

When is a Sale Not a Sale? Selling vs. Licensing Digital Content

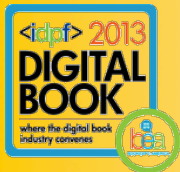
May 30, 2013

Bill Rosenblatt

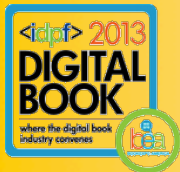
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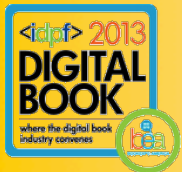
What happens when you buy a book?



You can...

- ✓ Read it
- ✓ Lend it
- ✓ Sell it
- ✓ Give it away
- ✓ Use as doorstop

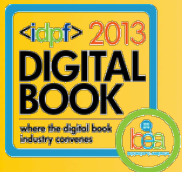
What happens when you buy an ebook?



You can...

- ✓ Read it
- ~ Lend it
- ✗ Sell it
- ✗ Give it away
- ✓ Sync devices
- ✗ Use as doorstop

What happens when you buy a DRM-free ebook?



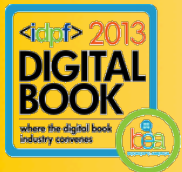
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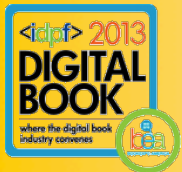
You may...*

- ✓ Read it
- ~ Lend it
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- ✓ Sync devices
- ✗ Use as doorstop

*In most cases.



Why?



Sale vs. License

Physical Products

- Sale
- Copyright bundle of rights
- Store is a seller
- User is a buyer
- Publisher and seller cannot restrict rights

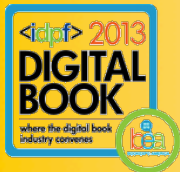
Digital Downloads

- License (EULA)
- Store's Terms of Use
- Store is a licensor
- User is a licensee
- Publisher and seller can set whatever rights they want

The First Sale Doctrine

(17 USC § 109)*

- “...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.”



*Known outside the US as “copyright exhaustion”



Thanks to First Sale...



Digital First Sale

- ✓ Read it
- ✓ Lend it
- ✓ Sell it
- ✓ Give it away
- Ⓢ Sync devices
- ✗ Use as doorstop

Two possibilities...

- **Digital first sale is legal**
Anyone can resell anything
without permission
- **Digital first sale is not legal**
Reseller must get permission
from copyright holder

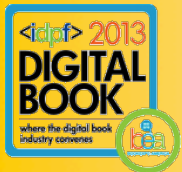
Implications: Retail

- Anyone can resell their files
- Marketplaces will appear, including eBay
- Big e-retailers will add resale
- Digital resale will be a must-have
- Price will be the only differentiator
- Publishers could be disintermediated

Implications: Libraries

- Libraries can lend ebooks freely
- Publishers can't forbid or restrict
- Copies last forever, don't wear out
- No more confusion & complexity

Legal Developments



Recent Litigation

- *Vernor v. Autodesk* (9th circuit, 2010)
 - Attempt to resell expensive CAD software on eBay
 - Holding: If EULA is more restrictive than copyright, its terms prevail
- *UsedSoft v. Oracle* (EU Court of Justice, 2012)
 - Reseller of enterprise software
 - Holding: Copyright exhaustion applies to downloads as well as CDs/ DVDs (for software, in Europe)
- *Capitol Records v. ReDigi* (SDNY, 2013, on appeal)
 - Marketplace for reselling downloaded MP3 music
 - Holding: copy created for resale purposes is infringing; no holding on license vs. sale

Amazon's Terms of Use Kindle ebooks

- “... the Content Provider grants you a non-exclusive right to view, use, and display such Kindle Content an unlimited number of times, solely on the Kindle or a Reading Application ... solely for your personal, non-commercial use. **Kindle Content is licensed, not sold, to you by the Content Provider.**”

Copyright Office 2001 Report

- Copyright Office: copyright advisor to Congress
- Asked to provide opinion on Digital First Sale
- Can't trust users to take step of deleting files
- Requires universal “forward and delete” scheme
- Such mechanism not practical
- ...so therefore let's leave well enough alone

Technical Implications

- Forward-and-Delete mechanism
- Would have to delete all copies: backups, synced, cloud, etc.
- IEEE P1817 standard for “Consumer Ownable Digital Personal Property” – a DRM-like scheme

Digital Resale Businesses

- Lexink
 - UNLODER forward-and-delete technology
- ReDigi
 - Resell music MP3s
- ReKiosk
 - Resell content where owner has given permission
- Amazon
 - Patent on “Secondary Market for Digital Objects”
- Past attempts: Weed, Peer Impact, File-Cash, Bitmunk, Bopaboo
 - All music, some using DRM or watermarking

Publishers vs. Libraries

- Service providers (OverDrive, 3M, Baker & Taylor) license ebooks on libraries' behalf
- Confusing tangle of licensing restrictions
- War of words between ALA and publishers
- Libraries claim to help sales through discovery
- Publishers skeptical, despite recent OverDrive study
- Libraries probably doomed unless law changes

Thoughts for the Future

- As reading goes digital, discrepancies in rights between print and ebooks become more glaring
- Disruptive innovations will leverage/circumvent gaps
- Digital resale inevitable either way as experiments are done (think eMusic for DRM-free MP3s)
- Yet as content goes to the cloud, will “ownership” and “resale” remain relevant?

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