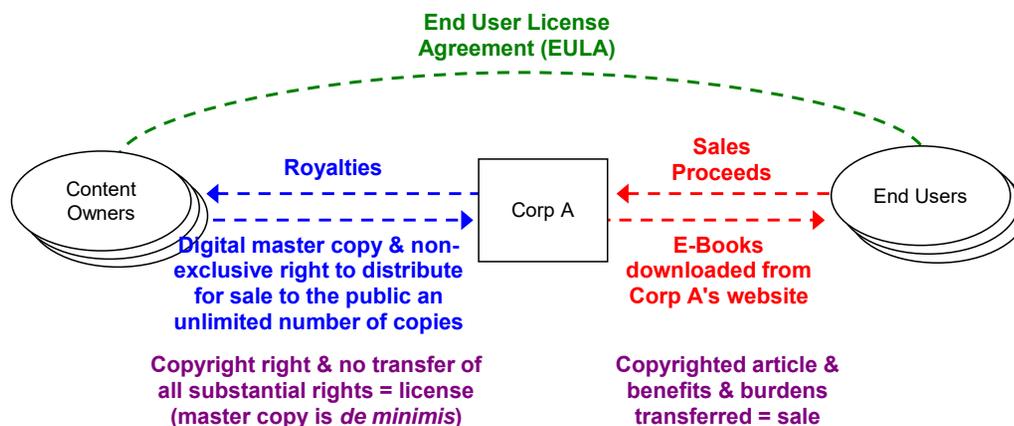


Prop. Reg. 1.861-18(h), Example 19

E-Book Downloads Are Sales (e.g., Amazon)

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Corp A operates a website that offers electronic books for download onto end-users' computers or other electronic devices. The books offered by Corp A are protected by copyright law. Under the agreements between content owners and Corp A, Corp A receives from the content owners a digital master copy of each book, which Corp A downloads onto its server, in addition to the non-exclusive right to distribute for sale to the public an unlimited number of copies in return for paying each content owner a specified amount for each copy sold. Corp A may not transfer any of the distribution rights it receives from the content owners. The term of each agreement Corp A has with a content owner is shorter than the remaining life of the copyright.



Corp A charges each end-user a fixed fee for each book purchased. When purchasing a book on Corp A's website, the end-user must acknowledge the terms of a license agreement with the content owner that states that the end-user may view the electronic book but may not reproduce or distribute copies of it. In addition, the agreement provides that the end-user may download the book onto a limited number of its devices. Once the end-user downloads the book from Corp A's server onto a device, the end-user may access and view the book from that device, which does not need to be connected to the internet in order for the end-user to view the book. The end-user owes no additional payment to Corp A for the ability to view the book in the future.

(A) Notwithstanding the license agreement between each end-user and content owner granting the end-user rights to use the book, the relevant transactions are the transfer of a master copy of the book and rights to sell copies from the content owner to Corp A, and the transfers of copies of books by Corp A to end-users. Although the content owner is identified as a party to the license agreement memorializing the end-user's rights with respect to the book, each end-user obtains those rights directly from Corp A, not from the content owner. Because the end-user receives only a copy of each book and does not receive any of the copyright rights described in Reg. 1.861-18(c)(2), the transaction between Corp A and the end-user is classified as the transfer of a copyrighted article under Reg. 1.861-18(c)(1)(ii). See Reg. 1.861-18(h)(1) and (2) (Example 1 and Example 2). Under the benefits and burdens test of Reg. 1.861-18(f)(2), the transaction is classified as a sale and not a lease, because the end-user receives the right to view the book in perpetuity on its device.

(B) The transaction between each content owner and Corp A is a transfer of copyright rights. In obtaining a master copy of the book along with the right to sell an unlimited number of copies to customers, Corp A receives a copyright right described in Reg. 1.861-18(c)(2)(i). For purposes of Reg. 1.861-18(b)(2), the digital master copy is *de minimis*. Under Reg. 1.861-18(f)(1), there has not been a transfer of all substantial rights in the copyright rights to the content because each content owner retains the right to further license or sell the copyrights, subject to Corp A's interest; Corp A has acquired no right itself to transfer the copyright rights to any of the content; and the grant of distribution rights is for less than the remaining life of the copyright to each book. Therefore, the transaction between each content owner and Corp A is classified as a license, and not a sale, of copyright rights.