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## Will the First Sale Doctrine Disappear?

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# copyright corner

## Will the First Sale Doctrine Disappear?

by Anne Klinefelter

The first sale doctrine is one of the most important copyright law principles for libraries. This doctrine, now codified at 17 U.S.C. section 109, allows a lawful owner of a copy of copyrighted material to lend, sell or give away that material. The exact language is "...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." This makes it possible for libraries to lend a copyrighted book it has purchased or received as a gift. In fact, it protects the right of the gift-giver to make that donation and allows the library to sell, rent to users or pass along the material to another library as part of a weeding process.

For years, libraries have relied on this principle that describes the rights of the owner of a publication. Cases from the late nineteenth and twentieth centuries established the first sale doctrine as a limitation on the copyright owner's distribution rights after the initial transfer of a copy. When the copyright law was updated with the 1976 Copyright Act, the first sale doctrine was endorsed by Congress with the inclusion of section 109 of the new code. While other countries around the world passed additional laws that required new payments to the copyright owner each time a library lent a book, the United States never

passed such "public lending right" legislation and held fast to the full meaning of the first sale doctrine.

When software entered the picture and was recognized as a proper subject for copyright, copyright owners focused new energies on avoiding the first sale doctrine's limitations on their control over each copy sold. In 1990 Congress passed the Software Rental Amendments Act in response to software publishers' concerns that sales of their products were diminished by the development of a secondary market that would rent the software to other users. This amendment narrowed first sale rights significantly by forbidding the renting or lending of computer programs, providing an exception only for nonprofit libraries serving a nonprofit need.<sup>1</sup>

Most special libraries probably do not meet the definition for the amendment's exception because of the nonprofit restriction. It may be a small loss, though, because software publishers are seeking to side step the first sale doctrine entirely. Since the doctrine requires the existence of an "owner of a particular copy or phonorecord lawfully made," the publishers avoid the law by avoiding owners. The publishers now say that they do not sell copies; they sell certain uses of the copy. These transactions are achieved by the inclusion of contracts or licenses that outline the terms of the purchase, take it or leave it. Thus the first sale doctrine cannot apply. As a greater percentage of libraries' collections are electronic, the idea of the owner is lost. Libraries may not miss the first sale doctrine if they can negotiate equivalent rights at a reasonable price. The difference, however, is that the federal copyright law

protected libraries and other users of copyrighted information from an unequal balance of power in the print world. In the electronic world, each library may be on its own.

U.C.I.T.A., the Uniform Computer Information Transactions Act, a model law proposed by the National Conference of Commissioners on Uniform Laws, would further validate these take-it-or-leave licenses. If other states join Maryland and Virginia in enacting this law, or if publishers designate Maryland or Virginia as the choice-of-law state in their license, the first sale doctrine further loses its relevance.

This past year, the first sale doctrine was the subject of hearings conducted by the Register of Copyrights and the Assistant Secretary for Communications and Information. These hearings are required by a provision of the Digital Millennium Copyright Act in order to provide to Congress a joint evaluation of the impact of the copyright law and amendments on electronic commerce and technological development. Specifically, the report must evaluate the effects of the DMCA and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of the copyright. Additionally, the report must include any legislative recommendations that the Register and the Assistant Secretary may have.

At the hearing in late November, Jim Neal (Johns Hopkins) and Rodney Peterson (University of Maryland) spoke on behalf of the Special Libraries Association and several other major library associations. Mr. Neal emphasized that several library activities are threatened by the loss of a meaningful first sale doctrine in the digital environment. Mr. Neal said lending and interlibrary loan should not be different for different formats, nor should access to materials exclude users who are located

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## chapter & division news

### SLA's St. Louis Chapter Celebrates the 60th Anniversary of its Founding

The St. Louis Metropolitan Area Chapter of SLA celebrated the 60th anniversary of its founding on March 1, 2001, with a dinner and ceremony at the Missouri Botanical Garden Library. Donna Scheeder, President of the Special Libraries Association and Deputy Director of the Congressional Research Division of the Library of Congress will honor members of the chapter with a visit.

The association thanks the following St. Louis founders who met in 1941 and established plans for a formal organization out of which grew the St. Louis Metropolitan Area Chapter: Ida May Hammond, Ralston Purina Company; Allen G. Ring, Mallinckrodt Chemical Works; Lillian A. Case, Anheuser-Busch Brewery; Frederick C. Ault, St. Louis Municipal Reference Library; Mary Zelle, St. Louis Public Library, Applied Sciences; Dr. Arthur E. Bostwick, Librarian, St. Louis Public Library.

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elsewhere as in distance education. Mr. Neal encouraged libraries' continuing ability to archive materials and receive donations of works to libraries, even when those works are in an electronic format.

Upon questioning by Mary Beth Peters, Register of Copyrights, Mr. Peterson pointed out that his library would not purchase an e-book with restrictive licensing if they could get a print or electronic copy with first sale doctrine protections. Peterson's point underscored the fact that new licensing and anti-circumvention models were already frustrating the distribution of electronic products.

Publishers appear to believe that, unlike transactions in the print environment, a library cannot divest itself of an electronic copy or restrict use to a single user at a time. Much of the testimony covered focused on the desirability of developing a technology that could reproduce the print environment for lending and interlibrary loan of digital materials by destroying or temporarily disabling access to the home copy. The testimony and the written comments supplied as part of the same process are currently available under "What's

New" on the Copyright Office webpage.<sup>2</sup>

The report, due to Congress on May 1, 2001, will be on the web page as well.

Special libraries must continue to support efforts to protect the first sale doctrine. Even if licensing options allow libraries to serve the current information needs of users, the first sale doctrine is still essential for the digital environment. If the first sale doctrine is not available, libraries not only lose the copyright protections for transfer and acquisition of materials, but also lose a bargaining chip at the negotiation table. With consolidation in the publishing industry, market competition will be insufficient to provide a balance of power to replace the balance of rights developed in the copyright law.

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<sup>1</sup> Now codified as a part of 17 U.S.C. § 109 (1994)

<sup>2</sup> <url> <http://www.loc.gov/copyright/>.