable under both tort claims, without statutory authority to grant them, none would be awarded in this case.

<sup>143</sup> See discussion *supra* note 91.

<sup>144</sup> See *supra* note 14 (discussing 1984).

<sup>145</sup> 18 U.S.C. § 1030 (Supp. II 2008).

<sup>146</sup> § 1030(a)(5)(A), (c). Section (g) goes on to state that a civil remedy is available to "any person who suffers damage or loss by reason of a violation of this section." § 1030(g).



calculator, or other similar device.”<sup>147</sup> A “protected computer” is such a device that “is used in interstate or foreign commerce or communication.”<sup>148</sup> The Kindle is undeniably a “high-speed data processing device” that performs logical and storage functions and accesses data storage facilities and computer networks through its Whispernet technology.<sup>149</sup> Moreover, the Kindle is used in interstate commerce and communication, as users are able to cross state borders and access Whispernet to purchase digital content from wherever they are presently located.

What becomes more troublesome is whether Amazon, in deleting the e-books, accessed the Kindle devices “without authorization.” The phrase “without authorization” is not explicitly defined in the statute, which has led to a split in the courts that have interpreted § 1030(a)(5).<sup>150</sup> With respect to Amazon, one interpretation would suggest its actions have violated the CFAA, while the other suggests it did not. The split among the courts arose because, among the various subsections of § 1030(a), the language used to describe the access element varies.<sup>151</sup> While (a)(5) speaks of “without authorization,” (a)(4), which addresses computer fraud, uses the phrase “exceeds authorized access.”<sup>152</sup> “Exceeds authorized access” is defined in the statute as to “access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.”<sup>153</sup>

Because “without authorization” is not defined, some courts have construed it as synonymous with “exceeds authorized access”<sup>154</sup> while others have emphasized the difference in the plain meaning of the chosen words in the two statutory sections.<sup>155</sup> The semantics are particularly important here because Amazon did reserve the right to access Kindle devices to update software and deliver digital content.<sup>156</sup> Therefore, its actions appear in line with the definition of “exceeds authorized access.” Consequently, if “exceeds authorized access” and

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<sup>147</sup> § 1030(e)(1).

<sup>148</sup> § 1030(e)(2)(B).

<sup>149</sup> See *Kindle Wireless Reading Device*, *supra* note 18. “Whispernet” is the name of the software that enables the Kindle to wirelessly access the internet. *Id.*

<sup>150</sup> See discussion *infra* at note 157.

<sup>151</sup> Compare § 1030(a)(5), with § 1030(a)(4).

<sup>152</sup> § 1030(a)(5); § 1030(a)(4).

<sup>153</sup> § 1030(e)(6).

<sup>154</sup> See *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991).

<sup>155</sup> See *US Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189, 1192 (D. Kan. 2009).

<sup>156</sup> See *Amazon Terms of Use Agreement*, *supra* note 51.

“without authorization” mean two different things, Amazon’s conduct may fall outside the scope of § 1030(a)(5) and the CFAA.

In *United States v. Morris*, the Second Circuit defined “without authorization” in the context of § 1030(a)(5) to include situations where an authorized user of one computer uses such authorization to access other computers and cause damage.<sup>157</sup> The court concluded that, while the defendant had authority to access the internet from his computer, he was not authorized to transmit a damaging computer worm to other computers and therefore acted “without authorization.”<sup>158</sup> Conversely, the court in *US Bioservices Corp. v. Lugo*, concluded that one acts “without authorization” only when the initial access is not permitted while one “exceeds authorized access” when the initial access to the computer is permitted but access to certain information is not.<sup>159</sup>

Based on this apparent split of authority, Amazon would have a reasonably strong argument that, because it had initial authorization to access users’ Kindles, its actions in deleting the e-books were not “without authorization” and, therefore, fall outside the scope of § 1030(a)(5) and the CFAA. Nothing in the Terms of Use Agreement, however, “authorized” Amazon to delete user-purchased Kindle content. Therefore, under the *Morris* interpretation, while Amazon had “access” to the Kindles, users could plausibly argue that Amazon did not have authorization to remove purchased content and its action in doing so was “without authorization.” Whether Amazon’s actions fit within § 1030(a)(5) ultimately comes down to which one of these interpretations a court chooses to adopt.

Even assuming, *arguendo*, that Amazon did act “without authorization,” its actions likely do not amount to a “loss” necessary to sustain a claim under the CFAA. “Damage” is defined as “any impairment to the integrity or availability of data, a program, a system, or information.”<sup>160</sup> “Loss” is “any reasonable cost to any victim, including the cost of responding to an offense, . . . restoring the data, program, system or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.”<sup>161</sup> The statute, however, limits the scope of the offense by making conduct that arises under § 1030(a)(5)(A) punishable only if the damage results in a loss aggre-

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<sup>157</sup> *Morris*, 928 F.2d at 509–11.

<sup>158</sup> *Id.*

<sup>159</sup> *US Bioservices Corp.*, 595 F. Supp. 2d at 1192.

<sup>160</sup> 18 U.S.C. §1030(e)(8) (Supp. II 2008).

<sup>161</sup> § 1030(e)(11).

gating at least \$5,000 during any 1 year period to one or more individuals.<sup>162</sup> Therefore, to make a claim under the CFAA, plaintiffs must be able to allege, in the aggregate, losses amounting to at least \$5,000 from a single act.<sup>163</sup>

The statutory language is none too clear as to what constitutes a “single act” and neither is the case law. In *Christian v. Sony*, the plaintiffs alleged damage as a result of a defect in their individual computers.<sup>164</sup> The court ultimately considered the defect in all affected computers a “single act,” but it found that the aggregate damage suffered by the two named plaintiff’s did not meet the \$5,000 threshold in the absence of a class certification, which the court had denied.<sup>165</sup> Applying that reasoning here, the “single act” could be the collective deletion of all Orwell books. Much like the plaintiffs in *Christian*, however, meeting the \$5,000 loss threshold would be impossible without class certification and perhaps still impossible even if a class were certified.

As this analysis of the statutory language suggests, a court could deem a Kindle a computer, but users would nonetheless have a difficult time winning on a CFAA claim. First, users would have to convince the court that Amazon acted “without authorization,” not merely in excess of its authorization. Second, the plaintiffs would have to plead sufficient facts to show an aggregate of \$5,000 worth of losses, which would at the very least require a successful class certification. Thus, the CFFA may not be a viable option for consumers attempting to combat corporate manipulation of user-purchased digital content.

#### IV. ARE CONSUMERS ADEQUATELY PROTECTED?

The above discussion of plausible claims demonstrates that current law poses many hurdles for consumers and likely little by way of remedies if successful suits are brought. Perhaps a better solution lies with administrative agencies such as the Federal Trade Commission (FTC), which can monitor the actions of companies like Amazon, respond to consumers’ complaints, and take action on their behalf.

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<sup>162</sup> § 1030(c)(4)(B)(i).

<sup>163</sup> See *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 523 (S.D.N.Y. 2001) (concluding that the fact that the definition of “damage” is phrased in the singular demonstrates that the aggregated loss must stem from a single action or “impairment,” and supporting this conclusion by quoting the Senate Judiciary Committee Report, which states that losses caused by the same act may be aggregated to meet the threshold.).

<sup>164</sup> 152 F. Supp. 2d 1184, 1186 (D. Minn. 2001).

<sup>165</sup> *Id.* at 1187.

The more difficult challenge remains managing consumers' expectations in purchasing digital content, which will require more than mere executive agency interference. It will require a deliberate shift in business practices.

As the media uproar surrounding the Kindle debacle raged, many infuriated users insisted that they "bought" the e-book and, therefore, believed that they "owned" it.<sup>166</sup> The incident forced many to reconsider exactly what they had purchased. Voicing frustration, some noted how different purchasing an e-book was from purchasing a physical copy. One Kindle user stated:

It illustrates how few rights you have when you buy an e-book from Amazon. . . . As a Kindle owner, I'm frustrated. I can't lend people books and I can't sell books that I've already read, and now it turns out that I can't even count on still having my books tomorrow.<sup>167</sup>

Another simply stated, "I never imagined that Amazon actually had the right, the authority or even the ability to delete something that I had already purchased."<sup>168</sup> This raises the question: has Amazon misinformed consumers? As the earlier discussion in this Comment indicates, affected users who choose the courts as a method of recourse are unlikely to be successful in bringing about any meaningful change in the way that Amazon operates its e-book business—only the cost of the e-book is easily recoverable.<sup>169</sup>

Moreover, Amazon reserves the right to amend or change its Terms of Use Agreement at any time.<sup>170</sup> If actually found liable for breach of its terms as a result of deleting users' e-books, nothing can stop Amazon from simply updating the agreement to provide itself with the power to delete content in the future. Other e-book distributors have similar terms in their service agreements,<sup>171</sup> as do the

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<sup>166</sup> Johnson, *supra* note 3 (quoting the post of a puzzled Kindle owner from a Kindle message board who stated that "[b]eing able to pull the books out of your paid-for and legal library doesn't sound right" because "[o]nce it's sold, they no longer own the rights to that copy, or at least, that's what I thought").

<sup>167</sup> Stone, *supra* note 2.

<sup>168</sup> *Id.*

<sup>169</sup> See *supra* Part III.

<sup>170</sup> *Amazon Terms of Use Agreement*, *supra* note 51 ("Amazon reserves the right to amend any of the terms of this Agreement at its sole discretion by posting the revised terms on the Kindle Store or the Amazon.com website. Your continued use of the Device and Software after the effective date of any such amendment shall be deemed your agreement to be bound by such amendment.").

<sup>171</sup> See, e.g., *Sony Reader Terms of Service*, SONY.COM, <http://ebookstore.sony.com/termssofservice.html> (last visited Dec. 16, 2009) ("We reserve the right to modify, add

producers of other smart devices such as Apple, Inc.<sup>172</sup> Merely by using the Kindle, consumers agree to be subjected to changing terms, which may detrimentally affect their rights to the content they store on their devices.<sup>173</sup> The protection that a written contract provides consumers is seriously diminished when the dominant party to the contract remains able to unilaterally change it. Perhaps Amazon and its counterparts should be forced to be more forthcoming with consumers to ensure that they are aware of the vulnerabilities of purchased digital content.

Cindy Cohn, legal director of the Electronic Frontier Foundation, noted that Legal analysts have

long been concerned that digital rights management is essentially tricking people . . . . It's creating a situation where people think they've purchased something—in the way you might purchase a pair of shoes, for example. But from the perspective of the seller, and often from the perspective of the law, it's quite a lot less.<sup>174</sup>

Many have suggested that the FTC should become involved and provide better regulations for digital rights management (DRM) equipped products.<sup>175</sup> Others have argued that Amazon's actions are a violation of the Federal Trade Commission Act prohibition of unfair and deceptive business practices.<sup>176</sup> FTC involvement may provide users with something that a lawsuit cannot, a meaningful change in the business practices that have become commonplace in the digital content market.

The Federal Trade Commission Act states that “[u]nfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”<sup>177</sup> In 1983, to better articulate the FTC's enforcement policy against deceptive practices, the Commission issued the *FTC Policy Statement on Deception*.<sup>178</sup> The policy statement sets forth three elements of all successful deception claims: (1) the occurrence

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to, change or remove any part of these Terms of Service at any time, with or without notice.”).

<sup>172</sup> See *iTunes Store Terms of Service*, APPLE.COM, <http://www.apple.com/legal/itunes/us/terms.html#SERVICE> (last visited Jan. 14, 2010) (“Apple reserves the right, at any time and from time to time, to update, revise, supplement, and otherwise modify this Agreement and to impose new or additional rules, policies, terms, or conditions on your use of the Service.”).

<sup>173</sup> *Amazon Terms of Use Agreement*, *supra* note 51.

<sup>174</sup> Johnson, *supra* note 3.

<sup>175</sup> Claburn, *supra* note 7.

<sup>176</sup> See Garon, *supra* note 6.

<sup>177</sup> 15 U.S.C. § 45(a)(1) (2006).

<sup>178</sup> FED. TRADE COMM'N, *FTC POLICY STATEMENT ON DECEPTION*, *appended to* 103 F.T.C. 110, 174 (1984).

of a representation, omission, or practice likely to mislead the consumer; (2) the representation, omission, or practice is misleading from the perspective of a reasonable consumer in light of consumer expectations; and (3) the representation, omission, or practice is material to the consumer's conduct or decision with regard to a product or service.<sup>179</sup>

Based on the process set forth by the policy statement, the FTC would not have a difficult time prosecuting Amazon in this situation. Amazon's Terms of Use Agreement made no mention of its ability or willingness to delete content on consumers' devices.<sup>180</sup> In light of that omission, consumers likely believed that Amazon could not delete their purchased content. Thus, the omission is misleading. Reasonable Kindle users assumed that the digital content on their Kindles was theirs to keep. While the Terms of Use Agreement does state that digital content is licensed, not "owned," by users, it refers to users' licenses as the nonexclusive right to keep a "permanent copy."<sup>181</sup> Even a reasonable user who takes the time to read the Terms of Use Agreement and understands that the digital content is licensed, would reasonably believe that the e-book purchased would remain permanently on the Kindle. Finally, had consumers been aware of Amazon's ability to delete their content, they may have chosen a different e-book reader or not bought a reader at all—they may have instead purchased a traditional paperback or book on tape.<sup>182</sup>

If the FTC is successful in bringing suit, it has the authority to mandate that Amazon change its business practices. The Federal Trade Commission Act states that the FTC shall order an offending party to cease and desist from using a deceptive method or practice.<sup>183</sup> Therefore, the FTC has the power to order Amazon to stop deleting consumer content unless Amazon first discloses to consumers that it will do so. But the Gawronski settlement demonstrates that this may not be enough. In agreeing not to delete consumers' purchased content in the future, Amazon qualified the statement by enumerating various instances in which it may still do so.<sup>184</sup> The FTC may be able to mandate that Amazon lay out its deletion policy in its Terms of Use

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<sup>179</sup> *Id.* at 2–7.

<sup>180</sup> See *Amazon Terms of Use Agreement*, *supra* note 51.

<sup>181</sup> *Id.*

<sup>182</sup> See, e.g., Stone, *supra* note 2 ("If this Kindle breaks, I won't buy a new one, that's for sure.").

<sup>183</sup> 15 U.S.C. § 45(b) (2006).

<sup>184</sup> Stipulated Settlement, *supra* note 10; see also discussion in text at *supra* note 47 (listing the various instances in which Amazon will still delete content from Kindles).

Agreement, but that will not in and of itself remedy the unfortunate misconception that consumers have about purchasing digital content, nor will it make consumers any less vulnerable to future content deletions.

The Orwell debacle received significant press, and fear of public backlash may, for now, be enough to keep Amazon from overstepping its bounds. But Amazon still has the technical capability to reach in to Kindles and delete consumer content. The only way to truly ensure that consumers are protected going forward would be to require that Amazon disable its deletion capability. Prior case law suggests that the FTC may have the authority to require Amazon to do so. As a condition of settlement with Sony BMG, in a lawsuit for placing hidden spyware software on consumer CDs, the FTC required Sony to disclose the limitations on consumers' use of the CDs, prohibited Sony from installing spyware software without consumer consent in the future, and additionally required Sony to provide a reasonable means for uninstalling the software on the CDs already sold.<sup>185</sup> Further, the settlement required that Sony BMG allow consumers to exchange the CDs and reimburse consumers for up to \$150 to repair damage to their computers suffered as a result of trying to remove the software.<sup>186</sup> In light of this rather expansive settlement agreement with Sony, perhaps if the FTC chose to act, it could require Amazon to disable its intrusive technological capability.

#### V. THE FUTURE: TECHNOLOGY AND THE "MEMORY HOLE"

In response to the Amazon debacle, one insightful blogger noted, "Deleting copies of *1984* should serve to provide another reminder of the liberties we take for granted and the technologies that have the potential to put those liberties at risk."<sup>187</sup> The most disturbing aspect of this incident is not that a major corporation may have breached its contract with consumers or was perhaps deceptive in describing its product; it is the sheer technological power that Amazon wielded in reaching into individual consumers' devices and removing content of its choosing. This power is a cause for concern as more and more aspects of daily life are controlled by computerized devices.

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<sup>185</sup> Brian Krebs, *Sony Settles FTC Suit Over Music CD Spyware*, SECURITY FIX, WASH. POST (Jan. 31, 2007 1:24 PM), [http://voices.washingtonpost.com/securityfix/2007/01/sony\\_settles\\_ftc\\_suit\\_over\\_mus.html](http://voices.washingtonpost.com/securityfix/2007/01/sony_settles_ftc_suit_over_mus.html).

<sup>186</sup> *Id.*

<sup>187</sup> Garon, *supra* note 6.

The Kindle is what Professor Jonathan Zittrain has dubbed a “tethered appliance.”<sup>188</sup> Professor Zittrain refers to devices like e-book readers, smart phones, video game consoles, mp3 players, and digital video recorder (DVR) systems as “tethered” because the devices are constantly communicating with their corporate creators to assure that functionality and security improvements can be made as problems arise.<sup>189</sup> Tethered devices are also built in such a way that only the manufacturer/service provider can modify them.<sup>190</sup> Zittrain acknowledges how attractive tethered devices are to some users because they tend to be more reliable and “safer” than computers running on operating systems that third-party users can alter or tamper with to create computer glitches.<sup>191</sup> He notes, however, that the shift to tethered appliances, centrally controlled by one powerful service provider, creates different dangers.<sup>192</sup> Tethered devices can be easily regulated and invite excessive intervention from both the service providers and government regulators.<sup>193</sup> Amazon’s decision to delete unlicensed copies of e-books it inadvertently sold to customers is a perfect example of such power.<sup>194</sup>

Zittrain argues that this shift to smarter, tethered appliances, changes the way that people experience technology because the device has become contingent on the service; even if paid for up front, the device is effectively now “rented” instead of “owned” because it is subject to impromptu revision.<sup>195</sup> Economic theorists who believe that the markets tend to reflect demand do not see any real problem with this type of device and argue that it would not be lucrative for vendors to make changes that customers do not want.<sup>196</sup> Amazon’s actions, however, prove that this theory is not infallible. Moreover, as Zittrain aptly noted, companies may, in the future, be compelled to take action against the will of their consumers.<sup>197</sup> With products tethered to a centrally controlled network, government agencies or courts seeking to regulate aspects of the internet need only require

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<sup>188</sup> ZITTRAIN, *supra* note 13, at 101.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 102.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 103.

<sup>194</sup> Interestingly enough, in his book, Professor Zittrain actually predicted that something like this Orwellian disaster would occur in the e-book context. See ZITTRAIN, *supra* note 13, at 109.

<sup>195</sup> *Id.* at 107.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*



the service provider to take action, because the service provider has the ability to effect change in all the devices tethered to its network, without allowing for refusal from individual consumers.<sup>198</sup>

Instances of court-ordered interference with consumers' purchased products have occurred through the use of tethered technology. In *PlayMedia Systems, Inc. v. America Online, Inc.*, America Online was ordered to remove Playmedia software from consumers' computers through a live update, after the court found that AOL did not have permission to include the Playmedia software in its offering.<sup>199</sup> In 2004, TiVo sued satellite television distributor EchoStar for infringing TiVo's patents by building DVR technology into some of its satellite dish systems.<sup>200</sup> The jury found for TiVo, and awarded \$90 million in damages plus interest,<sup>201</sup> but the court went even further.<sup>202</sup> The court ordered EchoStar to

disable the DVR functionality (i.e., disable all storage to and playback from a hard disk drive of television data) in all but 192,708 units of the Infringing Products *that have been placed with an end user or subscriber*. The DVR functionality, (i.e., disable all storage to and playback from a hard disk drive of television data) shall not be enabled in any new placements of the Infringing Products.<sup>203</sup>

The court essentially ordered EchoStar to remotely delete the DVR capabilities of numerous satellite dish systems already placed in customers' homes. This is the judicially compelled equivalent to Amazon remotely deleting books that it did not have the rights to sell. In granting TiVo a permanent injunction, the court noted that "[t]he hardship of disabling DVR capabilities to Defendants' DVR customers is a consequence of Defendants' infringement . . . . Defendants do not dispute that, with software updates transmitted directly to the infringing products, the DVR capabilities of the infringing products can be disabled."<sup>204</sup> Therefore, through the use of tethered technology,

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<sup>198</sup> *Id.*

<sup>199</sup> *PlayMedia Sys., Inc. v. Am. Online, Inc.*, 171 F. Supp. 2d 1094, 1120 (C.D. Cal. 2001).

<sup>200</sup> See ZITTRAIN, *supra* note 13, at 103.

<sup>201</sup> *Id.*

<sup>202</sup> *TiVo, Inc. v. EchoStar Commc'ns Corp.*, 2:04-CV-1-DF, 2006 U.S. Dist. LEXIS 64293, at \*22 (E.D. Tex. Aug. 17, 2006).

<sup>203</sup> *Id.* at \*22-23 (emphasis added).

<sup>204</sup> *Tivo, Inc. v. EchoStar Commc'ns Corp.*, 446 F. Supp. 2d 664, 670 (E.D. Tex. 2006), *rev'd in part*, 516 F.3d 1290 (Fed. Cir. 2008). The injunction was stayed during appeal, and on appeal, in 2008, the court, reversing in part, found insufficient evidence of infringement of hardware, but it affirmed infringement of software. The stay on the injunction was lifted. *TiVo, Inc. v. Echostar Commc'ns Corp.*, 516 F.3d 1290, 1312 (Fed. Cir. 2008). The legal battle, however, is still ongoing, because

courts have a method of perfect enforcement, never before available, to regulate digital media at the detriment of the unsuspecting consumer.

Even more troublesome in the e-book context are the First Amendment issues raised by the possibility that this technology can be used to remotely edit digital content, which effectively emulates Orwell's Big Brother.<sup>205</sup> The technology used to reach into devices and delete entire books clearly lends itself to altering specific portions of that book. Amazon's Terms of Use Agreement expressly states that it will edit the Kindle software by periodically providing automatic updates and upgrades, as most similar smart devices do.<sup>206</sup> Surely purchased content could be updated and "edited" in much the same way. If the power to remotely edit exists, courts could compel companies like Amazon—as a result of a libel suit, for example—to edit offending content. While this has yet to happen, the future implications of the technology are clear. Professor Zittrain, in response to the Kindle incident, expressed concern about the ways in which this technology may be used across the world.<sup>207</sup> He suggested that some governments may use it "like a line item veto for content" to remove objectionable portions of books.<sup>208</sup> "It could happen first in jurisdictions like the United Kingdom, where there isn't as rich a First Amendment tradition and where libel suits happen much more frequently."<sup>209</sup>

The technological enforcement of libel-suit book bans is frightening because, unlike the book bans and recalls judicially compelled in the past, this new method is perfectly enforceable.<sup>210</sup> No single corporate empire or government regulator should have the power to perfectly enforce such a ban, particularly when that enforcement could also be permanent.<sup>211</sup> As Professor Zittrain noted, there are

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Echostar has been succeeded by Dish Network, and as of yet, no deletion has taken place. *Dish Network Corp. v. TiVo, Inc.*, No. 08-327-JFF, 2009 U.S. Dist. LEXIS 44722, at \*1 (D. Del. May 28, 2009).

<sup>205</sup> See *supra* note 14 for a discussion of 1984.

<sup>206</sup> See Terms of Use Agreement, *supra* note 51.

<sup>207</sup> Stone, *supra* note 6.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See Farhad Manjoo, *Why 2024 Will Be Like Nineteen Eighty-Four*, SLATE (July 20, 2009, 5:53 PM), <http://www.slate.com/id/2223214/>.

<sup>211</sup> For example, in 2007, the Cambridge University Press settled a libel claim filed in England by Khalid bin Mahfouz. David Glenn, *Cambridge U. Press Seeks to Destroy All Copies of Book on Terrorism to Settle Libel Lawsuit by Saudi Businessman*, CHRON. HIGHER EDUC., Aug. 1, 2007, at 12, available at <http://www.campus-watch.org/article/id/3779>. In the court hearing, the publisher promised to destroy all unsold

certainly some instances in which the ability to permanently remove information publically circulating on the internet would not be cause for alarm; for example, permanently deleting “leaked medical records, child abuse images, and nuclear weapon designs.”<sup>212</sup> In the literary context, however, permanence is far too powerful. Consider the numerous book bans that have been reversed in the past century. While courts have overturned or revised many decisions years later, this change of heart may not be feasible if offending works are sent down the digital “memory hole.”<sup>213</sup> “Imagine a world in which all copies of once-censored books like *Candide*, *The Call of the Wild*, and *Ulysses* had been permanently destroyed at the time of the censoring and could not be studied or enjoyed after subsequent decision-makers lifted the ban.”<sup>214</sup> If technology is left to evolve in this manner, without legislative and/or judicial interference, our future may come to resemble the Party-controlled society portrayed in *1984*. Winston’s fears in the novel are telling of what such a future may hold:

The diary would be reduced to ashes and himself to vapor. Only the Thought Police would read what he had written, before they wiped it out of existence and out of memory. How could you make appeal to the future when not a trace of you, not even an anonymous word scribbled on a piece of paper, could physically survive?<sup>215</sup>

## VI. CONCLUSION

Kindle users were rightfully outraged by Amazon’s behavior, and Amazon admittedly has been extremely apologetic. While future legal action pertaining to the Orwell deletions is unlikely as a result of the settled Garwonski suit, the incident has certainly made tech-savvy consumers more wary of the technological capabilities of smart de-

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copies of the book and contact university libraries across the world to ask them to remove the book from their shelves. *Id.* Libraries, however, were free to refuse to remove the book. Manjoo, *supra* note 210. Moreover, no inquest was made into the homes of those individuals who purchased the book to force its return. *See id.* Amazon has demonstrated that had Mr. Mahfouz sued over an e-book publication, it could, in addition to stopping the sale of the e-book, reach into Kindles and take it back or perhaps redact the offending paragraph from purchased copies. In a digital world in which hard copies are obsolete, this would in effect be perfect enforcement of the judgment because the court could arguably compel Amazon and other e-book sellers/service providers to eliminate all digital copies in existence.

<sup>212</sup> *See* ZITTRAIN, *supra* note 13, at 116.

<sup>213</sup> *See id.*

<sup>214</sup> *Id.*

<sup>215</sup> ORWELL, *supra* note 1, at 27.

vices. Hopefully, as Amazon expands its Kindle market across the globe, it will be more mindful of consumer expectations. Nonetheless, much can be learned from what transpired.

First, users of tethered devices may find little recourse through the courts when device manufacturers meddle with their content. As the Kindle example illustrates, breach of contract claims may be difficult to successfully plead because of the increasingly complex agreements into which users enter when purchasing such devices and the various disclaimers that manufacturers include. Moreover, even if such suits are successful, compensatory damages in the breach of contract context would remain very limited. While common law tort claims such as trespass to chattels and conversion allow for possible punitive damages, the first hurdle is determining whether varying jurisdictions will recognize intangible, digital content as a “chattel.” Finally, the federal Computer Fraud and Abuse Act, though reasonably applicable in this situation, requires an aggregate loss of \$5,000, which forces individual plaintiffs who have suffered very little personal loss to garner successful class certification to bring a claim.

Second, even if users could collect in court, without an injunction to bar a company like Amazon from exercising its ability to remove content for users’ devices in the future, a successful suit means very little. Even in the Gawronski settlement, for example, Amazon agreed it would no longer delete users’ content, but it simultaneously reserved the right to do so in a myriad of situations. FTC involvement—specifically, instituting proceedings against Amazon for deceptive business practices—may help to protect consumers. This would be particularly true if the FTC could compel Amazon to disable the remote deletion technology and perhaps promulgate more specific rules for the ways in which smart-device vendors, such as Amazon, market products containing digital rights management technology.

In the end, neither the courts nor the enforcement powers of the FTC can solve the overarching problem of regulating tethered devices. Amazon’s actions demonstrate that current law has not kept pace with technology. To stave off this type of behavior in the future and to ensure personal rights and liberties are protected, legal reform is necessary. Federal law must better reflect the reality of being a consumer in this digital age while still balancing the important concerns of copyright, patent, and trademark holders. The fear of future censorship, through the deletion and undetected editing of digital content, is real—the technology to effectuate such results exists. The new generation of smart devices needs to be closely moni-

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tored and regulated to combat the possible infringement of First Amendment rights in the future. We should thank Amazon and Orwell for reminding us all to be cautious in embracing the technological advances of tomorrow.

If the Party could thrust its hand into the past and say of this or that event, *it never happened*<sup>216</sup>—that, surely, was more terrifying than mere torture and death.

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<sup>216</sup> *Id.* at 34.