

Exceptions to the First-Sale Doctrine in in Copyright Law

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17 U.S.C. § 109

109(a): “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord, lawfully made under this title, . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”

Record Rental Amendment (1984)

109(b)(1): “unless authorized by the owners of copyright in the sound recording and in the musical works embodied therein, the owner of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by rental, lease, or lending”

Computer Amendments Act (1990)

109(b)(1)(A): “unless authorized by . . . the owner of copyright in a computer program . . . [no] person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program) may, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that . . . computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending . . .”

Computer Amendments Act (1990)

109(b)(1)(B): “This subsection does not apply to

(i) a computer program which is embodied in a machine or product which cannot be copied during the ordinary operation or use of the machine or product; or

(ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.

TRIPS Agreement (1994)

Article 11: “In respect of at least computer programs and cinematographic works, a Member shall provide authors . . . the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works.

A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction ...

In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.”

TRIPS Agreement (1994)

Article 14: “The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law.

If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.”

WIPO Copyright Treaty (1996)

Article 11: “(1) Authors of

(i) computer programs;

(ii) cinematographic works; and

(iii) works embodied in phonograms, as determined in the national law of Contracting Parties,

shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

(2) Paragraph (1) shall not apply

(i) in the case of computer programs, where the program itself is not the essential object of the rental; and

(ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.”

EU Rental Right Directive (1992)

Article 1: “1. Member States shall provide . . . a right to authorise or prohibit the rental and lending of originals and copies of copyright works.

2. The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works ”

Article 6: “1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.”

Public Lending Rights

United Kingdom (1979): “. . . there shall be conferred on authors a right, known as ‘public lending right,’ to receive from time to time out of a Central Fund payments in respect of such of their books as are lent out to the public by local library authorities in the United Kingdom.”

Germany Copyright Act, Art. 27(2): Appropriate remuneration shall be paid to the author for the lending of originals or copies of a work . . . if the originals or copies are lent by an institution which is open to the public (library, collection of sound or visual recordings or other originals or copies of a work).”

Australia, Canada, Israel, New Zealand; 24 in Europe

Berne Convention (1971)

Droit de Suite (Resale Royalty Right)

Article 14ter: “(1) The author . . . shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.”

EU Resale Right Directive (2001)

Article 1: “1. Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.”

Article 3: May provide a minimum sale price of < 3000 €

Article 4: Royalty is 4% up to 50,000 €; 3 % of 50,000 to 200,000 €; 1% of 200,000 to 350,000 €; .5 % of 350,000 to 500,000 €; .25% above 500,000 €; max. of 12,500 €

Calif. Civil Code § 986 (1982)

“(a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller . . . shall pay to the artist . . . 5 percent of the amount of such sale. The right of the artist . . . may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale.”

(a)(7): [If artist died after January 1, 1983, rights apply to artist’s heirs until 20 years after death.]

(b) [Does not apply to resale for less than \$1000; or to resale for less than the purchase price paid by seller.]

Visual Artists Rights Act (1990)

17 U.S.C. § 106A(a): “Subject to [fair use] and independent of the exclusive rights provided [in § 106], the author of a work of visual art —

(3): . . . shall have the right —

- (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.