ROBERT W. KASTENMEIER LECTURE

I AM THE CAPTAIN NOW: RESISTING PIRACY AND CONTORTION IN THE COPYRIGHT MARKETPLACE

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It is a true honor to pay homage to a congressman who shaped the copyright law that I have studied and practiced all of my professional life. Mr. Kastenmeier was the most important lawmaker of the twentieth century in matters of copyright law; he was both a hands-on expert and genuine supporter. He saw the United States as "the world's leader in creativity,"[1] and he described the output of intellectual property as "one of our most cherished commodities."[2] As Chairman of the House Judiciary Committee, he presided over the careful negotiation and statutory overhaul that became the 1976 Copyright Act.[3] Remarkably, this signature legislation remains largely in effect today more than forty years later.

Throughout his long service, Mr. Kastenmeier was a friend of the U.S. Copyright Office and had long relationships of mutual respect with two highly regarded Registers of Copyright: Abraham Kaminstein, who worked closely with him on the study and drafting of the copyright law, and Barbara Ringer, who also helped draft and then implement the considerable statutory changes. In 2013, when House Judiciary Chairman Bob Goodlatte commenced a major review of the copyright law to assess gaps and modernization needs for the twenty-first century, many stakeholders—including those in favor of updates—noted the ongoing viability of much of the underlying Act.[4]

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1. Robert W. Kastenmeier, *The 1989 Horace S. Manges Lecture - Copyright in an Era of Technological Change: A Political Perspective*, 14 COLUM.-VLA J.L. & ARTS 1, 13 (1989).

2. *Id.*

3. Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2012).

4. *See generally Congressional Hearing and Statements to Congress*, COPYRIGHT.GOV, https://www.copyright.gov/laws/hearings/ [https://perma.cc/Q8JH-EZE6].

I had the honor of corresponding with Mr. Kastenmeier briefly towards the end of his life. He was interested in current copyright issues and sent me his personal, inscribed copy of some of the legislative history from the 1976 hearings, a thoughtful and inspiring gift that bears witness to the pace and process of public service and yet captures only one of the many areas of law that he touched while in Congress.

In my remarks today, I would like to revisit two copyright issues that were well known to Chairman Kastenmeier, but which have some new urgency as applied to digital copies: piracy and the first sale doctrine. Piracy is a timely topic because, in its modern incarnation, the problem is more damaging, demoralizing, and sophisticated than ever before. Piracy is a business model devoted to breaking the law. But not infrequently, pirates will attract a chorus of support from those who want proprietary content to be free and devoid of restrictions on the internet.[5]

The doctrine of first sale is equally critical to the viability of online commerce. This doctrine (which functions as a statutory limitation on the exclusive rights of authors, publishers, and other copyright owners and a defense against infringement) has an important role in the copyright marketplace with respect to the sale or other transfer of copyrighted works that are embodied in material objects.[6] As codified, the first sale defense prescribes whether and when the owner of a particular copy or phonorecord may sell or otherwise dispose of the possession of that copy or phonorecord without the copyright owner's consent.[7] For example, it permits a person who lawfully purchases a paperback book to resell or donate that tangible copy to a secondhand store, and permits the store to further resell the same tangible copy, dog-eared pages and all. The first sale doctrine derives from property law and the right to sell one's lawfully owned chattels.[8] The plain meaning of the statute makes clear that it is not a defense to unauthorized copying or the transfer of digital works.

Lately, however, litigants have been testing the statutory construction of first sale, putting it through damaging contortions that would, if successful, permit downstream entrants to circumvent the copyright owner and distribute digital copies working from as little as

5. *See* discussion *infra* pp. 660–62.

6. *See* U.S. COPYRIGHT OFFICE, DCMA SECTION 104 REPORT 19 (2001), https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf [https://perma.cc/W8NG-MAZ5] [hereinafter DCMA REPORT]; *Capitol Records, LLC v. Redigi Inc.*, 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

7. 17 U.S.C. § 109 (2012).

8. *See generally* DCMA REPORT, *supra* note 6, at vii.

one purchased book or set of files.[9] As Congress has long understood, such a result would turn the value chain on its head and undermine the balance of the law; it would destroy the exclusive rights, investments, and future markets of the authors and their licensed partners.

Nonetheless, in copyright litigation, strategies that employ patience and resolve have been known to work, because the story of copyright law is about the relationship between content and technology, a relationship that never stands still and sometimes puts courts in a difficult position. As one example, despite the objections of authors and publishers from around the world, the Second Circuit found that the systematic digitization of millions of books by Google to be transformative when used to empower a search engine.[10] The concept of transformative use is not in the statute; judges, not lawmakers, crafted it. But as the litigation slowly percolated, the reproduction of books, although spectacular in scale, became difficult to imagine separately from the popularity and utility of the search in which it was deployed, at least as far as the court was concerned.[11]

Similarly, in the Sony Betamax case years earlier, the Supreme Court overturned the Ninth Circuit (albeit in a 5-4 decision), stating that the consumer-friendly VCR was not infringing on balance, because despite its infringing capacity, it was also capable of a substantial noninfringing purpose.[12] Although there is more to Sony Betamax than the fair use determination, the point is that by the time the case was resolved, the practice of taping and time-shifting TV shows had become popular and well established.

We will talk further about marketplace tensions, but first let us return to pirates. If you are familiar with the 2013 film, "Captain Phillips," you know it is a story of actual pirates, not from the days of Blackbeard but from present day Somalia.[13] The film, nominated for six Academy Awards, is based on a book that presents the true story of raggedy outlaws who hijacked an American container ship off the Horn of Africa.[14] Although they are disorganized, the pirates assault the crew, disrupt the commercial voyage, and wreak havoc on the rule of law.

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9. *See* discussion *infra* pp. 664–66.

10. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015).

11. *See generally id.* at 219–25.

12. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

13. CAPTAIN PHILLIPS (Sony Pictures 2013).

14. Nominees by Film 2014, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, https://www.oscars.org/oscars/ceremonies/2014/C?qt-honorees=1#block-quicktabs-honorees [https://perma.cc/4BZ7-96DE].

Phillips is played by Tom Hanks and, as he tells the crew, the pirates are not there to fish.[15] In one of the most mesmerizing scenes, the film captures the complex and contradictory appeal of the intruders who are projected as both criminals and underdogs, at least initially. "Hey! Look at me. Look at me," says the lead pirate as he fixates on Tom Hanks. "*I* am the captain now."[16]

It can feel this way in the world of copyright at times. Indeed, sometimes persons who dedicate themselves to the piracy and plunder of other people's intellectual property emerge from the shadows with misguided but passionate fan followings. As larger than life personalities go, you may remember Kim Dotcom (Schmitz), the German internet entrepreneur who became the nemesis of the music and movie industries when, over a period of seven years, he founded and operated a file hosting service called Megaupload, which is what it sounds like.[17]

At the height of the service, he had already made millions from other tech businesses and led a lavish lifestyle that included flashy cars, yacht parties, and bombastic envoys into politics.[18] He was in every way a large figure and to this day he has supporters. "Look at me. Look at me," would fit him well.

But, as should come as no surprise for a crime as multi-faceted as piracy, Kim Dotcom was accused by the U.S. Department of Justice of not only criminal copyright infringement, but also money laundering, racketeering, and wire fraud.[19] He proceeded to hide from authorities in New Zealand and is now fighting the possibility of extradition.[20] He

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15. CAPTAIN PHILLIPS, *supra* note 13.

16. *Id.*

17. *See* Complaint at 1–2, *Twentieth Century Fox Film Co. v. Megaupload.com*, No. 14-CV-00362 (E.D. Va. Apr. 7, 2014).

18. Charles Graeber, *Inside the Mansion—and Mind—of the Net's Most Wanted Man*, WIRED (Oct. 18, 2012, 6:30 AM), https://www.wired.com/2012/10/ff-kim-dotcom/ [https://perma.cc/EF7C-6FMT].

19. Press Release, Dep't of Justice, Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement (Jan. 19, 2012), https://archives.fbi.gov/archives/news/pressrel/press-releases/justice-department-charges-leaders-of-megaupload-with-widespread-online-copyright-infringement [https://perma.cc/G9DV-2VD5] ("Seven individuals and two corporations have been charged in the United States with running an international organized criminal enterprise allegedly responsible for massive worldwide online piracy of numerous types of copyrighted works through Megaupload.com and other related sites, generating more than $175 million in criminal proceeds and causing more than half a billion dollars in harm to copyright owners . . . .").

20. As of July 2018, the New Zealand Court of Appeal upheld the decision that Kim Dotcom can be extradited to the United States for prosecution on criminal copyright infringement and related charges. Charlotte Graham-McLay, *Internet Renegade Kim Dotcom Loses Appeal on Extradition to U.S.*, N.Y. TIMES (July 5,

continues to maintain that he is a legitimate businessman who has been demonized by Hollywood, and continues to enjoy support, if not for his pirate activity per se, then for his ancillary position that one or more governments involved in investigating him engaged in the broader crime of illegal domestic surveillance.[21] But this support does not extend to the U.S. legal system. The Supreme Court recently rejected Dotcom's challenge to the government's seizure of assets, leaving in place a lower court's ruling that the U.S. government could seize up to $40 million of Dotcom's "treasure" from his illegal exploits.[22]

It is an important fact, however, that not all pirates look or act like Kim Dotcom or are motivated by money. Just recently, the U.S. District Court for the Southern District of New York entered a default judgment and $15 million in damages against a willful infringement operation known as Sci-Hub, powered by servers in Russia.[23] Elsevier, the global publisher of scientific, technical, and medical information instituted the action,[24] but many publishers were affected.[25]

The lead pirate is a woman named Alexandra Elbakyan, who reportedly started Sci-Hub as a twenty-two-year-old graduate student in Kazakhstan.[26] At the direction of Elbakyan and her ring of partners,

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2018), https://www.nytimes.com/2018/07/05/world/asia/kim-dotcom-loses-appeal-extradition.html [https://perma.cc/8258-JU8G].

21. *See* Courtney Bostdorff, *United States Department of Justice: Drop All Charges Against Kim Dotcom*, CHANGE.ORG, https://www.change.org/p/united-states-department-of-justice-drop-all-charges-against-kim-dotcom (last visited Oct. 4, 2018) [https://perma.cc/JRQ5-A428]; John Bowden, *NSA Unlawfully Surveilled Kim Dotcom in New Zealand: Report*, THE HILL (Aug. 1, 2017, 10:42 AM), http://thehill.com/policy/cybersecurity/344742-nsa-unlawfully-surveiled-kim-dotcom-in-new-zealand [https://perma.cc/J6FN-9YEE].

22. Greg Stohr, *Supreme Court Rejects Kim Dotcom's Appeal*, BLOOMBERG (Oct. 2, 2017, 8:32 AM), https://www.bloomberg.com/news/articles/2017-10-02/kim-dotcom-rejected-by-u-s-supreme-court-on-40-million-seizure.

23. *Elsevier Inc. v. Sci-Hub*, No. 15-cv-4282, 2017 WL 3868800, at *2 (S.D.N.Y. June 21, 2017).

24. *See* Jyllian Kemsley, *Lawsuits Progress Against Sci-Hub*, C&EN (July 3, 2017), https://cen.acs.org/articles/95/i27/Lawsuits-progress-against-Sci-Hub.html [https://perma.cc/H4TZ-BMD5].

25. The American Chemical Society, a highly-regarded non-profit organization, also filed suit against Sci-Hub in June of 2017 in the Eastern District of Virginia. Complaint at 1, 20, *Am. Chem. Soc'y v. Sci-Hub*, No. 1:17-cv-00726-LMB-JFA (June 23, 2017). In November of the same year, the court entered a default judgment in favor of ACS. Order, *Am. Chem. Soc'y v. John Does 1-99*, No. 1:17-cv-00726-LMB-JFA (Nov. 3, 2017), https://regmedia.co.uk/2017/11/07/sci_hub_block_order_short.pdf [https://perma.cc/6C5B-HRFS].

26. Michael S. Rosenwald, *This Student Put 50 Million Stolen Research Articles Online. And They're Free*, WASH. POST (Mar. 30, 2016), https://www.washingtonpost.com/local/this-student-put-50-million-stolen-research-articles-online-and-theyre-free/2016/03/30/7714ffb4-eaf7-11e5-b0fd-073d5930a7b7_story.html?utm_term=.d4fa6d4e5801 [https://perma.cc/HRZ8-BQ75].

Sci-Hub has amassed more than fifty million scholarly articles and related documents protected by copyright using a combination of tactics.[27] These include third-party uploads, some unfortunately from university faculty that are bound by copyright licenses, as well as phishing, spoofing, and other methods that hijack log-in credentials and lure users to the pirate portal.[28] It is unlikely that damages will be collected, but the decision is a straightforward rejection of willful infringement and puts everyone on notice that supporting or doing business with Sci-Hub amounts to aiding an outlaw.

Elbakyan has suggested she wreaks chaos on the rule of law because she objects to the copyright fees of publishers.[29] Copyright fees are part of the business transaction between those who own the rights to content and those who wish to use it; they are central to authorship, access and delivery. As an alternative and as applicable, users are also free to assert fair use or other exceptions and limitations within the bounds of the law, but such details are not nearly as dramatic. To her fan base and anyone who will listen, Elbakyan has effectively stated in no uncertain terms that she "is the Captain now."

Piracy is commonly understood to violate the copyright owner's reproduction right, but it is particularly damaging to the distribution right, which has been central to U.S. law from the earliest days of our copyright system. As Justice Ginsburg opined in the 2012 case of *Golan v. Holder*,[30] it is clear that publication and dissemination were very much on the minds of our Framers.[31] In other words, publication is not a condition of copyright, but it is most certainly part of the constitutional bargain and public benefit of incentivizing authors and creativity.[32]

The *Golan* case is also important for its reminder that Congress, too, can be creative, especially when it is working to balance competing objectives. The case involved legislation by which Congress briefly resurrected copyrights in certain foreign works that had been

27. *Id.*

28. *Id.*

29. *Id.*

30. 565 U.S. 302 (2012).

31. *Id.* at 326 ("Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science.").

32. For many years, publication was necessary to trigger federal statutory protection, but Congress preempted common law state protections in the 1976 Copyright Act and specifically covered unpublished works within the Copyright Act. 17 U.S.C. § 301(a) (2012). However, as of yet, this preemption has not been applied to pre-1972 sound recordings. U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 13 (2011), https://www.copyright.gov/docs/sound/pre-72-report.pdf [https://perma.cc/NUF4-QJR2].

prematurely injected into the public domain in the United States, primarily due to technicalities in the law that were eliminated when we joined the Berne Convention in 1989.[33] The United States was a latecomer to Berne, joining some 100 years after it came into force, and normalizing our law required a series of changes that began during Mr. Kastenmeier's day (such as making copyright registration more permissive than before).[34]

Golan's petitioners unsuccessfully argued, generally, that restoring copyrights that are in the public domain is doctrinally anathema, and more specifically, unconstitutional, because extending the copyrights of works already in existence does not induce new creativity.[35]

The majority flatly rejected the argument, concluding instead that there is more than one way to diffuse knowledge under copyright law.[36] The Court opined that international agreements like that at stake in *Golan* are a logical and appropriate focus for Congress when considering the constitutional purpose of the law, not because they induce authorship but because they induce dissemination. As the Court explained, "[a] well-functioning international copyright system would likely encourage the dissemination of existing and future works."[37]

International agreements were in fact a great point of emphasis for the United States following our ascension to the Berne Convention in 1989, as evidenced by dozens of trade agreements and a pair of internet-specific World Intellectual Property Organization (WIPO) Treaties in 1996.[38] The 1996 treaties underscored the centrality and application of the distribution right on the Internet. In ratifying the treaties, the United States confirmed that the exclusive rights afforded by copyright apply in the online environment, and specifically, that authors may authorize "the making available to the public of works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[39]

This so-called "making available right" was designed from the start to have staying power, applicable to downloads, streaming, and

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33. *Golan*, 565 U.S. at 306–07.

34. *Id.*

35. *Id.* at 324.

36. *Id.* at 325–26.

37. *Id.* at 326.

38. *See* World Intellectual Property Organization, WIPO Copyright Treaty, WIPO Publication No 226(E) (Dec. 20, 1996) [hereinafter WIPO Copyright Treaty], http://www.wipo.int/edocs/pubdocs/en/wipo_pub_226-accessible1.pdf [https://perma.cc/E54Q-3BQB]; World Intellectual Property Organization, WIPO Performances and Phonograms Treaty, WIPO Publication No 227(E) (Dec. 20, 1996), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_227-accessible1.pdf [https://perma.cc/A898-ZX84].

39. WIPO Copyright Treaty, *supra* note 38, art. 8.

online transmissions, existing or future.[40] Most importantly, it addresses access rather than receipt, meaning that a copyright owner can establish an infringement claim if individual members of the public may access it separately through individual transmissions.[41]

Most U.S. trading partners implemented the making available obligation through national legislation that established a broad right to communicate copyrighted works to the public.[42] The United States chose another route. We neither mention the words "making available" nor the words "communicate to the public." Rather, we concluded that the existing exclusive rights, enacted largely in 1976, collectively address the obligation.[43]

In 2016, some twenty years after treaty negotiations, my colleagues and I at the Copyright Office delivered to Congress the first government status report on the making available right, analyzing domestic and foreign judicial opinions, legislative history and treaty documentation, as well as public comments.[44] The Report confirmed that the enumerated exclusive rights in the Copyright Act together confer the making available right, and must be read to include not only the transfer of copies but also offers of public access, including through on demand services.[45]

The Report further notes that both downloads and the offer of downloads are governed by the distribution right, and that with respect to file sharing, streaming or display of an image, the enumerated rights of public performance, public display, and reproduction govern.[46] Around the same time, in 2014, the Supreme Court handed down an important decision in *ABC v. Aereo*,[47] in which it confirmed that the public performance right governs transmissions to the public even when

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40. U.S. COPYRIGHT OFFICE, THE MAKING AVAILABLE RIGHT IN THE UNITED STATES 1 (2016), https://www.copyright.gov/docs/making_available/making-available-right.pdf [https://perma.cc/SAM3-7J4X].

41. World Intellectual Property Organization, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference*, ¶ 10.10, at 44, WIPO Doc. CRNR/DC/4 (Aug. 30, 1996) [hereinafter WIPO Basic Proposal], http://www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_4.pdf [https://perma.cc/49Z9-DWPU] ("The relevant act is the making available of the work by providing access to it.").

42. INTERNET POLICY TASKFORCE, U.S. DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 15 (2013) [hereinafter Green Paper], http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf [https://perma.cc/YJ5T-UWZB].

43. U.S. COPYRIGHT OFFICE, *supra* note 40, at 2.

44. *Id.* at 3–4.

45. *Id.* at 4.

46. *Id.*

47. 134 S. Ct. 2498 (2014).

the members of the public enjoy access through individualized streams.[48] *Aereo* involved a service that streamed content to consumers on demand.[49] Its contorted argument to the court was that this made the performance private rather than public and therefore outside of the copyright owner's control,[50] but the Court was having none of it.

This decision and the Copyright Office Report helped clarify for courts, lower courts in particular, that under U.S. law authors have a cause of action when their works are offered to the public without consent. As business models continue to evolve, the courts will be challenged to keep exclusive rights meaningful and fair use and other limitations reasonable with respect to the objectives of downstream entrants in the copyright marketplace. Such actors rely on creative content to execute their own innovations, but in a variety of instances, both commercial and noncommercial, seek to minimize and circumvent those who created and own the content that is so essential to their plans. Which brings us back to first sale and the contortions of the *ReDigi* case.

Redigi v. Capitol Records[51] is pending in the Second Circuit following oral arguments in August of 2017.[52] ReDigi is a tech company that provides pristine copies of music files, think iTunes, to consumers at a discounted price, think market substitutes.[53] Capitol Records and its affiliates (Virgin Records and Capitol Christian Music) own the copyrights in the sound recordings.[54]

The district court found squarely for Capitol Records, rejecting all four factors of Redigi's fair use defense, and found the first sale doctrine inapplicable on its face.[55] This second part of the analysis is the most important, because the court explained that first sale applies only to the distribution activities of Redigi and offers no defense to its unauthorized copying that it must undertake in the first place.[56] In other words, the court said a person cannot claim to sell a tangible, lawfully owned product if he or she is actually making copies of a product and selling those copies to multiple consumers.

As the Second Circuit considers *ReDigi*, it might look to a case decided thirteen years prior by its own lower court. There, in *UMG*

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48. *Id.* at 2511.

49. *Id.* at 2503.

50. *Id.*

51. 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

52. *See Argument Calendar*, U.S. CT. APPEALS FOR SECOND CIR., http://ww2.ca2.uscourts.gov/calendar/index.php?eID=1441 [https://perma.cc/9M65-PBZG].

53. *See Capitol Records, LLC*, 934 F. Supp. 2d at 645.

54. *Id.* at 646.

55. *Id.* at 660–61.

56. *Id.* at 655.

Recordings v. MP3.com,[57] the court delivered its opinion with a warning. "Stripped to its essence," the court wrote, "defendant's 'consumer protection' argument amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiff's property simply because there is a consumer demand for it. This hardly appeals to the conscience of equity."[58]

Although the business at issue on appeal is ReDigi's music service, the case is concerning to publishers because ReDigi has long talked about selling used E-Books on the Internet at discounted rates, which would most certainly seem to involve copying.[59] Here, it is the assertions of the library community that are most concerning. In an amicus brief to the appeals court the three largest library associations, as well as the privately funded Internet Archive, argued that although ReDigi's activities place it outside of the protections of the statute, the court should treat the unauthorized reproductions and distributions as analogous to lawful activity and, where needed, apply fair use as a bridge to first sale principles.[60] According to their brief, the libraries and archives are seeking a blessing from the court that they may make digital reproductions of copyrighted books and distribute them to the public through "digital lending services" without the permission of copyright owners.[61] As noted by publishers, however, no court has ever permitted such a sweeping interception of copyright owner's rights.[62] Unlike the Google and Sony Betamax cases, which involved markets for search and consumer electronics, the contortions of the *ReDigi* case are a threat to the primary copyright markets of authors and publishers, and are likely to become more egregious, not less, over time.[63] Much

57. 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

58. *Id.* at 352.

59. Judith Rosen, *ReDigi Plans to Sell Used E-Books*, PUBLISHERS WEEKLY (July 27, 2012), https://www.publishersweekly.com/pw/by-topic/digital/retailing/article/53334-redigi-plans-to-sell-used-e-books.html [https://perma.cc/PB6C-HY2C].

60. *See generally* Brief of Amici Curiae American Library Association et al in Support of Reversal, *Capitol Records, LLC v. Redigi*, No. 16-2321-cv (2d Cir. Feb. 14, 2017), http://www.librarycopyrightalliance.org/storage/documents/ReDigiFairUse_2017feb14-rs.pdf [https://perma.cc/4Z36-9S2L].

61. *Id.* at 21 ("A finding of fair use in this case would provide additional legal certainty along with cases like *HathiTrust* to spur investment and innovation in digital services by libraries. The resulting availability of comprehensive collections of digital books, and potentially other types of works such as music and films, will have lasting public benefit . . . .").

62. *See* Brief of Amicus Curiae Association of American Publishers, Inc. in Support of Plaintiffs-Appellees at 4, *Capitol Records, LLC*, No. 16-2321-cv (2d Cir. May 12, 2017).

63. *See supra* pp. 658–59.

as Tom Hanks discovered in the movie, the goal is not to share the ocean, it is to hijack the ship.

Although first sale contortions may be marketed as selfless or, worse, public interest objectives, they would, in fact, be deeply at odds with established law. In 2001, the Copyright Office and then-Register Peters issued a forward-facing report on the premise and likely impact of a digital first sale, following enactment of the Digital Millennium Copyright Act (which added certain digital specific provisions to the 1976 Copyright Act).[64] The Office concluded that copying for the sake of selling "used digital files," was outside the scope of the law as enacted and extremely risky to the rights of copyright owners.[65]

The Register testified that "the tangible nature of a copy is a defining element of the first sale doctrine and critical to its rationale. The digital transmission of a work does not implicate the alienability of a physical artifact."[66] Fifteen years later, in 2016, an Internet Task Force at the Department of Commerce revisited the topic but again warned against extending first sale to digital transmissions, stating that the "risks to copyright owners' primary markets . . . do not appear to have diminished . . . [and] could curtail . . . new business models."[67] These are clear policy determinations.

Efforts to contort the first sale doctrine and make piracy a populist movement are not new, but they are serious in their modern forms and will require exacting analysis, not rhetoric, to protect the integrity and efficacy of the copyright law and its constitutional bargain. Here, it is helpful to turn to Mr. Kastenmeier's cogent understanding of what is at stake. In 1967, he observed:

> A means must be found to assure the public ready access to published information and to provide compensation to the copyright owner. This is no less true for copying by librarians and other custodians of copyrighted works, particularly with respect to the mounting grist of scholarly, technical and scientific materials that are being produced today. In this necessary effort, publishers and authors must take the lead. Its

64. *See generally* DMCA REPORT, *supra* note 6.

65. *Id*.

66. *Digital Millennium Copyright Act (DMCA) Section 104 Report: Before the Subcomm. on Court, the Internet, and Intellectual Prop.*, 107th Cong. at III.B.1.a. (2001) (statement of Marybeth Peters, Register of Copyrights), https://www.copyright.gov/docs/regstat121201.html [https://perma.cc/R5RH-UUF4].

67. INTERNET POLICY TASK FORCE, DEP'T OF COMMERCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES 58 (2016), https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf [https://perma.cc/3GCV-G9GM].

success seems essential to the survival of the copyright system of which they are the most immediate beneficiaries.[68]

This is important advice from a true and lasting captain.

68. Robert W. Kastenmeier, *The Information Explosion and Copyright Law Revision*, 14 BULL. COPYRIGHT SOC'Y U.S.A. 195, 202 (1967).