

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: The exclusive rights of the copyright owner

Subject to sections 107 through 122 [recall: Section 107 is fair use], 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;

(2) to prepare **derivative works** based upon the copyrighted work;

(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;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform** the copyrighted work **publicly**;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display** the copyrighted work **publicly**; and

(6) in the case of **sound recordings**, to **perform the copyrighted work publicly by means of a digital audio transmission**.

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. . . ."

Section 106(1) and Section 106(3) both refer to **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. “Distribution” usually implies that some (person) comes into possession of a copy.

What if the second copy is temporary (less than a period of transitory duration)? 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 TikTok 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) and Section 106(3) both refer to **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) and/or 106(3)?



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?



BIZ & IT TECH SCIENCE **POLICY** CARS GAMING & CULTURE

CONTROLLED DIGITAL LENDING? —

Lawsuit over online book lending could bankrupt Internet Archive

Publishers call online library “willful digital piracy on an industrial scale.”

TIMOTHY B. LEE - 6/1/2020, 8:02 PM

<https://arstechnica.com/tech-policy/2023/03/publishers-beat-internet-archive-as-judge-rules-e-book-lending-violates-copyright/>

Hachette Book Group, Inc. v. Internet Archive (S.D.N.Y. March 24, 2023)

What is a copy?: history



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”).

Infringement under Section 106(3) requires proving 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?

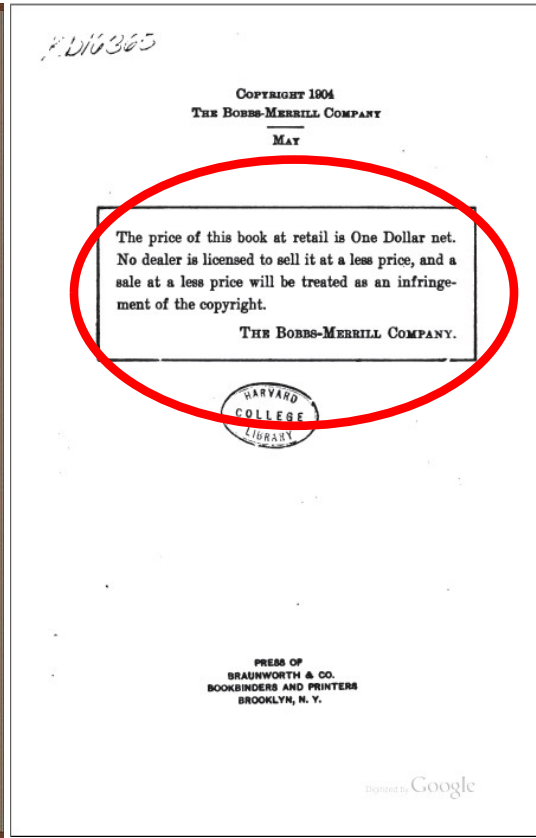
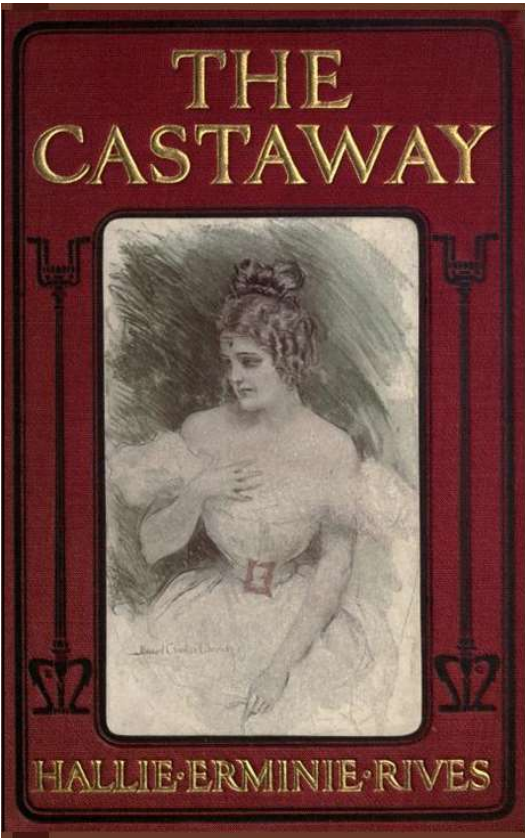
Section 106(3): First sale and exhaustion

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

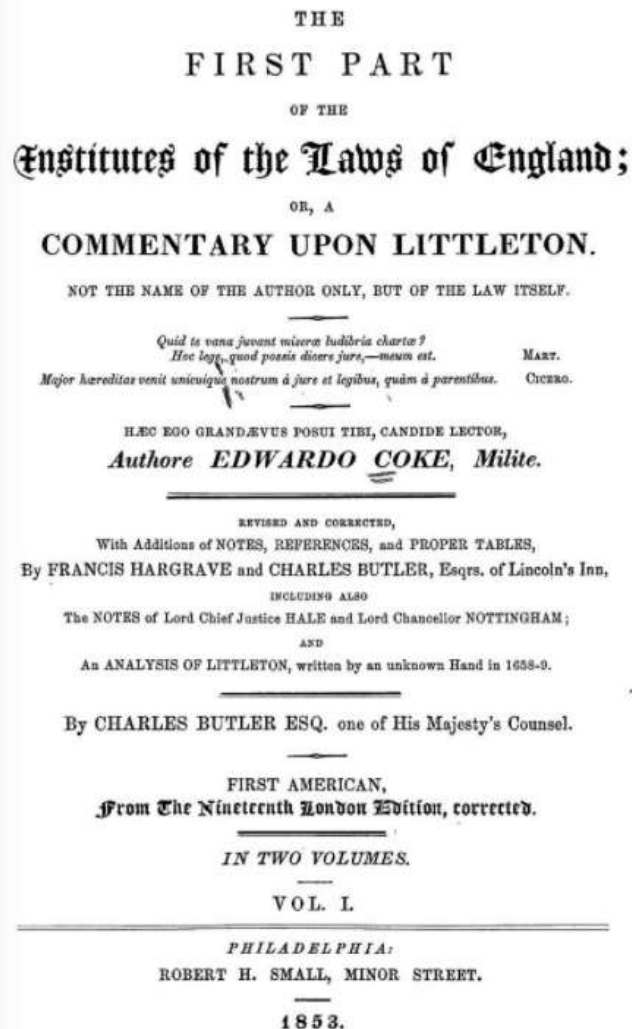
“[T]o secure the author the right to multiply copies of his work may be said to have been the main purpose of the copyright statutes.”

“[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



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 void, because ... it is against Trade and Traffique, and bargaining and contracting between 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?

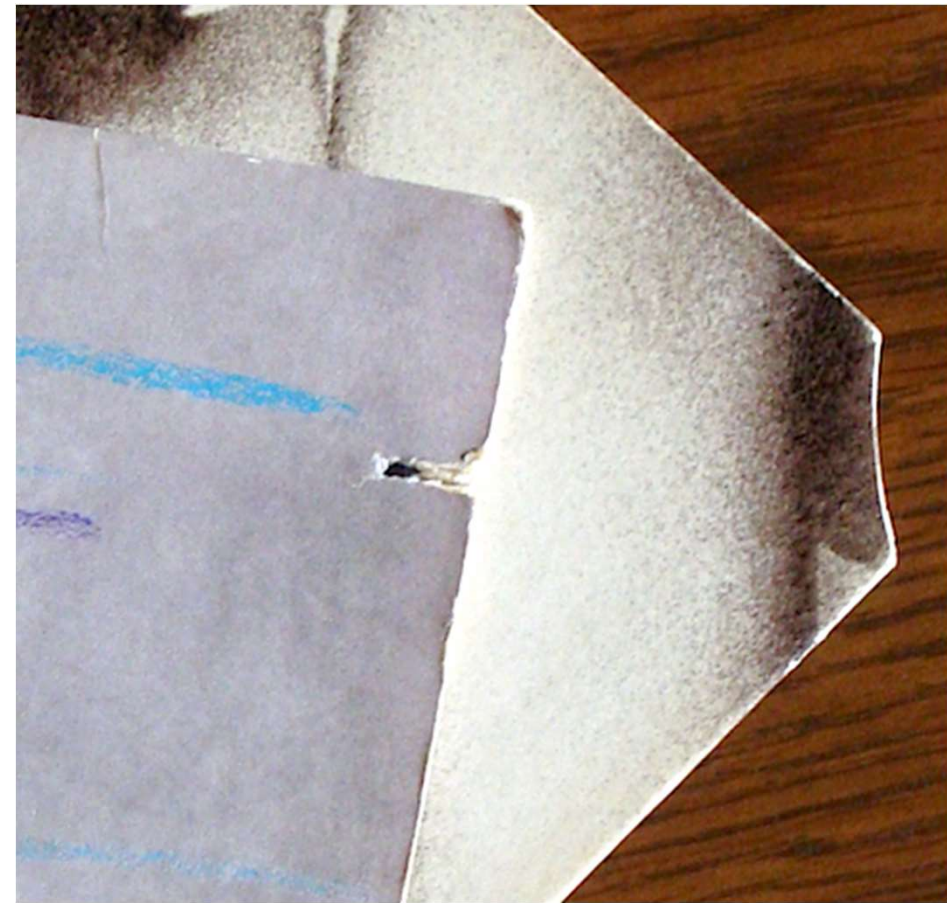
Does it promote “progress”? Economic efficiency?

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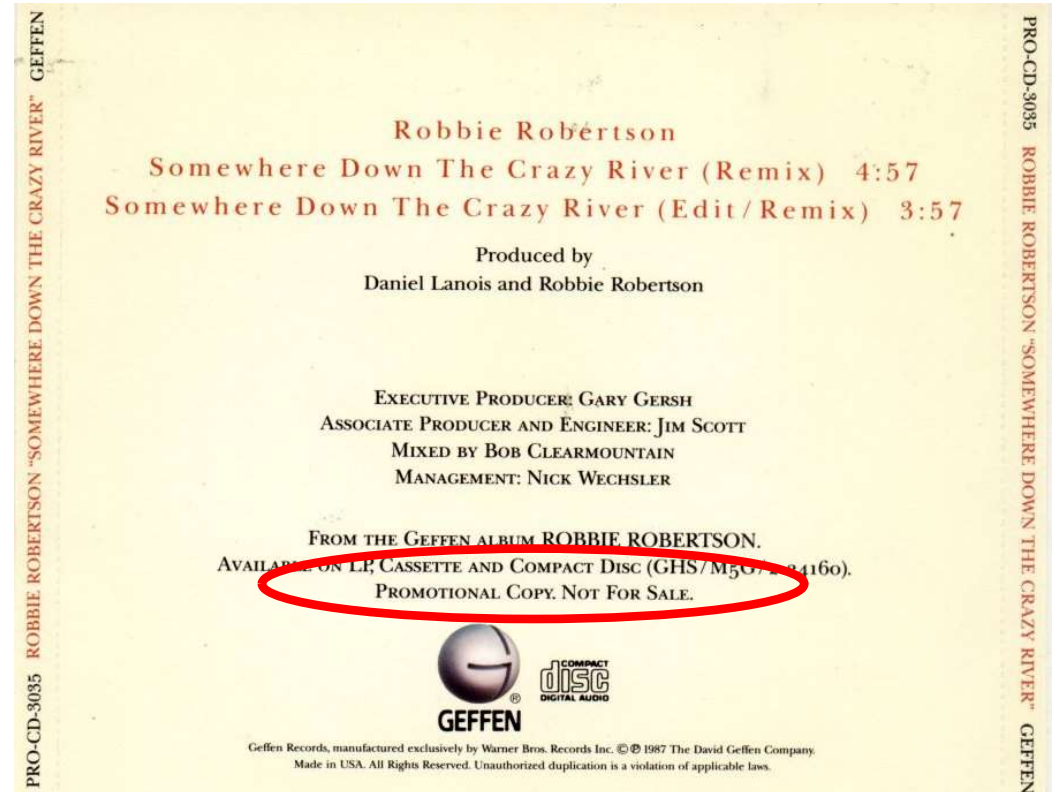
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1952: RCA



1987: Geffen Records



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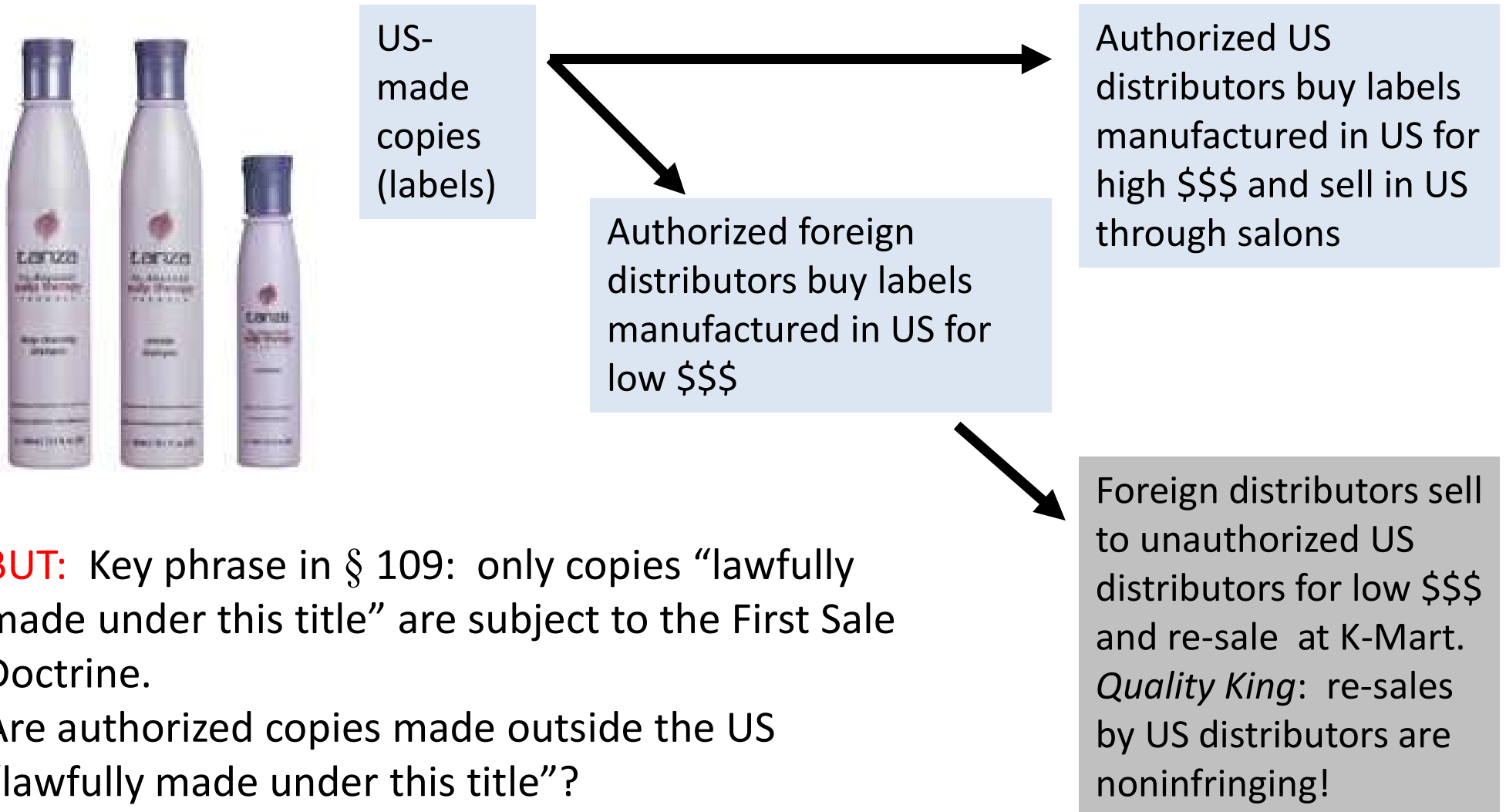
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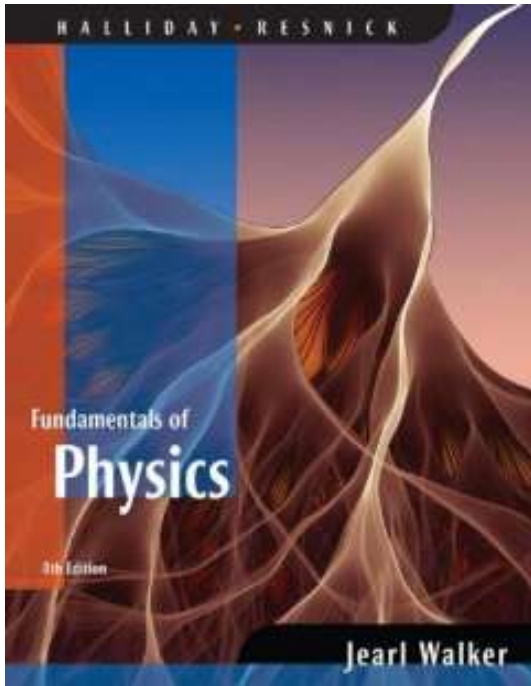
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Section 106(3): First sale and exhaustion nationally and internationally

The Importation Right: Section 602 (no unauthorized imports) is a violation of Section 106(3); Section 106(3) is subject to Section 109(a) (first sale). See **Quality King Distributors, Inc. v. L'anza Research International** (U.S. 1998).



Section 106(3): First sale and exhaustion nationally and internationally



Thai-made copies

("This book is authorized for sale in Europe, Asia, Africa, and the Middle East only and may be not exported out of these territories.")

Authorized purchase by Thai buyers

Shipment to the US

Re-sale in the U.S., for low \$\$\$ relative to US-made copies of the same work

Quality King dealt with "round trip" gray-market imports. What about importing (non-piratical) copies made outside the US?

See **Kirtsaeng v. John Wiley & Sons (U.S. 2013)**:

Those copies are "lawfully made under this title," because they were produced with the permission of the US copyright owner, so the first sale doctrine applies to someone who bought those copies in Thailand, where they were made, and re-sold them in the US.

(Dissent: "under this title" means "made in the US")

Section 106(3): First sale and exhaustion

Does the first sale doctrine focus too much on the economics of sale and 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]
- **Would “digital first sale” undermine the power of copyright owners to structure markets for copies via price discrimination (charge different prices for different versions, like airplane seats) or otherwise (terms of licenses to different users)?**

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.

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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 time, 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 times 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 buying 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 also 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 for 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 has 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 e-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 priced from \$12.99 to \$14.99, while discounted titles are regularly as low as \$2.99.

The screenshot shows the Apple website's legal section. At the top, there are navigation links for various Apple products: Mac, iPad, iPhone, Watch, TV, Music, and Support. Below this is the 'Legal' header with sub-links for Hardware, Software, Sales & Support, Internet Services, Intellectual Property, and More Resources. The main content area is titled 'Apple Media Services Terms and Conditions'. It begins with a paragraph stating that these terms create a contract and asks the user to read them carefully. Below this is a section titled 'A. INTRODUCTION TO OUR SERVICES', which explains that the agreement governs the use of Apple's services (iTunes Store, App Store, etc.) and lists the terms of use, including that services are available in the user's home country and require compatible hardware and internet access.

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[<http://www.apple.com/legal/internet-services/itunes/us/terms.html>]

The screenshot shows the Amazon website's Kindle Store Terms of Use page. At the top, there are navigation links for 'NEW & INTERESTING FINDS ON AMAZON' and 'EXPLORE'. Below this is the Amazon logo and a search bar. The page is titled 'Kindle Store Terms of Use' and includes a search bar, a 'Go' button, and a 'Help & Customer Service' section. The main content area is titled 'Kindle Store Terms of Use' and includes a search bar, a 'Go' button, and a 'Help & Customer Service' section. The page is updated as of October 5, 2016.

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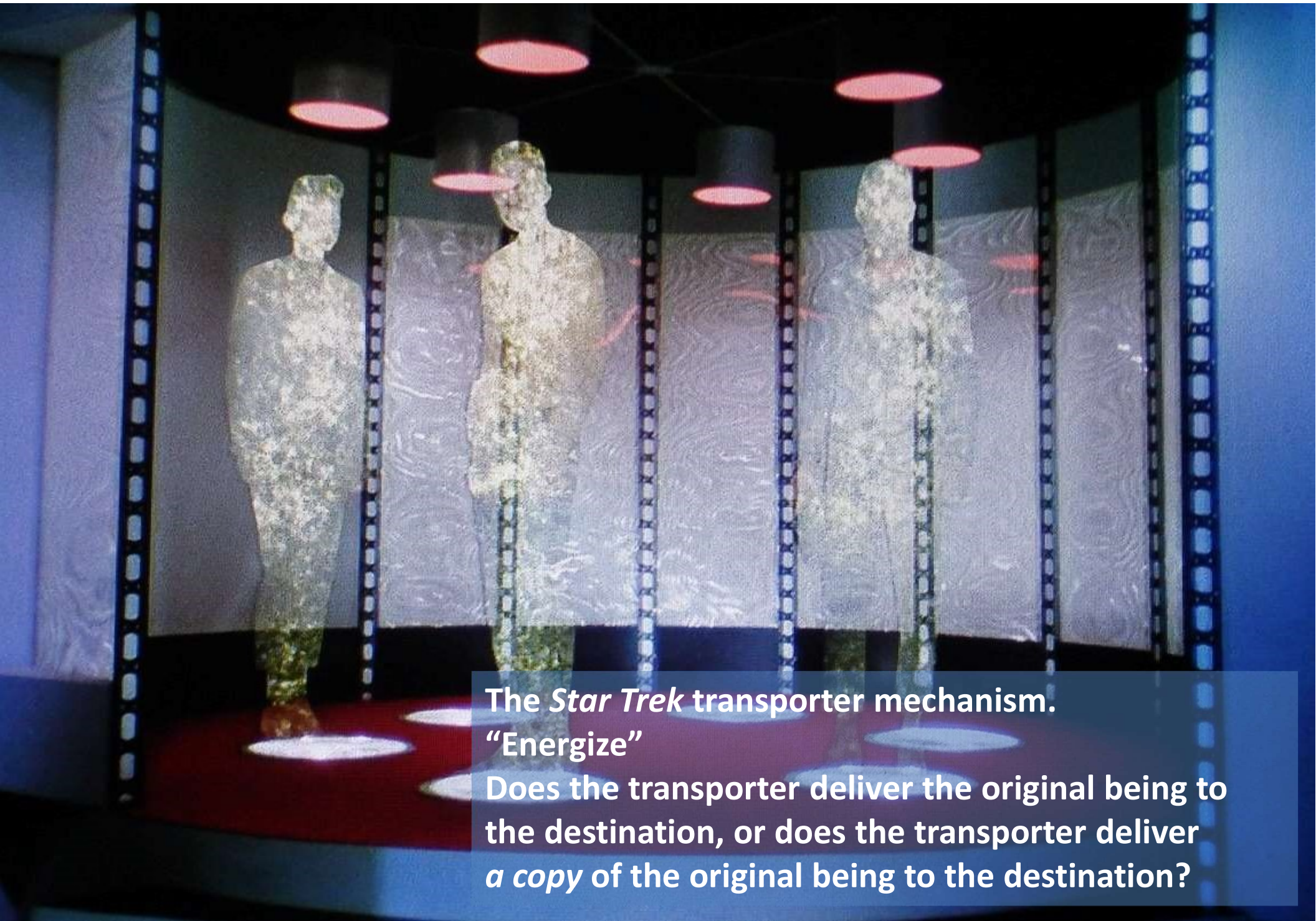
"Kindle Content" means digitized content obtained through the Kindle Store, such as books, newspapers, magazines, and other content.

[<https://www.amazon.com/gp/help/customer/display.html?nodeId=201014950>]

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?

A black and white photograph of a landscape. The sky is filled with large, dramatic clouds. In the foreground, there are dark silhouettes of what appear to be people or structures on a hillside. The overall mood is somber and atmospheric.

THE END

A Universal Picture