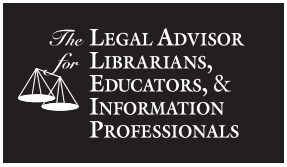
The Legal Advisor for Librarians, Educators, & Information Professionals

THE LIBRARIAN'S LEGAL COMPANION FOR

Licensing Information Resources and Services

TOMAS A. LIPINSKI



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The Legal Advisor for Librarians, Educators, & Information Professionals

No. 1—*The Complete Copyright Liability Handbook for Librarians and Educators*, by Tomas A. Lipinski
No. 2—*Professional Liability Issues for Librarians and Information Professionals*, by Paul D. Healey
No. 3—*The Digital Librarian's Legal Handbook*, by John N. Gathegi
No. 4—*The Librarian's Legal Companion for Licensing Information Resources and Services*, by Tomas A. Lipinski

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Preface

Well, now that you have decided to actually read this book, or at least browse this preface, several comments about the purpose of this book, including some suggestions on how to use it—depending upon your interest and level of expertise on legal issues, in specific licensing (or contract) law and, where relevant, copyright and other laws—are in order.

Maybe you are one of those persons who bought the book weeks or months ago but is just now getting around to reading it, or maybe you are one of the those users who religiously reads from cover to cover every page of a new book. Then again, perhaps you have used or consulted this book before but never bothered to read the preface. It may be possible that this book or a part of it is assigned to you as a required text in a course you are taking or is recommended in conjunction with a seminar you are attending and you are seeking a fast and painless way to get a sense of what the book is about, its content, and its value without having to read it. If so, well then, this preface is for you.

PURPOSE

My reason for writing *The Librarian's Legal Companion for Licensing Information Resources and Services* is simple: to allow you to read and understand the law surrounding the contracting of information content and, to a lesser extent, information services in library and related settings.

Contract law serves as the legal foundation for interpreting licenses. In addition, understanding copyright law often helps one understand the practical impact of licenses. The scope of this book is the former, emphasizing contract law. Many, many books have been published on understanding copyright law; significantly fewer center on licensing. However, reference is made to those places where there is an intersection of license and copyright, offering brief explanation on the latter and indicating where additional information can be obtained. The book begins with several chapters on basic contract law and where at times this can be applied in library settings. More advanced concepts in contract and licensing law are presented—concepts impacting licensing today and in the future. Purchasing or licensing information content and services is essentially the law of contract. Though these transactions may raise additional issues such as advertising, fair trade, and related consumer law issues, the focus of this book is on the factors you can control rather than the regulatory issues often raised by these legal concepts. In other words, you may have an opportunity to play an active role in determining or at least contributing to the terms by which an acquisition is made. Where the

transaction does not offer such opportunity, a so-called "take it or leave it" offer, you will at least be able to evaluate whether you can live with those terms, whether it is better to take it or leave it. Later, more practical chapters build upon these foundations.

By learning a bit of the law of licensing you also learn some contract law and vice versa. While a fair amount of law is discussed—more than in other books on licensing—this book provides the necessary foundation for those readers seeking advanced knowledge into the "why" behind many license provisions. How much of the book is consumed dictates whether the treatment is intermediate or advanced, at least as far as librarian use is concerned. (Chapter 14 can be consulted for a introductory look at an alphabetical listing and discussion of licensing terms, but even this treatment is far more robust than that found on websites or other articles and monographs.) More and more librarians are being asked to step up to the licensing counter when placing their order for library content (databases, e-books, etc.) and services (software, devices such as e-book readers, etc.). As contract law (including the law of licensing) is state based, this book cannot address the laws of each of the fifty states, even if limited to contract concepts alone. Librarians need to understand the legal aspects regarding acquisition by purchase or license of information in the library and to use that understanding to their advantage. The laws surrounding gifts and donations will be discussed in another title in this series, I hope.

Second, not all library schools prepare students to delve into such issues in any great detail. At best, course work in copyright and license is elective, or given mention or short treatment in other courses. As a result, information professionals continue to enter practice without adequate, significant, or advanced and practical exposure to these issues. This book will help you overcome that deficiency or further increase your professional competence. I hope it also serves to empower you as well by providing a thorough discussion of the context, law, and application of that law to your information acquisition practices.

While use of the terms *library* and *librarian* is made throughout the text, the principles here would of course be of assistance to archivists (in archives) and curators (in special and perhaps museum collections), as well as those in educational settings. The book does not, however, cover purchase and license of works of art, cultural artifacts, and the like.

A BRIEF COMMENT ON THE LAW

As mentioned, purchasing books or licensing information content, such as access to a proprietary database, or information services, such as library automation software or a system with its various modules (serials management, public access catalog, etc.), is essentially based on the law of contract. While there are sources

of countrywide guidance on contract principles well-known to the law librarian readership, they tend to be less commonly known to other librarians—for example, the Restatements of Contracts (which has a first and second edition) with its series of "statements" followed by "comments" and "illustrations" for each of the hundreds of so-called black-letter rules or restatements, and the Uniform Commercial Code (UCC).

The Restatements are not laws per se but an attempt to restate in general terms what the law is across the jurisdictions and the courts that rule or make law in a particular area. Restatements exist on a variety of topics, from "agency" to "unfair competition." The second edition "constitutes a thorough revision and updating of the original 1932 Restatement. It embodies additions inspired by the Uniform Commercial Code and improves the black-letter formulations by altering the order or scope of topics to enhance clarity or reduce redundancy." Consulting the second edition (referred to in later discussions simply as "the Restatements" or "Restatement" when reference is made a specific statement), a reader can get an approximation of the law in a particular area across the states—a sort of legal snapshot, if you will. The Restatements offer a series of concise statements (known as black-letter law) regarding the aspects of the Restatement topic, followed by official comment and illustrations for each such statement, all built upon existing case law. The second edition contains hundreds of these statements and accompanying comments and illustrations.

As the name implies, the UCC is a standardized codification of contract law. Uniform laws are proposed by the National Conference of Commissioners of Uniform State Laws (NCCUSL). Such uniform laws are proposed (and, it is hoped, adopted by the state legislatures) in an attempt to create standardization across the states in a given area of law. There are many, many uniform laws, from the Adult Guardianship and Protective Proceedings Jurisdiction Act to the Unsworn Foreign Declarations Act.

In the case of contract law and the UCC, all states have adopted in some form or another the text of the uniform code. In the original proposed version by NCUSL, the statutory text is followed by an "official comment" accompanying each UCC provision. The comments provide a sort of readers guide and help in interpreting each provision.[1] Contract law remains state law, codified by individual state legislatures and interpreted by the courts, either by the state's own courts or by the federal courts of the jurisdiction applying it in diversity[2] cases. This state-based contract law is often a combination of code, that is, the statutes enacted by state legislatures (which are often from the UCC, except in licensing cases, as most courts conclude the UCC does not apply to information and software licenses) and court, or the decisions of the courts interpreting the code and advancing the development of the common law, including consideration of sources that comment upon that law (often the Restatements), or both. Even federal courts dealing with

contract issues under diversity jurisdiction principles use the law of the state in which the dispute is being adjudicated.

As a result, the law can vary from state to state. For example, the Restatement may reflect the majority or trend but alert the reader to the minority position as well, or merely restate a general concept that not all state appellate courts have had opportunity to consider. "Restatements are secondary sources that seek to 'restate' the legal rules that constitute the common law in a particular area . . . Restatements are one of the most highly regarded types of secondary authority and have exerted considerable influence on the judicial process. Many courts have adopted Restatement sections verbatim as the law of their jurisdiction."

However, while all states have adopted the UCC, the precise language of its provisions may vary from state to state. Of course, the interpretation of similar language may vary from court to court as well. This occurs because each state's respective case law (and, to an extent, each federal district court's case law) operates merely as persuasive precedent, though it may be influential. So the decision of one state's court may not matter much in another state, but this is not to say that books such as this one are of no value. Rather, this legal reality should alert you to the practical limitation of trying, without involving a multivolume treatise, to have a single place be the first and last place you look. (Indeed, I hope this book will be one of your first resources on the topic, but it should not be the last you consult in resolving an issue concerning contract or licensing law.) So, rather than lengthen the book even further, discussion of the Restatements and the UCC is placed in the beginning contract-based chapters to provide a sense of the overall status of the law.

The goal is to bring to you, the reader, in one volume an exposition of the basic, intermediate, and advanced contract law principles—and this will in part depend upon the point from which you are beginning, both in terms of your knowledge and which parts of the book you decide to read—involved in the license of information content and services most likely applicable in the library setting. As a result, the case examples used throughout the book are expository, intending to explain or describe the application of a particular concept (such as the idea of unconscionability, for example) or to represent the extant or emerging case law in the area (such as the application of the doctrine of copyright misuse in the context of licensing). If you are searching for a final answer, it may or may not exist; the matter might not yet have been addressed by a legislature or reported by a court, but the place to uncover that answer will require eventual consultation with the applicable governing local law. This governing law would be the law of your state, that is, its code and its case law (made up of the decisions by the state and federal courts that have applied the law). However, this book will surely get you started in that direction, informing you of the basic issues and possibilities. The book also attempts to apply the content in a practice-oriented chapter that lists and comments upon the various terms typical in a license agreement, as well as providing

several chapters that review different agreements, offer an inventory of questions useful in license review, and suggest a basis for library-friendly clauses. The latter content—a reference toolkit of sorts—can get you up and running quickly, but often the discussion in those chapters refers to the basic concepts covered in earlier chapters, which could then be consulted for additional explanation.

One other point about copyright law should be made at this early point: it will be reinforced throughout this book as well. While you do not need an understanding of copyright law to understand the legal issues involving a particular license clause (or before you read and use this book), you will be challenged to both appreciate the significance of that clause and assess (or alter) its practical impact in your library. Having some understanding of copyright can assist you in meeting that challenge. This is because a license clause may give you more rights than you might otherwise be entitled when using content protected under the copyright law, such as right to digital first sale; conversely, a license might take away or limit a right, such as fair use. This understanding is an obvious prerequisite to figuring out whether a particular license agreement or a particular clause is palatable to your information tastes. This initial understanding leads to the ability to determine the overall costs and benefits of a particular agreement your library is being asked by the licensor to enter; for example, you may be granted the convenience of online access but asked to forgo some fair-use rights in return. Based on the examples and trends in current license agreements reviewed in conjunction with the preparation of this book, the author will alert you to those circumstances where the copyright-license interface is significant or troublesome (at least to the author), as well those circumstances where other legal rights might be implicated, such as patron privacy or librarian free-speech rights to make public comment on the product, for example.

ORGANIZATION AND USE

You can use *The Librarian's Legal Companion for Licensing Information Resources and Services* in a number of ways. You can read it cover to cover (the advanced approach), but another way is to scan the table of contents, which is detailed and gives a list of the subtopics within each chapter so you can jump from issue to issue if you like. Another way to do this would be to begin with Chapter 14, "A Basic Licensing Glossary, A–Z," that lists and discusses a variety of license terms and either work backward or forward as needed (the intermediate approach). Or you might just want to look up a specific term or two (Chapters 14 and 17) or review one of the actual license agreements analyzed in Chapter 15. To be sure, licensing is not for the faint of heart; if you think copyright law is challenging, licensing law is even more complex, but any unease you feel likely stems from your unfamiliarity with subject. The more you get used to it, the more comfortable and knowledgeable

you will become in moving within its contours. So do not cower from these issues. Read this book, and remember that help is only a page or two away.

Synopsis of Parts and Chapters

Part I, "Before You Read the License: Essential Background Concepts," discusses basic and at times essential concepts in contract law upon which the law of licensing is based, as a license is a form of agreement or contract. Many of these concepts have direct connection to topics discussed later.

- Chapter 1, "The Information Acquisition Landscape Today," reviews the ascent of licensing and sets the stage and perspective of the book, contrasting essential differences between acquisition by sale (governed by copyright) and acquisition by license.
- Chapter 2, "Basic Contract Law Concepts," shows that historically contracts are based upon the understandings of the parties regarding the nature of their relationship. This chapter reviews some simple fundamentals and sets the stage for later topics, such as website permissions and access, or determining whether a scenario is governed by contract.
- Chapter 3, "Contract Formation and Enforceability," completes the discussion of basic contract concepts, again laying the groundwork for later interpretation of license terms, such as *material breach*. It gives a good overview on how to begin thinking in terms of contract/license law.
- Chapter 4, "Broader Legal and Policy Issues in Licensing," discusses a handful of concepts that courts use to question the value of a contract in a broader societal context. Contracts and licenses do have limitations, and recent doctrines have emerged to address overzealous licensors.

Part II, "The Range and Nature of Information Resource Licenses Libraries Encounter," covers the day-to-day basics of licenses that libraries and other organizations encounter.

- Chapter 5, "Electronic Signatures in Global and National Commerce Act and the Uniform Electronic Transactions Act," reviews the basic laws that paved the way for online contracts.
- Chapter 6, "Negotiated and Nonnegotiated Licenses," discusses the two general forms of licenses encountered daily. Knowing the difference is important, and each has advantages and disadvantages.
- Chapter 7, "Shrink-Wrap, Click-Wrap, and Browse-Wrap Licenses," covers another layer of difference by detailing the several contractual forms where assent or agreement is performed by some action, such as tearing the wrapping, clicking an icon, and so forth. Courts focus on basic issues of notice of

terms, assent to those terms, and so on, most based on basic concepts drawn from Part I.

Chapter 8, "End User License Agreements (Websites)," involves website transactions often for access alone and without any payment or exchange. The chapter discusses the legal status of website permission and use restrictions.

Chapter 9, "General Public Licenses, Open Source Agreements, and Creative Commons Agreements," covers agreements viewed by some as an alternative to copyright. It is important to know that Creative Commons licenses and other agreements are based on the concepts of license formation and enforceability.

Chapter 10, "Basic Music and Media Licenses," discusses musical works and sound recordings that librarians, teachers, and students often use in the course of a workday. This chapter reviews the basics of licensing such uses and when the copyright law allows such use without permission (remember that a license is a form of permission).

Chapter 11, "The Uniform Computer Information Transactions Act," reviews the controversial law of contract designed specifically for information products and services.

Chapter 12, "The Developing Law of Implied Licenses," is a picture of today. There may be some circumstances where a license, though not formally entered into, is nonetheless determined by courts to grant permission (the essence of a license) to make use of content posted on a website or in other circumstances. This determination is again based upon the application of basic contract principles.

Chapter 13, "The Future Look of Licenses," presents a few thoughts on potential future issues regarding licensing.

Part III, "A Licensing Reference Toolkit for Everyday Use," contains resources to use in evaluating license terms and provisions and maximizing those terms and provisions to the library's advantage.

Chapter 14, "A Basic Licensing Glossary," contains dozens of license terms, often with some mention of the legal status of such terms, examples from actual agreements, comments on the effect the term can have, unintended consequences, suggestions for alternative approaches, pluses and minuses, and so on.

Chapter 15, "Four Common Library Licenses Deconstructed," may be the most-consulted chapter in the book. It provides clause-by-clause/provision-by-provision review of the practical and legal aspects of licensing in four different agreements and in the context of and in relation to the provisions of the same agreement.

Chapter 16, "Twenty Sample Key Clauses to Look For in Content Licenses," is also designed for quick reference. It reviews the major licensing provisions with suggestions that are library friendly.

Finally, Chapter 17, "Look Before You License: 126 Questions and Answers for Evaluating Licenses," provides questions to ask about a license. It can also be used as a review of license issues in general. The questions are grouped with commentary regarding the major issues.

PERSPECTIVES AND ATTITUDES

It was in conjunction with a presentation I was making at InfoToday a decade ago that Neal-Schuman Publishers editor Charles Harmon asked me to consider writing a book on licensing. The presentation was in essence a reflection on recent developments in licensing law, rather than a how-to session. However, its conclusion established the perspective for this book: licenses will not go away, so why not use licenses to our advantage? Or stated perhaps a bit more figuratively, we need to stop looking at licensing as a dirty word, embrace the challenge licensing poses without fear, and where possible adopt its circumstances to our advantage.

I suppose the premise and purpose, then, of *The Librarian's Legal Companion for Licensing Information Resources and Services* is to show that licensing can and should be a positive experience, if we in the library prepare for it, combat it at times, and, dare I say, exploit it as well.

Consider one simple observation in support of this idea. I lecture frequently on the topic of copyright (and licensing) law in libraries and schools to library consortia and systems, school districts, colleges and universities, and the like, and at a variety of library conferences and professional meetings. While I can say much about what we know to be true of our rights as copyright users and facilitators of use to others (our patrons), when we make content and services protected by copyright available to our patrons there remains a great deal that is unsettled within the copyright law. Why not settle it, remove the copyright guesswork, and let a license govern your use of content in the library? The additional up-front cost of the license (negotiation, drafting, etc.), for example, can be more than recaptured in the savings resulting from the legal certainty of subsequent uses being compliant under the license instead of working under copyright principles alone. Although some of these savings may be negated by the actual cost of the license fee, remember that in a copyright regime you would need to pay the acquisitions cost of the item anyway. Certainty reduces risk, and this benefit alone may be worth the price of the license. The license agreement can define those uses. Of course, the license giveth and the license can taketh away, so understanding what the licensor might be asking you to surrender is paramount.

Does this mean that publishers and licensors (two more dirty words?) are out to get us? Of course not. They merely have an agenda of their own: to stay in business, which likely entails the maximization of profits and minimizations of costs, which translates into a desire for the best terms for their products that the market will

carry. And we are the market. A license, then, is merely a tool to achieve an end. When that tool is not of assistance, we seek another tool, but we need to know how to use the tools we have. As the adage states, we need the right tool for the job.

I hope *The Librarian's Legal Companion for Licensing Information Resources and Services* will provide you with an understanding of licensing, the law behind it, the various associated terms and their meanings, and, to a lesser extent, how an understanding of copyright can increase the instruments at your disposal, allowing you to select from an array of tools to solve distinct problems.

ENDNOTES

1. "The Uniform Commercial Code (UCC), a comprehensive code addressing most aspects of commercial law, is generally viewed as one of the most important developments in American law. The UCC text and draft revisions are written by experts in commercial law and submitted as drafts for approval to the National Conference of Commissioners on Uniform State Laws (now referred to as the Uniform Law Commissioners), in collaboration with the American Law Institute. . . . The UCC is a model code, so it does not have legal effect in a jurisdiction *unless* UCC provisions are enacted by the individual legislatures as statutes. Currently, the UCC (in whole or in part) has been enacted, with some local variation, in all 50 states, the District of Columbia, and the Virgin Islands." Uniform Commercial Code, available at http://www.law.duke.edu/lib/researchguides/ucc.
2. BLACK'S LAW DICTIONARY 502 (9th ed.) (Bryan A. Garner ed., St. Paul, MN: West Publishing, 2009) defines diversity jurisdiction as "[a] federal court's exercise of authority over a case involving parties who are citizens of different states and an amount in controversy greater than a statutory minimum [$75,000.00]" (no pagination in Westlaw).

PART I

BEFORE YOU READ THE LICENSE: ESSENTIAL BACKGROUND CONCEPTS

1

THE INFORMATION ACQUISITION LANDSCAPE TODAY

Read this chapter to gain an understanding of these licensing issues:

- Differences between contracts and licenses and their relationship to copyright law
- Basic issues in contract law and the application of that law to licenses
- Assessing permissions granted or taken away in a license to ensure that the agreement matches the rights under copyright
- Application of the first-sale doctrine in license agreements
- Possible impacts from recent litigation on the libraries' use of traditional library content

In the preface, the concept of licensing law was presented in contrast to copyright law. It is often difficult to understand the full impact of a license or a particular provision in a license without some understanding of copyright. This is especially true of licenses or provisions that relate to use rights and restrictions governing material that is protected by copyright law. This book does not attempt to present both understandings. Its focus is upon the former and not the latter. Where relevant, the book presents the essential difference between a particular right or restriction under a license versus the result that would occur under the copyright law (i.e., the legal concepts that would operate if the copyright law had applied), instead of the license or particular license provision. In addition, this chapter attempts to overview the foundation for this dichotomy from a definitional as well as a larger, big-picture perspective.

BASIC CONCEPTS: CONTRACT, LICENSE, AND COPYRIGHT

A license is a type of contract:

> A contract has been defined as an agreement upon a sufficient consideration to do, or refrain from doing, a particular lawful thing. Similarly, a "contract" has been defined as an agreement, obligation, or legal tie by which a party binds itself, or becomes bound,

> expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing. Also, a "contract" has been defined as a private, voluntary allocation by which two or more parties distribute specific entitlements and obligations.[1]

The provisions of the contract are determined by the parties (or at least by one party in the case of a so-called mass-market or consumer contract, such as for a rental car, cell phone application, etc., but this is getting ahead of ourselves, as contract basics are covered in the next two chapters and the various license types are covered in more detail in Part II). An important feature to note here is that a contract is a sort of private ordering of events, circumstances, responsibilities, obligations, and so forth. In other words, the "rules" under which the parties must operate are determined by the parties (or, at least in the situation of a nonnegotiable license, the terms are set by one party, and the other party nonetheless agrees). Of course, legislatures can impact this ordering through codified contract law, the basic rules under which any such private ordering proceeds. For example, a legislature might make voidable contracts entered into by minors (and courts can establish such basic rules as well), but upon this foundation the parties are free to build their own set of rights and responsibilities and other circumstances under the contract; this is true of licenses as well. In this way, legislatures draw the general contours of the contract, but within those contours the parties have the freedom to choose the particular legal shape of their agreement. So, too, courts interpret and apply the "ordering" that the contract through its provisions established, again in light of any existing statutory law and previous interpretations made by the court.

So what is a license? A license is a type of contract that does not generally result in the transfer of ownership rights in physical objects. Unlike a contract for a purchase of a new set of encyclopedias, a license is in a sense ephemeral: "The word license means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize."[2] For libraries and similar institutions, these permissions relate to services (e.g., a license for a library automation system) or information access (e.g., a database license) or devices (e.g., an e-book reader). So a license is an agreement between at least two parties wherein one party grants permission to the other to engage in some course of conduct. In the previously noted examples, this would be permission to load and use the automation software to process library acquisitions, holdings, and circulations; the right to have authorized users access and use the online database; and the right for a library to lend (circulate) the e-readers to its patrons (although, without getting ahead of ourselves, a legal argument can be made that the software on devices such as cell phones, readers, tablets, etc., is actually a sale; this exception is covered in detail in Chapter 4). The permission granted by one party may be dependent upon the other party undertaking additional obligations

besides paying a fee. Likewise, there may be obligations upon the party granting the permission, known as the licensor. As long as the basic agreement contours established by a legislature or court are adhered to, the parties are free to craft or order their series of rights, responsibilities, obligations, future conduct, and so forth, as the parties see fit.

PRIVATE ORDERING OF CONTRACTS VERSUS PUBLIC ORDERING OF COPYRIGHT

In the absence of a license, the law most likely to apply to the sort of content libraries come into contact with-that is, the law that would govern the use rights, restrictions, obligations, and so on, for such areas as automation or device software or "information" such as books—is copyright law.[3] The private ordering of a contract-license is in contrast to copyright law, where the basic rules are established by the U.S. Congress through the codified copyright law and as applied by the courts.

This landscape is in contrast to contract-license, representing then a sort of public ordering. It is public in two senses. First, the laws are made with opportunity for public input through our system of elected representatives and legislative processes. Second, since copyright law is federal law, this law applies to all citizens, owners or providers, and users or consumers alike. For example, when the use of a book is subject to copyright law, then fair use of that book under the copyright law can be made by all users; it need not be negotiated or obtained from each publisher but applies to all members of society. Of course, courts may interpret fair use slightly differently depending upon the jurisdiction of the user, as discussed in the next example. This private-public dichotomy was explained by Judge Easterbrook in *ProCD v. Zeidenberg*, a decision of the 7th Circuit:

> Copyright law forbids duplication, public performance, and so on, unless the person wishing to copy or perform the work gets permission; silence means a ban on copying. A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create "exclusive rights." Someone who found a copy of SelectPhone (trademark) on the street would not be affected by the shrinkwrap license—though the federal copyright laws of their own force would limit the finder's ability to copy or transmit the application program.[4]

In contrast, the rights, responsibilities, conditions, limitations, obligations, and so forth, governing the use of works protected by copyright is public law in the sense that the rights and responsibilities are determined by the copyright statutes and regulations (and the interpretation the courts give to the statutes and regulations), and not by the individual copyright owner and user.[5] There are numerous points of public input, both direct and indirect, in addition to traditional legislative processes and inputs. The copyright statutes are enacted by legislators (elected

officials). In the copyright arena, the U.S. Copyright Office reporting and rule-making processes often include opportunity for public comment through hearings,[6] roundtables,[7] public comment, and so on.[8] Finally, the federal judiciary is at least nominated by an elected official (the president) and confirmed by elected officials (members of the Senate). To some extent, as licensing and private ordering increases, the significance of copyright is lessened or made less relevant; or, in a more critical phrasing, it could be said that copyright law is threatened through some situations of licensing.[9]

There are several reasons why understanding basic issues in contract law and the application of that law to licenses is important in library and archive-related information settings, and educational environments as well—the latter environments being those in which libraries or archives can reside. This understanding is enhanced by an understanding of basic copyright law. However, other legal concepts, such as privacy and free speech, can also be implicated by license provisions, but because much, if not all, of what is licensed—be it content (e.g., a database)[10] or a service (e.g., a computer program)[11]—is protected by copyright, the copyright law is most relevant here.[12] Remember, a license is a form of permission; the range of use (the scope of the permission) that can be made of licensed content is determined by the provisions of the license. In contrast, content protected by copyright that is purchased (not licensed) by the library (e.g., a book or set of encyclopedias) is governed by copyright law.

COPYRIGHT LAW AND UNDERSTANDING LICENSES

First, without an understanding of basic copyright law, the librarian may not be aware of his or her use rights[13] under the copyright law or the conditions or obligations[14] placed upon him or her to secure those use rights—rights that under the law allow the library and its staff to use and make available to patrons content acquired through purchase to the maximum extent possible under the copyright law. If, for example, a library desires to circulate a computer program that it has purchased (as opposed to licensed), what rights or restrictions, if any, are imposed on the library to make use of the program in this way?[15] Understanding what is possible under copyright law can assist in assessing and ensuring that the rights under a license are at least as great as those under the copyright law (and the licensor may propose terms that offer rights far less than those under the copyright law), but it is impossible to undertake that assessment without some knowledge of copyright law. The author is not suggesting you run out and buy a copyright book to have on hand as you use this book (unless your knowledge of copyright law is very limited) but asks instead that you be aware of the alternative world of rights and restrictions that a license may present. Further, this book will alert you to those specific license provisions that purport to "take away" these copyright use rights.

"Use," under the copyright law, refers to those acts that implicate, or in the colloquial "step on," one or more of the exclusive rights of the copyright owner. These uses are *reproduction* (photocopying or scanning a book), *public distribution* (circulating a VHS cassette or DVD), *public display* (think transmission or display of multiple images of the same item in the same place but not "display" as in holding up a map or poster and showing it to an audience during a book talk), and *public performance* (playing the VHS cassette or DVD during a library programming) of content protected by copyright, and also perhaps the *preparation of derivative works* (scripting a young adult novel into a play), and even the *public performance through the digital transmission of a sound recording* (streaming a music CD through an online reserve or course content delivery system such as Moodle or Desire2Learn).[16] These are the sort of uses librarians and patrons often make of content found in the library and related educational settings. However, these are the exclusive rights of the copyright owner. As a result, the often complex interplay of copyright rights and restrictions (and obligations) already mentioned apply. A license can change all of that, realigning both rights and restrictions (or from the library and patron perspective, the uses the copyright law otherwise might allow) from the public ordering of the copyright law to the private ordering of the license.

With a knowledge of the basic copyright concepts, the librarian can assess what permissions might be missing in a license and work toward getting language into the agreement that matches the rights under copyright as well as press for additional rights; in situations where the negotiation of terms is not possible, this understanding of copyright versus license can help the librarian to determine whether the license, taken as it is, is worth its cost.

Take, for example, the same computer program mentioned previously and make library acquisition of it subject to a license agreement that includes a prohibition on further distributions. Without some understanding of section 109, the provision of the copyright law that allows for circulation (public distributions) of protected (by copyright) material, including a special provision for circulation of computer programs, you may not realize that you have contracted away your so-called first-sale rights, restoring to the copyright owner his or her right to control distributions after the first sale or transaction of a copy of the work (i.e., the software program the library acquired). Without an understanding of basic copyright law, it is often difficult to appreciate the significance of a particular clause in a license agreement and to assess whether the library might lose more that it gains by entering into the license; for example, the cost (in terms of price, conditions, obligations, and limitations) may not be worth the benefit of increased access (in terms of content, format, etc.). Even worse, the cost of licensing content is increasing, in actual and associated costs.[17]

With a license agreement, the use of the content (or service) is governed by the terms of the license agreement and the law that applies to interpreting that language

is essentially the law of contract. License agreements in various forms, even shrink-wrap, web-wrap, and new iterations (all of which are discussed in subsequent chapters), can be enforceable. This legal position reflects the deference by the courts to an underlying policy of American society and its focus upon commerce: the freedom to contract is honored by the court, even when that contract might not be in the consumer's best interest because its terms are in some way less than fair. The agreement can alter what would be the result in the absence of the agreement—what would exist under the copyright law (or other law, for that matter, such as privacy).[18] This can have enormous implications for the library and its patrons. It may be a better or a worse result in terms of use rights, restrictions, obligations, and so on. A license, like any contract, can give you rights that you might not otherwise have, or the license can take away rights that you would otherwise have:[19]

> What rights are acquired or withheld depends on what the contract says. This point only is implicit in Article 2 [of the Uniform Commercial Code] for goods such as books; UCITA [Uniform Computer Information Transactions Act, discussed in Chapter 11] makes it explicit for the information economy where, unlike in the case of a book, the contract (license) is the product.[20]

The hope is that you come to realize this potential or possibility and use this book to become familiar with such contractual implications. Without understanding the underlying legal concepts, you cannot fully appreciate what it is you might be giving up and, likewise, what you might be gaining through the license agreement. This book focuses on the former in detail but also covers the latter, where relevant, at least in as much detail as to explain its significance within the licensing context and offer additional sources where more information may be found.

Other rights may be implicated as well. Does the copyright law impose any limitations on the librarian who desires to write a review of the same software program the library purchased? The answer is no.[21] However, if the computer program is instead acquired by the library through a license agreement, then the terms of the license agreement will govern the use of the software program. License agreements may contain language that restricts the ability to undertake and disseminate such reviews or to undertake related product or benchmark testing.[22] While this is not a book on copyright law (or free speech or privacy law, for that matter), the author endeavors where appropriate to point out to the reader where copyright and contract converge from opposite ends of a continuum and where other rights, such as privacy and free speech of librarians and patrons alike, may be implicated by license terms and conditions and likewise intersect at the license agreement.

Another reason why understanding licensing is important in libraries and other information-rich environments is obvious: From both supplier and consumer perspectives, and for many sorts of works, the digital format is becoming the

dominant if not also the preferred method of delivery and consumption.[23] Nothing prevents a content provider from licensing content that was traditionally purchased, for example, as an analog item (and by logic, a physical item) such as a book or cassette, or even digital-physical items such as a music CD.[24] (There is some discussion among commentators on whether the doctrine of copyright preemption[25] limits or should limit the reach of license terms,[26] but more on this in Chapter 4.)

It could be argued that content providers already consider the use of contractual terms to limit the use of analog-physical items or digital-physical items that are purchased for library and patron use.[27] Consider a VHS cassette (analog-physical) or DVD (digital-physical) that contains one of these warning screens: "By continuing to view this work you agree to limit the use of the work to home-use or personal use only, and make no public or commercial use of the work whatsoever"[28] or "Your viewing of this motion picture obligates you to send us an additional $25.00." Is either an enforceable contract? If so, what is the impact on section 110(1) or 110(2) of the copyright law that allows qualifying public performances to be made of protected content in educational settings? Contract can indeed override copyright, so does this mean you may not play or stream a portion of the VHS cassette or DVD of *To Kill a Mockingbird* (the 1962 movie adaptation starring Gregory Peck) during a class session on American literature? It depends on whether a valid contract with this language ("By continuing . . . /Your viewing . . .") was formed between the copyright owner (e.g., Walt Disney Studios or another movie studio, producer, authorized distributor, or rights holder) and the home viewer (e.g., the patron who checked out the VHS cassette or DVD from the public library). Chapters 2 and 3 address these questions with discussions of the basic rules of contract law, especially contract formation.

Some digital-physical items are subject to license agreement already, such as a CD-ROM that comes shrink-wrapped (terms and agreement printed inside the box or container) or click-wrapped (terms and conditions viewable upon installation or use). Books could be next![29] Whether this is a good idea—whether the expansion of licensing regimes into all areas of content acquisition in the library or elsewhere in society is good information policy—is not the primary focus of this book (though such considerations are unavoidable when discussing the topic in any detail); rather, the focus here is to understand the legal possibility of such a result.[30] An obvious result here is that the license also determines what use rights our patrons possess. With a book that is purchased, librarians can rest assured that their patrons will have fair-use rights in that book, for example. This is not so with a license agreement governing the same book read through a database or on an e-reader. The use rights in the content are determined by the provisions of the license agreement, which often govern use of e-book content. The point is that while content providers are experimenting with digital and online formats as well

as migrating more content to these formats, patrons are likewise expecting the wider range and convenience of access that such formats provide. Why does licensing matter here? Licensing matters because the content (e.g., iTunes music downloads) as well as the delivery devices (e.g., an e-book reader) that libraries are now using are governed by license.[31]

UNDERSTANDING THE LICENSE-CONTRACT DICHOTOMY AND THE FIRST-SALE DOCTRINE

As alluded to earlier, a license agreement could alter the application of the first-sale doctrine that allows one in possession of a lawfully acquired copy of a protected work to make further public distribution of the copy of that work. The first-sale doctrine is of paramount importance to libraries and in essence limits the public distribution right of the copyright to "first sale" or first transaction of the copy alone, not to every subsequent public distribution that might occur: publisher through a bookstore sells book (the first sale) to customer; customer donates book to library; library uses book for a time and then sells book through its "friends" group; library patron buys book and gives it to a friend to read. All subsequent transfers beyond the first sale are in theory public distributions, but does each implicate the exclusive right of the copyright owner, the first-sale right? No, because the first-sale doctrine as codified in section 109 of copyright law limits the right of public distribution to the first sale—the first transaction point alone. The practical effect is that while the author gets a percentage of the sale by the publisher/bookstore in the form of royalties, the author is not entitled to subsequent earnings on any subsequent public distributions, such as donations or further sales. This right applies to content that is purchased but not to content that is licensed. As discussed in Chapter 4 (see When Is a License Not a License?), recent courts have struggled with determining whether an acquisition of software can be in fact a purchase even if the agreement that accompanies it claims the use of the computer program is subject to a license.

The first-sale doctrine applies to items the library purchases for its collection and allows to circulate (use in public distribution). "For example, a library may lend an authorized copy of a book that it lawfully owns without violating the copyright laws."[32] As long as the copy of the item the library owns is a lawfully made copy, the doctrine applies and the distribution right of the copyright owner is limited. The concept is codified in section 109,[33] but there are exceptions, such as for computer programs[34]—and exceptions to the exceptions for libraries if a warning notice is used![35] Here we've scratched the surface of the often complex sequence of rights, responsibilities, conditions, limitations, obligations, and so forth, at play within the copyright law. However, a license can change all of that. A license can make your "information life" simpler or more complex. A license agreement can indicate that

the e-book you download cannot be further distributed to the public in any way and is for the personal use of the immediate licensee alone. Likewise, a license agreement can include language to the effect that use of the downloaded music file or e-book is limited to "personal, noncommercial uses" and that "no further distribution" may be made of the acquired content. Content subject to these terms in a school or public library could not be used in the classroom or circulated to patrons as these would be public distributions of the work.

Some courts have concluded—and not all courts have addressed this question—that the terms of the license would override the provisions of the copyright law, such as the first-sale doctrine, because the license transaction is not a sale transaction. The licensee never acquires any lawfully made copy of the work to which the first-sale doctrine can apply.[36] However, the license binds only the parties to the agreement; the license cannot bind or restrict third parties, such a school student or library patron.[37] This is one reason many licensors desire to have the library monitor at some level what use students or patrons make of the licensed content or promise that its patrons will comply with the use rights and restrictions established by the license. The broader policy impact is that a license can alter the balance that the copyright law strives to achieve in section 109[38] or other provisions of the copyright law, such as section 107 (fair use) or 108 (library and archive reproduction and distribution), if the librarian allows the license to do so, that is. A license can override other use rights that the "limitations on exclusive rights" granted by sections 107 through 122 of the copyright law allow. Courts have observed that a license can override section 117,[39] the provision that allows the making of a "copy or adaptation of that computer program" in certain circumstances, such as for backup or maintenance.[40] Fair use may also be in similar jeopardy, making users subject to the terms of a license agreement.[41] However, this may not be applied to nonnegotiated, so-called mass-market licenses (more will be said of this later). Even Raymond Nimmer admits that in a mass-market license a clause that overrides fair-use rights, such as the right to reverse-engineer, "may very well preclude enforcement of a contract clause . . . but that issue has never been settled."[42] It is important to remember that the realignment of copyright uses, rights, restrictions, obligations, and so forth, offered by a license agreement can improve or exacerbate the situation either by offering a greater array of uses than would otherwise be available under the copyright law alone or by limiting use rights the librarian or patron would otherwise have had under the copyright law; and in either instance, the agreement may make it worse by imposing additional responsibilities, conditions, limitations, obligations, and so on, than would otherwise exist under the copyright law. Of course, a license can do a little of both. Sorting out which clauses in a license agreement are likely to do the former and which are likely to do the latter is a major objective of later chapters, including Chapters 5 and 6.

THE POTENTIAL IMPACT OF RECENT LITIGATION

Courts are beginning to wrestle with these issues as well, as they may impact the uses libraries have made of traditional library content, such as books. In a case involving watches, but with implications for any work manufactured overseas—that there could be no first-sale or public distribution rights if, say, the book were manufactured overseas—courts have interpreted the first-sale doctrine in a narrow way. One appellate court concluded that the "general rule that § 109(a) refers 'only to copies legally made . . . in the United States," *id.* [*BMG Music v. Perez*, 952 F.2d 318, 319 (9th Cir. 1991)], is not clearly irreconcilable with *Quality King* [*Quality King Distributors, Inc. v. L'anza Research International, Inc.* 523 U.S. 135 (1998)] and, therefore, remains binding precedent. Under this rule, the first sale doctrine is unavailable as a defense to the claims under §§ 106(3) [the copyright holder's right of public distribution] and 602(a)[43] because there is no genuine dispute that Omega manufactured the watches bearing the Omega Globe Design in Switzerland."[44] If this holding applies to library items such as books, CDs, DVDs, and so on, then a library would violate the copy owner's right to make a public distribution of works manufactured overseas and imported without the permission of the copyright holder. If this applies to libraries and their books (and other items), a library would be prohibited from circulating the item[45] per the previous discussion. This decision was appealed to the U.S. Supreme Court, but the Court affirmed the decision without opinion.[46]

In a follow-up to *Omega S. A. v. Costco Wholesale Corp.*, the 2nd Circuit appellate court answered the question left undecided by the U.S. Supreme Court: "The Supreme Court recently seemed poised to transform this dicta into holding when it granted a writ of certiorari to review the Ninth Circuit's decision in *Omega S. A. v. Costco Wholesale Corp.* . . . After hearing oral argument, an equally divided Supreme Court (with Justice Kagan recused) was obliged to affirm the judgment rendered by the Ninth Circuit. Without further guidance from the Supreme Court, we now consider the extent to which the protections set forth in § 109(a) may apply to items manufactured abroad. In doing so, we rely on the text of § 109(a), the structure of the Copyright Act, and the Supreme Court's opinion in Quality King."[47] In *John Wiley & Sons, Inc. v. Kirtsaeng* the 2nd Circuit likewise considered the application of the first-sale doctrine to books manufactured overseas: "The principal question presented in this appeal is whether the first sale doctrine, 17 U.S.C. § 109(a), applies to copies of copyrighted works produced outside of the United States but imported and resold in the United States."[48]

Under section 602 of the copyright law, importation of copies of a work without the authority of the copyright owner is infringement, violating the owner's right of public distribution. The question in *John Wiley & Sons, Inc. v. Kirtsaeng*, as with the *Costco Wholesale Corp. v. Omega S. A.* litigation, was whether the first-sale doctrine

applies to such copies, operating, as do all of the user rights granted in sections 107 through 122 of the copyright law, as an affirmative defense to a claim of infringement. If the first-sale doctrine applies to such works, then the public distribution of such works is not infringing and, therefore, any public distribution of those works does not violate the owner's right under section 106(3); and if the right to make public distributions is allowed, then such acts, including importation, are also not infringing:

> Finally, because conduct covered by § 109(a) does not violate § 106(3), and because absent a violation of § 106(3) there cannot be infringement under § 602(a), conduct covered by § 109(a) does not violate § 602(a). In short, infringement does not occur under § 106(3) or § 602(a) where "the owner of a particular copy. . . lawfully made under this title" imports and sells that copy without the authority of the copyright owner.[49]

Section 602(a)(3)(C) contains an exception:

> [I]mportation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2).[50]

However, this exception suggests that acquisitions of foreign-made works could not be done in order to serve as a source of "systematic reproduction or distribution" but would allow for the occasional interlibrary loan or reproducing service for patrons under section 108(g)(2), which provides:

> The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.[51]

Subsection (d) authorizes the reproduction and distribution "of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work,"[52] either for a patron of a qualifying library or archive or the patron at another qualifying

library or archive. That works so acquired might on occasion be the subject of such requests for reproduction and distribution would appear acceptable.[53] The legislative history of the provision does little other than to repeat the exception:

> The bill specifies that the third exception does not apply if the importation "is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2)." If none of the three exemptions applies, any unauthorized importer of copies or phonorecords acquired abroad could be sued for damages and enjoined from making any use of them, even before any public distribution in this country has taken place.[54]

The 2nd Circuit observed the possible interpretations of the phrase "lawfully made under this title": "But while a textual reading of § 109(a) does not compel the result favored by Wiley, it does not foreclose it either. The relevant text is simply unclear. '[L]awfully made under this title' could plausibly be interpreted to mean any number of things, including: (1) 'manufactured in the United States,' (2) 'any work made that is subject to protection under this title,' or (3) 'lawfully made under this title had this title been applicable.'"[55] Nevertheless the appellate court decided that "we conclude that the District Court correctly decided that Kirtsaeng could not avail himself of the first sale doctrine codified by § 109(a) since all the books in question were manufactured outside of the United States. In sum, we hold that the phrase 'lawfully made under this Title' in § 109(a) refers specifically and exclusively to copies that are made in territories in which the Copyright Act is law, and not to foreign-manufactured works."[56]

If such items are not "lawfully made under this title," then libraries would be infringing if such items are circulated and, arguably, when also made available for public access in such libraries short of being actually circulated. However, all is not lost, as explained by Jonathan Band: "a combination of defenses, including section 602(a)(3)(C) of the Copyright Act, the Ninth Circuit's *Drug Emporium* [*Parfums Givenchy, Inc., v. Drug Emporium, Inc.*, 38 F.3d 47 (9th Cir. 1991)] exception, implied license, and fair use, allow libraries throughout the country to continue their existing purchasing and circulation practices with a fair degree of confidence that they will not infringe copyright by doing so."[57] Band also opines that for libraries in the 2nd Circuit the decision in *John Wiley & Sons, Inc. v. Kirtsaeng*

> is actually worse than the Ninth Circuit's decision in *Costco* in a manner significant to libraries. The Ninth Circuit realized that its interpretation had a negative policy impact . . . So, the Ninth Circuit created an exception to its interpretation, and ruled that the FSD [First-Sale Doctrine] still applied to a foreign manufactured copy if it was imported with the authority of the U.S. copyright owner. Thus, if a library buys a foreign printed book from an authorized dealer in the U.S., the FSD applies to that book and the library can lend it . . . Unfortunately, the Second Circuit rejected this exception as not having a foundation in the language of the FSD. Accordingly, a library in the

> Second Circuit that wants to lend foreign manufactured copies must rely on fair use or the ambiguous exception in 17 USC 602(a)(3)(C) that allows a library to import 5 copies (except audiovisual works) for lending purposes, but doesn't specifically allow the library to actually lend those copies.[58]

For now, this narrow interpretation of the first-sale doctrine is the law only in those circuits where the question has been litigated, the 9th and 2nd Circuits. Other circuits may follow. However, the Supreme Court granted certiorari in April 2012. If oral arguments occur in the fall, a decision may be forthcoming in 2013. It is hoped the Court would interpret "lawfully made under this title" to make clear that foreign-sourced or -manufactured materials fall within the phrasing and first-sale rights would apply to owners of lawfully made copies. This decision might also impact other provisions where the same appears, such as section 110 (classroom use). Depending on the decision rendered by the Court, Congress, if pressured, may seek to craft a legislative solution, allowing distribution of such works so acquired to be lawful.[59] For example, Congress could limit such exception to works in the current holdings of a library and let the market decide future acquisitions; or it could limit the application to another of the possible interpretations considered but rejected by the 2nd Circuit—that the work must be made (manufactured) in a country where the work also is subject to copyright protection.[60]

A BRIEF WORD REGARDING COURT DECISIONS

So far this chapter has mentioned and referenced different sorts of courts, such as the 9th Circuit, the 2nd Circuit, and the U.S. Supreme Court. A brief comment should be made on the sources of law discussed in this and succeeding chapters. There are legislative laws, codes, and statutes. In the contract-license area, such law is most often created by state legislatures, resulting in codified or statutory standards for creating and executing agreements between parties, establishing a sort of legal minimum and maximum, if you will (think contours), regarding what the parties can and cannot agree to in their agreement. In the contract arena, states have enacted slight variations on the Uniform Commercial Code (UCC), as discussed in the preface. Courts then interpret this law in given situations. In the area of modern copyright law, Congress enacts or amends the copyright law. Courts then interpret and apply this law. As is often the case with the licensing of software (automation or devices) or information (databases), the codified law does not always apply, so courts apply their own "rules," with the resulting court-made law referred to as the common law. (Most codifications of contract have origins in the common law.)

One more point about court interpretations. The parties to a contract-license, as well as those making fair use or other use of content governed by copyright law, exist in jurisdictions. The parties may be in the same or different jurisdictions. Here the concept of jurisdictions relates to which court or courts possess the

authority to govern the parties. Which court decisions represent "the law" for a particular contract-license or use under the copyright law depends on which court or courts have jurisdiction.[61] The short version is that the rulings of the U.S. Supreme Court apply to all citizens across all jurisdictions. The Supreme Court rules on both contract-license issues as well as copyright issues. Likewise, decisions of state supreme courts govern the parties within that state. The trial courts of a state are often organized by circuit or district (other terms may be used), which can be organized into different appellate districts. All states have a supreme court, decisions of which can bind persons in the entire state. Likewise, the federal courts are organized into a similar three-tiered system, with the trial courts known as district courts. Some states have more than one federal district. In general, states are then organized into courts of appeal or circuit courts. Federal courts can apply contract-license law as well as copyright law. As copyright law is federal law, state courts do not have subject matter jurisdiction to decide copyright cases. From the individual's perspective, each court's decisions in the chain of command or hierarchy represent "the law." In other words, a person in Indianapolis is governed by the law of the federal district court of southern Indiana, the 7th Circuit Court of Appeals (as district courts in Indiana, Illinois, and Wisconsin are within the jurisdiction of this appellate court), and the U.S. Supreme Court (whose decisions have binding authority across the United States). The decisions that constitute "the law" for a given jurisdiction are known as mandatory authority. But what of the courts of other jurisdictions, federal or state? This book cites cases from federal and state courts all over the country. These decisions are known as persuasive authority. In the case of our sample person from Indianapolis, what impact does a decision from Arizona (state or federal court) or the 9th Circuit (the federal appellate court with jurisdiction over cases arising in Arizona) have? Such decisions are not the law but can be used to persuade a court in the Indianapolis jurisdiction that this other court was correct and its decision should also be followed in Indianapolis.[62] Suffice it to say that the cases cited and discussed in this book may represent either mandatory (what the law is here) or persuasive (what the law is elsewhere and could be here) authority for the reader, depending on where the case is from and where the reader resides. Moreover, the cases cited in this book are not exhaustive but are included to offer example illustrations—not to represent a comprehensive review of contract case law or, to a lesser extent, copyright law.

ENDNOTES

1. 17A American Jurisprudence 2d Contracts § 1, footnotes omitted (Westlaw database, updated November 2011).
2. Federal Land Bank of Wichita v. Board of County Commissioners of Kiowa County, 368 U.S.146, 154, note 3 (1961), quoting Gibbons v. Ogden, 9 Wheaten 1, 22 U.S. 1 (1824).

3. "The right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work" per BLACK'S LAW DICTIONARY (9th ed.) (Bryan A. Garner ed., 2009) (no pagination in Westlaw). The subject matter or protected works is found in 17 U.S.C. § 102(a)(1)–(8): "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."
4. ProCD v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996). See also Universal Gym Equipment, Inc. v. ERWA Exercise Equipment Ltd., 827 F.2d 1542, 1550 (Fed. Cir. 1987): "Parties to a contract may limit their right to take action they previously had been free to take." See also Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECHNOLOGY LAW JOURNAL 475 (2002).
5. See Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM LAW REVIEW 375, 407 (2005) (Symposium, Law and the Information Society, Panel 1: Intellectual Property and Public Values): "We often think of property and contracts as two distinct legal mechanisms that together constitute the market. There seems to be a division of labor between the two: Copyright law is responsible for allocating the initial entitlements, while contract law governs their transfer; copyright law creates rights against the world (*in rem*), whereas contract law applies only to the parties (*in personam*). Property rights differ from contract rights in that a property right 'runs with the asset,' namely, it can be enforced against subsequent transferees of the asset. Enforcing standard licenses against third parties blurs the distinction between property and contracts. It allows distributors, right holders, and possibly others to establish rights in rem through contracts. Typically, the law does not enforce contracts that run with the asset, and claims against third parties are normally denied" (footnote omitted).
6. See, for example, United States Copyright Office Field Hearings, Copyright Office Study On Distance Education, Library of Congress, Copyright Office, Docket No. 99-12A, Promotion of Distance Education Through Digital Technologies, Request for Comments and Notice of Public Hearing, available at 63 FEDERAL REGISTER 71,167 (December 23, 1998); UNITED STATES COPYRIGHT OFFICE, III. REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (1999), transcripts of hearings.
7. See, for example, United States Copyright Office Public Roundtables, United States Copyright Office and the Office of Strategic Initiatives, Library of Congress, Docket No.

06-10801, Section 108 Study Group: Copyright Exceptions for Libraries and Archives, available at 71 Federal Register 70434 (December 4, 2006), DePaul University College of Law, Lewis Building, Room 1001, 25 E. Jackson Boulevard, Chicago, Illinois, 60604, January 21, 2007, transcripts available at http://www.loc.gov/section108/roundtables .html; and United States Copyright Office Public Roundtables, United States Copyright Office and the Office of Strategic Initiatives, Library of Congress, Docket No. 06-10801, Section 108 Study Group: Copyright Exceptions for Libraries and Archives, 71 Federal Register 7999 (February 15, 2006), Rayburn House Office Building, Room 2237, Washington, DC, March 16, 2006, transcript available at http://www.loc.gov/section108/ docs/0316-topic1.pdf.

8. See recent cycle of § 1201(a)(1)(C) rule making: 71 Federal Register 68472 (November 27, 2006). Comments available at http://www.copyright.gov/1201/2006/comments/index.html; reply comments available at http://www.copyright.gov/1201/2006/reply/. Status and documentation from the current section 1201 rule making can be found at http://www.copyright.gov/1201/.
9. Steven A. Heath, *Contracts, Copyright, and, Confusion: Revisiting the Enforceability of "Shrinkwrap" Licenses*, 5 Chicago-Kent Journal of Intellectual Property 12, 26 (2005): "[W]hile the case law discussed has provided valuable information to software producers seeking to uphold their licensing agreements, the ultimate effect is to reinforce the licensing norm within an ill-suited paradigm. The rise of licensing as 'private governance' has eroded the scope of the Copyright Act; the remedy for which can surely only be found through appropriate legislative action."
10. Of course, some licensed content may not be protected. A statistical database—for example, one made up of facts—can still be subject to copyright protection as a compilation. See 17 U.S.C. § 101 (2006), defining compilation as "work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." The way in which the noncopyrightable facts in the database are selected, coordinated, or arranged might be protected by a compilation copyright, but the underlying facts would not be protected.
11. A computer program is also protected by copyright: "It is not disputed that a computer program is a form of literary work, and thus is copyrightable," per Greenberg v. National Geographic Society, 533 F.3d 1244, 1262, at note 6 (11th Cir.), cert. denied 129 S.Ct. 727 (2008). A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result per 17 U.S.C. § 101 (2006). See also Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d Cir. 1983): "[A] computer program, whether in object code or source code, is a 'literary work' and is protected from unauthorized copying, whether from its object or source code version," cert. dismissed 464 U.S. 1033 (1984).
12. A good review of basic copyright principles is found in Kenneth D. Crews, Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions (3d ed.) (Chicago: American Library Association, 2012).

13. The headings of § 107 through § 122 of the copyright law (title 17 of the U.S. Code) all begin with the phrase "Limitations on Exclusive Rights" to indicate that these sections offer "uses" or, in a legal sense, privileges to make what would otherwise be an infringing use, in other words, a use that limits on one the exclusive rights of the copyright owner. These use rights then operate as a limitation on or an exception to the exclusive rights granted to copyright owners in § 106: to reproduce the work, to make derivative works, to distribute the work to the public, to make public performance or display, and to make public performance of a sound recording through a digital audio transmission, for example, to make a webcast of a music CD. The most well-known of these exceptions is found in § 107, Limitations on Exclusive Rights: Fair Use.
14. Again, § 108 through § 122 of the copyright law often impose conditions or obligations upon users as a prerequisite to the availability of the limitation on exclusive rights granted by a particular section. In addition, the use right granted may be limited to particular works or to certain types of users or circumstances, or apply to selected exclusive rights. For example, the requirement in § 108(d) for library and archive reproduction and distribution, the section of the copyright that allows interlibrary loan transactions, obligates display of a warning notice under § 108(d)(2), imposes a condition under § 108(d)(1) that the item reproduced and distributed "becomes the property of the user," and restricts through the limitation under § 108(i) that reproduction and distribution to patrons under § 108(d) cannot "not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news." 17 U.S.C. § 108 (2006).
15. See 17 U.S.C. § 109(b)(2)(A) (2006): "Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation."
16. 17 U.S.C. § 106 (2006).
17. Elkin-Koren, *supra* note 5, at 375, 381: "The cost associated with licensing copyrighted materials has increased exponentially in recent years. This can be attributed to two developments: one substantive and the other procedural. The substantive element concerns the expanded scope of copyright protection, and the procedural one the removal of formal requirements. The expansion of copyright protection to cover more subject matters, extended duration, and additional rights reduced the volume of works that are freely available to build upon. Furthermore, in addition to the expansion of copyrights, the characteristics of the digital environment also make informational works less available" (footnotes omitted).
18. See, for example, ProCD Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996): "A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create 'exclusive rights'"; and Universal Gym Equipment, Inc. v. ERWA Exercise Equipment Ltd., 827 F.2d 1542,

1550 (Fed. Cir. 1987): "Parties to a contract may limit their right to take action they previously had been free to take." See also Casamiquela, *supra* note 4.

19. "[L]ibraries need to be aware that licensing arrangements may restrict their legal rights and those of their users," per the Association of Research Libraries, *Reshaping Scholarly Communication: Principles for Licensing Electronic Resources* (July 15, 1997), http://www.arl.org/sc/marketplace/license/licprinciples.shtml.
20. Uniform Computer Information Transactions Act (UCITA) (2000), Prefatory Note.
21. See NXIVM Corp. v. Ross Institute, 364 F.3d 471, 482 (2d Cir. 2004): "It is plain that, as a general matter, criticisms of a seminar or organization cannot substitute for the seminar or organization itself or hijack its market. To be sure, some may read defendants' materials and decide not to attend plaintiffs' seminars . . . But that sort of harm, as the district court properly recognized, is not cognizable under the Copyright Act. If criticisms on defendants' websites kill the demand for plaintiffs' service, that is the price that, under the First Amendment, must be paid in the open marketplace for ideas," cert. denied 543 U.S. 1000 (2004).
22. See Genelle I. Belmas and Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 Communications Law and Policy 37, 38, at note 4 (2007), referencing the Oracle license as one such example of an agreement prohibiting dissemination of any benchmark test results without prior permission of Oracle.
23. For a snapshot of licensing practices across 70 major academic libraries, see Research and Markets Primary Research Group, The Survey of Library Database Licensing Practices, 2011 Edition (January 2011), http://www.researchandmarkets.com/product/d9b5d9b2/the_survey_of_library_database_licensing_prac.
24. See Ticketmaster Corp. v. Tickets.com, Inc., 2003 WL 21406289, at *2 (C.D. Cal. 2003): "The 'shrinkwrap' cases find the printed conditions plainly wrapped around the cassette or CD enforceable." See also Aundrea Gamble, *Google's Book Search Project: Searching for Fair Use or Infringement*, 9 Tulane Journal of Technology and Intellectual Property 365, 383–384 (2007): "Even the 'public benefit' inherent in the [Google] Book Search program could lead to increased contracting for consumers, forcing publishers to include license agreements with every new book"; and Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 William and Mary Law Review 1245 (2001): "Book publishers can shrink-wrap their books."
25. 17 U.S.C. § 301 (2006): "[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [the exclusive right of the copyright owner] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title."
26. Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. Davis Law Review 45, 71 (2007): "As a general matter, courts rarely hold that federal statutes preempt the operation of state contract law, and, more specifically,

contractual restrictions on baseline copyright principles have generally been upheld over preemption challenges. This approach has been misguided and the results skewed, however, because courts have failed to engage in the interpretive preemption task."

27. See Paul Deane, posting to LISNews (June 7, 2005), http://lisnews.org/node/14943: "This year I have been recieving [*sic*] reference books with a license on shrink wrap"; and G. M. Filisko, *Shrink-Wrap Contracts 'Booked': Publishers Stretch Software-Type Licensing to Ink-on-Paper Products*, ABA Journal E-Report (July 29, 2005):"Librarian Paul Deane from Arlington Heights, Ill., says he's seen shrink-wrap agreements on at least five books in the past four months, one a directory of medical practitioners, the others reference books." See also Charles McManis, *The Privatization (or "Shrink-Wrapping") of American Copyright Law*, 87 California Law Review 173, 173–174 and 176 (1999).
28. See, for example, Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 Fordham Law Review 1025, 1068, at note 152 (1998): "Pre-recorded videotapes typically bear a notice that the film is 'licensed for home [or personal] use/exhibition only.'"
29. John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful*, 57 Rutgers Law Review 1, 56–57 (2004): "This could be done by placing the license agreement on top of the book, covering the book in shrinkwrap, and placing a label on the outside stating that important terms are enclosed. The purchaser of the book acquires it subject to the terms of the license agreement. The agreement licenses the acquirer to read the book as many times as she likes, and to distribute it to members of her immediate family. (Just for fun, the agreement might prohibit her from reading the ending before slogging through the entire book, or require the publisher's written permission before publication of any review of the book" (footnote omitted). This result was hypothesized by the U.S. Supreme Court a hundred years ago! See Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 349–350 (1908): "What does the statute mean in granting 'the sole right of vending the same?' Was it intended to create a right which would permit the holder of the copyright to fasten, by notice in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one 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." The "license" at issue in the case included the following notice: "The price of this book at retail is $1 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright." *Id.* at 341. See also L. J. Kutten, 2 Computer Software: Protection Liability Law Forms § 9:72 (database updated April 2012): "This author finds EULAs [End User License Agreements] disturbing from a public policy perspective . . . Further, if EULAs are valid, why must they be limited to software? Why wouldn't the following nonsoftware transactions also be valid contractual restrictions? . . . A book publisher put a shrink-wrap agreement on its back covers prohibiting the loaning of its books by a public library."

30. See Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 Berkeley Technology Law Journal 93 (1997) (Symposium: Digital Content: New Product and New Business Model), http://www.law.berkeley.edu/journals/btlj/articles/vol12/Elkin-Koren/html/reader.html.
31. See IFLA's Committee on Copyright and other Legal Matters (CLM), *Licensing Principles* (2001), http://www.ifla.org/V/ebpb/copy.htm: "P3. Licenses (contracts) for information should not exclude or negatively impact for users of the information any statutory rights that may be granted by applicable copyright law."
32. Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1999). "When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public" (*id.* at 205).
33. 17 U.S.C. § 109(a) (2006): "Notwithstanding the provisions of section 106(3) [establishing the copyright owner's right of public distribution], 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."
34. 17 U.S.C. § 109(b)(1)(A) (2006): "Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program) . . . may, for the 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, or by any other act or practice in the nature of rental, lease, or lending."
35. 17 U.S.C. § 109(b)(2)(A): "Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation."
36. See MGE UPS Systems, Inc. v. Fakouri Electrical Engineering, Inc., 422 F. Supp. 2d 724, 733 (2006): "[I]f MGE transferred ownership of copies of Muguet and Pacret, the first-sale doctrine would bar MGE from claiming copyright infringement; however, the first-sale doctrine would not apply if MGE simply licensed the software"; Novell, Inc. v. Unicom Sales, Inc., 2004 U.S. Dist. LEXIS 16861, at *30 (N.D. Cal. 2004): "Accordingly, the Court finds that the SLA is a license, rather than a sale, and the first sale doctrine has no application to defendants' distribution of SLA software they obtained from Joy"; Adobe Systems, Inc. v. Stargate Software, Inc., 216 F. Supp. 2d 1051,1054 (N.D. Cal. 2002): "The issue before the Court is whether Adobe, through its OCRA and EULA, transferred ownership of each particular copy of its software to its distributors D.C. Micro and Dallas Computers. Having transferred such ownership would bar Adobe from claiming copyright infringement by Stargate under the first sale doctrine. An issuance via license, however,

would not. Rather, the establishment of a license by Adobe would protect Adobe under the first sale doctrine"; and Microsoft Corp. v. Harmony Computer and Electronics, Inc., 846 F. Supp. 208, 213 (E.D.N.Y. 1994): "Entering a license agreement is not a 'sale' for purposes of the first sale doctrine. Moreover, the only chain of distribution that Microsoft authorizes is one in which all possessors of Microsoft Products have only a license to use, rather than actual ownership of the Products . . . Defendants' argument is unpersuasive. First, to the extent that defendants' argument invokes the first sale doctrine, it must fail for the reasons stated above" (references and footnote omitted); see also ProCD Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996): "Whether there are legal differences between 'contracts' and 'licenses' (which may matter under the copyright doctrine of first sale) is a subject For Another Day"; and Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91, 96 (3d 1991): "There Was No Need to characterize the transactions between Step-Saver and TSL as a license to avoid the first sale doctrine because both Step-Saver and TSL agree that Step-Saver had the right to resell the copies of the Multilink Advanced program." But see SoftMan Products Company, Inc. v. Adobe Systems, Inc., 171 F. Supp. 2d 1075 (C.D. Calif. 2001): "The Court finds that the circumstances surrounding the transaction strongly suggests that the transaction is in fact a sale rather than a license . . . [T]he purchaser commonly obtains a single copy of the software . . . for a single price . . . The license runs for an indefinite period . . . the ultimate consumer . . . pay[s] full value for the product, and accept[s] the risk that the product may be lost or damaged. This evidence suggests a transfer of a title in the good . . . Ownership of a copy should be determined based on the actual character, rather than the label of the transaction by which the user obtained possession . . . If a transaction involves a single payment giving the buyer an unlimited period in which it has a right to possession, the transaction is a sale" (*id.* at 1086). It would appear that most if not all mass-market software products are characterized by a single price for an indefinite period. However, the case appears to be an anomaly, relegated to the unique facts of unbundled software products, and not a general call for the proposition that a software license or any other license for that agreement cannot override first-sale rights.

37. SoftMan Products Inc. v. Adobe Systems, Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001): "However, the existence of this notice on the box cannot bind SoftMan. Reading a notice on a box is not equivalent to the degree of assent that occurs when the software is loaded onto the computer and the consumer is asked to agree to the terms of the license" (id. at 1087). "In this case, Adobe seeks to control the resale of a lawfully acquired copy of its software . . . The Court finds that SoftMan has not assented to the EULA and therefore cannot be bound by its terms" (*id.* at 1089). Contra, Vernor v. Autodesk, Inc., 621 F.3d 1102, 1111 (9th Cir. 2010): "We hold today that a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions. Applying our holding to Autodesk's

SLA, we conclude that CTA was a licensee rather than an owner of copies of Release 14 and thus was not entitled to invoke the first sale doctrine or the essential step defense" (footnote omitted), petition for cert. filed, 79 USLW 3674 (May 18, 2011, No. 10-1421, 10A990), cert. denied 132 S.Ct. 105 (Oct. 3, 2011).

38. H. R. Rep. No. 101-735, at 8 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6938: "The first sale doctrine represents an important balancing of interests. The doctrine prohibits copyright owners from controlling the terms and conditions of further distribution of lawfully made copies of a work once the initial authorized distribution of those copies has taken place. At the same time, the limitations on the doctrine preserve other, essential rights of copyright owners, including the right to authorize public performances. Congress has, in the past, resisted proposals to alter the balance achieved in section 109, requiring those seeking amendments to make a compelling case for change. Proposals to reform the first sale doctrine are neither easy nor without controversy. They occur in a shifting legal, technological and economic landscape. Frequently, calls to amend the first sale doctrine are made in response to a new technology developed for reproduction of copyrighted works."
39. See MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518, at note 5 (9th Cir. 1995): "Since MAI licensed its software, the Peak customers do not qualify as 'owners' of the software and are not eligible for protection under § 117." See also DSC Communications Corp. v. Pulse Communications, Inc., 170 F.3d 1354 (Fed. Cir. 1999): "Plainly, a party who purchases copies of software from the copyright owner can hold a license under a copyright while still being an 'owner of a copy of the copyrighted software for purposes of section 117. We therefore do not adopt the Ninth Circuit's characterization of all licensees as non-owners. Nonetheless, the MAI case is instructive, because the agreement between MAI and Peak, like the agreements at issue in this case, imposed more severe restrictions on Peak's rights with respect to the software than would be imposed on a party who owned copies of software subject only to the rights of the copyright holder under the Copyright Act. And for that reason, it was proper to hold that Peak was not an 'owner' of copies of the copyrighted software for purposes of section 117" (*id.* at 1360). Rather it depends on the terms of the license: "The question of ownership of the copies of the software, by contrast, was a matter that needed to be addressed in the contracts" (*id.* at 1361). "We conclude that the district court read the market rights clause too broadly... [W]e hold that it was improper for the court to conclude, as a matter of law, that the RBOCs were 'owners' under section 117 of the copies of DSC's software that were in their possession" (*id.* at 1362).
40. 17 U.S.C. § 117(a)(2) (2006): "[F]or archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful"; and 17 U.S.C. § 117(c) (2006): "[M]ake or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine."

41. Davidson & Associates, Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1180 (E.D. Mo. 2004): "The defendants in this case waived their 'fair use' right to reverse engineer by agreeing to the licensing agreement. Parties may waive their statutory rights under law in a contract." See also Bowers v. Baystate Technologies, Inc., 320 F.3d 1317, 1335 (Fed. Cir. 2003): J. Dyk, concurring in part, dissenting in part; referring to the majority opinion: "By holding that shrinkwrap licenses that override the fair use defense are not preempted by the Copyright Act," cert. denied, 539 U.S. 928 (2003).
42. Raymond T. Nimmer, 2 Information Law § 11.149 (updated in Westlaw, November 2011); Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 Ohio State Law Journal 849, 855 (2001) (Symposium: The Impact of Technological Change on the Creation, Dissemination, and Protection of Intellectual Property): "Ultimately, Congress may be forced to decide whether copyright policy should allow copyright owners to circumvent by contract copyright law's balance of rights and limitations. The truth is that in American law the ambit of fair use has receded; its contours ever more uncertain. Determining what constitutes a fair use of a copyrighted work in a given situation is a hazardous undertaking. Providing guidance on fair use is the last thing that a practicing lawyer, even one versed in copyright, would prefer to do. Despite the uncertainty, the clear tendency as manifested in the case law is becoming apparent: in cases that really count, that is, anytime large group rights are involved, courts have progressively sided with information providers against the user's right to access" (footnote omitted).
43. 17 U.S.C. § 602(a) provides that the "[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106."
44. Omega S. A. v. Costco Wholesale Corp., 541 F.3d 982, 990 (9th Cir. 2008); judgment affirmed by an equally divided court without opinion, Costco Wholesale Corp. v. Omega S. A., 131 S.Ct. 565 (2010).
45. Omega S. A. v. Costco Wholesale Corp., 541 F.3d 982, 986 (9th Cir. 2008): "The statute would not apply because Omega made copies of the Omega Globe Design in Switzerland and Costco sold the copies without Omega's authority in the United States"; judgment affirmed by an equally divided court without opinion, Costco Wholesale Corp. v. Omega S. A., 131 S.Ct. 565 (2010).
46. Costco Wholesale Corp. v. Omega S. A., 131 S.Ct. 565 (2010).
47. John Wiley & Sons, Inc. v. Kirtsaeng, 654 F.3d 210, 218 (2d Cir. 2011), petition for Writ of Certiorari granted, 2012 WL 1252751 (Apr. 16, 2012) (Docket No. 11-697).
48. *Id.* at 212.
49. Omega S. A. v. Costco Wholesale Corp., 541 F.3d 982, 985 (9th Cir. 2008), and observing that the Supreme Court "adopt[ed] this interpretation" in Quality King Distributors, Inc. v. L'anza Researc International, Inc., 523 U.S. 135, 144–145 (1998).
50. 17 U.S.C. § 602(a)(3)(C).

51. 17 U.S.C. § 108(g)(2).
52. 17 U.S.C. § 108(d).
53. For a more detailed discussion of "systematic" in § 108, Tomas A. Lipinski, The Complete Copyright Liability Handbook for Librarians and Educators (New York: Neal-Schuman, 2006).
54. H. Rpt. No. 94-1476, 94th Cong. 2d Sess. 125 (1976) reprinted in 5 U.S.C. Congressional and Administrative News 5659, 5786 (1976).
55. John Wiley & Sons, Inc. v. Kirtsaeng, 654 F.3d 210, 220 (2d Cir. 2011), petition for Writ of Certiorari granted, 2012 WL 1252751 (Apr. 16, 2012) (Docket No. 11-697).
56. *Id.* at 222, footnotes omitted.
57. Jonathan Band, *The Impact of the Supreme Court's Decision in Costco v. Omega on Libraries*, 1 (2011), http://www.arl.org/bm~doc/lcacostco013111.pdf. This paper is a follow-up to a similarly focused paper on the 9th Circuit decision.
58. Jonathan Band, *Second Circuit Makes the First Sale Situation Worse for Libraries,* ARL Policy Notes (2011), http://policynotes.arl.org/post/9005206450/second-circuit-makes-the-first-sale-situation-worse-for.
59. See John Wiley & Sons, Inc. v. Kirtsaeng, 654 F.3d 210, 222 (2d Cir. 2011), petition for Writ of Certiorari granted, 2012 WL 1252751 (Apr. 16, 2012) (Docket No. 11-697): "If we have misunderstood Congressional purpose in enacting the first sale doctrine, or if our decision leads to policy consequences that were not foreseen by Congress or which Congress now finds unpalatable, Congress is of course able to correct our judgment."
60. This interpretation is offered by the dissent: "Unlike the majority, I conclude the first sale defense should apply to a copy of a work that enjoys United States copyright protection wherever manufactured. Accordingly, I respectfully dissent," per John Wiley & Sons, Inc. v. Kirtsaeng, 654 F.3d 210, 225 (2d Cir. 2011), petition for Writ of Certiorari granted, 2012 WL 1252751 (Apr. 16, 2012) (Docket No. 11-697), J. Murtha, dissenting.
61. Jurisdiction is a "geographic area within which political or judicial authority may be exercised," per Black's Law Dictionary 502 (9th ed.) (Bryan A. Garner ed., St. Paul, MN: West Publishing, 2009).
62. For on the various sorts of law and authority, see Christina L. Kunz, Deborah A. Schmedemann, Ann Bateson, and Mehmet Konar-Steenberg, The Process of Legal Research (New York: Aspen Publishers, 2008); Amy E. Sloan, Basic Legal Research: Tools and Strategies (New York: Aspen Publishers, 2009); Morris L. Cohen and Kent Olsen, Legal Research in a Nutshell (10th ed.) (St. Paul, MN: West Publishing, 2010).

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Monographs include *The Library's Legal Answer Book* (ALA, 2003), co-authored with Mary Minow; *Copyright Law in the Distance Education Classroom* (Scarecrow Press, 2004); and *The Complete Copyright Liability Handbook for Librarians and Educators* (Neal-Schuman Publishers, 2006).

Among his many articles are "The Myth of Technological Neutrality in Copyright and the Rights of Institutional Users," in the *Journal of the American Society for Information Science and Technology* (2003); as third co-author with Lee S. Strickland and Mary Minow, "Patriot in the Library: Management Approaches When Demands for Information Are Received from Law Enforcement and Intelligence

Agents," in 30 *Notre Dame Journal of College and University Law* 363 (2004); with Thomas Gould and Elizabeth Buchanan, "Copyright Policies and the Deciphering of Fair Use in the Creation of Reserves at Major University Libraries," in the *Journal of Academic Librarianship* (2005); with Elizabeth Buchanan, "The Impact of Copyright Law and Other Ownership Mechanisms on the Freedom of Inquiry: Infringements upon the Public Domain," *Journal of Information Ethics* (Spring 2006); as third co-author with Kathrine A. Henderson and Richard A. Spinello, "Prudent Policy? Reassessing the Digital Millennium Copyright Act," in *Computers and Society* (November 2007); as co-author with Hannelore Dekeyser, "Digital Archiving and Copyright Law: A Comparative Analysis," in 12 *International Journal of Communications Law & Policy* 180 (2008); and "A Functional Approach to Understanding and Applying Fair Use," in 45 *Annual Review of Information Science and Technology* (*ARIST*) (Blaize Cronin, ed., 2010).

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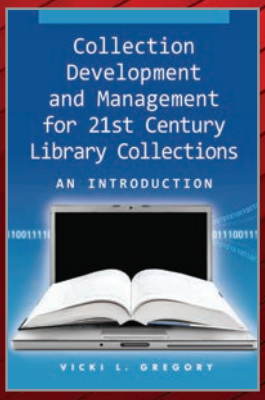

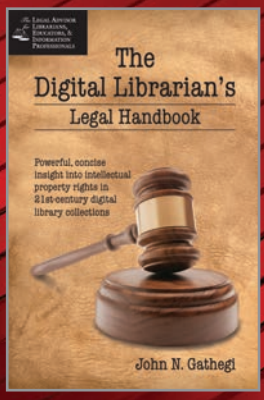

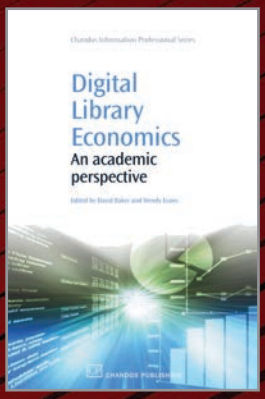

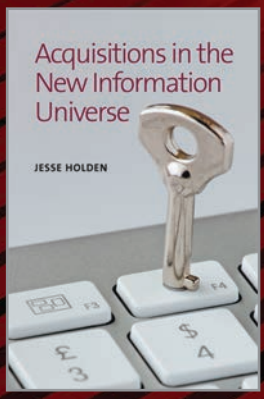

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