

## 17 USC § 109: The First Sale Doctrine

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If you've studied even a little copyright, you probably know that copyright grants authors not just one right, but a number of rights to control their works in different ways. One of these is the right to control the distribution of their works. If authors don't want to give their works to the world, they don't have to. I may write the most beautiful sonnet ever written, but that doesn't give anyone but me the right to distribute it. The decision to do so is mine alone.

But if you know this, then have you ever wondered how libraries can exist if copyright protects distribution? Don't we distribute books all the time when we lend them out? Do libraries need to sign some sort of agreement with copyright holders that lets us do this? Or do libraries operate based on fair use? As it turns out, the answer to these questions are in something called the First Sale Doctrine, 17 USC § 109.

Let's look at the law.

17 USC § 109:

*(a)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....<sup>1</sup>*

As usual, statutory language can be confusing, so let's break this down piece by piece.

First, "*notwithstanding the provisions of section 106(3)....*" 106(3) gives authors the right to distribute their works. So, this part of 109 tells us that it creates a situation where the distribution right doesn't apply.

Second, "*the owner of a particular copy or phonorecord*". Notably, this "owner" is not the copyright holder. Instead, this is anyone who legally acquires a copy of a work that the copyright holder has made available. Most commonly, this means that the first sale doctrine applies when you legally buy a physical copy of a work.

At this point, don't worry about the term "phonorecord." I know this word might be unfamiliar to you, and sometimes esoteric terms can confuse people who are trying to

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<sup>1</sup> 17 USC § 109(a). The law has several other parts, but this white paper will focus on subsection (a).



make sense of the law. However, it doesn't have to be intimidating. In copyright law, phonorecords are just physical objects that hold copies of sound recordings. So they are things like vinyl records, cassettes, and CDs.

Third, "*lawfully made under this title*". This part of the law tells us that illegal copies are not covered by the first sale doctrine. As such, this section does not apply to something like stolen copies, or copies that someone creates without the permission of the author.

So let's say someone pirates *The Last Jedi*, prints it to DVD, and sells it on eBay. Since that copy was not "lawfully made under this title," a library couldn't buy it and lend it out. However, if the same library waited until the movie was officially released and purchased the DVD from Amazon, then the library could lend that copy.

Similarly, if someone makes a copy of *The Force Awakens*, 17 USC §109 does not allow that person to sell this copy, even though the copyright holder has made this movie available to the public. This is because, again, the the copy was made without permission of the copyright holder. So the first sale doctrine doesn't apply.

Fourth, "*is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.*" This section brings everything together. It tells us that if someone legally acquires a lawfully made copy of a work, he/she can dispose of it as he/she wants. He/she can lend it out, rent it, resell it, give it away, bury it in the ground, etc., and the copyright holder can't prevent any of this.

It should be easy to see how this applies to libraries. Once libraries buy their books, they are free to lend them to anyone. They don't need to ask permission from the copyright holder, sign a contract, or anything.<sup>2</sup> Those books belong to the libraries and libraries can do with them as they please.

However, one big question today is what about works in digital formats? Let's say I buy an album on iTunes. Can I then give that album to a friend? Can I sell it on eBay? The answer, at this point, is probably no, unless -- maybe -- you give someone your whole hard drive.<sup>3</sup> 17 USC § 109 does not permit a "digital first sale."

There are at least two issues with digital files that make a digital first sale rule problematic. First, it is difficult to transfer digital files without creating a copy in some way. If I want to sell you a song I legally purchased from iTunes, I will almost certainly create a copy when I give it to you. If I email it to you, I create a copy when I attach it to the email and you create a copy when you download it. If I burn it to a CD, I create a copy on the CD and you create a copy when you put it on your computer. Or if I put it on a flash drive, I create a copy when I

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<sup>2</sup> Sometimes, copyright holders require libraries to sign agreements that restrict usage in some ways. However, this is a contract issue not a copyright issue.

<sup>3</sup>Notably, I am not addressing any Terms of Use agreement issues that may come from purchasing music on iTunes. Here, we are only talking about copyright.



put it on the drive, and you create a copy when if access it from the drive. I might be able to get around this by selling you my hard drive, but not only is that impractical, it's also not clearly permitted by the law. The problem is that when you access the file, your computer still create a copy in some way, and that may still trigger infringement.

Second, digital files are infinitely and perfectly copyable in a way that physical media are not. As such, it's much harder to be sure the thing you're transferring is, in fact, the original, or even what the original is. Even if I decide to sell you my iTunes songs by giving you my hard drive, it is difficult to ensure I didn't create a copy for myself and stash it on my other hard drive. The first sale doctrine allows people to dispose of the works they have purchased, but does not permit them to keep a copy for themselves. So we have to be careful how to apply this doctrine to digital works.

The Southern District of New York recently looked into digital first sale in *Capitol Records v. ReDigi*, 934 F. Supp 640 (S.D.N.Y. 2013). ReDigi allowed people to resell the music files they purchased from iTunes by installing software on users' computers that copied, transferred, and immediately deleted the songs people wanted to sell. The company argued that this was the modern equivalent of reselling a CD because it provided a system where the owner of the original no longer owns the song after selling it, similar to how you no longer have physical items after you dispose of them. Since the first sale doctrine normally allows me to sell other types of music I legally purchase, and the only difference here is format type, ReDigi should be ok under the law.

The court disagreed. It held that ReDigi's software works by creating copies. Indeed, it can't exist without making copies. So ReDigi doesn't enable sales of the original files, but instead sells copies. Even tho it removes the original files, it still violates copyright law by creating these copies. Thus, ReDigi's method of transfer does not qualify for protection under the first sale doctrine.

So, for now, there is no digital first sale. Since works are increasingly all-digital, this may change, but that isn't certain. Still, because no resale is in the interests of copyright holders, let alone digital resale, there will likely be strong opposition to any proposal to expand the first sale doctrine. Nevertheless, libraries like ours can continue to use 17 USC § 109 for our physical collections and rest assured that we are safe to lend the books we own without worrying about copyright problems.

