



copyright alliance

POSITION PAPER

First Sale in the Digital Environment

Copyright protects works of authorship that are embodied in a material object, referred to in the Copyright Act as a “copy.” The first sale doctrine, codified in 17 USC § 109, states that the *owner* of a *particular* copy of a work can sell or otherwise dispose of *that particular copy*.

The First Sale Doctrine applies only to distribution, not reproduction

The first sale doctrine does not apply to the transmission of digital works over the internet since it involves making a new copy. This is not a purely formalistic approach to copyright law—it carries strong policy prescriptions. A “used” digital copy is indistinguishable from a new one because digital copies are perfect, and they do not degrade like physical goods. In addition, the need to transport physical copies reduces the impact of resales on a copyright owner’s market while digital copies can be transmitted instantaneously anywhere with minimal costs. A secondhand market for “used” digital goods would thus compete directly with “new” works.

The ability to license has led to many benefits in the digital economy

Innovation in the digital economy is increasingly being driven by a meaningful ability to license creative works. Consumers benefit greatly from licensing, which has emerged as the principal mode of distribution for a wide array of creative works. Licensing creates a dynamic marketplace that affords creators and distributors the flexibility to give consumers a range of choices — accessing the creative works they want, when they want, at a variety of price points.

DVDs, CDs, and paperbacks remain an option, but customers today have exponentially more options than they did in the analog world. Rather than all fitting into a rigid sales model, consumers have the choice to either buy or license a physical copy of a work or obtain access on more flexible terms. Licensing allows the management of relationships among copyright owners, distributors, and consumers on a granular level, permitting a degree of customization not possible when a buyer-seller relationship exists is the only option.

Critically, the first sale doctrine does not apply when a work is licensed. It applies to owners, not licensees. The first sale doctrine should not be used to erode the sales/license distinction; availability of a greater selection of expressive works in the marketplace is not merely an abstract societal benefit, it is a principal goal of copyright law.