‘Fixing’ the First Sale Doctrine: Adapting Copyright Law to the New Media Distribution Paradigm
Samuel Perkins

This Article discusses Section 109 of the Copyright Act, the first sale doctrine, in the context of digital media and internet-based storage. Traditionally, the first sale doctrine served as an important limitation on the exclusive rights of copyright owners, allowing copies of lawfully obtained works to be resold without interference from the copyright owner. As a result of this limitation, physical media remains freely alienable after the first sale, providing secondary markets for used copies and more consumer choice. However, due to the nature of digital media and the recent market shift among media distributors, first sale doctrine has become ambiguous and inconsistently applied.

This Article argues that Section 109 of the Copyright Act should be amended to allow consumers to resell their lawfully acquired digital media. By amending the Copyright Act for the digital media age, copyright holders will benefit from the increased clarity of the extent of their rights, while consumers will benefit from greater choice and competition in the market. Alternatively, this Article argues that reinterpreting the first sale doctrine using the common law principle of copyright exhaustion is necessary to restore the balance between the ability of copyright holders to exploit their works and the ability of consumers to alienate and resell their property.

Protecting the Sanctity of Family: An Argument for the Equitable Parent Doctrine
Kelli Schmidt

This Comment examines the rights of men who held themselves out as a child’s father or who did not know they were the biological father with a focus on the equitable parent doctrine. Because the equitable parent doctrine has not been adopted in Illinois, the author proposes new legislation. The proposed legislation establishes factors to assist a court in determining when a man should be granted rights to a child with respect to two different
scenarios: first, if he held himself out as the child’s father, but ultimately found out he was not the biological father, or second, if the man did not know he was the child’s father but found out he was the biological father after parentage had already been granted to a different man. The author then applies the proposed legislation to recent court decisions that established parentage to determine whether a more equitable result could have been reached. Lastly, this Comment briefly examines the effect the proposed legislation would have on child support.
‘Fixing’ the First Sale Doctrine: Adapting Copyright Law to the New Media Distribution Paradigm

SAMUEL PERKINS*

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INTRODUCTION

The music business is a cruel and shallow money trench, a long plastic hallway where thieves and pimps run free, and good men die like dogs. There’s also a negative side.¹

When Steve Jobs, the visionary CEO of Apple, introduced the iTunes Music Store in 2003, he “demonstrated that the Internet was made for music delivery.”² But the iTunes Music Store was not revolutionary in the sense that it provided consumers the ability to download music from the Internet—services like Napster had been doing it for years.³ Rather, the Store revolutionized the music industry because it provided users a legal means of purchasing and downloading music over the Internet.⁴ That revolution has proven quite lucrative for the technology giant; Apple’s online sales of digital content exceeded ten billion dollars in 2013.⁵ However, while Apple’s online music store was a victory for consumers over the music business’s “cruel and shallow money trench,” perhaps the “negative side” was that it also created a mutual interest between Internet media distribution services and the music industry in preventing the transfer or resale of digital media between individual consumers.⁶

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² See Jobs, supra note 1.
⁴ See Jobs, supra note 1 (“Why has [piracy] proliferated? Well, because there is no legal alternative.”).
⁶ See Jobs, supra note 1.
While Mr. Jobs showed the world that the Internet was made for music delivery in 2003, consumers quickly realized that the Internet was the perfect conduit for delivering all types of digital media. Consequently, the Internet fundamentally altered the way consumers purchase and use copyrighted works. For example, a decade ago, if you wanted to buy a music album or a movie, you would go to the record or movie store and purchase a CD or DVD. You could then play the disk at your home, bring it to a friend’s house, listen to it in your vehicle, or sell it without ever worrying about copyright infringement. Today, music and movies are often purchased through online digital marketplaces, such as Apple’s iTunes or Amazon’s CloudPlayer, where they can be downloaded to a phone, tablet, or laptop. These services also allow users to store their digital content in the cloud instead of on local storage devices such as hard drives or compact disks. In addition, subscription music and video services like Spotify and Netflix give consumers a new alternative to purchasing media—allowing subscribers instant access to vast libraries of digital content for a monthly fee. This paradigm shift in media distribution business models—replacing the physical distribution and sale of CDs and DVDs with digital media downloads, cloud storage, and subscription services—has made some sections of the Copyright Act ambiguous and difficult to apply to new technologies.

This Comment addresses the legal dichotomies between physical and digital mediums and concludes by arguing that Section 109 of the Copyright Act, commonly known as the first sale doctrine, should be amended to address new technologies and market changes in media distribution platforms. Alternatively, courts should apply common law copyright exhaustion principles to resolve the disparate legal treatment between physical and digital media. In the interim, as consumers continue to transition from physical to digital mediums, the necessity for a digital first sale doctrine in copyright law will become even more pronounced.

Part I of this Comment provides a background and history of the Copyright Act and related statutes. Part II presents three recent cases—Capitol Records, LLC v. ReDigi, Inc., Cartoon Network LP v. CSC Holdings, LLC v. ReDigi, Inc. 934 F. Supp. 2d 640 (S.D.N.Y. 2013).
Inc., 13 and Kirtsaeng v. John Wiley & Sons, Inc. 14—in order to illustrate the struggle courts face when applying existing copyright law to new technologies and formats. 15 Part III explains how cloud computing is changing the way consumers access and acquire digital media, and proposes that Congress re-work some provisions of the Copyright Act to restore the balance between the competing ownership interests of consumers and copyright holders. 16

Alternatively, Part IV posits that common law copyright exhaustion principles can and should be used to provide a more straightforward and cogent approach to analyzing copyright interests in digital media downloads. 17 This Part also shows that consumers are negatively impacted when copyright owners are allowed to exert unchecked control over works after they enter the stream of commerce. 18 Part V surveys the different ways digital media retailers and Internet service providers have addressed piracy concerns. 19 Finally, Part VI concludes by arguing that, as consumers continue to transition to Internet platforms as their primary conduit for purchasing and accessing digital content, the need for a digital first sale doctrine will become even more apparent. 20 Therefore, courts should take advantage of common law copyright exhaustion principles until adequate changes are made to the Copyright Act. 21

I. THE COPYRIGHT ACT, THE DIGITAL MILLENNIUM COPYRIGHT ACT, AND THE FIRST SALE DOCTRINE.

A. THE COPYRIGHT ACT OF 1976

The Copyright Act grants certain exclusive rights to the owner of a copyrighted work, including the right to reproduce, distribute, and publicly perform the work. 22 As codified, copyright protection extends to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 23 However, these rights are not unlimited. Sections 107 and 109 of

15. See infra Part II, at 7.
16. See infra Part III, at 12.
17. See infra Part IV, at 19.
18. See infra Part IV (B), at 20.
19. See infra Part V, at 23.
20. See infra Part VI, at 25.
the Act—the fair use and first sale doctrines—place limits on a copyright holder’s ability to exploit works once they have entered the marketplace.\textsuperscript{24} The first sale doctrine allows “the owner of a particular copy or phonorecord lawfully made under this title . . . without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”\textsuperscript{25} Similarly, the fair use doctrine protects the use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” against claims of infringement.\textsuperscript{26} Together, these two doctrines significantly limit the copyright holder’s control over a work after it has entered the market.\textsuperscript{27} For example, the first sale doctrine prevents the owner of a copyrighted work, such as a book, from controlling the sale or distribution of a lawfully made (i.e., not pirated) copy once the particular copy has been sold in the primary market.\textsuperscript{28} Thus, once a book is purchased from a bookstore, the owner of that particular copy is able to sell the book to a friend, donate it to a library, or sell it to a used bookstore.\textsuperscript{29} Likewise, the fair use doctrine functions to limit the copyright owner’s ability to control the reproduction or distribution of a work when the copied portion is minor in relation to the whole,\textsuperscript{30} when the copying is used for education or a non-commercial purpose,\textsuperscript{31} or when some amount of copying is necessary in order to provide news, commentary, or criticism of the work.\textsuperscript{32}

\section*{B. THE DIGITAL MILLENNIUM COPYRIGHT ACT}

In addition to the Copyright Act, Congress passed the Digital Millennium Copyright Act (DMCA) to address technological advancements made since the Copyright Act was passed in 1976.\textsuperscript{33} Section 512 of the Act limits direct liability for copyright infringement for Internet service providers

\begin{itemize}
\item \textsuperscript{24} 17 U.S.C. §§ 107, 109 (2012).
\item \textsuperscript{25} 17 U.S.C. § 109(a) (2012) (“Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”).
\item \textsuperscript{26} 17 U.S.C. § 107 (2012).
\item \textsuperscript{27} \textit{See} Aaron Perzanowski & Jason Schultz, Digital Exhaustion, 58 UCLA L. Rev. 889, 931 (2011).
\item \textsuperscript{28} \textit{See generally} 17 U.S.C. § 109 (2012).
\item \textsuperscript{29} \textit{See, e.g.}, Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).
\item \textsuperscript{30} \textit{See} Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 284 (S.D. N.Y. 2013).
\item \textsuperscript{31} 17 U.S.C. § 107(1) (2012).
\item \textsuperscript{32} \textit{See generally} Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding that parodies are entitled to Fair Use protection because some amount of copying is necessary in order for the parody to “conjure up” the original in the listener’s mind).
\item \textsuperscript{33} \textit{See} 17 U.S.C. §§ 101-17, 411, 507, 512 (2012).
\end{itemize}
(ISPs), including private cloud-based data-storage companies, through a safe harbor provision. For example, this statutory limitation shields services like Google and Dropbox from liability when individual users upload illegal copies to their personal accounts. On the other hand, Section 1201 of the DMCA makes it illegal to circumvent the anti-piracy measures in digital media files that prevent the unauthorized copying of protected works. Thus, while Section 106 of the Copyright Act prevents the owner of a copy from actually making illegal reproductions of the work, Section 1201 of the DMCA makes it illegal for the owner of that copy to bypass the anti-piracy measures that restrict such copying. While these technological measures, commonly referred to in this Article as Digital Rights Management, have helped to curb Internet piracy through tethering media content to a physical device or owner, they have also diminished the function of the first sale doctrine because they prevent the copy owner from selling or transferring their copy to others. Moreover, the DMCA has been criticized for its inadequacies, especially in the context of cloud-based storage and computing. Although the DMCA helped address piracy concerns from peer-to-peer file-sharing services such as Napster, Grokster, and Aimster, it fails to offer meaningful protection in the context of private, cloud-based storage platforms.

C. THE FIRST SALE DOCTRINE

One of the biggest legal issues relating to digital media downloads involves the first sale doctrine. Traditionally, the first sale doctrine limited a copyright holder’s ability to exploit a protected work—such as a movie on a DVD or a sound recording on a CD—to the initial sale. This allowed used record stores, movie rental companies, and libraries to sell or lend lawfully made copies of sound recordings and movies. The policy considerations

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35. See Datesh, supra note 34, at 694-95.
36. See Perzanowski et al., supra note 27, at 902.
37. See Datesh, supra note 34, at 724.
38. Perzanowski et al., supra note 27, at 903.
39. Id.
43. See Kiker, supra note 41, at 250.
behind the first sale doctrine center on the fact that “[p]hysical copies of works degrade with time and use, making used copies less desirable than new ones.” Since physical copies of works are restricted by geography and must be transported for resale, a “natural brake” restricts the volume of sales in secondary markets.

The application of the first sale doctrine to copyrighted works “fixed in any tangible medium of expression,” such as records, CDs, and DVDs, is relatively straightforward. However, the increasing prevalence of digital media and the ability to download movies and music via the Internet has created novel legal issues that do not fit well with statutory definitions or judicial interpretations contemplating only physical mediums. Complicating matters further, digital media downloads often subject the purchaser to lengthy End User License Agreements (EULAs) and the digital content itself may contain Digital Rights Management (DRM) technology that restricts the user’s control over the media. Finally, the popularization of subscription music services such as Spotify, iTunes Radio, and Pandora, as well as subscription video services like Netflix, Redbox, and Amazon Prime have fundamentally altered the traditional media distribution business model. In fact, subscription services like Spotify are likely
responsible for the first decline in digital music sales since the inception of iTunes in 2001. In order to understand how the first sale doctrine operates to limit a copyright holder’s control over a work once it has entered the stream of commerce, it is necessary to examine how courts have construed the Copyright Act’s fixation requirement, the reproduction right, and the distribution right.

II. CASES DEALING WITH THE FIRST SALE DOCTRINE

A. THE REPRODUCTION RIGHT: CAPITOL RECORDS, LLC V. REDIGI, INC.

ReDigi launched its “online marketplace for digital used music” on October 13, 2011, offering users the ability to buy and sell digital music previously purchased from iTunes. Essentially, ReDigi offered an online market analogous to a used record store. After the user downloads ReDigi’s “Media Manager,” the program searches the computer hard drive for media eligible for sale on ReDigi’s website. Once the scan is complete, the user is presented with a list of files—iTunes downloads and music purchased from ReDigi—that are eligible for sale. If a user decides to sell a music file, the Media Manager software uploads the copy to ReDigi’s servers and simultaneously deletes the file from the user’s computer. Thereafter, the software continuously runs in the background to ensure the user has not retained music that has already been sold or uploaded for sale.

Once users upload a file to ReDigi’s “Cloud Locker” server, they have the option either to store the file in the “Cloud Locker” for streaming and personal use, or place the music file in ReDigi’s digital marketplace for sale. ReDigi characterizes the upload process as a piece-by-piece migration of the file “analogous to a train” running from the user’s computer to ReDigi’s servers, so that the file never exists in more than one place at a time. In contrast, Capitol Records insists that ReDigi’s upload process,

music-sales-decrease-for-first-time-in-2013 (last visited Jan. 5, 2014) (attributing the decline in digital music sales to the increasing popularity of streaming music services).

58. Id.
60. Id.
61. ReDigi, 934 F. Supp. 2d at 646.
62. Id.
63. Id.
64. Id.
65. Id.
transferring a file from the user’s computer to ReDigi’s servers, “necessarily involves copying.”  

ReDigi earns a sixty percent commission on every sale, while the seller retains twenty percent of the sale price and an additional twenty percent is held in an escrow account for royalty payments for the artist.  

To determine whether ReDigi violated Capitol’s reproduction or distribution rights, the court first looked to Section 106 of the Copyright Act. Since the reproduction right of copyright owners defines sound recordings as “works that result from the fixation of a series of musical, spoken, or other sounds,” the protected work is distinct from the material object it is fixed in. Thus, the reproduction right is implicated once the owner of a particular copy embodies the copyright holder’s work in a material object. Since, by their very nature, digital music files must be embodied in a new material object (i.e., a hard drive) after they are transferred over the Internet, the transfer implicates the copyright owner’s exclusive reproduction right under the Copyright Act.  

Rejecting ReDigi’s “train” analogy, the court held that ReDigi infringed Capitol’s reproduction right, even if the original file was deleted simultaneously, because the file transfer (from the user’s computer to ReDigi’s servers) fixed the copy in a new material object. Although the court acknowledged that the application of the first sale doctrine to digital media files was necessarily limited, it noted that Section 109(a) still allowed for the owner of a particular phonorecord to sell the device onto which the file was originally downloaded, such as a hard drive, mp3 player, or iPod.

67. Id. at 646.  
68. Id.  
70. See ReDigi, 934 F. Supp. 2d at 646; H.R. REP. No. 94–1476 at 56 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5669 (“The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, ‘sound recordings’ as copyrightable subject matter are distinguished from ‘phonorecords,’ the latter being physical objects in which sounds are fixed.”).  
71. DAVID NIMMER, 1 NIMMER ON COPYRIGHT, § 8.02 (1965).  
72. See ReDigi, 934 F. Supp. 2d at 655.  
73. Id. The court noted that:  
ReDigi’s argument fails for two reasons. First, while technological change may have rendered Section 109(a) unsatisfactory to many contemporary observers and consumers, it has not rendered it ambiguous. The statute plainly applies to the lawful owner’s ‘particular’ phonorecord, a phonorecord that by definition cannot be uploaded and sold on ReDigi’s website. Second, amendment of the Copyright Act in line with ReDigi’s proposal is a legislative prerogative that courts are unauthorized and ill suited to attempt.  
74. Id.
Yet, such a limited reading of the first sale doctrine usurps the long-standing balance of rights between consumers and copyright holders.

B. THE FIXATION REQUIREMENT: CARTOON NETWORK LP V. CSC HOLDINGS, INC.

In Cartoon Network LP v. CSC Holdings, Inc., the Second Circuit was tasked with determining what constituted a fixation in a material object as defined by the Copyright Act. In that case, CSC Holdings (Cablevision), a cable television operator, released a new Remote Storage Digital Video Recorder (RS-DVR), allowing its customers to record cable programming on Cablevision’s remote servers without purchasing a standalone DVR device.

Cablevision’s RS-DVR system works by intercepting live feeds sent from content providers to cable companies and splitting the feed into two streams. The first data stream is relayed directly to customers as expected. However, the second data stream is routed into a Broadband Media Router (BMR) where the video stream is buffered and reformatted before being sent to high-capacity hard drives. If an RS-DVR customer requests a particular program, the stream will move from a buffer to a hard drive on Cablevision’s remote servers. Old data is erased from the buffer as new data enters so that the buffer holds no more than 1.2 seconds of television programming at a time. The process is similar to traditional DVRs in the sense that customers use a remote control to record programming in advance, but may not record an earlier portion of a program that has already begun. According to the court, the main difference between traditional DVRs and Cablevision’s RS-DVR is that:

[I]nstead of sending signals from the remote to an on-set box, the viewer sends signals from the remote, through the cable, to [Cablevision’s] Server at [their] central facility. In this respect, RS-DVR

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75. See Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 124 (2d Cir. 2008).
76. See id. “RS-DVR customers may then receive playback of those programs through their home television sets, using only a remote control and a standard cable box equipped with the RS-DVR software.” Cartoon Network, 536 F.3d at 124.
77. Id.
78. Id.
79. Id.
80. Id. at 125.
81. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 125 (2d Cir. 2008).
82. Id.
more closely resembles a [Video On-Demand] service, whereby a cable subscriber uses his remote and cable box to request transmission of content, such as a movie, stored on computers at the cable company’s facility. But unlike a [Video On-Demand] service, RS-DVR users can only play content that they previously requested to be recorded.83

To address the issue of whether Cablevision’s buffering of the feeds contain copyrighted works “reproduced” the work “in copies” within the meaning of Section 106(1) of the Copyright Act, the court first looked to the definitions of copies and fixed.84 According to the court, section 101 of the Act imposes two distinct, but related requirements: the work must be embodied in a medium (the embodiment requirement),85 and it must remain embodied in the medium for a period of more than transitory duration (the duration requirement).86 Thus, “[u]nless both requirements are met, the work is not ‘fixed’ in the buffer, and, as a result, the buffer data is not a ‘copy’ of the original work whose data is buffered.”87

Finally, the court looked to the Copyright Office’s 2001 DMCA Report to determine when a copy is fixed within the meaning of the Copyright Act, but criticized the Report for reading the “transitory duration” language out of the statute.88 The court held that because the copyrighted works were not embodied in the buffers for a period of more than transitory duration, they were not ‘fixed’ within the meaning of Section 101 of the Act.89 Since, by definition, a copy must be fixed in a material object, Cablevision’s services did not create copies within the meaning of the Act.90

83. Id.
84. Id. at 127. “‘Copies’ are material objects . . . in which a work is fixed by any method . . . and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” See 17 U.S.C. § 101 (2012) (“A work is ‘fixed’ in a tangible medium of expression when its . . . embodiment is sufficiently permanent or stable to permit it to be reproduced for a period of more than transitory duration.”).
85. Cartoon Network LP, 536 F.3d at 127.
86. Id. at 125.
87. Id. at 127.
88. See id.; DMCA Report, supra note 45, at 111 (a work is fixed “[u]nless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated . . . .”).
89. Cartoon Network, 536 F.3d at 130.
90. Id.
C. THE DISTRIBUTION RIGHT: KIRTSANG V. JOHN WILEY & SONS, INC.

In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Supreme Court extended the first sale doctrine to copies of a copyrighted work lawfully made abroad. In that case, John Wiley, a publisher of academic books, sued Supap Kirtsaeng, a college student from Thailand, after Kirtsaeng sold foreign editions of textbooks in the United States. Wiley claimed that Kirtsaeng infringed its section 106(3) exclusive distribution right when he imported the textbooks and sold them without Wiley’s permission. Kirtsaeng argued that he did not need Wiley’s permission to sell the books because section 109(a) permitted him to resell the “lawfully made” books without the permission of the copyright holder. Thus, the Supreme Court was tasked with deciding whether the words “lawfully made under this title” impose a geographical limitation on section 109(a)-the first sale doctrine.

First, the Court looked to the text of section 109(a) and concluded that the most logical interpretation of the language favored a nongeographical interpretation. According to the majority view, “lawfully made” distinguishes copies that were made lawfully from those that were made illegally, and “under this title” is used to set forth or define the standard of lawfulness. On the other hand, Wiley’s interpretation of the words “lawfully made” would deprive the words of significance. Moreover, “neither ‘under’ nor any other word in the phrase means ‘where.’” Thus, the Court concluded that a geographical interpretation would create more linguistic problems than it would solve.

Next, the Court looked to the history and context of the first sale doctrine for support of a geographical restriction. Specifically, the Court compared the language of section 109(a) with its immediate predecessor.

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92. *Id.* at 1356.
93. *Id.* at 1357.
94. *Id.*
95. *Id.* at 1358.
96. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1358 (2013) (“[T]he nongeographical reading is simple, it promotes a traditional copyright objective (combatting piracy), and makes word-by-word linguistic sense.”).
97. *Id.*
98. *Id.* (the Court asked: “How could a book be *un* lawfully ‘made under this title’?”).
99. *Id.* at 1359.
100. *Id.* at 1360.
under the 1909 Copyright Act.\textsuperscript{102} Under the previous version, the Act read, “Nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work \textit{the possession of which has been lawfully obtained}.”\textsuperscript{103} Under the current version of the Act, the statute reads, “the owner of a particular copy or phonorecord \textit{lawfully made under this title} is entitled to sell or otherwise dispose of the possession of that copy or phonorecord.”\textsuperscript{104} The Court reasoned that the change in language was meant to limit the scope of the first sale doctrine to owners of a particular copy, as opposed to lawful possessors of a copy.\textsuperscript{105} Thus, the legislative history behind Section 109(a) clearly favored a non-geographical interpretation.\textsuperscript{106}

Finally, the Court looked at how imposing a geographical restriction on Section 109(a) would undermine basic objectives of the Copyright Act.\textsuperscript{107} First, the Court noted that libraries contain millions of books published abroad, and imposing a geographical interpretation would “likely require the libraries to obtain permission (or at least create significant uncertainty) before circulating or otherwise distributing these books.”\textsuperscript{108} Similarly, used-book dealers rely on the assumption that the first sale doctrine applies to books printed and published abroad.\textsuperscript{109} Reading a geographical restriction into section 109(a) would injure a large portion of the used-book business and create uncertainty for books made outside the United States.\textsuperscript{110} Moreover, a geographical interpretation of section 109(a) would create difficulties for companies who manufacture products such as automobiles abroad and then import the products into the United States.\textsuperscript{111} For example, such interpretation would prevent the resale of a foreign vehicle without first obtaining the permission of the holder of each copyright on each piece of copyrighted automobile software.\textsuperscript{112} Thus, the Court rejected a geographical interpretation of section 109(a), reasoning that “the practical problems . . . are too serious, extensive, and likely to come about . . . particularly in light of the ever-growing importance of foreign trade to America.”\textsuperscript{113}

\begin{footnotesize}
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\item[\textsuperscript{103}] Kirtsaeng, 133 S. Ct. at 1360.
\item[\textsuperscript{104}] Id. (citing 17 U.S.C. § 109 (2006)).
\item[\textsuperscript{105}] Kirtsaeng, 133 S. Ct. at 1360.
\item[\textsuperscript{106}] Id. at 1361.
\item[\textsuperscript{107}] Id. at 1362.
\item[\textsuperscript{108}] Id. at 1364.
\item[\textsuperscript{109}] Id.
\item[\textsuperscript{110}] Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1364 (2013).
\item[\textsuperscript{111}] Id.
\item[\textsuperscript{112}] Id.
\item[\textsuperscript{113}] Id. at 1367.
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III. CURRENT PROBLEMS AND PROPOSED SOLUTIONS TO THE DIGITAL FIRST SALE DILEMMA

A. THE FIXATION REQUIREMENT LOSES RELEVANCE IN THE CLOUD

Section 101 of the Copyright Act defines “copies” as material objects in which a work is fixed by any method, and from which the work can be reproduced.114 “A work is ‘fixed’ in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”115

In ReDigi, the court relied on these definitions, reasoning that because the transfer of a digital file over the Internet requires a new copy to be created on the recipient’s hard drive, the reproduction right is implicated even when the original file is simultaneously deleted.116 However, the ReDigi decision effectively read the duration requirement out of the statute.117 Because the copies only existed for a brief moment (during the transfer from the user’s computer to ReDigi’s servers), they were not “sufficiently permanent or stable”118 and incapable of being reproduced “for a period of more than transitory duration.”119 Thus, the ReDigi court should have concluded that the reproductions were not fixed, and therefore not copies within the meaning of the Act.120 This interpretation is also compatible with the holding in Cartoon Network, which criticized the district court’s decision for reading the durational requirement out of the statute.121 These cases illustrate the difficulty courts face in applying copyright principles to digital

115. Id.
117. See id.
118. Compare MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 517 (9th Cir. 1993) (holding that a computer program stored in the computer’s temporary memory (RAM) was capable of being perceived, reproduced, or otherwise communicated) with Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 123 (2d Cir. 2008) (noting that the MAI Systems court did not correctly analyze the duration requirement).
120. See id.
121. See id.

The district court mistakenly limited its analysis primarily to the embodiment requirement. As a result of this error, once it determined that the buffer data was “[c]learly . . . capable of being reproduced,” i.e., that the work was embodied in the buffer, the district court concluded that the work was therefore “fixed” in the buffer, and that a copy had thus been made. Id.
media downloads.\textsuperscript{122} Unfortunately, the arduous fixation analysis becomes even more convoluted when applied to cloud-based distribution platforms for digital media.\textsuperscript{123}

The advent of cloud storage and computing is fundamentally altering the way consumers buy, store, and access digital media.\textsuperscript{124} Digital music distributors such as Apple’s iTunes Store or Amazon’s CloudPlayer allow users to purchase digital media and store it on the distributor’s servers.\textsuperscript{125} This allows customers to access the same media file on multiple devices, download the file, or stream it.\textsuperscript{126} The emergence of cloud-based platforms has also created an alternative to purchasing media, and a growing number of consumers are transitioning to paid subscription-based streaming services like Netflix and Spotify.\textsuperscript{127} Essentially, these services create a limited license for subscribers to reproduce a copyrighted work on any device associated with their account.\textsuperscript{128} The shift in the digital marketplace—from purchasing and downloading media files onto local storage devices to purchasing and storing content using cloud storage—presents an interesting question: What happens when you purchase, but do not download, a song from iTunes or Amazon?\textsuperscript{129}

In ReDigi, the court stated that “a ReDigi user owns the phonorecord that was created when she purchased and downloaded a song from iTunes to her hard disk.”\textsuperscript{130} Thus, since a copy must necessarily be downloaded before it is created, an iTunes user who purchases a song without downloading it should be able to sell his or her access to the song (via their account information\textsuperscript{131}) without violating the reproduction right.\textsuperscript{132} While the iTunes EULA prohibits sharing or transferring personal accounts,\textsuperscript{133} the hypothetical raises serious questions about the applicability of existing copyright law to digital media.\textsuperscript{134} Specifically, the fixation requirement,\textsuperscript{135} requiring a work to be fixed in a tangible medium (i.e., a computer hard

\textsuperscript{122} See generally ReDigi, 934 F. Supp. 2d 640; Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013); Cartoon Network, 536 F.3d 121.
\textsuperscript{123} See generally ReDigi, 934 F. Supp. 2d at 655; Kiker, supra note 41, at 239-40.
\textsuperscript{124} See Kiker, supra note 41, at 239-40.
\textsuperscript{125} See Datesh, supra note 34, at 694.
\textsuperscript{126} See, e.g., Apple, iCloud, supra note 8.
\textsuperscript{127} See Christman, supra note 57 (attributing the decline in digital music sales to the increasing popularity of streaming music services).
\textsuperscript{128} See, e.g., Apple, iCloud, supra note 8.
\textsuperscript{129} See Kiker, supra note 41, at 282.
\textsuperscript{131} See, e.g., Apple, iCloud, supra note 8.
\textsuperscript{132} See id.
\textsuperscript{133} See generally Apple, User License Agreement, supra note 49.
\textsuperscript{134} See Perzanowski et al., supra note 27, at 902.
\textsuperscript{135} Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008).
drive) for a period of more than transitory duration, is ill-suited for cloud storage applications because the fixation initially occurs on the distributor’s server, not the user’s hard drive. Since “actual dissemination of a copy” is a prerequisite for infringement of the distribution right, copy owners who resell their media that is stored in the cloud may be able to avoid liability for copyright infringement because the copy has not changed hands; rather, it remains on the cloud server. Additionally, files stored on hard disks regularly move to different locations on the same disk, to different disks on the same server, or even between servers. Thus, until the Copyright Act is amended, courts will continue to struggle with the application of existing copyright law to new technologies and platforms and services.

B. A MORE WORKABLE APPROACH: AVOIDING TECHNICAL ANALOGIES TO PHYSICAL MEDIA DISTRIBUTION MODELS

The ReDigi court took a very technical approach in defining ReDigi’s digital marketplace. In ReDigi, the court relied on the fact that a new copy of the music file must be created on the recipient’s hard drive when an Internet transfer takes place in holding that the service infringed the copyright holder’s reproduction right. However, the practical effect of the service was more akin to ReDigi’s “train” analogy; transferring a copy over the Internet so that the data does not exist in two places at any one time. Moreover, the Second Circuit’s decision in Cartoon Network suggests that


A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

Id.


141. See Kiker, supra note 41, at 281-82.


143. See ReDigi, 934 F. Supp. 2d at 655.

144. Id. at 645.
a transfer of a media file over the Internet does not necessarily involve copying, especially when the copy is not fixed for more than a transitory duration. The common problem in ReDigi and Cartoon Network is that section 101’s fixation requirement was designed for an era that used physical media. In the age of digital media downloads and cloud storage services, it is better to think of content as fixed to a user’s account, not in a material object such as a CD or DVD. The fixation requirement as currently interpreted creates a significant obstacle for owners of digital media to sell, transfer, or otherwise alienate their digital media libraries.

Instead of defining the material object as a user’s hard drive, courts should interpret the fixation requirement in relation to the user’s account. Under this approach, a work would be fixed in a material object (the user’s account or digital library) when a customer purchases media from an online marketplace such as Apple’s iTunes or Amazon’s CloudPlayer. Thus, a user would be free to stream, download, and access all media purchased under his or her account without violating the copyright holder’s reproduction or distribution right. However, users would not be able to access content that they have not purchased under that particular account. This approach closely mirrors the industry practice; Apple and Amazon already offer these services, avoiding copyright barriers by contracting with record labels and production companies and attempting to license, rather than sell

145. See Cartoon Network, 536 F.3d at 129 (“In sum, no case law or other authority dissuades us from concluding that the definition of ‘fixed’ imposes both an embodiment requirement and a duration requirement.”).


147. See, e.g., Apple, iCloud, supra note 8.

148. See ReDigi, 934 F. Supp. 2d at 653; Cartoon Network, 536 F.3d at 123.

149. See ReDigi, 934 F. Supp. 2d at 649. The court notes that: Because the reproduction right is necessarily implicated when a copyrighted work is embodied in a new material object, and because digital music files must be embodied in a new material object following their transfer over the Internet, the Court determines that the embodiment of a digital music file on a new hard disk is a reproduction within the meaning of the Copyright Act.

Id.

150. See Perzanowski et al., supra note 27, at 943.

151. See id. (noting that DRM technologies already tie user-accounts to protected media files).

152. See Kiker, supra note 41, at 244; see also Datesh, supra note 34, at 703-04 (noting that cloud storage creates legal ambiguities and enforcement problems under the DMCA).

153. See Perzanowski et al., supra note 27, at 943 (noting that DRM technologies already tie user-accounts to protected media files).
digital media.\textsuperscript{154} In fact, consumer preference for subscription music services like Spotify, which give subscribers access to a vast library of digital music for a fixed monthly fee, are thought to be responsible for the first ever decline in digital music sales since Apple’s iTunes opened in 2001.\textsuperscript{155} Although defining the fixation requirement in terms of a user account would provide consumers with legal certainty and greater personal control over their purchased content,\textsuperscript{156} without a digital first sale doctrine consumers would still be unable to sell or transfer their purchased media content to others.\textsuperscript{157}

C. §117 & COMPUTER PROGRAMS—A ROADMAP FOR CREATING A DIGITAL FIRST SALE DOCTRINE

If Congress ever considers incorporating a digital first sale limitation into the Copyright Act, section 117 would provide them with an ideal template for doing so.\textsuperscript{158} Section 117 of the Copyright Act was first introduced in 1980 to extend limited copyright protection to computer programs.\textsuperscript{159} The current version of the statute places limitations on the exclusive rights of copyright holders in computer programs, allowing copy owners to make copies of, and alterations to, the original program when it is necessary for the use, backup, or repair of the program.\textsuperscript{160} Additionally, section 117 con-

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tains a corollary to the first sale doctrine of section 109, allowing the owner of a copy to sell, lease, or transfer their copy of the program. The rationale behind allowing copy holders of computer programs to make copies and adaptions of the work stems from the fact that computer programs may need to be reproduced in order to be used as intended. Moreover, many computer programs must be adapted or modified in order to function with the user’s hardware and software configuration. Copies are also necessary to the user because computer programs are inherently susceptible to accidental deletion or corruption, and often must be re-installed when upgrading components and software.

Many of the justifications mentioned above for allowing the copying and resale of computer programs also apply to digital media. For example, computer programs and digital media files must both be reproduced in a computer’s Random Access Memory (RAM) in order to be used. Also, both computer programs and digital media files are capable of degradation, accidental deletion, and corruption. Digital movie files, just like computer programs, must be modified and converted to different formats and resolutions depending on the screen or device they are being played on. The same is true for digital music files; in fact, Apple’s iTunes software allows users to convert music files between multiple formats of varying quality and size. The statutory definition of a computer program—“a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result”—is so overbroad as to encompass not

Id.

161. 17 U.S.C. § 117(b) (2012) states:
Lease, sale, or other transfer of additional copy or adaptation.—
Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

Id.

162. See Perzanowski et al., supra note 27, at 935.
163. Id.
164. Id.
165. Id. at 936; see also MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 517 (9th Cir. 1993) (holding that a computer program stored in the computer’s temporary memory (“RAM”) was capable of being perceived, reproduced, or otherwise communicated).
166. See Perzanowski et al., supra note 27, at 935.
167. Id.
168. See Apple, User License Agreement, supra note 49.
only digital media, but also nearly every file on a computer.\textsuperscript{169} The striking functional similarities between computer programs and digital media calls into question the disparate treatment afforded to each under existing copyright law. Regardless, section 117 provides an excellent template for Congress to amend the first sale doctrine to include digital works.\textsuperscript{170}

D. UNRESOLVED ISSUES

Fixing a customer’s digital media to their account, instead of to their hard drive, also presents issues of statutory interpretation. First, a user account is not a “material object” contemplated by section 101 of the Copyright Act.\textsuperscript{171} Rather, a user account is like a key or passcode that grants a user access to purchased content residing on remote servers.\textsuperscript{172} Thus, the requirement that a copy be fixed in a material object presents a significant hurdle to the proposed approach.\textsuperscript{173} Second, section 101 of the Act defines copies as material objects “from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”\textsuperscript{174} A CD player is an example of a machine or device used to reproduce a copy.\textsuperscript{175} However, is the Internet a “machine or device” within the meaning of the Act? If a copy is fixed in a cloud server after a user purchases a song from iTunes, technically the user should be able to sell his or her access to the file without ever making an illegal reproduction.\textsuperscript{176} Thus, infringement would lie with the subsequent purchaser, not with the seller.\textsuperscript{177} Third, is a media file protected with DRM or a comparable technology capable of being “perceived, reproduced, or otherwise communicated” if it can only be accessed by the original purchaser, and how does the transition to the cloud affect the interests of copyright owners?\textsuperscript{178} Finally, even if a digital media file is fixed in a user’s account instead of a local hard drive, the current copyright statutes and case law

\textsuperscript{175} See Perzanowski et al., supra note 27, at 896.
\textsuperscript{176} 17 U.S.C. § 101 (2012) (“A ‘device,’ ‘machine,’ or ‘process’ is one now known or later developed.”); see also Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 650 (S.D. N.Y. 2013) (“[I]t is the creation of a new material object and not an additional material object that defines the reproduction right.”).
\textsuperscript{177} See ReDigi, 934 F. Supp. 2d at 650.
\textsuperscript{178} See Datesh, supra note 34, at 702 (noting that the transition to cloud-based storage has exposed many weaknesses in the Digital Millennium Copyright Act, making “its application in the cloud . . . untenable.”).
would provide little guidance on the legality of selling or transferring these media files to others, and digital media distributors like Apple and Amazon do not allow transfers from one account to another.  

IV. COPYRIGHT EXHAUSTION AS AN ALTERNATIVE APPROACH TO THE FIRST SALE DILEMMA

A. APPLYING THE FIRST SALE DOCTRINE TO DIGITAL MEDIA DOWNLOADS

In *Kirtsaeng v. John Wiley*, the Supreme Court held that copies of textbooks lawfully manufactured abroad were protected by the first sale doctrine.  

180 In that case, the Court emphasized that “[t]he Court doubt[ed] that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities.” This reasoning should also be imported to first sale defenses to copyright infringement for digital media content. Just as a geographical interpretation would substantially limit the rights of libraries and used-book retailers, a technical interpretation of fixation and reproduction, like in *ReDigi*, creates practical copyright-related harms to digital media consumers.  

Without a digital first sale doctrine, a CD can be resold indefinitely, but a digital download of the same album can only be resold if the computer or device is sold along with it. The flaw in this approach to digital media is apparent when the analogy is reversed—it would be tantamount to requiring one to sell his or her CD player or stereo along with the CD. Although the United States Copyright Office expressed concerns with a digital first sale doctrine in its Digital Millennium Copyright Act Report, its hesitancy to adopt a digital first sale doctrine should not be equated with complete disapproval. The “practical copyright-related harms” of a geograph-

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179. See *Apple, User License Agreement*, supra note 49 (“This license granted to You for the Licensed Application by Application Provider is limited to a non-transferable license . . . .”).
181. *Id.* at 1358.
182. *Id.* at 1354.
184. *See id.* at 656 (“Section 109(a) still protects a lawful owner’s sale of her ‘particular’ phonorecord, be it a computer hard disk, iPod, or other memory device onto which the file was originally downloaded.” *Id.*).
186. See *DMCA Report*, supra note 45, at 82-83; *see also* Kiker, supra note 41, at 252 (noting that “[e]ven though some courts have been skeptical to provide protection to
ical restriction to the first sale doctrine are equally harmful when applied to medium restrictions for digital media resale. As consumers continue to adopt digital mediums as the primary method of purchasing content, the need for a digital first sale doctrine will become even more pronounced.

B. COPYRIGHT EXHAUSTION AS AN ALTERNATIVE REMEDY TO A DIGITAL FIRST SALE DOCTRINE

A corollary to the first sale doctrine is the principle of copyright exhaustion. This principle is premised on the idea that “a fundamental set of user rights or privileges flows from lawful ownership of a copy of a work.” Although copyright exhaustion is a common law principle not codified in the Copyright Act, the fair use and first sale doctrines originated from the broader exhaustion concept. According to Professor Perzanowski, courts should adopt a copyright exhaustion rule that enables copy owners “to reproduce or prepare derivative works based on that copy to the extent necessary to enable the use, preservation, or alienation of that particular copy or any lawful reproduction of it.” Thus, a copyright exhaustion rule, in conjunction with the first sale doctrine, would give users of digital media functionally similar rights to those enjoyed by users of traditional physical mediums. This alternative approach provides functionally similar rights to the fixation in a user account approach outlined in Part III (B).

Using the common law copyright exhaustion principle, together with the first sale doctrine, the analysis in ReDigi would be much simpler and straightforward. First, a court would determine if the user owned the particular media file. If so, the court would determine whether the reproduction of the file was used to facilitate the transfer of the user’s limited ownership interest. If the user does not retain any copies of the file once a transfer is completed, copyright exhaustion should protect the transfer. Since the end result of a transfer requires that only a single copy exist before and after

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188. See Christman, supra note 57 (attributing the decline in digital music sales to the increasing popularity of streaming music services).
189. See Perzanowski et al., supra note 27, at 912.
190. *Id.*
191. *Id.*
192. *Id.*
193. See supra Part III (B).
195. See generally Perzanowski et al., supra note 27.
196. See *id.* at 939.
the transaction, the temporary copies discussed in ReDigi would be irrelevant.\textsuperscript{197} Rather, this approach is comparable to Cablevision’s “train” analogy.\textsuperscript{198} Overall, copyright exhaustion offers a more flexible and balanced approach than the \textit{ad hoc} application of the fair use or first sale doctrines on their own.\textsuperscript{199} Additionally, the increased clarity and easy application that common law copyright exhaustion offers would benefit consumers and copyright owners alike, by reducing the frequency of costly and time-consuming litigation.\textsuperscript{200}

C. COPYRIGHT EXHAUSTION AND THE FIRST SALE DOCTRINE WOULD PROMOTE INNOVATION AND MARKET COMPETITION

Perhaps one of the most compelling arguments for limiting copyright holders’ control over works once they enter the stream of commerce is the positive effect on marketplace innovation and competition.\textsuperscript{201} For example, because the first sale doctrine applies to physical copies such as DVDs, movie rental companies such as Netflix and Redbox are able to distribute purchased copies of movies to subscribers without the permission of the copyright holders.\textsuperscript{202} The importance of this right was recently highlighted when the Disney movie studio tried to implement rental windows—a delay between the time a DVD goes on sale at retail stores and when the same disk is offered to rental companies.\textsuperscript{203} When Netflix and Disney could not reach an agreement regarding the rental windows, the first sale doctrine allowed Netflix to purchase newly released copies from retailers such as Wal-Mart for a slightly higher price in order to make the DVDs available to subscribers without the rental window delay.\textsuperscript{204} Without common law and statutory limitations on works once they enter the stream of commerce, copyright holders would have excessive control over their works, leaving consumers with fewer choices and reducing competition.\textsuperscript{205}

While the first sale doctrine promotes market efficiency and competition for physical copies of media, digital media distributors such as Apple’s iTunes continue to stifle innovation and consumer choice through monopo-
lization and consumer lock-in. Consumer lock-in refers to the high transaction cost consumers face when attempting to switch to a new, more advantageous service or platform. When distributors restrict the compatibility and use of media so that it may only be used with a particular service, consumers are discouraged from switching to newer alternatives, even if they offer a better product or service. Thus, consumer lock-in deprives consumers of meaningful alternatives and creates a windfall for distributors, who enjoy the monopolistic and anti-competitive effects that such restrictions create.

For example, Apple’s iBooks store initially restricted eBook sales to iPad users. Because consumers who purchased eBooks through Apple’s iBook store could only access the texts on their iPads, consumers were discouraged from purchasing newer tablets or eReaders such as Amazon’s Kindle or Barnes & Noble’s Nook. Furthermore, because the first sale doctrine does not apply to eBooks, consumers are unable to sell or lend their digital copies. Eventually, the United States Department of Justice filed suit against Apple and five major book publishers under the Sherman Antitrust Act, alleging that Apple and the publishers colluded to fix prices in the eBook market. Thus, the fact remains that until a first sale doctrine is imported to limit copyright owners’ control over digital works already in the stream of commerce, consumers will have fewer options and continue to pay higher premiums for content that would otherwise be readily available and affordable through a secondary market. Meanwhile, digital media distributors like Apple will continue to monopolize the digital media marketplace, stifling innovation and competition. While piracy concerns provided justification for this disparate treatment in the past, new legal remedies under the DMCA and advances in DRM anti-piracy technologies have obviated the need for such distinctions.

206. Id. at 900.
207. Id.
208. Id.
209. Id.
211. Id.
212. See supra Part III (A).
214. See Perzanowski et al., supra note 27, at 891.
215. Id. at 895.
216. See DMCA Report, supra note 45, at 82-83.
V. DRM Technology and Piracy Concerns

A. CURRENT ANTI-PIRACY SOLUTIONS SUFFICIENTLY PROTECT COPYRIGHT INTERESTS IN DIGITAL WORKS

Traditionally, both Congress and the courts have been hesitant to expand consumer rights in digital assets due to piracy concerns. However, Digital Rights Management (DRM) and other anti-piracy measures currently used in the industry largely protect copyrighted works from piracy. DRM is an anti-piracy technology that encrypts digital files and restricts the distribution and use of the media. A popular type of DRM technology, known as tethering, links a protected work (i.e., an eBook) to a device or user account. In addition, the DMCA prohibits users from circumventing technological measures that restrict access to and copying of copyrighted works, as well as prohibiting the creation and distribution of tools that facilitate circumvention. Although current DRM and related technologies present obstacles to a digital first sale doctrine by tethering files to a specific device, its use has significantly curtailed piracy. Moreover, the concerns expressed in ReDigi over the differences between physical and digital mediums are less pronounced when DRM tethers a copyrighted work to a particular device because tethering effectively creates the same barriers as a

218. See Hayes Smith, supra note 140, at 856.
219. Id.
220. See Perzanowski et al., supra note 27, at 903-04.
222. See DMCA Report, supra note 45, at 75-76, noting that:

A plausible argument can be made that section 1201 may have a negative effect on the operation of the first sale doctrine in the context of tethered works. In the case of tethered works, even if the work is on removable media, the content cannot be accessed on any device other than the one on which it was originally made. This process effectively prevents disposition of the work. However, the practice of tethering a copy of a work to a particular hardware device does not appear to be widespread at this time, at least outside the context of electronic books . . . . Should this practice become widespread, it could have serious consequences for the operation of the first sale doctrine, although the ultimate effect on consumers is unclear.

Id.
physical copy.\textsuperscript{223} Similarly, piracy concerns are adequately addressed by 
DRM technology because it can prevent playback of a digital media file in 
the event of an unauthorized transfer.\textsuperscript{224}

Since DRM technology has advanced significantly and offers protection 
against piracy of copyrighted works, a digital first sale doctrine is now 
feasible and would not encourage piracy.\textsuperscript{225} Although DRM currently 
presents an obstacle to a digital first sale doctrine, it could easily be adapted to 
facilitate the resale and transfer of digital media in a controlled and legal 
manner.\textsuperscript{226} However, in order for the first sale doctrine to apply, courts 
would have to consider user accounts to be material objects, an idea that is 
hard to reconcile with the tangible nature of copies contemplated by the 
Act’s fixation requirement.\textsuperscript{227} Also, courts would have to decide if a digital 
download purchase is classified as ownership of the copy or a license to use 
the copy.\textsuperscript{228} Finally, existing cloud storage platforms like Apple’s iTunes or 
Amazon’s CloudPlayer that link content to a user account would have to 
amend their End User License Agreements and DRM technology to allow 
users to sell or transfer their digital media to other users.\textsuperscript{229}

\textsuperscript{223} See Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 656 (S.D. N.Y. 
2013) (citing DMCA Report, supra note 45, at 82-83 (“Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously nearly anywhere in the world with minimal effort and negligible cost.”)). But see Perzanowski et al., supra note 27, at 905 (noting that tethering a digital work to a device through DRM technology effectively alleviates this concern).

\textsuperscript{224} See Perzanowski et al., supra note 27, at 903-04 (“Many of these systems are tethered not just to particular devices but also to particular services, allowing copyright holders control over post sale consumer uses by requiring access to these services for the enjoyment of the purchased good.”).

\textsuperscript{225} Id. at 904.

\textsuperscript{226} See id.


“Copies” are material objects . . . in which a work is fixed by any method . . . and from which the work can be . . . reproduced . . . . A work is “fixed” in a tangible medium of expression when its embodiment in a copy is sufficiently permanent or stable to permit it to be . . . reproduced . . . for a period of more than transitory duration.

\textsuperscript{Id.}

\textsuperscript{228} See Kiker, supra note 41, at 249-50. The issue of sale vs. license is beyond the scope of this Comment.

\textsuperscript{229} See Apple, User License Agreement, supra note 49 (“This license granted to You for the Licensed Application by Application Provider is limited to a non-transferable license . . . ”).
VI. CONCLUSION

As consumers continue to adopt online digital media services as the primary method of purchasing media content, the necessity for a digital first sale or copyright exhaustion doctrine will become even more pronounced. Although media distributors and the film and recording industries have benefited from a windfall due to the lack of a digital first sale doctrine, recent studies have shown that consumers are beginning to look for alternatives to traditional media retailers and distributors.230 Previously, the courts and legislatures were able to justify differentiating between physical and digital mediums due to the proliferation of Internet piracy.231 However, the times are changing, and digital media distribution platforms have adopted new technologies to significantly curb piracy, making a digital first sale doctrine attainable.232

Regardless, the introduction and popularization of cloud-based computing and storage services will continue to create a gray area of copyright law.233 This confusion stems in part from the fact that when the Copyright Act was introduced, it only contemplated physical mediums.234 Therefore, in order to fully address the inadequacies of existing copyright law, Congress must revise the Copyright Act to include a digital first sale doctrine.235 Although amending the Copyright Act would be a lengthy and arduous process, the legislatures have an excellent template to work from—section 117 of the Act.236

In the interim, the courts are also well equipped to address the legal dichotomies between digital and physical mediums.237 Common law copyright exhaustion principles provide powerful tools for courts to use in restoring the balance between copyright owners and purchasers of digital media content.238 By reducing copyright owner’s control over works once they enter the stream of commerce, secondary markets in digital media would emerge,

230. See Christman, supra note 57 (attributing the decline in digital music sales to the increasing popularity of streaming music services).
232. See Perzanowski et al., supra note 27, at 943 (explaining DRM technology and anti-circumvention provisions of the DMCA).
233. See Kiker, supra note 41, at 288-89.
234. See Abelson, supra note 146, at 29.
235. See supra Part III (B).
237. See Perzanowski et al., supra note 27, at 892.
238. See id.
increasing competition and reducing monopolization and consumer lock-in. Additionally, using common law copyright exhaustion principles would provide courts with a more straightforward and succinct process for analyzing copyright infringement claims in the context of digital media.  

239. See id. at 907.  
240. See id.
Protecting the Sanctity of Family: An Argument for the Equitable Parent Doctrine

KELLI SCHMIDT* 

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I. INTRODUCTION

“America cannot continue to lead the family of nations around the world if we suffer the collapse of the family here at home.”1 When Mitt Romney sought the Republican nomination for the 2008 presidential election, this quote appeared on the home page of his website.2 Although it is true that the nuclear family, meaning the familial unit comprised of a father, mother, and children, is no longer the norm in today’s society, does this mean America’s familial values are collapsing?3 And if they are, what can be done to restore them, as so-called nontraditional families are becoming more traditional than the nuclear family?4

Romney is right about one thing: the nuclear family is not standard in America anymore.5 Between January 2013 and April 24, 2013, there were 2,096,000 marriages in the United States.6 Per one thousand people, there were 6.8 marriages.7 Conversely, per one thousand people, there were 3.6 divorces, meaning essentially half of all marriages ended in divorce.8 Due to the increase in divorces, family structures have undergone a major change. Grandparents are taking on parental roles, legal guardians are being appointed, and children have multiple stepparents. For example, in 2009, the United States Census Bureau reported 9,383,000 grandparents were responsible for the care of, or lived with, their grandchildren.9 Additionally, in 2010, the United States Census Bureau reported 38,705,000 of all households in America were considered non-family, meaning “a household maintained by a person living alone or with non-relatives only.”10 This was a

2. Id.
4. See id.
7. Id.
8. Id.
drastic increase from 1990, when only 27,257,000 of all households were considered non-family.\footnote{11}

Furthermore, not only are familial living arrangements changing, but the structure of the family has also undergone transformation.\footnote{12} For instance, the number of births to unmarried mothers has increased.\footnote{13} In 1990, 350,000 live births were to unmarried women fifteen to nineteen years old.\footnote{14} Yet, in 2008, 377,000 of live births were to unmarried women fifteen to nineteen years old.\footnote{15} If Romney’s assertion was correct, then it is natural to inquire what can be done to protect children who are being born into non-traditional families to ensure they are receiving the care that is needed. Yet, for all intents and purposes, Romney is incorrect. We are not suffering the collapse of the family in America. The familial structure is undergoing a transformation, proving an ancient Igbo and Yoruba proverb to be correct: “It takes a whole village to raise a child.”\footnote{16}

In Illinois, custody determinations are made based on the factors in the best interest of child standard.\footnote{17} Some of the factors courts consider in determining custody are whom the child’s parents want the child to be placed with, the child’s preferences as to his guardian, the interaction of the child with his parents, and the willingness of each parent to facilitate a relationship between the other parent and the child.\footnote{18} While this is a good standard to maintain, with the changes in the familial structure and an increase in the number of “potential parents,” legislatures and courts need to do more in determining the custody placement of a child. Scholars argue that the best interest of the child standard is outdated because “it has been used to justify trends toward joint custody . . . twisting a standard for children to serve

\begin{footnotes}
\item[13] \textit{Id}.
\item[15] \textit{Id}.
\item[17] 750 ILL. COMP. STAT. 5/602 (2012).
\item[18] \textit{Id}.
\end{footnotes}
Therefore, the equitable parent doctrine, also known as paternity by estoppel or de facto parentage, should be adopted to supplement the best interest of the child standard.20

Several states, including, but not limited to, Pennsylvania, Michigan, Rhode Island, New York, and Iowa, have adopted the equitable parent doctrine.21 The statutes adopted by these states have varying impacts due to the fact that equitable parent legislation is codified with different language and intent. Therefore, in an effort to gain the best understanding of how jurisdictions have treated the equitable parent doctrine, this Comment will examine these states’ statutes. The Illinois legislature is considering making changes to the Illinois Marriage and Dissolution of Marriage Act that might reflect legislation similar to an equitable parent doctrine, but no official action has been taken yet.22 Essentially, the equitable parent doctrine examines what action should be taken when a non-biological parent seeks to establish parentage or gain visitation rights to a child.23 For example, consider a scenario where the child’s biological mother is married to a man who presumes he is the father.24 However, the biological mother actually had an affair, and the biological father is a man that is not her husband.25 In this case, at the child’s birth, the mother, the biological father, and the biological mother’s husband could all establish parentage.26 Similarly, in a case where a gay or lesbian couple uses a surrogate, it could be argued the surrogate should have rights to the child, in order to provide the child with a father and a mother. However, this Comment will focus on the rights of a biological father versus a father who was married to the mother at the time of the child’s birth.27

In relevant statutes, parental relationships are referred to in the singular. For example, the Illinois legislature has defined parental relationships as “the mother and child relationship and the father and child relationship.”28 So, it appears it was not the legislative intent for children to have more than one legal father or mother.29 Yet, courts are liberalizing their

20. See id.
21. 2 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES, IN THIRD PARTY CUSTODY AND VISITATION § 10.4 (2d ed. 2013).
23. 2 HARALAMBIE, supra note 21.
24. See, e.g., In re Parentage of J.W., 990 N.E.2d 698 (Ill. 2013). See infra Part IV.A for a full case discussion on In re Parentage of J.W.
25. See, e.g., id.
26. Id.
27. See infra Part VI.
29. See id.
decisions regarding marriage, and since child rearing is an integral part of marriage, courts should consider how this liberalization will affect the upbringing of children.30

This Comment will argue that the Illinois General Assembly should adopt a type of equitable parent doctrine, specifically to help biological fathers who were not married to the mother of their child, when another man was presumed to be the child’s father. To begin, this Comment will explore equitable parent legislation in other states and will propose legislation as it might be codified in Illinois.31 Then, this Comment will apply the new legislation to other Illinois court decisions to determine the results of the cases if the proposed legislation had previously been adopted and whether the equitable parent doctrine produces the best result.32 This Comment will specifically be exploring the following questions: (1) Does the equitable parent have standing to bring a lawsuit? (2) Is it in the child’s best interest to have three parents? (3) When is acting like a parent enough, like in the case of an individual whose intent is not only to love and provide for the child, but also make the child a permanent part of the family? (4) What effect would the equitable parent doctrine have on child support obligations?

Illinois courts have recognized this is an important issue to consider. Recently, the Third District, while contemplating whether to award parental rights to the mother, biological father, and a man who believed he was the biological father, stated:

The various issues tackled in this trial court . . . will continue to arise until the legislature modifies existing statutory presumptions of paternity. Perhaps, the lawmakers could require a [Voluntary Acknowledgement of Paternity] father to show proof of a genetic connection to the child before an unchallenged VAP creates a conclusive and nonrebuttable statutory presumption for a court to apply in a parentage action.33

Therefore, the equitable parent doctrine should be adopted in Illinois.34

31. See infra Parts III and V.
32. See infra Part VI.
33. In re Custody of C.C., 1 N.E.3d 1238 (Ill. App. Ct. 3d Dist. 2013) (internal citations omitted). See Part VI.D for a full case discussion on In re Custody of C.C.
34. See id.
II. WHAT IS THE EQUITABLE PARENT DOCTRINE?

The equitable parent doctrine accomplishes one of three things: (1) stops a man who has held himself out as the child’s parent from later denying parentage; (2) helps a father who is not the biological father, but who has held himself out as the father, to establish parentage; or (3) helps a father who is the biological father, who did not, or has not, held himself out as the father, to establish parentage. Essentially, this doctrine provides a non-biological parent the opportunity to bring a cause of action to establish parentage or gain custody of a child, or it helps an unknowing biological father establish a parent-child relationship.

The equitable parent doctrine was first examined in Atkinson v. Atkinson, where a husband and wife were undergoing a divorce proceeding. During litigation, it was determined the father was not the biological parent of the parties’ son. The court determined that an individual who is not the child’s biological parent, but who desires to be recognized as such, who is willing to support the child, and who wants the right of visitation or custody, might be considered a parent. In this case, the child was conceived and born during the marriage, and the non-biological father had a strong relationship with the child. Additionally, the non-biological father supported the child, he was active in the child’s life, and he wanted the rights typically given to the father in order to be responsible for the child. Furthermore, the biological mother admitted that the child considered her husband to be his father. Due to these factors, the Michigan Court of Appeals first acknowledged the equitable parent doctrine as an option for non-biological parents to establish a legal parent-child relationship.
III. EQUITABLE PARENT LEGISLATION IN OTHER STATES

A. AMERICAN LAW INSTITUTE

No two states have adopted the same version of the equitable parent doctrine. In fact, equitable parent doctrine legislation varies vastly from state to state. The American Law Institute has written model legislation for the states to follow, which has:

Endorsed the concept of parentage by estoppel for a person who lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child’s legal parent to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as parent is in the child’s best interests . . . .

This statute would be difficult to satisfy in a situation where there are two potential fathers because it is impossible for two fathers to accept full and permanent responsibilities as a parent. Arguably, however, it is also impossible for a mother and a father to accept full responsibilities as a parent, since the responsibilities would naturally have to be shared between the two. Therefore, two fathers and a mother could all accept full responsibilities as parents.

B. PENNSYLVANIA

Pennsylvania, on the other hand, has adopted a more lenient rule, which indicates, “[P]aternity by estoppel continues to pertain . . . but it will apply only where it can be shown, on a developed record, that it is in the best interests of the involved child.” This rule is particularly interesting

44. See 2 HARALAMBIE, supra note 21.
45. Id.
46. Id. (internal quotations omitted) (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(b) (Am. Law Inst.).
47. See id.
48. See id.
49. See 2 HARALAMBIE, supra note 21.
50. K.E.M. v. P.C.S., 38 A.3d 798, 810 (Pa. 2012). Here, the mother sought to obtain support from the man she presumed was the child’s biological father, even though she was married to another man at the time of the child’s birth. Id. at 799. The biological father tried to rely on the marital presumption to prove he was not the biological father, but the court determined the mother could seek support from the biological father in spite of the marital presumption. Id. at 799, 811.
because the only requirement is having an equitable parent be in the best interest of the child, which is unlike the American Law Institute model statute that is filled with ambiguous requirements.\(^{51}\) However, it could be argued that Pennsylvania’s statute is too lenient, since it could effectively be granting parentage to three separate parents, based solely on the best interests of the child, and without considering the potential parent’s involvement in the child’s life.\(^{52}\) Conversely, portions of the Pennsylvania rule are too strict.\(^{53}\) For example, Pennsylvania does not allow a DNA test when a father has previously acknowledged he is the child’s biological parent.\(^{54}\) Rather, a DNA test is permitted only when paternity by estoppel does not apply, in order to advance the best interests of the child and promote the familial unit.\(^{55}\) Disallowing DNA tests is an attempt by Pennsylvania courts to not disrupt families that have been established for several years.\(^{56}\) However, the rule is too strict in certain situations, such as where the child needs to know who his biological father is for medical history purposes.\(^{57}\)

C. MICHIGAN

Michigan established the equitable parent doctrine in *Atkinson*.\(^{58}\) However, Michigan refused to extend the doctrine to an unmarried man, but does extend it to a man whose girlfriend gives birth to a child during their relationship.\(^{59}\) Michigan’s rule will not produce the best result in instances when two men are potentially the father of a child whose mother is married.\(^{60}\)

D. RHODE ISLAND

The Rhode Island statute created a rebuttable presumption that a man is the father of a child is created when one of six requirements are met: (1) the child was born to a man and woman who are married or the marriage

\(^{51}\) See id.
\(^{52}\) See id.
\(^{54}\) Freedman, 654 A.2d at 529.
\(^{55}\) Id.
\(^{56}\) See id.
\(^{57}\) See id.
\(^{59}\) Van v. Zahorik, 597 N.W.2d 15, 26 (Mich. 1999). The court chose to not extend the theory to unmarried individuals for several reasons: the court felt the legislature was better able to handle this problem, the Child Custody Act did not recognize the equitable parent doctrine outside marriage, and the court wanted to reinforce the institution and legitimacy of marriage. Id. at 20-22.
\(^{60}\) See id.
has been terminated within 300 days; (2) the man and woman attempted to marry prior to the child’s birth; (3) after the child’s birth, the man and woman attempted to marry; (4) the man acknowledges he is the father in a writing filed with the family law court clerk; (5) a blood test proved he is the father; or (6) both the mother and father sign a voluntary acknowledgment of paternity. Rhode Island courts established that a “de facto parent-child relationship is . . . based on a finding of a ‘parent-like relationship with the child that could be substantial enough to warrant legal recognition of certain parental rights and responsibilities’ respecting the child.” This state’s statute is interesting because it sets forth a requirement to establish parentage under the equitable parent doctrine, but it does not make it impossible for several parents to establish their rights. One potential issue with this statute is that it gives deference to the court to decide who the parent is, since the relationship need only be substantial enough to warrant legal recognition. Substantial is defined as “consisting of or relating to substance,” which leaves a lot of room for judicial interpretation. Arguably, this rule is less effective than Pennsylvania’s, which established that the best interests of child standard still applies.

E. NEW YORK

New York’s rule presents a unique issue. In New York, “both civil union and adoption require the biological or adoptive parent’s legal consent, as opposed to the indeterminate implied consent featured in the various tests proposed to establish de facto or functional parentage.” As a result, if a man is unsure whether he is the child’s father, he can choose to commence a relationship with the child, or he can request a DNA test prior to acknowledging paternity. So, an interesting problem is presented when the biological mother had an affair on her husband, and the man she had an affair with is the biological father. According to New York law, the biological father would hold the power to grant the biological mother’s hus-
band de facto parentage. However, if there is tension between the biological father and mother, or if the biological father did not know the biological mother was married, then the child could be used by the biological father as a pawn because he might withhold granting de facto parentage in order to retaliate against the biological mother. Therefore, this statute is not written most effectively.

F. IOWA

Iowa has an especially intriguing equitable parent doctrine. Iowa rejects equitable parentage in cases when a man lived with the mother and the child, but never married the mother. However, Iowa applies the doctrine where the man is married to the mother at the time of the child’s birth, but learns, at dissolution of marriage, that he was not the genetic father. On its face, this doctrine seems like it could be challenged under the Equal Protection Clause of the Fourteenth Amendment. Iowa appears to grant more rights to a married father who learned of his lack of parentage at divorce, as opposed to an unmarried father who actually lived with the mother and child.

G. SUPREME COURT OF KENTUCKY

Unlike Iowa, the Supreme Court of Kentucky has considered certain factors that might be examined in order to find an individual is a de facto parent. The factors the court considered in its decision include: (1) misrepresentation or concealment of material facts; (2) estopped party is aware of the material facts; (3) the other party does not know about these material facts; (4) the estopped party acts expecting that his conduct will be acted upon; and (5) the other party changed positions to its detriment based on

72. Petition of Ash, 507 N.W.2d 400 (Iowa 1993). Here, the putative father held himself out as the child’s father by bathing and feeding the child, and providing emotional, financial, and psychological support. Id. at 401. Additionally, the putative father continuously supported the child by paying for preschool, toys, and dance lessons. Id. at 402. However, the court refused to find the putative father was an equitable parent because he had no legal basis to establish parentage since he was not the biological father, adoptive father, foster parent, etc. Id. at 404.
73. Id. at 403-04.
74. See id. The doctrine might be challenged under the Equal Protection Clause of the Fourteenth Amendment because it creates a disparate impact between married fathers and unmarried fathers. See U.S. Const. amend. XIV.
75. Petition of Ash, 507 N.W.2d 400.
this conduct. In addition to providing for a child alongside the natural parent, the de facto parent must stand in the place of the natural parent. These factors set forth a bright line standard in order to help parties determine exactly what constitutes de facto parenting and what will not qualify. However, one of the factors potentially raises a variety of issues: the estopped party must act with the expectation her conduct will be relied upon. For example, consider a situation where the biological mother has a one time affair with another man, she does not expect a child to be conceived, and she continues a sexual relationship with her husband. A child is actually conceived during the affair, but she presumes the biological father is her husband. By presuming this, the biological mother does not act in a malicious way, nor does she expect the biological father or her husband to rely to their detriment on her actions. This is problematic because the two potential fathers could argue the mother acted with the expectation her conduct would be relied upon. Yet, it would be difficult for her to prove what assumption she proceeded under in choosing her course of conduct. Additionally, the Hinshaw court’s holding effectively eliminates the possibility that two separate men could have parental rights to the same child by saying a de facto parent cannot provide for a child alongside the natural parent, but must stand in the actual parent’s shoes because it is impossible for two people to stand in the actual parent’s shoes. However, a response to this argument might be similar to the response to criticisms of the American Law Institute’s model legislation: if two parents can ordinarily be actual parents, then three parents can be actual parents. Therefore, while this holding sets forth good factors to follow, Kentucky’s rule is not free from potential problems.

H. WEST VIRGINIA

The doctrine regarding de facto guardians has also been examined in the context of adoption. West Virginia, for example, declined to take the view that an express or implied contract to adopt was absolutely necessary to establish that an equitable adoption had taken place where a person has

76. Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007) (citing J. Branham Erecting & Steel Serv. Co. v. Ky. Unemployment Ins. Comm’n, 880 S.W.2d 896, 898 (Ky. Ct. App. 1994)). In Hinshaw, the court determined equitable estoppel is applicable to custody cases. Hinshaw, 237 S.W.3d at 174-75. The court looked at the factors that Kentucky courts typically consider when determining equitable estoppel cases. Id. at 173.

77. See id.

78. See id.

79. See id.

80. See id.

“stood from an age of tender years in a position *exactly* equivalent to a formally adopted child.”82 In essence, West Virginia has established that no formal process needs to be followed in a situation where a child has not been officially adopted, but has been held out as an adopted child for many years.83 The West Virginia court’s line of reasoning can be extended to the question regarding two potential fathers, because the sole requirement is that the child is held out as a formally adopted child. Similarly, perhaps the standard to establish a man is a de facto parent could be a man who has held himself out as the child’s father since the child’s tender years.84

I. CALIFORNIA

In California, there must be a direct expression of intent to adopt the claimant in order to prove an equitable adoption.85 This might also be a good standard to consider when determining de facto parentage in Illinois.86 For example, basic fairness indicates that a father who has expressed a direct intent to act as the father, even though he is not the presumed father, should be granted rights of some kind so long as there is testimony he is fit to be a parent.87

It is important to note that all courts place great emphasis on the Fourteenth Amendment in making determinations regarding the equitable parent doctrine.88 “[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”89

IV. INDICATION OF HOW ILLINOIS COURTS MIGHT TREAT EQUIitable PARENTS

A. DEHART V. DEHART

Whether a child can have a legal mother and two legal fathers is a case of first impression in Illinois.90 As a result, Illinois has not adopted the equi-

82. *Id.*
83. *See id.*
84. *See id.*
86. *See id.*
87. *See id.*
88. U.S. Const. amend. XIV, § 1; *see, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000).
89. *Troxel*, 530 U.S. at 65-66 (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). The Supreme Court refused to force a mother who was unwilling to give the paternal grandparents as much visitation as they were asking. *Id.* at 102.
table parent doctrine. However, there are court opinions that indicate how Illinois might treat equitable parents. First of all, there have been scenarios in Illinois where a biological parent’s rights have been terminated, and two non-biological parents adopted the child. In these situations, the court has held a child can have two mothers or fathers based on the termination of parental rights and subsequent adoption. Second, consider a recent Illinois Supreme Court decision, DeHart v. DeHart. In this case, a stepfather did everything he could to adopt his stepson, including telling the community he was the biological father and forging a birth certificate so the stepson would not know he was not the biological son. However, the stepfather never executed a statutory adoption contract. Ultimately, the stepson learned the stepfather was not his biological parent, but the stepfather continued to hold the stepson out as his son by listing him as his son in his funeral arrangements, paying for a trip for the stepson’s family, and executing a will leaving bequests to the stepson. Once the stepfather died, the stepson sought to claim his inheritance, but learned his stepfather wrote him out of the will at a time when he lacked testamentary capacity. The stepson then tried to establish he should still have rights to what was in the original will because his stepfather held him out as his son.

The DeHart court indicated in certain situations where a contract to adopt does not exist, circumstantial evidence can support the equitable adoption. Therefore, in cases where it can be proven by clear and convincing evidence that a parent consistently and publicly treated the child as his own blood relative, and so long as the child believed he was the parent’s biological child, the child should not be denied his inheritance because his parents failed to comply with statutory provisions. Therefore, the court effectively adopted a version of equitable adoption.

91. 17 ILL. PRAC., ESTATE PLANNING & ADMIN. § 32:6 (4th ed.).
94. See Petition of K.M., 653 N.E.2d at 899; Connor, 826 N.E.2d at 1273.
95. DeHart, 986 N.E.2d at 85.
96. Id. at 90.
97. Id.
98. Id.
99. Id. at 91.
101. Id. at 103.
102. Id. at 103-04.
103. Id.
After the *DeHart* case, there is good reason to believe Illinois could be moving toward adopting the equitable parent doctrine.\(^{104}\) However, the *DeHart* ruling seems strict, especially in situations where the biological fathers did not know, nor did they have reason to know they were the child’s father.\(^ {105}\) In that case, courts should examine whether it is in the child’s best interest to deny him a relationship with a loving individual who wants to be part of the child’s life.

### B. *KOELLE V. ZWIREN*

Consider *Koelle v. Zwiren*, where the mother of a child lied to a man she had a brief sexual relationship with and told him he was the biological father of her daughter, even though she was certain he was not.\(^ {106}\) For eight years, the purported father became very involved in the child’s life.\(^ {107}\) He babysat, assisted in her extracurricular activities, took her to various outings, and accompanied the child and biological mother on a family vacation.\(^ {108}\) However, he ultimately conducted a paternity test, which determined he was not the father of the child.\(^ {109}\) In its opinion, the court said awarding visitation to a nonparent over a parent’s objections is permissible if it is in the best interest of the child.\(^ {110}\) Therefore, the court held that visitation is possible for an unwed, non-biological father who parented for eight years while the biological mother misrepresented his genetic ties.\(^ {111}\) Therefore, Illinois courts have recognized visitation rights for nonparents, which indicates Illinois might recognize a type of equitable parent.\(^ {112}\)

### C. *IN RE MARRIAGE OF ROBERTS*

Another case that indicates how Illinois courts might treat equitable parents is *In re Marriage of Roberts*.\(^ {113}\) In that case, a husband filed for divorce against his wife, and during the proceedings, he learned he was not the biological father of the child born during their marriage.\(^ {114}\) The court determined “that the superior right of natural parents is not absolute” in determining parentage, and therefore, custody to a non-biological father

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104. *See id.*
107. *Id.* at 871.
108. *Id.*
109. *Id.*
110. *Id.* at 872.
112. *See id.*
114. *Id.*
was possible where the child was born to his wife during their marriage.\textsuperscript{115} As a result, the court essentially granted the father de facto parenting rights.\textsuperscript{116}

V. POTENTIAL LEGISLATION

Some courts have treated single parents poorly. Consider \textit{In the Interest of Ice}.\textsuperscript{117} In this case, a single father, who knew about the minor child, neglected to be part of the child’s life for three years.\textsuperscript{118} The court found the father to be an unfit parent and held that because the father failed to provide any kind of support to the child, he had “bastardized” the child.\textsuperscript{119} In its holding, the court said “[t]his conduct consisted not only of a denial of paternity and lack of support, but an inexcusable lack of interest, concern, and responsibility for his son’s welfare.”\textsuperscript{120} In a case where a parent purposefully neglects their child for several years, perhaps this is a reasonable response from the court.\textsuperscript{121} However, this is not a fair standard in a case where the biological father was not aware he has a child.\textsuperscript{122} Therefore, the court should consider the equitable parent doctrine when making custody determinations regarding a biological father who was unaware he was the father.\textsuperscript{123}

Although Illinois has not adopted any equitable parent legislation, this Comment will suggest legislation as it might be adopted in Illinois. The trial court should be given broad discretion in making a determination. In other words, the appellate court should review the trial court’s decision only for an abuse of discretion. Additionally, the trial court should examine the totality of the circumstances in making its decision, because the court would essentially be granting a stranger legal visitation rights. Therefore, in addition to the best interests of the child standard, the equitable parent’s criminal background, work history, and financial status should be scrutinized by the court in order to determine whether the person should be granted rights to the child.

Kentucky’s equitable parent doctrine is most likely to produce a just result, since it considers a variety of factors which set forth a bright-line

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\textsuperscript{115} Id. at 1350-51.
\textsuperscript{116} See id.
\textsuperscript{117} In the Interest of Ice, 342 N.E.2d 460 (Ill. App. Ct. 3d Dist. 1976).
\textsuperscript{118} Id. at 463.
\textsuperscript{119} Id. at 462.
\textsuperscript{120} Id.
\textsuperscript{121} See id.
\textsuperscript{122} See In the Interest of Ice, 342 N.E.2d 460, 462 (Ill. App. Ct. 3d Dist. 1976).
\textsuperscript{123} See id.
\end{flushleft}
Therefore, Illinois should use Kentucky’s equitable parent doctrine as a model. Primarily, the legislation should discriminate between individuals who have standing to seek to establish parentage and those who do not. Those who have standing to seek to establish parentage include men who, for the first two years of the child’s life, resided in a household with the child and openly held the child out as his own during that time. On the other hand, a biological father, who has not held himself out to be the child’s father, would have standing to seek to establish parentage if five different factors are met. First, the biological mother’s conduct, including acts, language, or silence, must amount to a misrepresentation or concealment of material facts. Second, the mother must be aware of these facts. Third, the biological father must be unaware of these facts. Fourth, the mother must act with the intention or expectation that her representation or concealment of material facts will be acted upon. Fifth, the biological father must rely on the biological mother’s conduct to his detriment.

In addition, the legislation should establish a limitation on the amount of time a person has to bring a cause of action to establish parentage. In the first scenario, where a man is aware he is the father and has held himself out as the child’s father for the first two years of the child’s life, the statute of limitations to bring the cause of action to establish parentage should be one year after he moves out of the home where the child lives. The justification for a shorter timeframe is to avoid allowing fathers to statutorily enter the child’s life whenever he pleases or deems convenient for him. However, for a father who does not know he is the child’s biological parent, the statute of limitations should be more ambiguous. Once the father knew or reasonably should have known he was the child’s father, he has one year to bring a cause of action to determine whether he is fit to establish parentage. The policy consideration surrounding a more ambiguous

125. See id.
126. See id.
127. See id.
128. See id.
130. See id.
131. See id.
132. See id.
133. See id.
135. See id.
136. See id.
137. See id.
138. See id.
statute is that the father did not try to establish parentage at an earlier time because he did not know he was the child’s father due to the biological mother’s misrepresentations. However, he should still have only one year after he knows or reasonably should have known he is the child’s father because at that point, he is in an equal position as a father who did know he was or was not the biological parent since he held himself out as one. A father is deemed to reasonably have known he was the child’s father based on the objective reasonable person standard. An example of this is seeing a picture of a child whom looks similar to him on a woman’s social media website, who the potential father previously had a sexual relationship with.

However, it should be duly noted that this is not an attempt to grant biological fathers the absolute right to parent. Under no circumstances is the statute to be construed as giving fathers the ability to ignore the child until he is older and more fun. In other words, the father should not rely on the biological mother to rear the child until the child is more self-sufficient. In re Paternity of J.S.A. v. M.H., the court held “the right of a biological father to establish paternity to a child born to a marriage does not also mean that the legal rights flowing from the parent and child relationship are automatically conferred.” Therefore, the father must show an honest intent to want to be part of the child’s life. But, the fact that a man is a child’s biological father does not mean he has automatic rights to parenthood.

VI. APPLYING THE LEGISLATION IN ILLINOIS

A. IN RE PARENTAGE OF J.W.

First, consider the recent case of In re Parentage of J.W. Here, a woman named Amy was dating a man named Jason. During the course of their relationship, Amy had a one-time affair with Steve. Amy subse-
sequently became pregnant, and she assumed Jason was the father of the baby.\textsuperscript{152} Jason and Amy married, and they lived happily as a couple, with Jason holding himself out as the father of the baby, J.W.\textsuperscript{153} Amy and Jason ultimately divorced, and at the dissolution of the marriage, Jason was listed as the father of J.W., had visitation rights, and child support obligations.\textsuperscript{154} Seven years later, Steve saw a picture of J.W. on Amy’s social media website.\textsuperscript{155} He noticed a striking resemblance between his baby pictures and J.W., which is when he realized J.W. might be his daughter.\textsuperscript{156} Jason requested a DNA test, and it was conclusively confirmed that Steve was J.W.’s father.\textsuperscript{157} Steve then filed a petition to establish paternity in an attempt to obtain visitation rights with J.W.\textsuperscript{158} In response to Steve’s petition, Jason sought a hearing on whether it was in J.W.’s best interest to have visitation with Steve.\textsuperscript{159}

In relying upon the opinion of a psychiatrist, who never observed J.W. interact with Steve, and the guardian ad litem’s (GAL) recommendation, the court determined it was not in J.W.’s best interest to have visitation with him because of the potential adverse effect it could have on J.W.’s cognitive development.\textsuperscript{160} However, at trial, a different clinical psychologist testified it was in J.W.’s best interest to continue to build a relationship with Steve, especially since he was able to show her love and affection.\textsuperscript{161} Additionally, even though Steve was not allowed to visit J.W., due to a court imposed no-contact order while the action was being litigated, Steve had continued to provide financial support to J.W., and the clinical psychologist believed a permanent and stable relationship, like the one Steve was trying to build, would be good for J.W.’s cognitive development.\textsuperscript{162} In the footnotes, the court said:

\begin{quote}
At the outset, we note that Jason has never challenged Steve’s standing to establish the existence of a parent-child relationship, and no attempt has been made or order entered disavowing Jason’s parental rights either under the Parentage Act or under the judgment of dissolution. Accordingly . . . we make no determination with regard to either party’s
\end{quote}

\begin{thebibliography}{9}
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} \textit{In re Parentage of J.W.}, 990 N.E.2d 698, 700 (Ill. 2013).
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} \textit{In re Parentage of J.W.}, 990 N.E.2d 698, 706 (Ill. 2013).
\item \textsuperscript{160} Id. at 711.
\item \textsuperscript{161} Id. at 701.
\item \textsuperscript{162} \textit{In re Parentage of J.W.}, 990 N.E.2d at 706.
\end{thebibliography}
standing, or as to Jason’s continued legal status as a parent.\textsuperscript{163}

Essentially, Steve was penalized for not knowing he could potentially be J.W.’s father, and he was stripped of an opportunity to develop a lasting relationship with his daughter.\textsuperscript{164}

Under this Comment’s proposed legislation, a different result might be warranted.\textsuperscript{165} First, it is important to consider whether Steve even had standing to bring the lawsuit.\textsuperscript{166} Under the new legislation, recall the five separate factors that must be satisfied in order for Steve to have standing to bring the cause of action.\textsuperscript{167} Pursuant to the legislation, Steve would have standing to bring a suit to establish parentage.\textsuperscript{168} First, Amy concealed material facts by not notifying Steve that he could potentially be J.W.’s father.\textsuperscript{169} Second, Amy was aware of these facts because she knew she had a sexual relationship with two men within a short period of time, and even though she knew this, she did not conduct a DNA test to determine who the child’s biological father was.\textsuperscript{170} Instead, she chose to guess.\textsuperscript{171} Third, Steve was unaware of these facts because he probably did not know that the sexual encounter resulted in a pregnancy, since the facts of the case indicate Amy and Steve had a one-time sexual relationship.\textsuperscript{172} Fourth, Amy expected the concealment of material facts would be relied upon, because if Steve did not know about J.W., he never would have brought a paternity action, and Amy would have avoided disruption of her relationship with Jason.\textsuperscript{173} Lastly, Steve relied upon this concealment, which resulted in a detrimental change in his position.\textsuperscript{174}

The second thing to consider is whether allowing Steve to have visitation with J.W. is in the child’s best interest.\textsuperscript{175} It is always important to consider the best interest of the child standard.\textsuperscript{176} The best interest of the child standard is the mechanism under which parentage is currently deter-

\textsuperscript{163}. \textit{Id.}
\textsuperscript{164}. \textit{See id.} at 711.
\textsuperscript{165}. \textit{See id.}
\textsuperscript{166}. \textit{See Hinshaw v. Hinshaw}, 237 S.W.3d 170, 173 (Ky. 2007).
\textsuperscript{167}. \textit{See id.}
\textsuperscript{168}. \textit{See id.}
\textsuperscript{169}. \textit{See id.; In re Parentage of J.W.}, 990 N.E.2d at 706.
\textsuperscript{170}. \textit{See Hinshaw}, 237 S.W.3d at 173; \textit{In re Parentage of J.W.}, 990 N.E.2d at 706.
\textsuperscript{171}. \textit{See In re Parentage of J.W.}, 990 N.E.2d at 700.
\textsuperscript{172}. \textit{See Hinshaw}, 237 S.W.3d at 173; \textit{In re Parentage of J.W.}, 990 N.E.2d at 700.
\textsuperscript{173}. \textit{See Hinshaw}, 237 S.W.3d at 173; \textit{In re Parentage of J.W.}, 990 N.E.2d at 700-01.
\textsuperscript{174}. \textit{See Hinshaw}, 237 S.W.3d at 173; \textit{In re Parentage of J.W.}, 990 N.E.2d at 706.
\textsuperscript{175}. \textit{See Hinshaw}, 237 S.W.3d at 173.
\textsuperscript{176}. 750 ILL. COMP. STAT. 5/602 (2012).
mined. Some of the factors that are considered include who the parents wish to have custody of the child, who the child wants his primary parent to be, the interaction of the child with his parents, the mental and physical status of “all individuals involved,” and whether the parents are willing to facilitate a healthy relationship with other parents. It is clear from these provisions that the statute is not limited to consider only two parents. In fact, these factors insinuate that they could apply to more than two parents when they indicate the mental and physical health of “all those involved” should be considered, and “the interaction and interrelationship of the child with his parent or . . . any other person who may significantly affect the child’s best interest.” Therefore, the best interest of the child standard can apply to a situation where there are more than two parents. Courts have even applied the best interest of the child standard in situations where grandparents seek custody.

In addition to the best interest of the child standard, the court should examine whether the biological father expresses interest, concern, and responsibility for the child’s welfare. In considering these three factors, the court should apply a high standard because the court would be permitting a man who has been absent from the child’s life, potentially for several years, to bring a cause of action to have legal visitation with the child. Some potential questions the court might ask include: Does he have a job? Can he support the child? What is his reputation in the community? Does he have an education? and/or Should he have considered the possibility of the child’s existence prior to when he actually did?

Based upon these considerations, in In re Parentage of J.W., the court could have found it was in the child’s best interest to have visitation with Steve. It is not fair to unwed biological fathers to deny them parental rights, just because they were not the presumed father. Further, the court should consider the potential harm to the child that could result from denying visitation from the biological father who has demonstrated interest,

177. Id.
178. Id.
179. See id.
180. Id.
184. See id.
185. See id.
186. See id. at 173. But see In re Parentage of J.W., 990 N.E.2d 698, 710-11 (Ill. 2013).
concern, and responsibility. A child can be protected from a father who is not serious about establishing parentage because the best interest of the child standard applies, and the court has to apply a high standard in determining whether the biological father truly has the best interests of the child at heart. Lastly, the court should rely on the testimony of a clinical psychologist, similar to In re Parentage of J.W. In the In re Parentage of J.W. case, the clinical psychologist testified that Steve did not present risk factors that would be dangerous to J.W.’s development, but rather, the transition could easily be achieved with counseling. Therefore, under this Comment’s proposed legislation, Steve should be granted visitation rights with J.W.

This Comment does not ignore the criticisms to the argument that three people could act as parents. Traditionally, courts have frowned upon the idea that three individuals could act as parents. For example, the Supreme Court, in applying California law, stated, “California law, like nature itself, makes no provision for dual fatherhood.” However, especially with the recent overturn of the Defense of Marriage Act, courts have been liberalizing their views on what a traditional family is. Perhaps courts might consider establishing two categories of parents: residential parent(s) and parent(s) with visitation. These categories are quite similar to what is already established, and they can be likened to a situation where stepparents are married, and the children have visitation with their biological parents.

Another criticism of this viewpoint is that having three parents with rights causes an issue regarding visitation where two of the parents do not have joint custody. If there is one residential parent and two parents with visitation, it is possible that visitation will be unfair. For example, if children only spend time with the parents that have weekend visitation, it is possible the children would not live at the same house for any consecutive weekend. Therefore, situations such as these will require strict restrictions imposed by the court. However, this issue is beyond the scope of this Comment.

188. See Hinshaw, 237 S.W.3d at 173; In re Parentage of J.W., 990 N.E.2d at 702.
189. See 750 ILL. COMP. STAT. 5/602 (2012); Hinshaw, 237 S.W.3d at 173.
190. In re Parentage of J.W., 990 N.E.2d at 702.
191. Id.
192. See Hinshaw, 237 S.W.3d at 173; In re Parentage of J.W., 990 N.E.2d at 702.
194. Id. at 118.
197. See id.
198. See id.
B. J.S.A. v. M.H.

This case poses a different sort of problem because the marital presumption of paternity comes into play.\(^{199}\) J.S.A. and M.H. were married to separate individuals.\(^{200}\) While they were both separately married, they engaged in an extramarital sexual affair with each other.\(^{201}\) M.H. became pregnant and gave birth to T.H.\(^{202}\) On the child’s birth certificate, W.H. was listed as the biological father because he was married to M.H. when T.H. was born.\(^{203}\) Ultimately, it was discovered, via a DNA test, that J.S.A. was the biological father of T.H.; but W.H. continued to raise the child as his own son.\(^{204}\) J.S.A. subsequently filed a petition to determine the existence of a father-child relationship with T.H.\(^{205}\) After J.S.A. filed his petition, M.H. and W.H. filed a petition to adopt T.H.\(^{206}\) The court held as a matter of law that J.S.A. had standing to bring the cause of action because he did so prior to the adoption petition being filed.\(^{207}\) However, there was a presumption that W.H. was the father because he was married to the mother when T.H. was born.\(^{208}\) Yet, the marital presumption of fatherhood is rebuttable.\(^{209}\) Therefore, by establishing he was the father through a DNA test, J.S.A. overcame the marital presumption of fatherhood.\(^{210}\) As a result, a man who wants to establish parentage is charged with the burden of overcoming any existing presumptions.\(^{211}\)

The proposed legislation would have a different effect on J.S.A. v. M.H.\(^{212}\) In this case, J.S.A. continued to have an affair with M.H. for three years after the child was born.\(^{213}\) Only after the affair ended did J.S.A. attempt to establish parentage.\(^{214}\) The proposed equitable parentage legislation should not be used as a tool to anger the other biological parent or as

\(^{200}\) Id. at 685.
\(^{201}\) Id.
\(^{202}\) Id.
\(^{203}\) Id.
\(^{205}\) Id.
\(^{206}\) Id.
\(^{207}\) Id. at 687.
\(^{208}\) Id. at 689.
\(^{210}\) J.S.A., 893 N.E.2d at 689.
\(^{211}\) See id.
\(^{212}\) See Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007); J.S.A., 893 N.E.2d at 682.
\(^{213}\) J.S.A., 893 N.E.2d at 685.
\(^{214}\) Id. at 685-86.
leverage to get revenge. Because the court held J.S.A. had standing to bring the suit since he filed prior to the adoption petition being filed, this Comment will also assume J.S.A. had standing under the proposed legislation. However, under the proposed legislation, J.S.A. would not be able to bring this cause of action because M.H. did not conceal material facts. J.S.A. was fully aware about W.H.’s existence, so he must have known it was possible that he was the father. He should not be able to establish parentage after his relationship with M.H. ended, which was three years into the child’s life.

C. IN RE PARENTAGE OF G.E.M.

G.E.M. was born to Renee, a woman who acknowledged relationships with three men at the time of the child’s conception and birth. Two of the men were at the hospital when the child was born, and Richard acknowledged he was the father of G.E.M. However, it was ultimately established that Richard was not the child’s father. When G.E.M. was six years old, Renee filed a petition to determine the existence of the father-child relationship with Louis, one of the other men whom with she had a sexual relationship. Renee also sought to extinguish Richard’s status as G.E.M.’s father. However, Louis did not want to be part of G.E.M.’s life, and he did not want to establish paternity. The court held voluntary acknowledgment of paternity must be rescinded within the statutory timeframe of sixty days. If the voluntary acknowledgment is not rescinded within sixty days, then it is permanent. Additionally, parties cannot vacate this voluntary acknowledgment by agreeing to disregard it.

This case raises a particularly interesting issue because the biological father did not want to be part of the child’s life. So, In re Parentage of
G.E.M. raises the question of whether the equitable parent doctrine can estop a man from denying parentage.\textsuperscript{230}

As it stands now, the law indicates if voluntary acknowledgment is not rescinded within sixty days, then it is permanent and can never be revoked.\textsuperscript{231} The policy consideration behind this is to ensure fathers are certain, when they acknowledge paternity, that they are the parent.\textsuperscript{232} In other words, the court is trying to avoid a father acknowledging paternity without seriously considering whether he is, in fact, the father.\textsuperscript{233} As a result, one would be inclined to ask: does the fact that a man voluntarily acknowledged he was the father, and failed to rescind the acknowledgment within sixty days, mean that the biological father is relieved of all duties?\textsuperscript{234} As the law stands now, the answer to this question is yes.\textsuperscript{235} But, is this fair? Certainly, it will encourage a father to get a DNA test before voluntarily acknowledging parentage if he is unsure whether he is the father.\textsuperscript{236} Yet, it seems as though the court should not be encouraging husbands to be suspicious of their wives, nor should courts be encouraging men to deny paternity until it is conclusively established.\textsuperscript{237}

Consider a scenario where Louis wanted to bring an action to establish paternity with G.E.M.\textsuperscript{238} It is arguable that he would not have standing to bring the action.\textsuperscript{239} First of all, Renee did not misrepresent any facts.\textsuperscript{240} She was candid with the three men that she was unsure who the father was, and, the fact that two different men were at the hospital when G.E.M. was born indicated they were aware of this fact.\textsuperscript{241} Therefore, it is likely that Louis would not have standing to bring this action, even if he wanted to.\textsuperscript{242} However, under the facts of this case, it is probably in the best interests of the child not to force the biological father to take part in the child’s life, especially when there is a man who has willingly held himself out as the father.\textsuperscript{243} Essentially, the court indicated that Renee cannot force Louis to


\textsuperscript{231} 750 ILL. COMP. STAT. 45/5(b) (2012).

\textsuperscript{232} See id.

\textsuperscript{233} See id.

\textsuperscript{234} See id.

\textsuperscript{235} Id.

\textsuperscript{236} 750 ILL. COMP. STAT. 45/5(b) (2012).

\textsuperscript{237} See id.


\textsuperscript{239} Id.

\textsuperscript{240} Parentage of G.E.M., 890 N.E.2d at 949-50.

\textsuperscript{241} Id.

\textsuperscript{242} See id.

submit to a DNA test. This result might seem unfair to Richard with regard to child support, but it has not been conclusively established that Louis is the father.

D. **IN RE CUSTODY OF C.C.**

*In re Custody of C.C.* poses another interesting problem because the biological father was aware of the child’s existence, and he had some inclination that the child may have been his. Additionally, the GAL recommended that all three parents be involved in the child’s life. In this case, a woman, Erica, had a sexual relationship with two men, David and Klay, and she subsequently became pregnant. Initially, Erica told Klay he was probably the father of the unborn child. However, Erica told Klay, one week later, that a doctor said it was “highly unlikely” he was the father of the child, and when C.C. was born in October 2007, David signed a voluntary acknowledgment of paternity and identified himself as the biological father. Erica and David ended their relationship, and a trial court entered an order finding Erica and David to be C.C.’s parents. Erica was awarded sole custody, and David was given visitation rights, subject to payment of child support. In 2009, Erica and Klay began dating, and Klay again became suspicious that he was the biological father of C.C. As a result, Klay brought a cause of action in June 2009, but it was dismissed. Ultimately, Klay filed three pleadings in July 2009, attempting to gain rights to the child. In the first pleading, Klay asserted Erica and David, fraudulently or due to a material mistake of fact, signed the voluntary acknowledgment of paternity. In the second pleading, Klay petitioned the court to order a DNA test to prove he was the biological father of C.C., name Erica the residential parent with reasonable visitation given to Klay, and fix his child support obligations at twenty percent of his income. In the third pleading, Klay requested the court vacate any order relating to David being

244. *Id.* at 955.
245. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
257. *Id.*
C.C.’s father, because Erica did not contact Klay before David signed the voluntary acknowledgment of paternity, or before filing the paternity action against David.\(^{258}\) Initially, the court denied Klay’s petition to intervene because it found Klay knew that Erica was pregnant and because David was conclusively found to be C.C.’s parent.\(^{259}\) However, since David’s obligation to pay child support had been rescinded by the court once he and Erica moved in together and both contributed to C.C.’s care, Klay asked the court to reconsider his petition to intervene.\(^{260}\) Subsequently, the court granted the petition, and Klay was allowed to proceed on his petition to establish the existence of a parent-child relationship.\(^{261}\) The court ultimately received verification from a DNA test that Klay was the biological father of C.C.\(^{262}\)

A GAL was appointed in this case to represent C.C.’s interests, and he recommended that all three parents be involved in the child’s life for three reasons.\(^{263}\) First, C.C., her mother, and David had developed a close relationship while they were living together.\(^{264}\) Second, since David was the only father figure that three year old C.C. knew, he should continue to be involved in her life.\(^{265}\) Third, since Klay truly cared for and desired to care for C.C., then he should have parental rights as her biological father.\(^{266}\) The trial court issued an order finding the biological father of C.C. to be Klay, required Klay to pay child support, awarded bi-weekly visitation, but denied Klay’s request to change C.C.’s last name.\(^{267}\)

Klay requested his child support be downward deviated to ten percent instead of the statutorily required twenty percent because David was also C.C.’s legal father, and he also had an obligation to help Erica provide for C.C.\(^{268}\) The court denied Klay’s appeal because it was not filed within thirty days of the trial court’s resolution of the final issue.\(^{269}\) However, the court pointed out that it is unsure under current law, in a situation where a child has a legal and conclusively presumed father, whether a biological father could be forced to pay child support.\(^{270}\) Additionally, the court indicated it was unclear whether Klay had standing to bring this cause of action.\(^{271}\)

\(^{258}\) Id.  
\(^{259}\) Id.  
\(^{260}\) Id.  
\(^{261}\) In re Custody of C.C., 1 N.E.3d 1238, 1242 (Ill. App. Ct. 3d Dist. 2013).  
\(^{262}\) Id. at 1243.  
\(^{263}\) Id.  
\(^{264}\) Id.  
\(^{265}\) Id.  
\(^{266}\) In re Custody of C.C., 1 N.E.3d 1238, 1243 (Ill. App. Ct. 3d Dist. 2013).  
\(^{267}\) Id.  
\(^{268}\) Id. at 1248.  
\(^{269}\) Id. at 1247.  
\(^{270}\) Id. at 1250.  
\(^{271}\) In re Custody of C.C., 1 N.E.3d 1238, 1250 (Ill. App. Ct. 3d Dist. 2013).
Yet, one of the most interesting aspects of this decision is the
dissent.\textsuperscript{272} The dissent opines that once the trial court determined a parent-
child relationship existed between Klay and C.C., the presumption that Da-
vid was C.C.’s father was terminated.\textsuperscript{273} Therefore, even though David nev-
er requested his parental rights be rescinded, an establishment of a parental
relationship between Klay and C.C would have effectively terminated Da-
vid’s parental status.\textsuperscript{274} The dissent cited other Illinois court decisions, such
as \textit{In re G.M.}, which stated, “Obviously, a declaration that one person is a
child’s father necessarily implies that all others are not the child’s fa-
thor.”\textsuperscript{275} However, the dissent also stated that this does not mean David
cannot be involved in the child’s life.\textsuperscript{276} Rather, a best interest hearing
should be conducted to determine whether David should have visitation
with C.C.\textsuperscript{277} So, even if David’s rights were terminated, the dissent agrees
that two men can have legal rights to visitation with a child.\textsuperscript{278}

\textit{In re Custody of C.C.} presents a special challenge when the proposed
legislation is applied.\textsuperscript{279} First, the biological mother’s conduct must be a
misrepresentation of material facts.\textsuperscript{280} In this case, Erica was upfront with
Klay about the fact that he could be the father of the unborn child.\textsuperscript{281} How-
ever, a week later, she told Klay that a doctor said it was highly unlikely
Klay was the father.\textsuperscript{282} Therefore, the first criterion is not satisfied because
even though Erica and the doctor were both wrong, Erica did not knowingly
make a material misrepresentation and, for example, hide her pregnancy.\textsuperscript{283}
Should the court find there was a knowing material misrepresentation,
though, neither the second nor third criterion are met.\textsuperscript{284} The second criteri-
on, which requires the mother be aware of the material misrepresentation of
the facts, is not met because Erica reasonably relied upon her doctor’s ad-
vice.\textsuperscript{285} Additionally, the third criterion indicates the biological father has to
be unaware that he is the potential father.\textsuperscript{286} However, in this case, Klay

\begin{itemize}
\item[272.] \textit{See id.} at 1251-57.
\item[273.] \textit{C.C.}, 1 N.E.3d at 1256.
\item[274.] \textit{Id.}
\item[276.] \textit{C.C.}, 1 N.E.3d at 1256.
\item[277.] \textit{Id.}
\item[278.] \textit{See id.}
\item[279.] \textit{See id.} at 1241-51.
\item[280.] \textit{See Hinshaw v. Hinshaw}, 237 S.W.3d 170, 173 (Ky. 2007).
\item[281.] \textit{C.C.}, 1 N.E.3d at 1241.
\item[282.] \textit{Id.}
\item[283.] \textit{See Hinshaw}, 237 S.W.3d at 173; \textit{C.C.}, 1 N.E.3d at 1241.
\item[284.] \textit{See C.C.}, 1 N.E.3d at 1241.
\item[285.] \textit{See id.}
\item[286.] \textit{See Hinshaw}, 237 S.W.3d at 173.
\end{itemize}
knew he could be the biological father of C.C.\textsuperscript{287} Therefore, although the doctor told Erica it was highly unlikely the father was Klay, he was not eliminated entirely as the biological father.\textsuperscript{288} It cannot be said Klay was unaware that he could be the father of C.C., so the third criteria is not satisfied.\textsuperscript{289} As a result, Erica did not know her concealment would be acted upon, and Klay did not rely upon Erica’s concealment to his detriment, so the fourth and fifth criterion were not satisfied.\textsuperscript{290} Therefore, in this case, the proposed legislation would actually produce the opposite result from the trial court’s holding.\textsuperscript{291}

However, this case does recognize one of the most fundamental issues with the equitable parent doctrine: How should child support be determined in a case where two men have legal visitation with a child?\textsuperscript{292} According to 750 ILCS 5/505, if child support is being determined based on the existence of one child to be supported, twenty percent of the supporting party’s net income shall be paid to the custodial parent.\textsuperscript{293} The statute also indicates the court has discretion to follow the guideline, or it can deviate if it finds any relevant factor to support its decision.\textsuperscript{294} So, should each father be responsible for ten percent of the statutorily required twenty percent?\textsuperscript{295} Or, should other factors be considered?

\section*{VII. CHILD SUPPORT}

This Comment will consider a case from Massachusetts to determine a solution to each father’s responsibility with regard to child support.\textsuperscript{296} Because this is a case of first impression in Illinois, outside sources must be considered.\textsuperscript{297} In \textit{Department of Revenue v. Ryan R.}, Susan was married to Sheldon.\textsuperscript{298} Susan had an extramarital affair with a man named Ryan.\textsuperscript{299} When Susan became pregnant, she informed Sheldon he was not the father, and she told Ryan he was the biological father of the child.\textsuperscript{300} Ultimately, Sheldon signed a voluntary acknowledgment of paternity when the child

\begin{itemize}
\item \textsuperscript{287} C.C., 1 N.E.3d 1238.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} \textit{See Hinshaw}, 237 S.W.3d at 173; C.C., 1 N.E.3d at 1241.
\item \textsuperscript{290} \textit{See id.}
\item \textsuperscript{291} \textit{See id.}
\item \textsuperscript{292} \textit{See, e.g., C.C., 1 N.E.3d 1238.}
\item \textsuperscript{293} 750 ILL. COMP. STAT. 5/505 (2012).
\item \textsuperscript{294} Id.
\item \textsuperscript{295} \textit{See id.}
\item \textsuperscript{297} \textit{See Ryan R.}, 816 N.E.2d at 1022.
\item \textsuperscript{298} \textit{Ryan R.}, 816 N.E.2d at 1022.
\item \textsuperscript{299} Id.
\item \textsuperscript{300} Id.
\end{itemize}
was born, but Ryan was not involved in the child’s life. The child suffered from a variety of ailments, and a great deal of stress was put on Susan and Sheldon’s marriage, which eventually ended in divorce. During the divorce proceedings, the court found that even though Sheldon was not the child’s biological father, he was the only father the child knew, and because of this, Sheldon was the child’s de facto parent. Therefore, Sheldon was given reasonable visitation, in addition to a child support obligation of seventy-five dollars per week. However, the court also indicated that the ordered child support was not in compliance with statutory guidelines, so Susan was entitled to additional child support from the biological father.

On Susan’s behalf, the Department of Revenue filed a complaint to establish that Ryan was the biological father of the child, in an effort to assist her in obtaining child support. The Probate Court examined several factors before determining what child support Ryan would owe. These factors include what alimony Susan was receiving, the other child support payment, and the fifteen thousand dollars annual income that was attributed to Susan. After considering this, the Probate Court determined Ryan’s yearly income was seventy thousand dollars, and based on that, he would owe Susan $285 per week in child support. Further, he would be responsible for paying the child’s medical expenses. The court affirmed this judgment on review, holding that the Probate Court was correct in making this determination based on joint federal tax returns Ryan and his wife filed. The court indicated that it would have also been appropriate for the Probate Court to consider whether Ryan’s wife’s salary made more of Ryan’s income available to pay additional child support. Ironically, although the judgment of this court meant Susan was receiving child support from two different men, only Sheldon was granted visitation rights. Ryan’s claims for custody and visitation were bifurcated from the

301. Id.
302. Id.
304. Id.
305. Id.
306. Id.
307. Id. at 1026.
309. Id.
310. Id.
311. Id.
312. Id. at 1027.
child support hearing, so although he paid child support, he was not given more legal rights to the child.\textsuperscript{314} The \textit{Ryan R.} case is particularly relevant to the proposed legislation because it contemplates a fix for the child support obligation problem.\textsuperscript{315} For example, reconsider \textit{In re Custody of C.C.\textsuperscript{316}} Had that case turned out differently, both Klay and David could have been responsible for child support for C.C.\textsuperscript{317} However, Klay’s proposition that each man pay ten percent of the statutory guideline will likely fail.\textsuperscript{318} Rather, courts are more likely to follow the \textit{Ryan R.} line of reasoning.\textsuperscript{319} Arguably, justice is better served where, instead of splitting the child support payments down the middle, the payments are equitably determined, for example, based on the child’s needs, what each parent has provided for the child during the child’s lifetime, and each parents’ income.\textsuperscript{320}

\section*{VIII. Conclusion}

For the foregoing reasons, the Illinois General Assembly should adopt the equitable parent doctrine, specifically to help biological fathers establish parentage if another man is presumed to be the child’s father. Illinois courts have already recognized de facto adoption.\textsuperscript{321} The \textit{DeHart} court indicated where a contract to adopt does not exist, circumstantial evidence can support an equitable adoption.\textsuperscript{322} Additionally, Illinois courts have indicated they are open to supporting de facto parentage.\textsuperscript{323} The \textit{Koelle} court awarded visitation to an unwed, non-biological father who held himself out as the child’s father while the biological mother misrepresented the father’s genetic ties because it was in the child’s best interests.\textsuperscript{324} Further, an Illinois court granted custody to a non-biological father because the child was born to his wife during their marriage, so there was a presumption he was the biological father.\textsuperscript{325}

In determining what legislation to codify in Illinois, it is important to consider an array of statutes adopted in other jurisdictions to determine which will produce the most equitable result in the multitude of scenarios

\begin{itemize}
  \item \textsuperscript{314} \textit{Id.} at 1023 n.6.
  \item \textsuperscript{315} \textit{See id.} at 1022-26.
  \item \textsuperscript{316} \textit{In re Custody of C.C.}, 1 N.E.3d 1238 (Ill. App. Ct. 3d Dist. 2013).
  \item \textsuperscript{317} \textit{See id.}
  \item \textsuperscript{318} \textit{See id.} at 1241.
  \item \textsuperscript{319} \textit{See Ryan R.}, 816 N.E.2d at 1020.
  \item \textsuperscript{320} \textit{See C.C.}, 1 N.E.3d at 1241; \textit{Ryan R.}, 816 N.E.2d at 1022.
  \item \textsuperscript{321} \textit{See supra} Part IV.A.
  \item \textsuperscript{322} \textit{DeHart v. DeHart}, 986 N.E.2d 85, 103 (Ill. 2013).
  \item \textsuperscript{323} \textit{See supra} Part IV.B.
  \item \textsuperscript{325} \textit{In re Marriage of Roberts}, 649 N.E.2d 1344, 1345 (Ill. App. Ct. 4th Dist. 1995).
\end{itemize}
that arise in family court. Due to its bright-line test and consideration of many factors, the Kentucky Supreme Court has established the best equitable parent doctrine. Under this consideration, the court considers many factors, including: (1) misrepresentation or concealment of material facts; (2) estopped party is aware of the material facts; (3) the other party does not know about these material facts; (4) the estopped party acts expecting that his conduct will be acted upon; and (5) the other party changed positions to its detriment based on this conduct.

The equitable parent doctrine should be adopted in Illinois because rather than blindly following the marital presumption, courts are forced to ask questions about the father, such as: Does he have a job? Can he support the child? What is his reputation in the community? Does he have an education? Therefore, while courts are currently relying on factors that seemingly have nothing to do with the child’s best interest, like which clinical psychologist testified better or who was married to the biological mother at the time the child was born, after the equitable parent doctrine is adopted, courts will be considering factors like the father’s involvement in the child’s life, the father’s intent to act as a parent, and the best interests of the child. Therefore, the equitable parent doctrine should be codified in Illinois, in order to promote the best interests of the child.

Although the nuclear family is no longer the standard in America, was Romney correct in saying America’s families are collapsing? Probably not. Families are certainly transforming, but instead of claiming they are collapsing, legislatures should be asking what they can do to ease the transition. The United States Supreme Court has stated, “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.” In an effort to protect all families, both traditional and nontraditional, the equitable parent doctrine should be adopted as a legislative fix in Illinois that will not burden the courts, will protect fathers’ rights, and will provide a just solution for the new, traditional American family.

327. Id.
328. See id.
330. Crowley, supra note 1.