

First Sale or Last Leg? The Future of Interlibrary Loan

Foreshadowing Question, “What might you be doing in your professional life 5 years from now that you’re not thinking about at all right now?”

Some years ago as I finished a presentation on computer security I said, “Typewriters and abacuses don't get viruses, it's important to consider that.” What I'd like to ask you to consider is “Libraries have always had collections, it's important to consider that.”

Why I'd like to ask you to contemplate something that may seem painfully obvious is found in these lines by Sven Birkerts, “I often think about reading and possession: reading as a way of inviting myself to be overtaken, commanded by another person’s sense of the world and reading as something one has, holds, and keeps. As ownership.”¹ Ownership as distinct from consumption, ownership defined by the deliberate construction of a memory. Now, who’s for a paradox? If we accept Birkerts definition as even semi-valid for reading, can we accept it for being even semi-valid for what a library is and does—an ownership that is meant to create a signature whole out of other people’s sense of the world?

Okay time for another paradox—I love paradoxes as much as I love abacuses and typewriters. The paradox of libraries is found in the words of Alberto Manguel “as a public space the Library of Alexandria was a paradox, a building set aside for an essentially private craft (reading) now to take place communally.”² This speaks to a concept of collection, but it also, in gathering to read, the dissemination of information that is libraries. Now, evidenced by the many engaging and creative presentations we've participated in here at the conference, digital dissemination makes communal reading global reading, and given the recent Google Books ruling and given the Open Access model of scholarship does a collection remain an intrinsic part of a library? And if not, does Interlibrary Loan have a future?

Yes, it does. Or more precisely, IT NEEDS TO. The reason for this is that Interlibrary Loan is the living breathing manifestation of the Doctrine of First Sale, and the Doctrine of First Sale is the instrument for protecting and realizing communal reading. While we librarians are all about sharing, to share something you need to own something, we share what we own, and therein is possession's paradox. A reader of libraries needs the Doctrine of First Sale to hold onto, to make decisions, therein is the real paradox of libraries—to share is to exert. (Robert Darnton’s story about the librarian who responds to the question “What is it like to be a librarian?” by saying “It’s all about money and power.”)

So, what I'd like to do to make this case is establish what First Sale is and why it's important, and then look at both the Google Books settlement and Open Access models in relation to Interlibrary Loan, and

¹ Birkerts, Sven. “Children’s Crusade.” *Reading Life: Books for the Ages*. St. Paul: Graywolf, 2007. Print. (28)

² Manguel, Alberto. *The Library At Night*. New Haven: Yale University Press, 2006. Print. (31)

then make a case for how I think Interlibrary Loan needs to be an instrument in the assertion of/defense of First Sale, and in that address the question of the viability of a library collection as a concept...

In an unpublished poem of mine I wrote “Eve drives a Chevy, Satan drives a Studebaker.” and I invoke this line that hasn't previously seen the light of day because when someone such as myself starts to talk about copyright law it becomes a progression of complexity for which I don't have the intellectual spare parts. What I hope I can do is work toward this thesis of why First Sale matters Librarian to Librarian and I'll start by drawing from the marvelous publication of the American Library Association *Complete Copyright: An Everyday Guide for Librarians*. This is going to take me a minute, but let's get this on the table:

...First Sale specifically addresses the transfer of a work following that work's *initial sale*. This distinction is important because it embodies the balance that must be found in effective copyright law. Copyright law, as originally intended, gives authors the exclusive right to publish their works and sell them to the public. Copyright law allows copyright holders to control the primary market, that is, the market to which the work is first sold. Once a third party holds the work, sale of that work to another entity constitutes a secondary market.³

Initial Sale becomes the problematic key in the Studebaker, because what if initial sale never starts or stops? Jessica Litman turned this theoretical thinking about the software you and I buy, and outlined the following problem:

If we no longer insist that people who own legitimate copies of works be permitted to do what they please with them, this presents an opportunity to attack a huge realm of unauthorized but not illegal use...[t]echnological fences, such as passwords or encryption, offer some measure of control, and enhance opportunities to extract value from the use of the work.⁴

To review, First Sale is why we have used bookstores, what Litman is suggesting is that without it content producers would be within their legal rights to significantly control how content is used in perpetuity. While that's not really possible to control how I read a book published during the days of the Studebaker, what about digital publications? Whither software?

Lost amidst the landmark and near landmark cases that the Supreme Court has heard in the last year or so, First Sale Doctrine had a day before the High Court in the case of *Kirtsaeng V. John Wiley and Sons Inc* (ruled on about a year ago). The outcome was that the court “held that the first sale doctrine as per 17 USC Section 109(a) applies to copies of copyright-protected work lawfully made abroad.”⁵

3 Russell, Carrie. *Complete Copyright: An Everyday Guide for Librarians*. Chicago: American Library Association, 2004. Print. (44)

4 Litman, Jessica. *Digital Copyright*. Amherst NY: Prometheus Books, 2001. Print. (82)

5 Rosati, Eleonora. “U.S. Supreme Court Holds First Sale Doctrine Applicable to Works Lawfully Made Aboard.” *Journal of Intellectual Property Law & Practice*. 8(8) 2013. 590-591. Print

Commenting on the significance of the ruling Eleonora Rosati reported that Justice Breyer wrote that if the court had opted “for a geographical interpretation of first sale doctrine (as had been invoked by Wiley), this could have resulted in libraries having to obtain permission before circulating or otherwise distributing” books published outside the United States.⁶ That's the good news, the bad news, again according to Ms. Rosati, is that “The ruling in *Kirtsaeng* marks once again the different legal regulation of analogue and digital copies of works.”⁷ Further, she adds, “the *Kirtsaeng* ruling can be seen as incentivizing the drafting of relevant terms and conditions as mere rights of use, rather than transfers of ownership. This has the potential to increasingly transform US consumers from proprietors of goods into mere licensees.”⁸ Let me assure you, my honorable parents did not raise me to become a *mere licensee*. Now the first issue I'd raise is the one of control—First Sale means to dispose of as you see fit that which is yours (turn the beads on your abacus into a necklace) and secondly, and more importantly given we are here to think about things digital, the lack of First Sale protection for things digital means that everything is a negotiated and all of the time and expense that entails. Every transaction a labor of circuitous language, and every exchange a slithering through serpentine fine print, every purchase a ponderous prognostication of what you've actually bought, and pretty soon you're talking real money.

Reflective Question, “In a presentation earlier at the conference the speaker argued the case that we need ‘agile’ collections, is it licenses (for all the negotiation they may require) that can create this agility?”

This is a good place to segue to Google Books, as Google Books is a good example of this...not too terribly long ago Judge Denny Chin of the United States Court of Appeals 2nd Circuit ruled in a long running law suit between the Author's Guild and Google that Google's Library Project was protected by Fair Use. Remember, Fair Use is the provision in Copyright Law wherein “one can exercise a copyright without authorization, without signing a license, and without paying a fee.”⁹ Relying on our new friend to report, Eleonora Rosati writes that Judge Chin “found that Google's use of copyright-protected content was highly transformative, and that Google Books does not supersede or supplant books, in that it is not a tool to be used to read books.”¹⁰ In commenting on the ruling Karen Coyle—who has all kinds of super-perceptive things to say about libraries—asserts that that Judge Chin “clearly admire the mission of libraries, and it seems clear to me that the educational use of the materials by libraries was seen to offset the for-profit use by Google. In fact, Judge Chin reverses the roles of Google and the libraries when he says:

6 Ibid

7 Ibid.

8 Ibid.

9 Russell. (19)

10 Rosati, Eleonora. “Google Books' Library Project is Fair Use.” *Journal of Intellectual Property Law & Practice*. 9 (2) 2014. Print. 104-106.

'Google provides the libraries with the technological means to make digital copies of books that they already own. The purpose of the library copies is to advance the libraries' lawful uses of the digitized books consistent with the copyright law.'"¹¹

Now first thing note with our purpose in mind is that Judge Chin expands the scope of Fair Use, but he doesn't, because he can't, codify it. Subsequently, while protected by Fair Use Google Books is in Google's pocket. Before the ruling Karen Coyle had another interesting take:

"My assumption is that Google has a research interest in having exclusive access to 20 million non-Web digital texts in a myriad of languages, and that this research is aimed not only at search but at Google's desire to be THE interface between man and machine, which means that machines have to get better at human languages."¹²

An interface determines how work gets done. While Judge Chin's invocation of libraries to expand Fair Use's utility is heartening, Fair Use does not make Google Books fair game. Google is a for-profit company responsible to shareholders and employees, and cloud-based enterprises have demonstrated over and over that terms of service are as changeable as locks on doors. Will it become our job to mitigate the Google interface in the name of communal reading? Certainly other companies like Elsevier have had excessively restrictive terms of service for the Interlibrary Loan of digital materials, and while that was changed, it was changed only after much effort. There are also ongoing contractual difficulties, reported in December 2013 that Elsevier was using copyright transfer agreements to make authors take down scholarship posted to Academia.edu.¹³ My point here is that life with Elsevier is endless wrangling, and that while Elsevier and Google are not the same company are we on the cusp of a moment when librarianship will evolve into legalistic work to maintain access...versus building a collection. First Sale or do it yourself, right? And that do it yourself would appear, prima facie, to encumber libraries with the necessity of harvesting contractual minutia has a charge to replace working with living breathing readers.

Now having invoked Elsevier I can evoke Open Access, the anti-Elsevier. I count myself as someone who gets Open Access, and the vision of Open Access is compelling but there is another issue of complexity. To get a definition in the words of Peter Suber "OA journals perform peer review and then make the approved contents freely available to the world. Their expenses consist of peer review, manuscript preparation, and server space."¹⁴ Peer review is an expense, but it is also, I argue, an uncertainty. In the definition that I'm drawing from Suber argues that because peer review is largely donated labor it can simply migrate to OA environments. Other peer review models are new—PLOS

11 Coyle, Karen. "It's Fair." *Coyle's InFormation*. Karen Coyle. 14 Nov. 2013. Web. 10 March 2014.

12 Coyle, Karen. "Hope and Fears for the Google Book Case." *Coyle's InFormation*. Karen Coyle. 24 Sept. 2013. Web. 10 March 2014.

¹³ "Elsevier is Taking Down Papers from Academia.edu." *Sauropod Vertebra Picture of the Week*. Mike Taylor, Matt, Wedel, and Narren Naish. 6 Dec. 2013. Web. 4 March 2014.

¹⁴ Suber, Peter. "A Very Brief Introduction to Open Access." Peter Suber. 20 Sept. 2008. Web. 10 March 2014.

co-founder Michael Eisen has argued: “*PLOS One*, follows a more radical publication model. With the goal of leaving the evaluation of a paper’s significance to the scientific community, *PLOS One* promises to ‘publish all papers that are judged to be technically sound.’ Post-publication review can then happen with a set of software tools on the journal’s website.”¹⁵ I am going to refrain from a critique of crowd-sourcing, and instead argue that while the vision Eisen has may work, it's going to be an uphill climb. In an investigative piece published in *The Economist* in October 2013 reported: “According to a piece they wrote last year in *Nature*, a leading scientific journal, they were able to reproduce the original results in just six. Months earlier Florian Prinz and his colleagues at Bayer HealthCare, a German pharmaceutical giant, reported in *Nature Reviews Drug Discovery*, a sister journal, that they had successfully reproduced the published results in just a quarter of 67 seminal studies.”¹⁶ The article claims that the problems with replicating experiments are a result of a mix of the politics of funding, the need for scientists to be doing “pioneering” research, and an over-reliance on quantitative approaches—but the point is that peer review at this moment in history is not a seamless process waiting to be translated. It is a complicated business that at the moment may not be working, and even our ability to track it may not be working—do a quick Google search on “impact factor fraud” and note you will not only see a variety of blogs represented, but articles in *The Atlantic*, *The Guardian*, and *Nature*.

This is not to say “don’t try,” rather, it’s to say try with an expectation that the difficulties intrinsic to peer review and the proprietary necessities in publishing are going to require a “try, try, and try again” equation.

One point Peter Suber makes in his book about OA is that among other things it’s about solving problems. He writes, “A less obvious but more fundamental opportunity is that knowledge is *nonrivalrous* (to use a term from the economics of property). We can share it without dividing it and consume it without diminishing it. My possession and use of some knowledge doesn’t exclude your possession and use of the same knowledge.”¹⁷

As far back as 1992 some very intelligent people very confidently made the same point to argue that the Internet would dissolve copyright like so many Alka-Seltzer tablets, and I’ve just finished making the case that user licenses still cause stomach pains. In the definition of Open Access that I’ve drawn from Peter Suber's states “archives and repositories do not perform peer review,”¹⁸ but my concern is that we may have to in sort of a “somebody’s got to” initiative, particularly if we are look to OA to be an alternative to the current journal model.

Reflective Question: “What is the secondary market in the OA model?”

¹⁵ White, Michael. Scientific Publishing is Killing Science.” *Pacific Standard*. Miller-McCune Center for Research in Media and Public Policy. 28 Feb. 2014. Web. 10 March 2014.

¹⁶ “Trouble at the Lab” *The Economist*. The Economist. 19 Oct. 2013. Web. 10 March 2014.

¹⁷ Suber, Peter. *Open Access*. Cambridge MA: MIT Press, 2012. Print. (44)

¹⁸ Suber, Peter. “A Very Brief Introduction.”

So what to do, other than fix peer review. Libraries have collections, let's think about that for a moment. One way to conceptualize of these collections (and First Sale) is the role of reputation in a gift economy. Writing about Linux hacker culture Eric Raymond describes how a carefully crafted reputation exists and even thrives within hacker culture...a culture where status is determined "not by what you control but by what you give away."¹⁹ Raymond continues, "it is quite clear that the society of open-source is in fact a gift culture. Within it, there is no serious shortage of the 'survival necessities'—disk space, network bandwidth, computing power. Software is freely shared. This abundance creates a situation in which the only available measure of competitive success is reputation among one's peers."²⁰ Raymond argues that the gift economy is how Linux came to be, and within this OS environment the control of reputation was a critical part of making this work—"peer credit goes where it is due and does not go where it is not due."²¹ Reading Raymond one takes away the idea that the sole object Linux hackers seek to control is their reputations, and these reputations become an index to Linux. Within the Linux community they are a way to chart Linux, even while reputations are not tactile things, provide a tangible accountability for Linux code.

Tangible is a great word. It is a great word partly because it is evocative of tangerines, and who doesn't love tangerines—but it also connotes the possibility of knowing something by experience. One of my lead in lines on Interlibrary Loan in documentation I've written is "Interlibrary Loan is the original analog Internet." A network of collections and collective accountability. Each collection is a reputation, and each collection an index to the tangible reputations that become a tangible greater whole. Ownership. In one of this more recent works the American philosopher Stanley Cavell wrote "A good society cannot depend upon our approval of each other's desires, but it does depend upon a certain capacity and willingness to make ourselves comprehensible to one another. Here is a place where the idea of a collection can play an essential role."²² He happened to be specifically writing about barbed wire and not books but a collection is a knowable entity. The point I'm trying to get at is that while Interlibrary Loan is an enterprise merging infrastructures, it has license to work. Donald Norman makes a useful distinction, "I distinguish between complexity and complicated. I use the word *complexity* to describe the state of the world. The word *complicated*' describes a state of mind...the definition for *complicated* includes a secondary meaning of *confusing*, which is what I am concerned with in my definition of that word."²³ You see where I'm going with this, right? Contracts for digital rights to access something, complicated, Interlibrary Loan, complex. Norman's point, we can deal with complexity, to our purposes we can deal with complexity because of First Sale Doctrine.

Okay so what to do? Writing in the *New York Review of Books* Robert Darnton reminds us, "Think of the old motto of Con Edison when it had to tear up New York's streets in order to get at the infrastructure beneath them: 'Dig we must.' Libraries say, 'Digitize we must.' But not on any terms. We must do it in the interest of the public, and that means holding the digitizers responsible to the

¹⁹ Raymond, Eric. "Homesteading on the Noosphere." *The Cathedral & the Bazaar: Musing on Linux and the Open Source by an Accidental Revolutionary*. Sebastopol CA, 2000. Print. (81).

²⁰ Raymond, Eric. *Ibid.* (81).

²¹ Raymond, Eric. *Ibid.* (85).

²² Cavell, Stanley. *Philosophy the Day After Tomorrow*. Cambridge: Harvard University Press, 2005. Print. (262).

²³ Norman, Donald. *Living with Complexity*. Cambridge: MIT Press, 2011. Print. (2).

citizenry.”²⁴ He has the Digital Library of American in Mind...but digitize as we do to complete Interlibrary Loan transactions it needs to be “not on any terms” but within the terms of First Sale. The rights within First Sale make it possible to be held responsible. The fact that First Sale allows for the unfettered control of information by libraries and their shareholders in ways that create communal reading. They create public good, but only on our terms. As Susanna Ashton so aptly noted, “Interlibrary lending only works when in some fundamental way, libraries consider all of us to be their patrons. They must have the foresight and the imagination to see that all knowledge, in some way, someday, will serve everyone.”²⁵

To do this is to agitate for First Sale in the stacks if not in the streets. It is the agitation, and it points to the agitation of how can we make things more like First Sale? Also we need legislative/legal action to reverse how some courts have recently held that first-sale rights do not apply to transfers of digital works when the transferred file is a copy of the original one, which is generally the case since the transferred file resides on a different hard drive than the original.²⁶

And in the short term, buy print books. Keep print books, keep First Sale.

Lines by Campbell McGrath:

Books live in the mind like honey inside a beehive,
that ambrosial archive, each volume sealed in craft made paper,
nutritive cells, stamen-fragrant, sung as apothecary jars.²⁷

Privacy

²⁴ Darnton, Robert. “Google and the Future of Books.” *New York Review of Books*. NYREV Inc. 12 Feb. 2009. Web. 9 Dec. 2009.

²⁵ Ashton, Susanna. “What Goes Around.” *The Chronicle of Higher Education*. The Chronicle of Higher Education. 14 March, 2007. Web. 16 July 2010.

²⁶ Asy, Clark D. “Kirtsaeng and the First Sale Doctrine’s Digital Problem.” *Stanford Law Review*. Stanford Law Review. 7 May 2013. Web. 10 March 2014.

²⁷ McGrath, Campbell. “Books.” *In the Kingdom of the Sea Monkeys*. New York: HarperCollins, 2012. Print. (3).