Copyright Law

Prof. Madison
University of Pittsburgh School of Law

Topics:

- The Idea of the Infringing Copy
- The Reproduction Right and Section 106(1)
- The Distribution Right and Section 106(3)
- The First Sale Doctrine

Section 106(1) requires proof of reproduction in copies

A "copy" is a material object that embodies the "work of authorship."

"Reproduction" of the "work of authorship" usually implies that there was one copy before, and two copies or more afterward.

What if the second copy is temporary? Or not usable as a substitute for purchasing or acquiring lawful access to a copy?

- When a user opens an application on a laptop or Mac, does that infringe the copyright in the software? Does the machine make a copy?
- Does a user who browses the World Wide Web (who reads tweets, watches Tik Tok videos) infringe copyright owners' right to reproduce their works in "copies"?
- Should downloading Internet content onto the user's hard drive be treated differently from mere browsing, which downloads content into the browser's cache? Is copying involved?
- Do the hosts of Internet archives (Google's cache system; the Internet Archive's Wayback Machine) infringe copyrights in online works under 106(1)?

See MAI Systems, Inc. v. Peak Computers (9th Cir. 1993)

Section 106(1) requires proof of reproduction in copies

Do the hosts of Internet archives (Google's cache system; the Internet Archive's Wayback Machine) infringe copyrights in online works under 106(1)?

The Internet Archive is a real place!

Section 106(1) requires proof of reproduction in copies

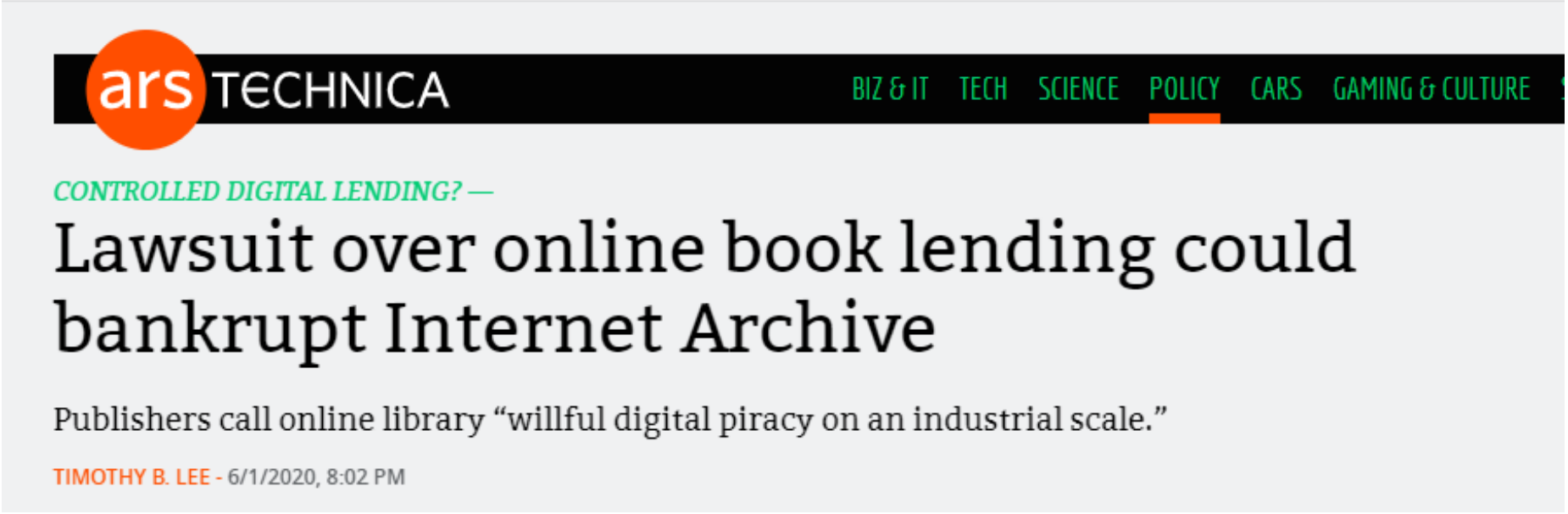
Do the hosts of Internet archives (Google's cache system; the Internet Archive's Wayback Machine) infringe copyrights in online works under 106(1)?

IA's physical archive space
(1 of 3 US warehouses)

A part of IA's digital archive space

Section 106(3) requires proof of distribution of copies

Do the hosts of Internet archives (Google's cache system; the Internet Archive's Wayback Machine) infringe copyrights in online works under 106(3) by making available digital copies of analog books in copyright?



https://arstechnica.com/tech-policy/2020/06/publishers-sue-internet-archive-over-massive-digital-lending-program/

Copies and Exclusive Rights in Section 106:
106(1) = reproduction in copies; 106(3) = distribution in copies

Sec. 106. - Exclusive rights in copyrighted works

. . . the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work ***in copies or phonorecords***; …

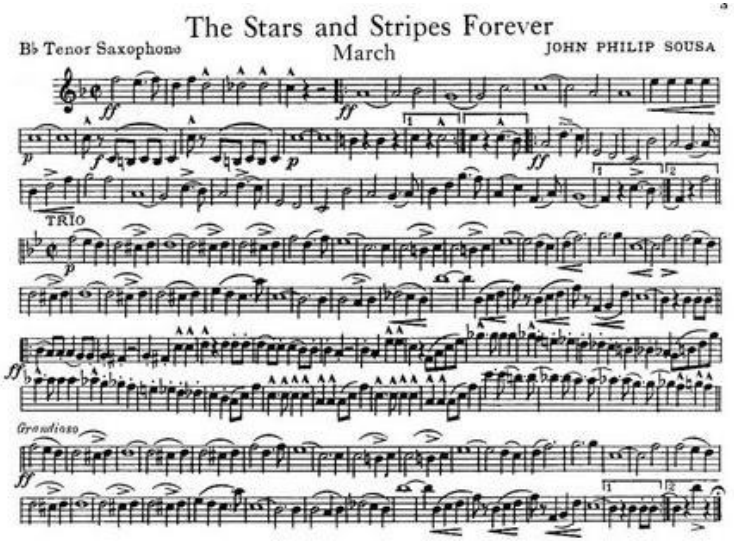
(3) to distribute ***copies or phonorecords*** of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

Sec. 101. - Definitions

"Copies" are ***material objects***, other than phonorecords, ***in which a work is fixed*** by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . . (plus: fixation requires perceptibility for more than "transitory" duration)

"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. . . ."

What is a copy?



White-Smith Music Publishing Co. v. Apollo Co. (U.S. 1908):

The 1909 Act provided copyright owners with the exclusive right "(a) to print, reprint, publish, copy, and vend the copyrighted work."

Here, the Court held, the defendant did not infringe; the piano rolls (not authorized by publishers of the copyright-protected compositions) was not "a written or printed record in intelligible notation."

This case would be decided differently under the 1976 Act; see section 101 ("copies").

Section 106(3) requires distribution of copies of the work

Does "making (copyrighted works) available" for copying/downloading violate Section 106(3)? *Should it?*

Compare

Hotaling v. Church of Jesus Christ of Latter-Day Saints (4th Cir. 1997) (yes)

with

Capitol Records, Inc. v. Thomas (D. Minn. 2008) (no)

Sec. 109. - Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(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.

Economic implications: re-sale markets and renting/lending markets keep prices down, increasing access.

- *Markets for new things can thrive and often do, but prices are lower because of competition from existing copies of those same things.*
- *Markets for lending (books) and renting (cars, houses/apartments).*
- *Markets for buying and selling used things (cars, books, houses).*

Exceptions to the first sale doctrine:

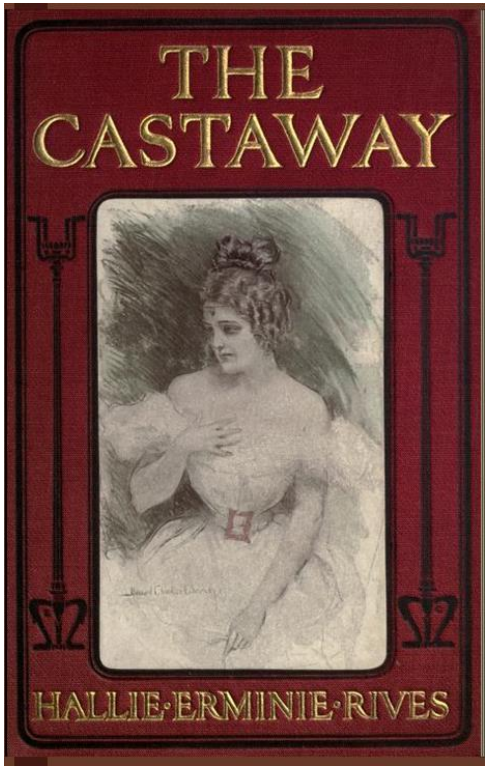
First sale doctrine does not apply to "rental, lease, or lending" for "indirect or direct commercial advantage" of—

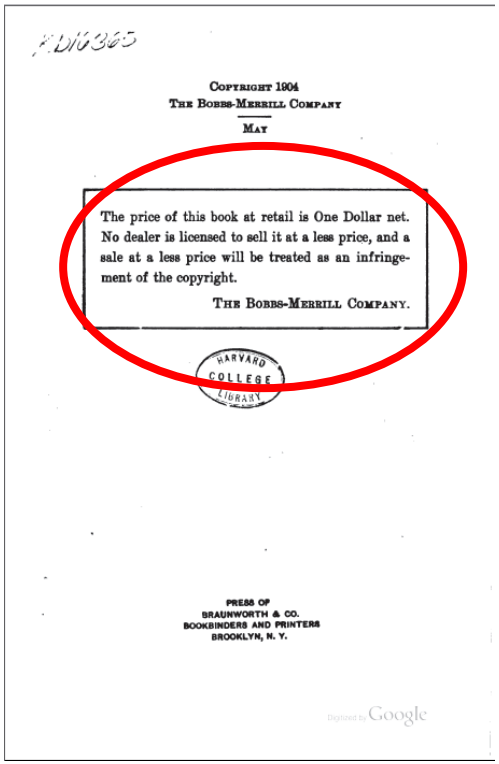
- Phonorecords
- Computer software

17 U.S.C. § 109(b)(1)(A) (2022)

- Does Netflix have to pay royalties when it distributes rental DVDs? (no)
- When it supplies those same films via stream? (yes)
- Can Netflix rent videogames to consumers without paying royalties? Blu-Rays?
- Can public libraries lend out DVDs, Blu-Rays, and videogames without paying royalties?

Section 106(3): First sale and exhaustion





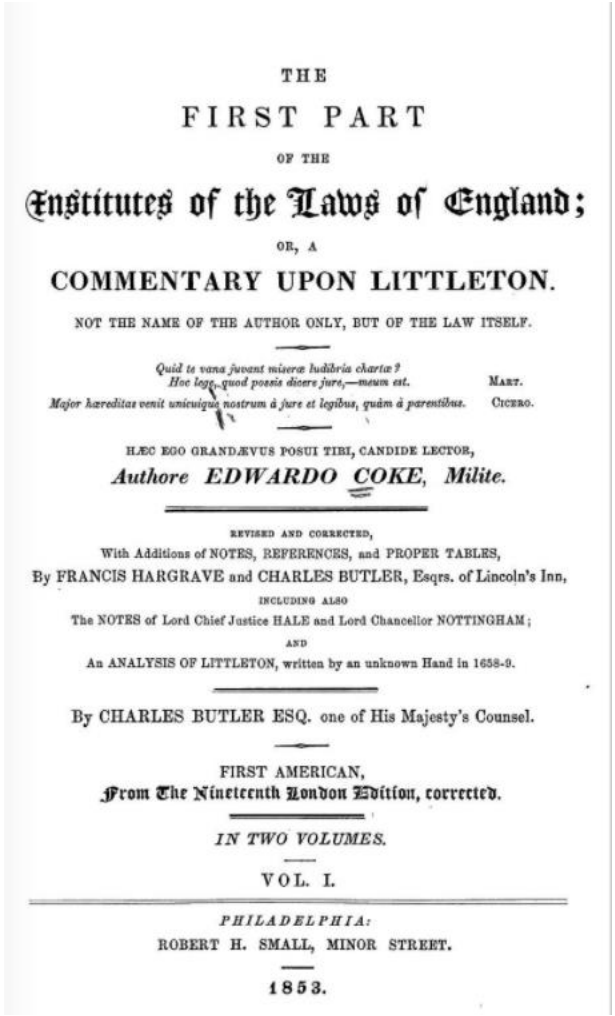
Bobbs-Merrill Co. v. Straus (U.S. 1908):

"[T]o secure the author the right to multiply copies of his work may be said to have been the main purpose of the copyright statutes."

"[O]ne who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it."

"There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book."

Section 106(3): First sale and exhaustion



THE

FIRST PART

OF THE

Institutes of the Laws of England;

OR, A

COMMENTARY UPON LITTLETON.

NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW ITSELF.

Quid te vana juvant miseræ ludibria chartæ?
Hoc legis, quod possis dicere jure,—meum est. MART.
Major hæreditas venit unicuique nostrum à jure et legibus, quàm à parentibus. CICERO.

HÆC EGO GRANDÆVUS POSUI TIBI, CANDIDE LECTOR,
Authore EDWARDO COKE, Milite.

REVISED AND CORRECTED,
With Additions of NOTES, REFERENCES, and PROPER TABLES,
By FRANCIS HARGRAVE and CHARLES BUTLER, Esqrs. of Lincoln's Inn,
INCLUDING ALSO
The NOTES of Lord Chief Justice HALE and Lord Chancellor NOTTINGHAM;
AND
An ANALYSIS OF LITTLETON, written by an unknown Hand in 1658-9.

By CHARLES BUTLER ESQ. one of His Majesty's Counsel.

FIRST AMERICAN,
From The Nineteenth London Edition, corrected.

IN TWO VOLUMES.

VOL. I.

PHILADELPHIA:
ROBERT H. SMALL, MINOR STREET.

1853.

Impression Products, Inc. v. Lexmark Int'l, Inc. (U.S. 2017):

"[I]f an owner restricts the resale or use of an item after selling it, that restriction 'is voide, because ... it is against Trade and Traffique, and bargaining and contracting betweene man and man.'"

1 E. Coke, Institutes of the Laws of England § 360, p. 223 (1628).

(Sir Edward Coke [pronounced 'Cook'], usually referred to as Lord Coke, was Chief Justice of the Common Pleas and later Chief Justice of the King's Bench and (according to Wikipedia!) is considered to be the greatest jurist of the Elizabethan and Jacobean eras. His *Institutes* are regarded as an authoritative summary of the common law.)

Legal rights and control over physical media:

- Conflicting public policies on the surface of the law:

Traditional property rights in material objects/chattels (possession as 9/10 of the law). Section 106(3) (distribution right) v. Section 109(a) (first sale).

- Conflicting public policies underneath the surface:

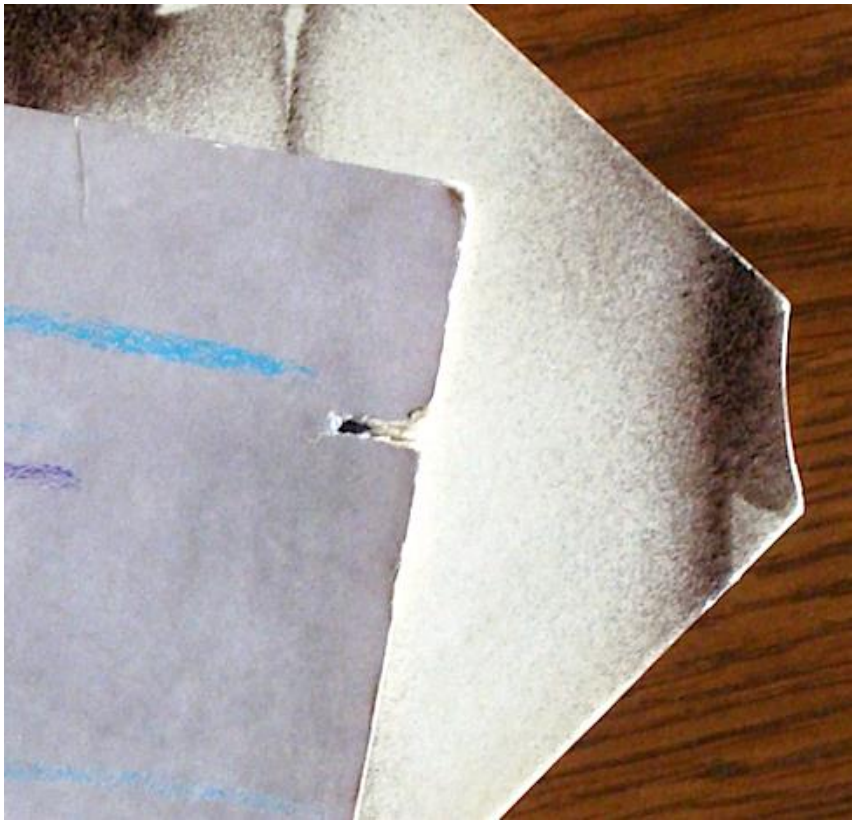
106(3) v 109(a) = balance implicit public policy claims about economics (cost, value, access); autonomy & privacy; and social welfare & progress in general. But: control over and access to *what*?

Is digital different? From a legal doctrine perspective? From a public policy perspective? How? Why?

A brief history of music industry efforts to control access and consumption via:

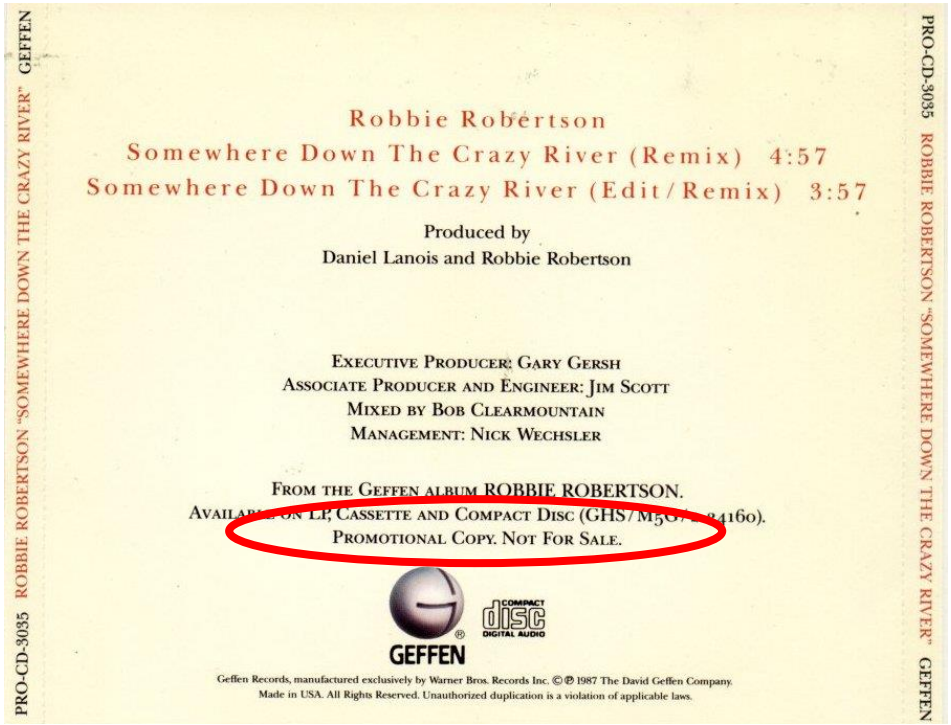
- price differences ("price discrimination")
- timing of distribution ("windows")
- quality differences
- marketing differences, &
- resale restrictions

Is this good for consumers? Good for the music industry? Does it promote "progress"? Economic efficiency?

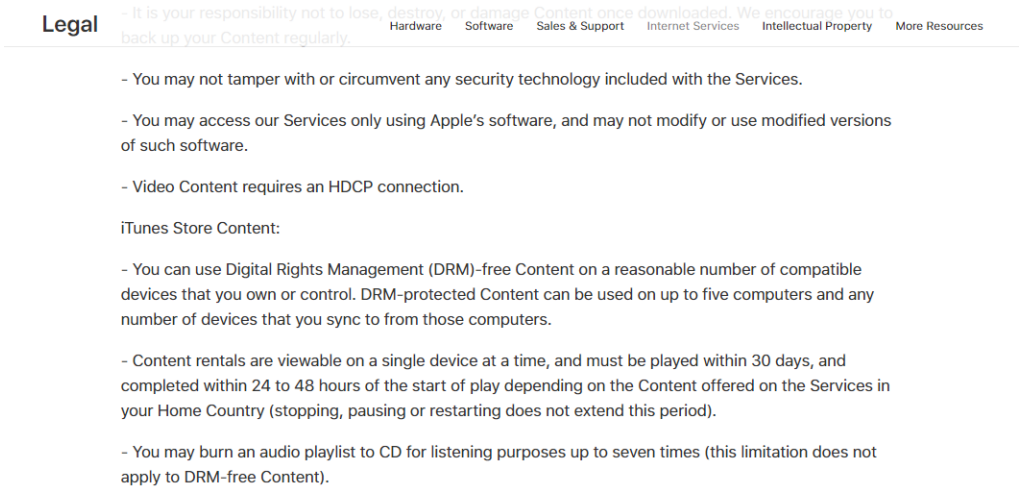


1952: RCA

1987: Geffen Records



2018: Apple



Legal

Hardware Software Sales & Support Internet Services Intellectual Property More Resources

- It is your responsibility not to lose, destroy, or damage Content once downloaded. We encourage you to back up your Content regularly.

- You may not tamper with or circumvent any security technology included with the Services.

- You may access our Services only using Apple's software, and may not modify or use modified versions of such software.

- Video Content requires an HDCP connection.

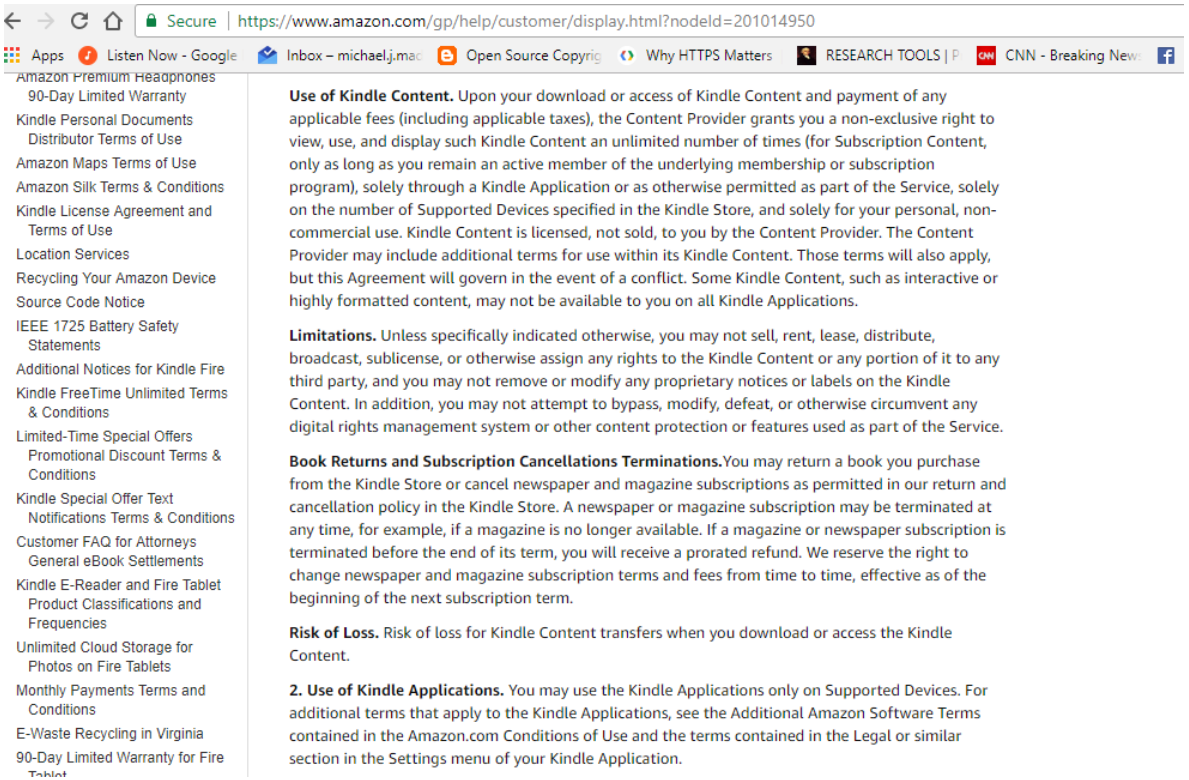
iTunes Store Content:

- You can use Digital Rights Management (DRM)-free Content on a reasonable number of compatible devices that you own or control. DRM-protected Content can be used on up to five computers and any number of devices that you sync to from those computers.

- Content rentals are viewable on a single device at a time, and must be played within 30 days, and completed within 24 to 48 hours of the start of play depending on the Content offered on the Services in your Home Country (stopping, pausing or restarting does not extend this period).

- You may burn an audio playlist to CD for listening purposes up to seven times (this limitation does not apply to DRM-free Content).

2018: Amazon



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Location Services
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Source Code Notice
IEEE 1725 Battery Safety Statements
Additional Notices for Kindle Fire
Kindle FreeTime Unlimited Terms & Conditions
Limited-Time Special Offers Promotional Discount Terms & Conditions
Kindle Special Offer Text Notifications Terms & Conditions
Customer FAQ for Attorneys General eBook Settlements
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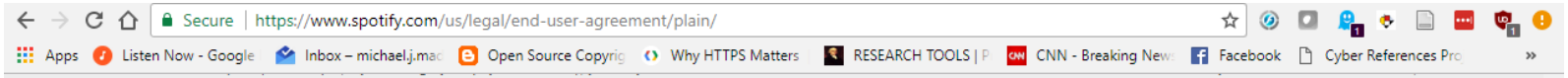

you will no longer be charged for the Service.

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From time to time, we or others on our behalf may offer trials of Paid Subscriptions for a specified period without payment or at a reduced rate (a "Trial"). Spotify reserves the right, in its absolute discretion, to determine your eligibility for a Trial, and, subject to applicable laws, to withdraw or to modify a Trial at any time without prior notice and with no liability, to the greatest extent permitted under the law.

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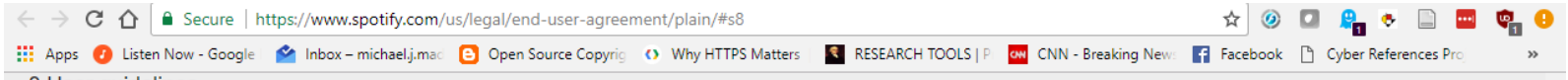

8 User guidelines

Spotify respects intellectual property rights and expects you to do the same. We've established a few ground rules for you to follow when using the Service, to make sure Spotify stays enjoyable for everyone. Please follow these rules and encourage other users to do the same.

The following is not permitted for any reason whatsoever:

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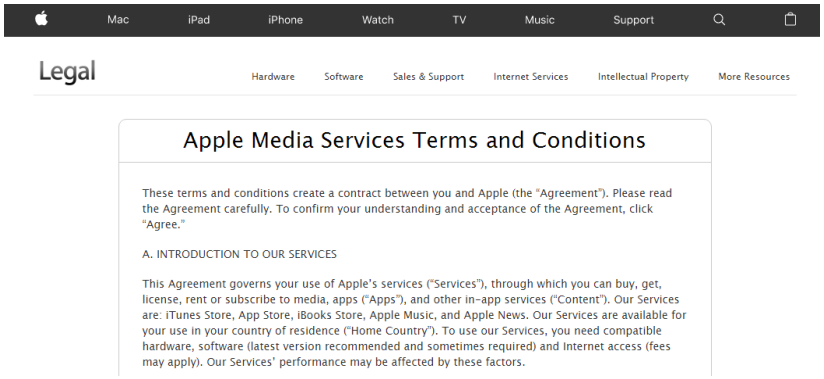
- selling a user account or playlist, or otherwise accepting any compensation, financial or otherwise, to influence the name of an account or playlist or the content included on an account or playlist.



INTELLECTUAL PROPERTY

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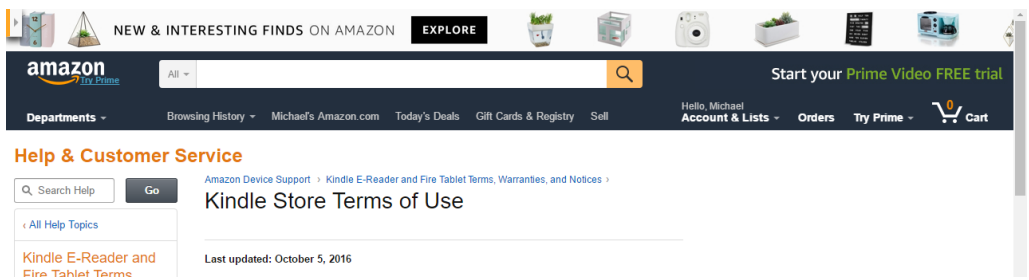

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March 14, 2011

Publisher Limits Shelf Life for Library E-Books

By JULIE BOSMAN

Imagine the perfect library book. Its pages don't tear. Its spine is unbreakable. It can be checked out from home. And it can never get lost.

The value of this magically convenient library book — otherwise known as an e-book — is the subject of a fresh and furious debate in the publishing world. For years, public libraries building their e-book collections have typically done so with the agreement from publishers that once a library buys an e-book, it can lend it out, one reader at a tin an unlimited number of times.

Last week, that agreement was upended by HarperCollins Publishers when it began enforcing new restrictions on its e-books, requiring that books be checked out only 26 t before they expire. Assuming a two-week checkout period, that is long enough for a book to last at least one year.

What could have been a simple, barely noticed change in policy has galvanized librarians across the country, many of whom called the new rule unfair and vowed to boycott books from HarperCollins, the publisher of Doris Lessing, Sarah Palin and Joyce Carol Oates.

"People just felt gobsmacked," said Anne Silvers Lee, the chief of the materials management division of the Free Library of Philadelphia, which has temporarily stopped buy HarperCollins e-books. "We want e-books in our collections, our customers are telling us they want e-books, so I want to be able to get e-books from all the publishers. I als need to do it in a way that is not going to be exorbitantly expensive."

But some librarians said the change, however unwelcome, had ignited a public conversation about e-books in libraries that was long overdue. While librarians are pushing fo more e-books to satisfy demand from patrons, publishers, with an eye to their bottom lines, are reconsidering how much the access to their e-books should be worth.

"People are agitated for very good reasons," said Roberta Stevens, the president of the American Library Association. "Library budgets are, at best, stagnant. E-book usage been surging. And the other part of it is that there is grave concern that this model would be used by other publishers."

Even in the retail marketplace, the question of how much an e-book can cost is far from settled. Publishers resisted the standard $9.99 price that Amazon once set on many books, and last spring, several major publishers moved to a model that allows them set their own prices.

This month, Random House, the lone holdout among the six biggest trade publishers, finally joined in switching to the agency model. Now many newly released books are pr from $12.99 to $14.99, while discounted titles are regularly as low as $2.99.

Section 106(3): First sale and exhaustion

Does the first sale doctrine focus too much on the economics of possession of tangible copies, and too little on the economics of access to copyrighted content ("works of authorship")?

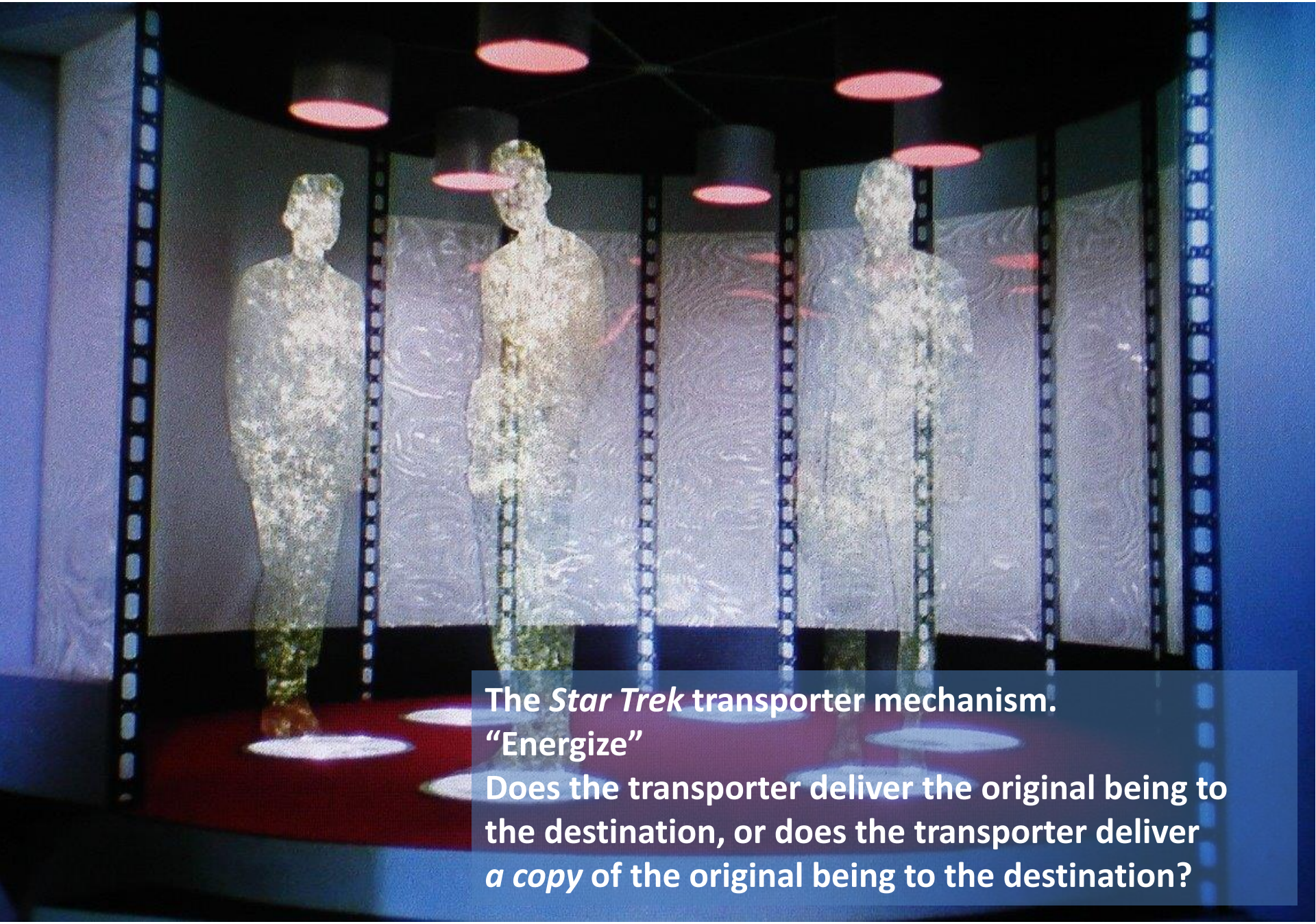
Does § 109(a) provide a defense to claims of infringement by digital reproduction under § 106(1)? [a doctrinal question]

Should there be a doctrine of digital first sale (so that purchasers of digital "things" could sell them just as they can sell their analog "things") (but creating markets for "perfect" "used" copies that would compete with new ones)? [a public policy question]

See Capitol Records, LLC v. ReDigi Inc. (2d Cir. 2018) (service that facilitates re-sale of music tracks originally purchased from the iTunes Music Store – via the "Atomic Transaction" feature of a software-based "marketplace" distributed by ReDigi - [infringes] [does not infringe] [distribution rights] [reproduction rights] in individual copyrighted sound recordings.

The district court opinion notes:

"At oral argument, the device was likened to the Star Trek transporter – 'Beam me up, Scotty' – and Willy Wonka's teleportation device, Wonkavision."


The *Star Trek* transporter mechanism.
"Energize"
Does the transporter deliver the original being to the destination, or does the transporter deliver *a copy* of the original being to the destination?


THE END
A Universal Picture