



The IALLT Journal

A publication of the International Association for Language Learning Technology

WHERE TECHNOLOGY MEETS LAW: THE RIGHT OF FIRST SALE



Julie Evershed
University of Michigan

A major misconception regarding U. S. copyright law is that it exists solely to protect the author/creator of a work. This is probably due in large part to the amount of media coverage given to artists, celebrities and large corporations when they claim that a use has infringed on their copyright. In reality, the purpose of copyright law is actually much broader in scope.

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

United States Constitution, Article I, Section 8

The basic premise behind this statement is that by giving authors and inventors¹ an economic incentive to disseminate their work, we are promoting the advancement of our body of knowledge. A very simple example of this idea is the following: when an author publishes a book, they earn money from that publication which encourages them to write more books. In turn, inspired by the ideas in this book, others then write a book (or play, or musical...), and the cycle continues. In order to set up a legal structure that would support this cycle, authors were given certain rights. These rights include the right to reproduce, the right to distribute, and the right to perform or display the work. Equally as important, exceptions to those exclusive rights were established so that the public can access and use the works without having to obtain prior permission from the copyright owner to do so. It is in maintaining the balance of these two opposing objectives where a majority of our challenges exist.

Advances in computing, networking and digital media have proven to be particularly troublesome with regard to the balance of rights and exceptions. The ease with which the general consumer can duplicate a book, song or video, and then disseminate those copies, while still maintaining the original copy for themselves creates a situation that is detrimental to authors being able to sustain their artistic and intellectual endeavors.² As a response to this ease of duplication and dissemination, digital measures to encrypt and protect intellectual property were introduced.³ These measures in turn tipped the balance to extremely favor the author. As the balance of power shifts rapidly between the two extremes, new laws and business models have sprung into existence. While many of these changes bring benefits to both consumers and authors, it is vitally important to understand how these changes are subtly impacting core principles of copyright law, lest we allow the goals of these foundational concepts to become subverted.

In this article, I will discuss the First Sale Doctrine, also known as the Right of First Sale, and how the current economic model that has evolved in

¹ For the purposes of this article, “authors” will be used to represent authors and inventors as outlined in section 109, referring to the creator of any intellectual work.

² Rub, G. (2014, September 24). Rebalancing Copyright Exhaustion. *Emory Law Journal* 64(3). Retrieved June 30, 2015, from <http://law.emory.edu/elj/content/volume-64/issue-3/articles/rebalancing-copyright-exhaustion.html>

³ John P. Uetz, *The Same Song and Dance: F.B.T. Productions, LLC v. Aftermath Records and the Role of Licenses in the Digital Age of Copyright Law*, 57 VILL. L. REV. 177 (2012). Available at: <http://digitalcommons.law.villanova.edu/vlr/vol57/iss1/6>

response to technological advances is posing a threat to its objectives. While I will be dealing with implications specific to U.S. copyright law⁴, it is important to note that this concept exists internationally as part of a broader concept known as “exhaustion of rights”, which may include any number of the rights granted to an author or inventor.⁵ As defined in U.S. law, the First Sale Doctrine addresses the extent of an author’s right to distribute their work.

Notwithstanding the provisions of §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. 17 U.S.C. § 109

The idea behind this doctrine is what enables us as consumers to use or dispose of a copyright-protected item as we wish, without having to obtain prior permission from the copyright holder. Imagine purchasing a book, then having to acquire permission from the author or publisher to give that book to a friend, donate it to charity or sell it at your garage sale. It is First Sale that allows libraries to loan out books and CDs, students to sell used textbooks, or individuals to give items as gifts or even dispose of/destroy items. It basically states that when we purchase an item, it is “ours”. In doing so, it serves the purpose of advancing knowledge and innovation by facilitating dissemination of works in the public realm: it fosters innovation and accessibility, it facilitates the ability to preserve our cultural history, it promotes competition as well as protects consumer privacy.⁶⁷

⁴ Internationally countries realize this concept according to different interpretations, thus this article will deal only with U.S. law for sake of simplicity. Rub, G. (2014, September 24). Rebalancing Copyright Exhaustion. *Emory Law Journal* 64(3). Retrieved June 30, 2015, from <http://law.emory.edu/elj/content/volume-64/issue-3/articles/rebalancing-copyright-exhaustion.html>

⁵ Horton, A. (2015, March 3). IP & IT Bytes: Copyright: Exhaustion of distribution rights. Retrieved June 30, 2015, from <http://www.twobirds.com/en/news/articles/2015/global/law-bytes/ip-it-bytes-copyright-exhaustion-of-distribution-rights>

⁶ Aaron, P., & Schultz, J. (2011, April 27). Digital Exhaustion. Retrieved June 23, 2015, from <http://www.uclalawreview.org/digital-exhaustion-2/>

Here is the problematic part of this doctrine: due to the fact that it was first established as precedent in the early twentieth century, prior to the existence of digital media, it was written to apply only to tangible goods. When you purchase a copy of a book, the copyright owner no longer has the right to dictate what you do with the physical copy of that book. Digital media however is intangible, thus the first sale doctrine does not apply. While we as consumers may believe we are acquiring an item under the pre-digital paradigm of ownership, we have in fact entered into a new type of relationship with our “possession” in which we are only purchasing the right to use that item. In this new paradigm, the terms of our ownership are dictated by the rights holder using two primary mechanisms: Digital Rights Management and the End User License Agreement.

Digital Rights Management (DRM) is the term for the technical measures put into place on software and media that prevents activities like duplication or unauthorized playback. Examples of DRM that we come into contact with often are the songs from iTunes and e-books from Amazon, both of which restrict access to a limited number of devices. Another example of DRM that is especially well known to language labs is region encoding on movies, this is intended to restrict video playback according to geographical boundaries. By wrapping core content in these protective envelopes, the rights holder is maintaining control of our use beyond what exists for analog materials, thereby subverting the goal of easy access and wide distribution that First Sale was put in place to foster.

The second mechanism that has emerged from the growth of the digital market is known as the End User License Agreement (EULA). This is most often seen as the text box that appears just prior to purchasing an item online, where the consumer must hit “agree” to continue with the purchase. It also exists in a much more insidious form, as implied agreement, when you break the seal on a software package. By purchasing digital media in this fashion (realizing that we have little choice), we as consumers are forfeiting the rights granted to us under First Sale. While this may serve us well in the short term, we must be aware of the longer-term implications to the creation of this type of market, “EULAs are more like legal mandates than consumer choices. They are, in effect, changing

⁷ See for description of how this impacts consumer privacy: Biek, A., & Carpenter, M. (2010, November 1). Library Implications of Changes in First Sale Doctrines. Retrieved June 30, 2015, from <http://www.unc.edu/~biek/First-Sale/resources.html>

laws without going through any kind of legislative process.”⁸ And the results are dangerous for consumers and innovators alike. Slowly, the general public is becoming more conscious of the issues that this type of market represents. In the past few years, news articles dealing with situations of inheritance, gifting, and resale highlight the problems that arise from this model.⁹

As this economic model matures, longer term and larger scale issues begin to surface: How do we as a society continue to preserve our cultural heritage with our intellectual content locked, and its life controlled by private industry? What is the role of libraries as markets evolve the delivery of content towards licensing/streaming purchasing models, thus leaving us with fewer physical artifacts? The custodianship of our cultural and historical heritage is slowly moving away from public institutions, towards private industry. These are important questions to ponder as technology continues to evolve, as with the introduction of each new technology or service, we witness the power and speed with which an industry can be turned upside down. The results of these advances will impact much more than how we purchase our media, and reach far into the future. What that future looks like, is up to us.

⁸ Marvin, L. (2014, April 4). Lorenzo Marvin: EULA’s Effect on the First Sale Doctrine. Retrieved June 30, 2015, from <http://lorenzomarvin.blogspot.com/2014/04/eulas-effect-on-first-sale-doctrine.html>

⁹ For recent examples of current issues due to the new ownership paradigm, see the following articles:
Bogle, A. (2014, August 22). Who Owns Your Kindle E-Books After Death? Retrieved June 25, 2015, from http://www.slate.com/blogs/future_tense/2014/08/22/digital_assets_and_death_who_owns_music_video_e_books_after_you_die.html

Carroll, E. (2014, August 1). Why You Won’t Inherit Digital Media. Retrieved June 25, 2015, from <http://www.thedigitalbeyond.com/2014/08/why-you-wont-inherit-digital-media/>

Von Lohmann, F. (2009, April 2). iPods, First Sale, President Obama, and the Queen of England. Retrieved June 25, 2015, from <https://www.eff.org/deeplinks/2009/04/first-sale-president-obama-and-queen-england>

REFERENCES

- Bridy, A. (2011, October 10). The Digital Death of Copyright's First Sale Doctrine. Retrieved June 30, 2015, from <https://freedom-to-tinker.com/blog/abridy/digital-death-copyrights-first-sale-doctrine/>
- Reis, S. (2015). Toward a "Digital Transfer Doctrine"? The First Sale Doctrine in the Digital Era. *Northwestern University Law Review* 109.1, 173-208. Retrieved June 25, 2015, from <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1193&context=nulr>
- Riehl, D. & Kassim, J. (2014). Is Buying Digital Content Just Renting for Life: Contemplating a Digital First-sale Doctrine. *William Mitchell Law Review: Vol. 40: Iss. 2, Article 10*. Retrieved June 23 2015, from <http://open.wmitchell.edu/wmlr/vol40/iss2/10>.
- Silver, J. (2012, July 24). Who's On First? A Look at the First Sale Doctrine and Music. *Future of Music Coalition*. Retrieved June 26 2015, from <https://futureofmusic.org/blog/2012/07/24/whos-first-look-first-sale-doctrine-and-music>.