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Who Fights For The Users? A Look at the First Sale Doctrine and Why It Should Apply In the Digital World

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I. Introduction

While few of us have the privilege of deriving a commercial benefit from our copyrights, each and every individual is at the very least a "user", a copyright user that is. We "users" use, experience, or interact with our own and others copyrighted material in our lives every day even if we don't always realize it. The new tunes you downloaded, that book you bought, and those "B" movies you love to indulge yourself to are all copyrighted. The games you played with your family and friends and even those that you watch on TV are also copyrighted.[1] The sculptures you pass on the way to work, the building that you live in, and even drawings hanging on your fridge – all have copyright protection. Old photos, home videos, choreography and even those pantomime acts that you loved watching so much while travelling are all protected by copyright. Copyrights permeate our daily lives and, in doing so, help to enrich them as well. Without the ability to use and interact with copyrights, our world would be far less interesting and most likely regressive, or "becoming less advanced; returning to a former or less developed state."[2]

The Framers reflected this very same fear when they drafted the copyright clause. Article I, section 8, clause 8 of the United States Constitution provides that Congress shall have the power: "to promote the Progress of Science and useful Arts, by securing for limited times to

[1] Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997)

[2] "regressive." Dictionary.com's 21st Century Lexicon. Dictionary.com, LLC. 11 May. 2012. <Dictionary.com http://dictionary.reference.com/browse/google>.

Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[3] This clause is the constitutional basis for the Copyright Act (as well as the Patent Act) and it is the only clause in the grant of powers to Congress that has a stated purpose. To fully appreciate this clause, one must understand "science" in its eighteenth century meaning. Science derived from the Latin word scientia, which meant knowledge.[4] And at the time of the writing of the Constitution "science" denoted, broadly, knowledge and learning.[5] So the core purpose of copyright law, as expressly stated in the Constitution is: to promote the progress of knowledge and learning.

The advent of digital technology, initially viewed as a great technological advance sought to bring about an even greater dissemination of knowledge and learning, has unleashed a dark current of increasingly harsh and draconian measures, which has targeted those users which copyright was meant to benefit.[6] Traditional users of copyright enjoyed certain protections, defenses and access, such as fair use, de minimus use, as well as the first sale doctrine. However, with the advent of the DMCA, and the rising tide of SOPPA/ACTA legislation[7], users have become targets rather than beneficiaries.

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[3] U.S. Const. art. I, § 8, cl. 8

[4] Allen, Sidney, William . Vox Latina – a Guide to the Pronunciation of Classical Latin (2nd ed.). nd ed. Cambridge: Cambridge University Press, 2004. 201

[5] Lynch, Jack. "A Guide to Eighteenth-Century English Vocabulary." 14 Apr. 2006. Web. 05 Apr. 2012. <http://andromeda.rutgers.edu/~jlynch/C18Guide.pdf>.

[6] See 17 U.S.C.A. § 1201 Circumvention measures and other restrictions significantly hamper traditional benefits.

[7] Magid, Larry. "What Are SOPA and PIPA And Why All The Fuss?" Forbes. Forbes Magazine, 18 Jan. 2012. Web. 11 Apr. 2012. <http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/>.

A. Traditional Rights are under Siege

One of the most fundamental principles copyright users have had the privilege of enjoying is currently endangered of becoming extinct. The first sale doctrine, also known as the exhaustion doctrine, is a judicial and statutory doctrine which holds that once an owner sells or relinquishes their work, they have historically lost control over its subsequent flow. The first sale doctrine prevented copyright owners from controlling and benefiting upon subsequent disposition of published copies.[8] These works could be resold, gifted away, or lent away by the purchaser.[9] The rationales behind the principle of exhaustion are the preservation of the free movement of goods and the presence of market failures.[10] It is from the first sale doctrine that certain individuals and institutions are able to profit so immensely such as libraries, teachers, students, and researchers. In this manner, traditional copyright law accorded the public substantial leeway in browsing published works.[11]

However as the world is becoming increasingly more digital as almost all forms of traditional media like music compilations or tunes, audio books, and other multimedia material like games and films have nowadays become predominantly featured online, via download.[12] Companies such as Amazon.com and Apple iTunes allows for products to be distributed to willing customers, and although it may have the same everyday feel of your good old normal

[8] See 17 USC §109 (exempting transfer of a particular copy or phonorecord from the copyright owner's exclusive rights).

[9] Guibault, Lucie, Copryright Limitations and Contracts – An analysis of the contractual overridability of limitations on copyright (2002) 16.

[10] Id.

[11] Arizona Retail Sys., Inc. v Software Link, Inc., 831 F. Supp. 759, 763-766 (D. Ariz. 1993).

[12] Niva Elkin-Koren, Copyright Policy and the Limits of Freedom of contract, 12 Berkeley Tech. L.J. 177 (1997).

American sale, it is a far departure from it. These companies implement licenses known as click wrap and browse-wrap in establishing user restrictions relating to their products.[13] With the advent of the digital era, where the reproduction of copyrighted works is easy and perfect, the traditional first sale doctrine has been relegated as archaic and irrelevant to today's time. This paper argues that the first sale doctrine is a bedrock principle of copyright and should be incorporated within a digital age. Further, it looks at the different methods humans have expressed themselves up until the present, and presents the issue that what has always been important for human civilization and progress is the precise content embodied in different expressive ways. In that regard, since content today is expressed in a new format, i.e. a digital one, the works embodied in this context should enjoy the same privileges as older works embodied in a physical medium. Further, this paper looks at a remarkable new company, whose entire business is built off digital first sale and demonstrates how it is forging the way forward in an effort to incorporate digital works in the first sale doctrine.

II. Ancient Mediums of expression

Humans are creatures of expression. They have used common methods such as orations, festivals and even sporting contests to celebrate or reflect on the human condition. Regardless of their form, the overriding purpose was to deliver some kind of message. It was the content that mattered and not necessarily the package that it came in. As civilizations became more advanced, it became increasingly important to record that content. Soon the art of expression was born, providing a way of extending human memory by imprinting information into a concrete form more consistent than that of the human brain. Although the mind is a powerful force it can sometimes forget, while something recorded could last in perpetuity. Writing for example, was

[13] Guibault, supra note 9 at 119.

utilized for accounting or record keeping purposes in order to attribute accurate counts of agricultural products and for developing a calendar to plant crops at correct times in the year.[14] It was also utilized very effectively as a taxing system by several ancient civilizations.[15]

A. Scrolls to binding

While we may not realize it, books were not always the way that writing was expressed. Content was captured in several ancient forms including cave paintings, ancient hieroglyphics and clay tablets. Around approximately 3000 B.C. though, humanity possessed a significant technological advancement with the development of ancient papyrus scrolls. These scrolls became the dominant method of expression and lasted over 3500 years.[16] Almost every "book" in the ancient civilizations of Egypt, Greece and Rome was a papyrus scroll of this type. But ancient civilizations are ancient for a reason, and scrolls soon became outdated with the next advanced technological achievements which were books.[17] Scrolls served their purpose however, books served as a far superior method for recording and maintaining information. Books were more portable, durable and could hold more content in a smaller form than several scrolls could.[18] For centuries, monks and scholars transferred the older scroll material onto codex, or what we commonly refer to as books. Yet even though this was an extreme advancement it was nonetheless still a laborious enterprise until one singular event altered the course of history.

[14] Powell, Barry B. Writing: Theory and History of the Technology of Civilization. Chichester, U.K.: Wiley-Blackwell, 2009.

[15] Id.

[16] Id at 103

[17] Id.

[18] Id at 117

B. Statute of Anne and its ramifications

In 1440, German inventor Johannes Gutenberg invented a printing press process that, with refinements and increased mechanization, remained the principal means of printing until the late 20th century.[19] The inventor's method of printing from movable type, including the use of metal molds and alloys, a special press, and oil-based inks, allowed for the first time the mass production of printed books.

The immediate effect of the printing press was to multiply the output and cut the costs of books. It thus made information available to a much larger segment of the population who were, of course, eager for information of any variety. Libraries could now store greater quantities of information at much lower cost. Printing also facilitated the dissemination and preservation of knowledge and learning. The printing press certainly initiated an "information revolution" on par with the Internet today.[20] Printing could and did spread new ideas quickly and with greater impact. And while books and the printing press proved to be a remarkable achievement from the papyrus scrolls of ancient Egypt, both technologies sought to disseminate particular content, and in that way were vessels for disseminating information. Just like scrolls and books after, the printing press was not revered but was praised as a valuable technological advancement for disseminating content.

Once the printing press was introduced into England in 1476, the need for protection of printed works was inevitable.[21] The genesis of copyright law was the crown's grant of letters

[19] Febvre, Lucien, and Henri-Jean Martin. The Coming of the Book: The Impact of Printing 1450-1800. London: NLB, 1976.

[20] Id.

[21] Fischer, Steven Roger. A History of Writing. London: Reaktion, 2003.

patent, the printing patent, giving one entity a monopoly on the printing of certain works.[22]

Therefore, the essence of copyright began when a single participant in the stationers' company registered the title of their work or "copy" with their guild. The act of registration provided that printer the exclusive right in the copy much like the exclusive right provided for in section 106(1) for reproduction.[23]

III. America's Reaction to Copyright

The framers of the Constitution were deeply suspicious of the monopolies and the fact that copyright was increasingly used as a tool of censorship and press control.[24] They wanted to assure that copyright was not used as a means of oppression and censorship in the United States.[25] They, therefore, expressly provided for the purpose of copyright: to promote the progress of knowledge and science. [26] With the stated goal firmly fixed in the Constitution, the task of accomplishing that goal was given to Congress. The means for achieving that goal are also stated in the Constitution. The promotion of the progress of knowledge and science was to be accomplished by "securing for limited times to Authors .... the exclusive Right to their ... Writings."[27] In that regard, monopolies would be tolerated, in order to affect a balance between this marketable right to the use of one's expression, copyright supplies the economic incentive to

[22] Id.

[23] see 17 U.S.C.A. § 106(1) (West) to reproduce the copyrighted work in copies or phonorecords

[24] Drahos, Peter, and John Braithwaite. Information Feudalism: Who Owns the Knowledge Economy? New York: New, 2003.

[25] Id. At 34

[26] Id.

[27] U.S. Const. art. I, § 8, cl. 8

create and disseminate ideas.[28] And as the Supreme Court has so eloquently put, "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[29]

In fulfilling the constitutionally mandated goal of copyright law, Congress has had to ask, as one early legislative report did, two questions: "First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public?"[30] Even from its earliest days copyright has focused specially on the benefits of the user. Further, as Judge Walker of the Second Circuit recently summarized: "The copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation."[31] The founding fathers understood the importance of spreading content and saw copyright to be a mechanism by which individuals within our society would grow and flourish. Copyright was, therefore, seen as a powerful force for progress.

A. Copyrights Far Departure Today

Since the advent of the Gutenberg printing press, copyright law and technology have been entangled in an ongoing legal chase.[32] In order to advance the quintessential goal of

[28] Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)

[29] Id.

[30] H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

[31] Computer Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992)

[32] See Doreen L. Blades, Copyright Issues and the Internet, 577 PLI/Pat. 89 (1999). .

American copyright law, the promotion of knowledge and learning, Congress constantly must balance the law's objectives: to promote widespread dissemination of original creative works, while providing incentives to authors and owners to create such works.[33] New technological advances continuously upset this balance by facilitating the ability to copy works without permission from copyright holders, thereby provoking controversy and necessitating reevaluation of the scope of legal copyright protection. However, as developments such as radio, television, and video have demonstrated, worries over the demise of copyright protection have been overstated.[34] In fact, such technological developments usually have been met with a ceaseless round of amendments to the United States copyright laws.[35]

The most recent historical change that has produced a legal outcry in the copyright community is the emergence of the Internet. Digitization is the new method of preserving and delivering content. We have certainly come a long way from the early papyrus scrolls and printing presses as now virtually any copyrighted materials can be instantaneously replicated allowing for perfect copies of originals.[36] Further these copies can be digitally transferred to millions of users anywhere in the world.[37] Because of decentralization and anonymity in cyberspace, copyright owners, much like the crown before it, have feared the potential

[33] See David N. Weiskopf, The Risks of Copyright Infringement on the Internet: A Practitioner's Guide, 33 U.S.F.L. Rev. 1, 9-10 (1998).

[34] See Dickerson Downing & Kathleen McCarthy, Copyright and the Digital Age, N.Y. L.J., Dec. 6, 1999, at T5.

[35] Supra note 33 at 11.

[36] See Kenneth D. Suzan, Comment, Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet, 59 Alb. L. Rev. 789, 792-95 (1995)

[37] Id.

widespread dissemination of copyrighted materials without permission from their owners. [38] The copyright owners see the internet as harboring great potential for pirating, while copyright users envision this new age as allowing for greater dissemination of works, and thereby increasing the proverbial wealth of society.[39] Accordingly, copyright owners and law-makers have become increasingly harsher and restrictive upon traditional user rights.

History of the First Sale Doctrine

The First sale doctrine, along with the principles of fair use, has become increasingly relegated in the age of digital works. The first sale doctrine as well as the notion of fair use found their origins in judicial, rather than congressional precedent.[40] First Sale or the exhaustion principle arose out of a common law rule disfavoring the inalienability of personal property.[41] Yet, the first sale doctrine was "officially" recognized by the judiciary in the infamous case of *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). Bobbs-Merrill was one of the original major publishing companies in America. In the early 1900s they entered into an agreement with novelist, Hallie Erminie Rives, for his work, *The Castaway.* Bobbs-Merrill, the exclusive distributor of the work, sold the books with the following notice, "The price of this book at retail

[38] See, e.g., Suzan, supra note 36, at 793-95

[39] Supra note 34 at 111.

[40] See United States v Atherton, 561 F.2d 747, 750 (9th Cir. 1977) (noting that the first sale doctrine "has been judicially read into the statute from a judicial gloss drawn on 17 U.S.C. §27").

[41] See Zechariah Chafee, Jr., Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945, 981-82 (1928); H.R. Rep. No. 98-987, at 2 (1984), reprinted in 1984 U.S.C.C.A.N. 2898, 2899; S. Rep. No. 162, at 4 (1983); ("Where chattels are involved and not just land or a business, the policy in favor of mobility creates even stronger cause for courts to hesitate and scrutinize carefully factors of social desirability before imposing novel burdens on property in the hands of transferees.")

is $1 net".[42] No dealer is licensed to sell it at a lower price, and a sale at a lower price will be treated as an infringement of the copyright" printed immediately below the copyright notice. The defendants in this suit, R.H. Macy & Co., purchased large lots of books at wholesale and thereby sold copies of the book at eighty-nine ($.89) cents a copy. The central issue posed by the case was whether, "the sole right to vend secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum?"[43] The court held that the copyright statutes protect an owner's right to "multiply and sell" the work on their own terms. However, this right did not also create a right to limit resale.

From its inception in the Bobbs-Merrill holding, the first sale doctrine emerged as one of the key limitations upon the broad rights afforded to copyright owners. This doctrine was incorporated into the Copyright Act of 1909, and is currently codified at 17 U.S.C. § 109(a). Thrift stores, used bookstores, used record stores, used video game stores, resale sites such as eBay, and the video rental industry owe their existence to the first sale doctrine. Although *Bobbs-Merrill* was principally a case of statutory interpretation, the first sale doctrine has since been justified by public policy concerns regarding restraints of trade and alienation of property.[44]

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[42] Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 342 (1908).

[43] Id. At 344

[44] See, e.g., Columbia Pictures Indus. V Redd horne, Inc., 749 F.2d 154, 159 (3d Cir. 1984) ("The first sale doctrine prevents the copyright owner from controlling the future transfer of a particular copy once its material ownership has been transferred.");Am. Int'l Pictures, Inc. v Foreman, 576 F.2d 661, 664 (5th Cir. 1978) ("After the first sale of a copy the copyright holder has no control over the occurrence or conditions of further sales of it....The first sale thus extinguishes the copyright holder's ability to control the course of copies placed in the stream of commerce.").

Despite the Court's claim that it acted merely as a faithful interpreter of the terms of the Copyright Act, Bobbs-Merrill reveals a Court engaged in judicial weighing of competing interests and policies that parallels the fair use inquiry.[45] The Copyright Act of the day provided rights holders the sole liberty to vend copies of their works, but it said nothing of alienability, exhaustion, or first sale.[46] The Bobbs-Merrill Court did not discover the first sale doctrine nestled between the lines of the Act. It applied a common law defense to infringement previously recognized by other courts that, while not inconsistent with the text of the Act, was nowhere to be found within it.

Similarly a digital first sale doctrine has no doctrinal basis, but if one considers traditional common law rule against alienation and the precedent of the physical first sale doctrine then the same principles should applied to the digital marketplace. However in this wonderful age of digitization, copyrights have ceased to become benefits for the users and more of a tool for the owners, one of censorship and monopolistic oppression.

A. The Importance of Balance in Copyright Law

The most important of the rights of users other than fair use is the first sale doctrine. Yet first sale in today's age holds almost no meaning, or, at the very best, has been relegated to being a relic, simply a product of a different time. This relic, like status, can also be said for the important balance between user's rights and owner's rights. There doesn't seem to be much of a balance anymore, as, one side, the owners appear to hold all of the cards.

[45] Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350 (1908).

[46] Id.

An argument in favor of more rights for users of copyrighted works and correspondingly fewer rights for copyright owners, often is countered by the copyright owning industries with an argument based on an economic analysis of copyright law. This is the argument in a nutshell, the larger a monopoly, leads to larger financial rewards and ultimately a greater incentive to create.[47] Therefore, with expansive monopoly rights, larger numbers of works are created and disseminated resulting in greater knowledge.[48] However, I believe there are three separate counter arguments which demonstrate the fallacy here.

First, as monopolies continue to grow, they naturally, even if intentionally, suffocate some expression. Over expanding monopolies perpetrated by only certain individuals can have profound implications on other user's expression. As the scope of owners copyright protection grows, the creation of new works is, itself, hampered. And every commercialized owner was at one time a user, who was able to build on the works of the past in some way. Unnecessary expansion of monopolies threatens the availability of new works that build upon old which in turn stifles creative expression and, therefore, the net value to society is lessened. We have what Judge Walker referred to a "monopolistic stagnation."[49]

Second, increasingly all encompassing, market dominating monopolies doesn't seem to serve the copyright industries fundamental argument that greater monopolies will result in greater levels of creativity. Users and owners produce new works for a variety of reasons. And there are no true empirical studies which suggest that increases in monopoly rights lead to an

[47] Supra note 7

[48] Id.

[49] Supra note 31

increase in the creation of new works.[50] Copyright owner's theory on this issue is just a theory, yet it seems an illogical one. After all, it does not seem very probable that an owner will spend additional time creating new works when they know they will seek a benefit for the rest of their life, and their heirs will receive it for 70 years after.[51] These monopolies instead benefit corporate owners of copyrights, whereby a majority of them are obtained through assignment after they've been created. The more copyrights Penguin Books, for example, has within their repertoire, the more profitable they can be.

Finally, even if larger monopolies would result in greater numbers of the creation of new works, the conclusion that greater knowledge will result does not follow. If users are limited in their scope of what they traditionally could have done, then there is a detriment to all members of society. Increased monopolization has led to increased restrictions and a significant hampering of traditional benefits such as the first sale doctrine and fair use. These rights allowed users the ability to be an active component in copyrights stated goals of the progression of knowledge and science, by dispersing or recreating works for other members of society. Copyright today threatens this traditional dispersion benefit and indirectly threatens copyrights stated goals.[52] If the range of the owner's monopoly is too broad, then those beneficial uses will never emerge. And these uses, which are those that disperse external benefits are the uses that, if permitted, would, in fact, further the goal of copyright, to promote the progress of knowledge and learning.

[50] Boldrin, Michele, and David K. Levine. Against Intellectual Monopoly. New York: Cambridge UP, 2008.

[51] Id at 74.

[52] Supra note 50 at 88.

When the ultimate goal of copyright is the exploitation of monetary rights of copyright owners, instead of the progress of knowledge and learning for the users the result for the rest of society is ultimately a detrimental one.

The recent configuration of copyright reflects a fundamental departure from traditional principles. As the owners' monopolies grow the content owning industry can generate more revenue which ultimately has some favorable short term benefits such as a larger gross national product, a smaller trade deficit, and greater employment.[53] However, in the long term, the threat of monopolistic stagnation remains firmly entrenched overhead and users remain in a very precarious position, much like deer in a woodland area increasingly being threatened to move away.

B. First Sale Benefits for Users

The Copyright Act provides owners with six exclusive rights: reproduction, preparation of derivative works, distribution, public performance, public display, and digital transmission performance.[54] Much of these rights are balanced by the rights of users as there are certain limitations placed upon these exclusive rights. For example section 106(3) of the United States Copyright statute which provides copyright owners with the exclusive right to distribute their works is ultimately limited by a user right codified in section 109 of the US copyright act, which is also known as the first sale doctrine.[55]

Users derive a significant right through the first sale and it is a principle which effectuates a fundamental balance in copyright law. As users we all have interests in trading and

[53] Id.

[54] See 17 USC §106.

[55] See 17 USC §109.

alienating the works we purchased, and transferring works to others serve in the ultimate goal of copyright, which is the promotion of progress and science. Under the doctrine, after the first sale has occurred, subsequent owners lawfully obtaining the work may freely alienate it.[56]

We have all benefited from the first sale doctrine whether we have realized it or not. It is this doctrine that has historically permitted users who own CDs, records, movies or even ancient scrolls or codex to resell their works, give them to friends and family, donate them or dispose of them.[57] It is also the first sale exception that enables used CD stores and bookstores, or even yourself, to capture the entire profit from reselling used versions of copyrighted works without having to share any of the money with the owners or publishers.[58] Finally, the first sale doctrine allows libraries to freely lend books to anyone with a library card, again without any residual payment obligations to the author or publisher.[59]

C. Section 109(a) and the First Sale Doctrine

Section 109(a) of the Copyright Act preserves the critical first sale right of users by endorsing a test composed of two prongs.[60] Accordingly, in order for the user to perceive the benefit of the first sale doctrine in an infringement suit, the user, i.e. the defendant must establish both prongs.[61] First, the defendant must own the particular copy of the specific work in question

[56] Supra note 42.

[57] Supra note 55.

[58] Id.

[59] US Copyright Office, DMCA Section 104 Report (Aug. 2001).

[60] Id. At 22.

[61] See 17 USC §109.

(i.e. a CD, DVD, book etc.).[62] A user can acquire a copy through the virtue of a sale, gift, bequest or other transfer of title such as a creditor action.[63]

Since the first sale doctrine is a derivative of the copyright owners exclusive right to distribute, users with anything less than full "ownership" may not exercise the doctrine.[64] Merely possessing works, therefore, "regardless of whether that possession is legitimate, such as by rental, or illegitimate, such as by theft,"[65] is insufficient for purposes of the first sale doctrine. For example a patron at a library who never returns a book they took out and then sells it would not only be converting the book itself, but would also be infringing the author's copyright in the book, because they never had actual ownership of it in the first place.

The first sale doctrine's second prong requires that the defendant's copy was made lawfully.[66] The copyright owner or the law, therefore, must have authorized the making of the copy in question.[67] Illegal copies, regardless of whether or not the owner has knowledge of piracy, do not receive the benefit of the first sale doctrine. A user therefore who holds a DVD that was pirated, thus cannot legally resell such item to a used DVD store without violating the copyright owner's distribution right.[68]

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[62] Id.

[63] Melville B. Nimmer & David Nimmer, Nimmer on Copyright §8.12(B)(1) (2002).

[64] Paul Goldstein, Copyright: Principles, Law and Practice §5.6.1.1 (1989).

[65] Supra note 63 at 23.

[66] Supra note 61.

[67] Supra note 63 at 23.

[68] Keith Kupferschmid, Lost in Cyberspace: the Digital Demise of the First-sale Doctrine, 16 J. Marshall J. Computer & Info. L. 825, 832 (1998).

II. Primary Concerns in a Digital Age

Historically, pirating works was no easy task.[69] It was only about a hundred years ago when one of the best ways to duplicate works was by actually possessing a printing press or alternatively the arduous work of copying by hand, which of course required considerable skill, money and time.[70] After a copy was made, the distribution process also remained equally intensive; this meant physically delivering each copy to its proper destination. The art of copying was thus extremely time consuming and one which required an immense amount of resources. Today, these historical obstacles to piracy have only very recently within the last two decades begun to unravel. First, in the 1980s, the advent of the photocopier and VCR provided for reduced skill, cost and time in a book or a movie. However, distribution of such copies still involved expenses on the distribution side.

Copyright owners correctly highlight that in today's age both the copying as well as the distribution process have been virtually reduced to almost no skill, time or energy.[71] The digital age has allowed for works to be copied with the simple movement of a finger on a mouse. And if something is copied, users can distribute these files with friends and family as well as anyone in the world, all with a few clicks on a mouse.

Moreover, unlike traditional methods of copying, copying digital files doesn't result in a lesser quality of a file.[72] Owners argue that this unique age of digital works conflates traditional

[69] Pamela Samuelson, Digital Media and The Changing Face of Intellectual Property Law, 16 Rutgers Computer & Tech. L.J. 323, 324 (1990).

[70] Id.

[71] Supra note 69 at 327.

[72] Supra note 68 at 848.

notions of copies.[73] The essential argument is that unlike the life of a paper book or a CD that degrades over time, a digital file, barring accidental erasure or corruption from a virus, can be used indefinitely.[74] And any copy transferred, exists in perpetuity and thereby permanently threatens to dilute the original works value.[75]

Further, owners put forth the argument that the essence of the works presents several concerns.[76] Since digital works creations are basically unseen strings of voltage, in which the high voltage corresponds to a 1 and the low voltage corresponds to a 0, creating a binary representation, they are essentially compact and naked to the visible eye.[77] The argument raised is that no longer is vast storage space required, as a complete library can be put onto an entire hard drive, and therefore this warrants increased protection.[78] One billion bits of data which could be stored in a one gigabyte hard drive would need a stack of paper three stories tall if it were typed.[79] Owners allege that users can therefore possess an abundance of digitized works, and effortlessly increase the pool from which works can be accessed and selected for piracy.

A. License Agreements Limit Application of the First Sale Doctrine

Given these standard fears and paranoia, owners have developed ingenuous ways to indefinitely preserve their copyright in the digital work. Since owners have come to view that

[73] Id.

[74] Id.

[75] Id.

[76] Supra note 69 at 334.

[77] Id.

[78] Id.

[79] Id.

every user has the proverbial printing press at his disposal, they have enacted harsher restrictions on digital works.[80] In an attempt to deal with these fears, copyright owners have turned to contract law in an effort to avert unauthorized copying. Intelligently, owners have labeled most e-copies as licenses rather than a sale, thereby undercutting the first sale doctrine altogether.[81] Several licenses such as a click wrap licenses or web wrap licenses require users to simply click yes, and, sometimes even unbeknownst to the users, the licenses typically have restrictions on use, reproduction, transfer and modification of the content.[82]

The use of such licenses in the age of digital works targets copyright user's traditional privileges. Licenses attempt to eliminate the first sale doctrine by reducing a copyright user's status from that of owner to a mere possessor, thereby rendering the user unable to meet the doctrine's ownership requirement.[83] By preventing the ability of users to transfer licensed works, owners have effectively frustrated users rights completely.

On its face, the first sale doctrine as codified in the Copyright Act does not distinguish between digital and non-digital works.[84] Your e-book of *Don Quixote*, cannot be disposed of, resold or transferred in any way due to the restrictions of the licensing terms. Further, the copyright statute itself seems to limit the first sale specifically to the particular copy possessed, which has been interpreted as a physical copy while arguments against incorporating a digital

[80] Id. At 326.

[81] As an example, the click-wrap license agreement accompanying Microsoft Reader 2.1 states "The software product is licensed, not sold

[82] Batya Goodman, Honey I shrink-wrapped the consumer: The Shrink Wrap Agreement as an Adhesion Contract, 21 Cardozo L. Rev. 319, 322 (1999).

[83] Id at 332.

[84] 117 U.S.C. 109

first sale doctrine currently hold the courts ear today, tomorrow holds the promise of the spectrum as to whether the first sale doctrine applies to digital works.

VI. Why the first sale doctrine should apply to digital works

Current legislation of not recognizing digital copies for first sale is antithetical to the ultimate goal of copyright. Specifically, it prevents the diffusion of culture and progress while it should be enhancing it. In fact in an era dominated by digital works one could say that the dangers the court was first worried about in the *Bobbs Merril* decision, have reared their head again with the advent of digital works, except this time the courts have been inadequate in their response.

Further, digital rights management and their protection significantly threaten the rights of users. This new trend is extremely dangerous for society because it circumvents traditional privileges which users entertained.[85] Copyright law should and could be amended to preserve the same user principles to the digital environment. This would need to ensure that the same balance of rights and exceptions guaranteed by copyright law is re-created in the digital world.

As stated by the Library Associations in their response to effects of the Digital Millennium Copyright Act a "formalistic application of the exclusive reproduction right must not prevent consumers from utilizing new technologies, and it must not prevent traditional user rights, like the first sale doctrine, from being replicated in new technological environments."[86] This position has strong precedent, as Supreme Court cases such as *Twentieth Century Music*

[85] Id.

[86] US Copyright Office, DMCA Section 104 Report (Aug. 2001).

Corp. v. Aiken[87] and *Fortnightly Corp. v. United Artists Television, Inc.,*[88] that illuminate the courts ability to adapt copyright law to technological changes.

Specifically, the central issue in *Aiken,* gives the court a very close analogy to the dilemmas with the first sale doctrine in the digital age today. In *Aiken* the plaintiff copyright owners sued a storeowner, alleging that by receiving a radio station broadcast of plaintiffs' copyrighted songs the storeowner infringed the plaintiffs' exclusive right to perform the work themselves.[89] In holding that the reception of a radio broadcast by the storeowner did not infringe the copyright owners' performance right,[90] the Court reasoned that while the legislative history of the 1909 Copyright Act aimed to prevent unauthorized performances of copyrighted material in public places such as concert halls and theaters, "it was never contemplated that the members of the audience who heard the composition would themselves also be simultaneously 'performing,' and thus also guilty of infringement."[91]

The *Aiken* decision is particularly significant due to the fact the way the court dealt with the importance of the technology of the radio on the exclusive performance right of owners. By providing a vehicle for new technology, with respect to a narrow or limited statute, the court effectively evolved the Copyright Act to handle unforeseen issues. Specifically embracing this

[87] Twentieth Century Music Corp v Aiken, 422 U.S. 151, 158 (1975).

[88] Fortnightly Corp., v United Artists Television, Inc., 392 U.S. 390 (1968) (stating that "our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here .... In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change.").

[89] Aiken 422 U.S. at 153.

[90] Id. At 162 – 164.

[91] Id. At 157.

position of flexibility the court stated, "A statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning . . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries." [92]

Under this same precedent, the mere progression of society and the advance in technology should not force traditional applications of the copyright act into extinction. Since it was first created, under *Bobbs-Merrill*, the first sale doctrine was itself an evolutionary concept of common law, which sought to encourage a balance between owner's rights to distribute and be compensated for their works with an overriding policy of promoting unrestricted alienability of property throughout society.

Owners have long advocated that a digital first sale doctrine is simply unworkable as transferring a digital file from one individual to another ultimately results in a copy and is not the user's "particular copy" as defined in the statute.[93] However, just because our society has significantly advanced since the first concepts of copyright emerged, should not mean that traditional rights are sacrificed. While the use of modern technology to transfer a digital copyrighted work results in a copy, and while that specific embodiment of the content may not be precisely the user's "particular copy," and even though such action may technically implicate the copyright owner's reproduction right, the copyright act should not be read so narrowly as to disregard the first sale entirely.

[92] Id. At 158.

[93] See 17 USC §109.

Another reason that the first sale doctrine should apply to digital works is that copyright has always been focused on the particular content which is embodied in a particular copy rather than the physical or other medium in which it is contained. And the first sale doctrine centered upon the scope of the property that is being shifted rather than on "the nature of the land or chattel that is the object of that property interest."[94] Just as the record rental amendment as codified in Section 109(b) of the Copyright Act makes a distinction between ownership and possession, so too should the distinction be made clear in the copyright statute. Specifically the Rental Amendment act states that the first sale doctrine does not "extend to any person who has acquired possession of the copy or phonorecord . . . without acquiring ownership of it".[95] This underlines the fact that "the first sale doctrine applies according to the scope of the property interest that has been transferred, rather than according to the object of that interest."[96] Therefore it would seem that restricting the application of the first sale doctrine only on the basis of the fact that the work is not rightfully owned because of its embodiment as a digital object, is inconsistent with the spirit of the first sale doctrine.[97]

The first sale doctrine should also apply to digital works because it has a fundamental goal like the copyright statute. Its objective is to assist and continue the flow of copyrighted works for individuals in society to benefit from. This goal is squarely in line with copyrights ultimate goal of promoting knowledge and progress and both should triumph over efforts of

[94] Supra note 59.

[95] See 17 USC §109.

[96] Supra note 59.

[97] Id.

owners to maximize their wealth. [98] The ways in which the first sale doctrine have been articulated by U.S. courts, "has consistently reflected the belief that the public benefit derived from the alienability of creative works outweighs the increased incentive to create that would stem from granting authors perpetual control over copies of a work."[99] And where the interests of copyright owners and the public conflict, it has been recognized that "the public interest must prevail."[100] As the Supreme Court stated in *Aiken*, "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. The sole interest of the United States and the primary object in conferring the copyright monopoly, this Court has said lie in the general benefits derived by the public from the labors of authors. When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."[101]

Copyright policy thus mandates application of the first sale doctrine with respect to digital works. At a minimum therefore, if the first sale doctrine as drafted in the Copyright Act does not apply to digitized works, some method of facilitating a first sale doctrine must be created.

[98] See Register's Report on the General Revision of the U.S. Copyright Law (1961) (explaining the purpose of public interest limitations on author's rights)

[99] id.

[100] Supra note 98.

[101] Aiken, 286 U.S. at 156.

A. The lack of a Digital First Sale Doctrine Effects Users Traditional Rights

Since digital works are currently viewed and enforced as being incompatible with the first sale doctrine, owners are able to perpetually extend their rights, thereby eliminating first sale and eliminating any opportunity for users to resell or transfer the works they purchased. Owners have incorporated copyright protection technology that prevents copying and denies access to anyone except the original user. In essence the balance strived by the founders and the copyright statute has become a card game where the owners hold all the cards. Owners can essentially remove used versions of the digital work from the market, thereby forcing interested consumers to purchase new versions of the digital work. Further, in the case of Adobe's Acrobat eBook Reader software, the inability of a user to transfer one eBook between multiple computer platforms may in some instances result in users purchasing more than one copy.

Encryption, restrictive licenses, and Section 1201 of the DMCA have impacted commerce tremendously. Several groups opposing the DMCA have set forth these concerns in the Copyright Office's Section 104 Report. For example some individuals have argued before that the used DVD market is harmed by the inability to play DVDs on devices other than those equipped with a content scrambling system (CSS) descrambling chip.[102] Because playback is only possible on certain devices users are at the very mercy of the owners not only purchasing the DVD but the player device as well.[103]

Most importantly, the first sale doctrine has significantly hampered libraries. Because first sale privileges are only viewed as extending to the object which embodies the content, owners with digital works cannot donate to libraries without donating their entire hard drive.

[102] Supra Note 59.

[103] id.

Libraries in an age of digitization are stuck in a hardbound age and continue to rely on donations of hard copies as their principle sources.[104] However given the increase in digitizing almost everything from music to movies to books, hard book sales are significantly diminishing.[105] And every single new work that is licensed or in E form, rather than purchased in hard-copy format correspondingly reduces the pool of copyrighted works that can be donated to libraries. Traditional donation channels, therefore, may logically subside to a point of infeasibility for libraries such that libraries will be unable to maintain a collection of current works large enough to support public demand.[106]

In summation, the DMCA's provisions combined with the use of restrictive licenses impede commerce substantially. Additionally, consumers are unable to sell or transfer their media that they normally would which hinders libraries to the point where they would not be able to enjoy the benefits that digital technology has to offer. Being that libraries are one of the segments of commerce standing to benefit substantially from modern technology, the incompatibility of the first sale doctrine with digital works poses an ironic twist. The use of digital works such as eBooks could save libraries considerable time and money in that works could be more cheaply and easily stored, retrieved and distributed to library patrons. As is, however, use of eBooks is prohibitively cumbersome, expensive, and impractical due to encryption software and the DMCA's anti-circumvention rules. Moreover, licensing digital works such as periodicals often requires libraries to submit to overly restrictive terms that render use of the digital work cost ineffective.

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[104] id.

[105] id.

[106] id.

C. Making the Digital First sale Doctrine Practical

The most efficient way to articulate a digital first sale exception is for the Copyright Act to be amended. As noted by one commentator, "the public interest and the evolution of the marketplace often are better served by laws that clearly address and define the rules for a new technological environment."[107] The amendment must address concisely that the first sale doctrine applies regardless of the particular media in which it was fixed in, and not discriminate as to print, digitized, or other media forms. For instance, the Library Associations proposed the following changes to section 109(a) of the Copyright Act: "notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or the owner of any right of access to the copyrighted work, 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, phonorecord, or right of access."[108]

Along with the Copyright Act amendment, certain technological measures must be developed to provide for copying and transfer of digital works while preventing piracy. To this end, several objectives must be achieved. First, certain measures must be taken in order to preserve the balance between owners and users that the first sale doctrine has traditionally attempted to establish. As we have already been witness to for several years, tipping the scale either way can have dramatic economic and social effects.

Second, technological measures to ensure owner's rights cannot be prohibitively expensive that they frustrate consumer's intention of electronic purchases. The measures taken

[107] Supra note 59.

[108] Reply Comments of the Library Associations Before the Library of Congress, The United States Copyright Office and The Department of Commerce, National Telecommunications and Information Administration, Washington, D.C., available at http://www.arl.org/info/frn/copy/letter060500.html (Sept. 5, 2000).

must be commercially feasible. Providing otherwise would undermine the incentive to create original works and reduce the market for used works.

Finally, technological measures must provide sufficient assurance to copyright owners that piracy will not occur. Because copyright owners bear all risks of piracy that could potentially ensue if the new technological measures fail, copyright owners will simply refuse to adopt the measures unless such assurance is obtained. The measures must therefore be developed pursuant to a broad consensus of copyright owners and other relevant industry representatives so that copyright owners feel confident in the technology.

VII. Redigi Inc. is pushing new boundaries in efforts to recognize a digital first sale doctrine

ReDigi, entered the market in 2011, operating a web based service allegedly offering, "the world's first and only online marketplace for used digital music".[109] Redigi purports to engage in the, "transfer of a digital music file from one user to another without copying or file sharing".[110] Users on the Redigi site can upload files purchased from itunes into ReDigi's cloud locker, and then access from one user to another can be effectively transferred without implicating any copies and thereby qualifying under the First Sale Doctrine.

A user's interaction with Redigi is accomplished in three easy steps. First, the user establishes a Redigi account and uploads a music file to the Redigi "music locker."[111] The user, and only the user, can stream the track on her computer. Moreover, in this process Redigi

[109] "ReDigi.com - Splash." ReDigi.com - Splash. Web. 11 Apr. 2012. <https://www.redigi.com/>.

[110] id.

[111] id.

verifies that the file was purchased from iTunes and it is legal – that is, it was not ripped from a CD or is itself a copy. Redigi digitally fingerprints the file, so that multiple copies of the file cannot be sold on Redigi. And, importantly, Redigi deletes the copy on the user's computer and synced devices, such as an iPod. Thus, at this point the file exists only on the Redigi servers, the "Redigi cloud." If the user wants to listen to it, they must do so by streaming from the cloud. On January 6, 2012, Capitol Records filed a copyright infringement suit against ReDigi. Capitol alleges that ReDigi, is engaged in "willful and systematic" copyright infringement.[112] Capitol is suing ReDigi in New York Federal Court and is seeking statutory damages of $150,000 per work infringed.[113] ReDigi, in response has stated the same message it has always stated, its service doesn't engage in copyright infringement at all ensures certain safeguards to protect owner's rights.[114] This case has gathered attention from certain big media organizations such as Google which recognize the significant implications that this case could have on various forms of digital media. Google like other business today are commonly engaged in cloud computing, which allows for users to access, process and store data remotely in a "cloud" comprised of network servers. Google even filed an amicus curiae brief in the case to address the issues that relate to "continued vitality of the cloud computing industry"[115] The court has subsequently rejected Google's request stating that "the parties are fully capable of raising these issues"[116] Recently, on

[112] Complaint Capitol Records LLC v Redigi Inc, case No 12 Civ 0095 (RJS) (SDNY 6 Jan 2012).

[113] id. At 18.

[114] Defendant's Memorandum of Law in Opposition to plaintiff's Motion for Preliminary Injunction at 9 – 12, Capitol Records LLC v Redigi Inc, case No 12 Civ 0095 (RJS) (SDNY 6 Jan 2012).

[115] Letter to Judge Sullivan from Katheryn J. Fritz of Fenwick & West LP, attorneys for Google, Inc. (dated 1 February 2012).

[116] Order, Capitol Records LLC v Redigi Inc, case No 12 Civ 0095 (RJS) (SDNY 6 Jan 2012).

February 6, 2012 the court denied Capitol's motion for a preliminary injunction mostly due to the recent supreme court decisions.[117]

Redigi, has taken the next step in providing for a method of applying the first sale to digital works. The heart of their defense is that the resale of music files is allowable under the first sale doctrine. Redigi alleges that it is able to facilitate the transfer of digital works from one user to another without actually reproducing the file (which would be a violation of copyright owner's exclusive right section 106(2). Users on Redigi can transfer songs they have purchased on itunes onto ReDigis cloud locker, which may not equate to infringing use[118] Specifically they state, "ReDigis structure ensures that no copies of an eligible file are made when one user sells an eligible file stored in the user's cloud locker to another ReDigi user through the cloud marketplace"[119] This process is sheltered ReDigi claims under the first sale doctrine
Capitol has responded with three arguments that have basically been same arguments always applied against first sale in the digital context. First it claims that the act of uploading onto a cloud necessarily creates a copy, thus implicating the exclusive reproduction right and outside the domain of first sale. Second, Capitol argues that the copies are not in a material form as required by the statute. Third, Redigi does not lawfully own any of the content placed on the cloud locker as they did not purchase it, and just because an original purchaser may have a lawful copy does not mean that ReDigi copy of a user's file is transformed into one. [120]

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[117] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006); Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010)

[118] Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008)

[119] Defendant's Memorandum of Law in Opposition to plaintiff's Motion for Preliminary Injunction at 9 – 12, Capitol Records LLC v Redigi Inc, case No 12 Civ 0095 (RJS) (SDNY 6 Jan 2012).

[120] See 17 USC §109

This case has yet to be resolved with oral arguments occurring on August 17 of this year, however it is a case which has profound implications for first sale. And there is some precedent to support their position as the court in *Cartoon Network* held that a third party service provider does not infringe copyright that operates a service that allows users to make and store digital copies of work in a cloud. [121] This is central to ReDigi's claims that users who upload songs onto the cloud actually legally own these as well. ReDigi, as it stated to the court during the motion for a preliminary injunction and as it states on its website, claims it has screening software that doesn't allow users to upload illegal copies of songs ripped from CDs or acquired via peer-to-peer file sharing services. Further, ReDigi also maintains that its software can locate MP3s which were acquired via services that merely license songs such as Amazon.com as opposed to iTunes which automatically transfers legal ownership over to its users. This distinction is critical because as we noted earlier just the possession of copyrighted works pursuant to a license is not a purchase and therefore has no part in the first sale doctrine.

ReDigi's arguments are those which fight for all of the users of copyright and seek to expand the first sale doctrine into the digital world. Since the transfer of digital files between individuals without permission from the copyright owner has generally focused on the fact that copy was ultimately made. ReDigi, however, has promoted an alternative a method of transferring among users without actually copying it. To support this, ReDigi states that as a file is being uploaded it is simultaneously being destroyed. It is in essence creating a file and at the same time deconstructing it as well. If these claims are true than it will force this court to redefine the parameters of the first sale doctrine within the context of the digital world of the 21st century.

[121] Cartoon Network LP v CSC Holdings, Inc, 536 F3d 121, 131 (2d Cir 2008).

A. ReDigi may prove that Simultaneous Destruction is feasible

Back in 1999, Representatives Boucher and Campbell proposed this exact idea that ReDigi is alleged to have implemented to the 105th Congress in H.R. 3048.[122] Although this proposal focused on the good grace of an individual who transfers work to subsequently erase his particular copy, ReDigi seems to have provided key technological measures to accomplish this.[123] The rationale underlying earlier proposal was "that by destroying the source copy, the conduct more closely resembles a traditional distribution (to which the first sale exception would apply) because the same number of copies exists at the end of the transaction as at the beginning of the transaction."[124]

While this proposal over a decade ago seemed to address the deficiencies of the first sale doctrine in a digital age it was ultimately not endorsed because of the inability to determine whether users would actually delete their original copies after transferor.[125] However, ReDigi has shown that there may be an alternative route which preserves owner's rights and allows for traditional user benefits.

The first sale doctrine has historically been limited because of the fact that traditional media "was restricted by the geography and circle of people known to the holder of that copy, as well as the time and effort necessary to re-distribute the copy."[126] This restriction no longer exist in today's world and since digitized works can be easily replicated to anyone around the world

[122] Digital Era Copyright Enhancement Act, H.R. 3048, 105th Congress (1st Sess.1997).

[123] id.

[124] id.

[125]

[126] id.

there has been significant apprehension in appreciating this alternative to accommodate digital works.[127] However, simply because humanity has improved technologically should not be a primary reason to enforce Draconian measures. If ReDigi's software actually works than the nightmare scenarios envisioned would not result.[128] The market would probably benefit more from practical technological evolution such as precise simultaneous destruction technology such as ReDigi.[129] If ReDigi can accurately accomplish what it says than the traditional arguments against it will not hold any water. [130]

III. Conclusion

The protection granted to copyright owners is essential in providing the economic incentive for the creation of works. But in determining the scope of the monopoly rights granted to copyright owners, given the extreme length of the monopoly, we must not lose sight of the true purpose of copyright - to promote the progress of knowledge and learning - and we must all realize that too broad a monopoly will impede rather than promote that progress on which this country was founded.

Initially the base of this country's economy was land; there was, after all, so much of it. Then, the base of the economy became manufacturing, the industrial age. Now, we have begun what is referred to as the information age. The way information-based products are protected is through intellectual property, including copyright. The economic importance of copyright has led

[127] id.

[128] id.

[129] id.

to additional rights for copyright owners, longer terms of copyright protection, and legal protection for the technological locks put on works in digital media.

With each request for an expansion of the copyright monopoly, whether an expansion in scope or in length, the question must be asked: will the significant cost to the public of the increased monopoly be outweighed by the additional works that will be created and disseminated as a result of a greater incentive provided by that increase in the scope or duration of the copyright monopoly?

The economic importance of copyright will only continue to grow and the contours of the rights of copyright owners and users will continue to change with much debate about the direction that change should take. In all of this debate, however, we should not let a fundamental misconception of the primary purpose of copyright law in this country shape our rules to the detriment of the true constitutional aim of the limited statutory monopoly of the copyright: to promote the progress of knowledge and learning.

ReDigi may provide for a way of bringing the gap the gap created by applying the traditional first sale doctrine to modern technology. If the traditional piracy concerns were piracy concerns can be adequately addressed through simultaneous destruction or some other alternative than the first sale doctrine as applied to digital works could successfully mesh with traditional copyright law. Content should not be restricted on the basis that human progress has provided for greater technological methods of dissemination, it should be embraced because after all it is copyrights stated purpose.