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TECHNOLOGY FOUGHT THE LAW, AND THE LAW LOST

BRYAN TISCIA

Abstract

This article examines why the Copyright Act treats physical copies of copyrighted work and digital media differently, while proposing solutions to reconcile the differences. During the past several decades technology has advanced at such a rapid pace, that the law has struggled to keep pace. These shortcomings are felt strongest where copyrights are applied to digital media. The recent decision in *Capitol Records, LLC v. ReDigi Inc.*, indicates that there is now absolutely no secondary market for digital media. This conclusion was never the intent of the Copyright Act. In fact, Congress clearly intended for the exhaustion of copyrights taking the form of digital media. However, given a world where piracy runs rampant, and exact replicas of copyrights can be created at the click of a button, should the Copyright Act allow for physical and digital copyrights to be treated the same?

This article will take a look at the history of the First Sale doctrine, the current landscape, and how to apply exhaustion principles to digital media. Early case law demonstrates that Congress was concerned with the right of the people to control their physical possessions. Thus, rights were created for the consumer to modify, destroy, display, and sell their physical copies. However, after the introduction of digital media, the same property policies evaporated in favor of copyright holder rights. With the advent of End User License Agreements, it is rare that a person actually owns their digital content. Under the current Copyright Act, licensing gives too much power to the Copyright holder at the expense of giving no outlet to the public to alienate digital media. While licensing is important to copyright holders, to avoid pirating and unauthorized copying, there are better remedies available. This article will describe several

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remedies to modernize the law, including the addition of all digital media into the copyright act, requiring uniform End User License Agreements, as well as allowing users to transfer their licenses as an alternative form of copyright exhaustion.

Part I.

In *Capitol Records, LLC v. ReDigi Inc.*, the Southern District of New York held that the “first and only online marketplace for digital used music” infringed copyrights, reproduction, and distribution rights.¹ This decision explicitly rejected the “first sale” defense, and put all Copyright creators, holders, and users on notice regarding the viability of any business model that seeks to create a second-hand market for digital media.

ReDigi was significant because it directly implicated the future existence of any company that utilizes “cloud” based technology. *ReDigi* further represented a long string of cases, which have eviscerated all of the common law property rights associated with tangible copyrighted works. These rights include the right to repair, restore, modify and adapt. None of these rights, commonly enjoyed by the public for physical works, apply to digital media. This article explores the First Sale doctrine, and the policy reasons for its existence. It also discusses if those policy reasons still apply to digital media, and if they do not, should the doctrine itself not apply?

This article approaches the problem with the understanding that the concerns of the copyright holder are strong. The digital version of copyrighted work can easily be pirated and copied without permission. However, the current licensing regime, created to protect those rights, is too strong at the expense of the public's right to access of copyrighted works. To establish this premise this article will proceed as follows: Part II. will discuss the origin of First

¹ 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013) (holding that the defendant's unauthorized transfer of digital music files over internet was reproduction within meaning of Copyright Act, and the first sale doctrine did not protect the defendant).

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Sale, leading to its existence today. Additionally Part II. will detail the common law rights associated with property that existed long before the First Sale doctrine was created. These rights, which still exist today, include the right to repair, restore, modify, and adapt. Part III. Will discuss how the First Sale doctrine no longer applies to digital media. In doing this, Part III. will discuss how Congress first intended to deal with digital media, by examining how Congress extended the rights of property to digital media. Part III. will then discuss how each of the rights, specifically given to digital media, have been eradicated. Part IV. will examine the conflict between the copyright holders and the public. Part IV. will then offer three solutions, which balance the rights of the copyright holder with the public, including: introducing all digital media into the Copyright Act, as opposed to just computer programs; making EULA's uniform; and allowing for the transfer of access to digital media, as opposed to ownership. Part V. concludes that the Copyright Act was intended to balance the rights of the copyright holder and the public, but that the current licensing regime favors copyright holders too favorably by eliminating alienation rights. However using the simple solutions proposed, several alienation rights can be restored to the public, while allowing the copyright holder the incentive needed to create digital media.

Part II. The Origin of First Sale

The purpose of Copyright is to motivate the creative activity of authors, while allowing the public access to their creative works.² In order to incentivize the creation of creative works of expression, Congress bestows upon authors limited monopolies on their works.³ To allow the

² Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (discussing the intention of Copyright is to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired).

³ The Copyright Act, 17 U.S.C. § 106 (2002).

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public access to these works, Congress put limitations on the rights of authors.⁴ The First Sale doctrine is a limitation that exhausts one of the monopolies held by a Copyright holder.⁵

The purpose of the First Sale doctrine is to end the copyright holders distribution right after a copyright holder sells a lawfully created copy of their work. The Copyright Act specifically states “the owner of copyright under this title has the exclusive rights to ... distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”⁶ However, § 109(a) prevents the previously mentioned actions from infringing copyright, because the owner of a lawfully purchased copy has the freedom to sell or otherwise dispose of that copy without permission from the author.⁷

While the average person may have no idea what the First Sale doctrine is, most people rely on it every single day. When an individual lends a new book to a friend, the First Sale doctrine is involved. What a person sells used DVDs at a garage the First Sale doctrine protects them. Whenever a new video game is purchased as a gift for a relative, the first sale doctor pops up. Without the First Sale doctrine, every one of these scenarios could trigger copyright infringement.⁸

The First Sale doctrine was not always a part of the Copyright Act. In fact, the First Sale doctrine was not codified in the United States of America until 1909.⁹ In 1908 *Bobbs-Merrill Co. v. Strauss* was decided, and many scholars consider that to be the grandfather of the First Sale Doctrine.¹⁰ However, prior to the Supreme Court decision in *Bobbs-Merrill Co. v. Strauss*, many of the principals associated with the First Sale doctrine were still litigated under English

⁴ 17 U.S.C. §§ 107-122.

⁵ 17 U.S.C. § 109.

⁶ *Id.*

⁷ *Id.*

⁸ 17 U.S.C. § 106.

⁹ The Copyright Act, 17 U.S.C. § 41 (1946) (amended 1947).

¹⁰ See, e.g., Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. Rev. 889, 909 (2011) (discussing the genesis of the First Sale doctrine, and it’s direct link to *Bobbs-Merrill*).

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Common Law. Part A. of this section will detail the history leading up to the First Sale doctrine, as it exists today, while Part B. will discuss the English Common Law property rights associated with the First Sale doctrine.

A. First Sale doctrine as it exists today

The current First Sale doctrine can trace its roots to 1908, when a crafty publisher attempted to control the subsequent sales of copyrighted works by including a contract within the first pages of the book. The controversy in *Bobbs-Merrill* surrounded *The Castaway*, a novel, by Hallie Erminie Rives.¹¹ The publisher of the book sought to fix the resale price of the book by attaching the following clause:

The price of this book at retail is one dollar 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.”¹²

The defendants bought the entirety of their stock from wholesalers and retail outlets.¹³ The copies, bought from wholesalers, were purchased at a price of forty cents.¹⁴ The defendants, having full knowledge of the publisher’s restriction, sold their copies for 89 cents.¹⁵ The plaintiff sued for copyright infringement, and the case was litigated to the Supreme Court¹⁶

The Supreme Court gave thorough consideration to the intent and meaning of the Copyright Act of 1831.¹⁷ The Court articulated how the primary focus of the copyright statute was to secure authors the right to multiply copies of their works.¹⁸ In order for that right to carry

¹¹ 210 U.S. 339, 339 (1908).

¹² *Id.* at 341.

¹³ *Id.* at 341-42. The plaintiff bought 80% of it’s stock from wholesalers, and 20% from retailers.

¹⁴ *Id.* at 342.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Bobbs-Merrill Co. v. Strauss*, 210 U.S. 339, 342 (1908).

¹⁸ *Id.* at 347.

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substance, authors needed the right to “vend.”¹⁹ However, the Court held that this right exhausted upon the first sale of a particular copy.²⁰

The Supreme Court’s decision was based largely upon the statutory interpretation of the term “vend.” The Court asked whether one, who had the sole right to vend, was entitled to restrict the further sale of a book, by including a statement within its pages.²¹ It was clear to the Court that an author, who sells a copyrighted article, without restriction, loses the ability to further control, or restrict, sale.²² The Supreme Court determined that the defendant had bought the copies wholesale, and had not made any agreement that the books be sold at a dollar a copy.²³ This conclusion, that the right to vend is exhausted upon the first sale of a lawfully created copy, represented the birth of the First Sale doctrine.

A year after the decision in *Bobbs-Merrill* the Copyright Act of 1909 was enacted, and included within was the First Sale doctrine. Section 41 of the Copyright Act, stated “nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”²⁴ That said, there is no doubt that the First Sale doctrine is tethered directly to the holding found within *Bobbs-Merrill*.

To date, no holding or congressional mandate has fundamentally altered the core concept of the First Sale doctrine. Section 109(a), of the Copyright Act, is the current residence of the First Sale doctrine. Section 109(a) states:

Notwithstanding the provisions of section 106(3), 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

¹⁹ *Id.* at 351.

²⁰ *Id.* at 350-351.

²¹ *Id.* at 351.

²² *Id.*

²³ *Bobbs-Merrill Co. v. Strauss*, 210 U.S. 339, 351 (1908).

²⁴ The Copyright Act, 17 U.S.C. §41 (1946) (amended 1947).

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copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.²⁵

In other words, the holding within *Bobbs-Merrill* is still controlling law. However, the rights of the owner do not end with the ability to determine price of the next sale. The owner of a lawfully created copy has property rights that developed out of the English Common.

B. How the laws of Property informed the First Sale Doctrine

Bobbs-Merrill may represent the genesis of the First Sale doctrine as it exists today, but cases decided before 1908 demonstrate how property law forms the bedrock of the First Sale doctrine. English common law is embedded deep in all facets of the American legal system. Common Law influenced the First Sale doctrine through the theory of alienability of personal property.²⁶ Our jurisprudence has avoided limitations, which restrict the use and resale of personal property, because they are “obnoxious to public policy.”²⁷ This public policy is best served by having few restrictions for personal property that moves from hand to hand.²⁸ Copyright law shares this concept, however, the alienation of copyrighted works extends beyond mere hand-to-hand transactions, selling, trading, or gifting, and extends to the ability to repair and restore, as well as the ability to adapt and modify.

1. The Right to Repair and Restore.

Long before *Bobbs-Merrill* was decided, and as early as 1894, courts granted owners the right to enjoy their copies in the matter intended. These rights included the right to repair copyrighted works that had been damaged. In 1894 the Second Circuit Court of Appeals

²⁵ The Copyright Act, 17 U.S.C. § 109 (2008).

²⁶ See. Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 981 (1928) (discussing how English Common Law has influenced intellectual Property in the context of unfair competition in Trademark).

²⁷ See. *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907).

²⁸ *Id.*

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rendered its decision in *Harrison v. Maynard, Merrill & Co.*²⁹ In *Harrison*, the plaintiff, a book publisher, had a policy of printing unbound sheets of books, and sending them to a bookbindery.³⁰ The plaintiff had contracted with the bookbindery to store and bind copies of their books.³¹ While unbound copies of the plaintiff's book were being stored at the bookbindery, a fire occurred.³² This fire damaged, or destroyed, all of the unbound pages stored within the warehouse.³³ An employee of the plaintiff examined the bookbindery's stock, and determined that the unbound pages could no longer be used to make books.³⁴ As such, the plaintiff had the bookbindery sell the damaged stock as waste paper, with a provision that the stock be used as waste paper and nothing else.³⁵ The defendant bought the damaged stock as waste paper, subsequently bound copies of the book together, and then sold them herself.³⁶ The plaintiff brought suit, in equity, to end the alleged infringement of its copyright.³⁷

The plaintiff alleged a cause of action sounding entirely in Copyright law. The key distinction examined was the difference between the remedy of a copyright owner who had been defrauded in an unauthorized sale, and the remedy of a copyright owner who has given up control to a copy of his work subject to a contract.³⁸ The Second Circuit held in favor of the defendant, and detailed how the right to restrain the sale of a copy evaporates when the seller parts with that copy.³⁹ The Second Circuit's conclusion fits in with the definition of the First Sale doctrine as created in *Bobbs-Merrill*, but it includes something more. *Harrison* also suggests that

²⁹ 61 F. 689, 689 (2d Cir. 1894).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Harrison v. Maynard, Merrill & Co.*, 61 F. 689, 689 (2d Cir. 1894).

³⁶ *Id.*

³⁷ *Id.* at 690.

³⁸ *Id.* at 691.

³⁹ *Id.*

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there exists a right to repair defective or destroyed copyrighted works so that they can be enjoyed in the manner the copyrighted work was intended.

This early vision of a right to repair would continue to be litigated in American jurisprudence, and would go as far as to allow the owner of a lawfully created copy the ability to replicate portions of copyrighted works in order to enjoy their copy. In *Doan v. Am. Book Co.*, the Seventh Circuit Court elaborated on how exhaustion of the right to distribute also allowed for the replication of copyrighted works for the limited purpose of repair or renewal.⁴⁰ The defendant was a publisher of various children's schoolbooks.⁴¹ The plaintiff was a second hand retailer of books.⁴² The plaintiff lawfully obtained copies of the defendant's books that required different levels of repair.⁴³ Some copies had as little as soiled pages, others had pages, or sections of pages destroyed, as well as damaged covers.⁴⁴ The plaintiff returned the damaged copies to a state where consumers could use them.⁴⁵

As already discussed in *Harrison*, the selling of books secondhand falls entirely within the purview of First Sale. However, there is something more than simply reselling the damaged books in *Doan*. While many of the "repairs" made by the plaintiff in no way implicated any of the reproduction rights, others appear to be bold-faced reproductions of copyrighted works.⁴⁶ The Seventh Circuit concluded that within the rights transferred during the lawful sale of a copyrighted work is the "right of repair or renewal."⁴⁷ This right allowed the owner of the copy the ability to return the work to original condition, even if that meant reproducing part of the

⁴⁰ 105 F. 772, 772 (7th Cir. 1901).

⁴¹ *Id.* at 776-77

⁴² *Id.* at 777

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Doan v. Am. Book Co.*, 105 F. 772, 777 (7th Cir. 1901).

⁴⁷ *Id.*

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work.⁴⁸ This case indicated that exhaustion covered more than the sale of lawfully produced copy, but also allowed the owner of a lawfully purchased copy the ability to utilize some of the rights allotted strictly to the holder of the copyright.

The right to renew or repair is a limited right. When replication appears to be less for repair, and more for duplication, courts have found an infringement of copyright. In *Ginn & Co v. Apollo Pub Co.*, the plaintiff was a publisher of schoolbooks.⁴⁹ The defendant was in the business of rebinding old or secondhand books.⁵⁰ After cleaning and rebinding the books the defendant would resells them secondhand.⁵¹ Some of the books had missing pages, and the defendant would replicate and replace them.⁵² These replacements were never intended to imitate the original; they were simply supplied so that the consumer would have a complete product.⁵³ The plaintiff brought suit on copyright grounds.⁵⁴

The issue before the court was how much of a copyrighted work may an owner replicate for the purposes of restoration, before the act itself is infringement.⁵⁵ The court determined that, the owner could not reprint any material part of the copyrighted work.⁵⁶ In coming to this conclusion, the court relied on the holdings in both *Doan* and *Harrison*.⁵⁷ The court balanced the language in *Doan*, that a man who is the “purchaser of a copyrighted book may resell it for what it is without any infringement of the copyright laws,”⁵⁸ against the dictum in *Harrison*, “the new

⁴⁸ *Id.* at 778, The court analogizes the right to repair to the ability to “fix” a patented device that breaks, or malfunctions.

⁴⁹ 215 F. 772, 772 (E.D. Pa. 1914).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 773, In some instances, the reproduction consisted of the original maps in geographies, which were part of the original publication, and other instances consisted of reprinted pages of text, which had been torn out, or were otherwise missing.

⁵³ *Id.* at 775.

⁵⁴ *Id.*

⁵⁵ *Ginn & Co v. Apollo Pub Co.*, 215 F. 772, 772 (E.D. Pa. 1914).

⁵⁶ *Id.* at 778-79.

⁵⁷ *Id.* at 779.

⁵⁸ *Ginn*, 215 F. 772 at 779. *Citing, Doan*, 105 F. 772 at 777.

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purchaser cannot ... print or publish a new edition of the book.”⁵⁹ The court rendered the two cases to suggest that where a material portion of a copyrighted work is recreated, it is infringement.⁶⁰ With this new rubric in mind, the court found the plaintiff had reproduced a material part of the Plaintiff’s book when they had sold copies with recreated maps inside.⁶¹

The holdings in cases such as *Harrison, Doan, and Ginn*, create a clear right to repair and restore copyrighted works in line with the First Sale doctrine, yet outside the language of the Copyright Act. However, this right is limited in scope. An underlying theme runs through all of these cases is that no duplication occurs. In both *Harrison* and *Doan*, the defendant was merely restoring, or repairing, the original copy. In *Ginn*, the court demonstrated the concern it had with duplication. The court indicated that the owner had the right to replicate parts of the copyright work to the extent that it was not material. In other words, an owner may make repairs, but not new copies. This theme is also present in the common law right to adapt or modify.

2. The right to Adapt or Modify.

On the same page as the common law right to repair and restore, are the rights to adapt and modify. These rights allowed owners of lawfully created copies to merge several copyrighted works together, and sell the works as a new collection. As with the rights to repair and restore, the right adapt and modify are limited to the extent that they do not create a new work benefiting entirely from the labor of the copyright holder.

One of the first cases discussing the right to adapt or modify detailed how an owner, of several lawfully created copies, merged his collection with several non-propriety works, and sold that collection separately. In *Kipling v. G.P. Putnam's Sons*, the plaintiff sued a publisher who purchased numerous unbound copies of the plaintiff’s work, and bound them in an entirely new

⁵⁹ *Ginn*, 215 F. 772 at 779, citing, *Harrison*, 61 F. 689 at 689.

⁶⁰ *Ginn*, 215 F. 772 at 778.

⁶¹ *Id.*

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set.⁶² As part of the newly bound set, created by the defendant, were uncopyrighted works created by the same author, a biography written by another author, as well as an index.⁶³ The Second Circuit held that the defendant, as the owner of copies of the plaintiff's work, was entitled to create and distribute the new collection of the copies.⁶⁴

In *Kipling*, the redistribution of a copyrighted work falls neatly into the First Sale doctrine, but in addition there is the creation of an entirely new work, separate from the copy bought by the defendant. The holding in this case simply stood for the premise that nothing in the Copyright Act indicated that a person was forbidden from taking a lawfully owned copy, combined with another lawfully owned copy, and selling it as a new collection.

Further illustrating the adapt or modify concept was the case of *Fawcett Publications v. Elliot Pub. Co.*⁶⁵ In that case, both parties were members of the magazine publishing industry.⁶⁶ The plaintiff had had obtained copyrights on several comics they owned.⁶⁷ The defendant bought copies, bound them together, and resold them under the title double comics.⁶⁸ The court held that the defendant did not infringe the plaintiff's copyright.⁶⁹ In coming to this conclusion, the court noted that the defendant had not multiplied copies, but simply resold the comics with a different cover.⁷⁰ The plaintiff did not allege, and the defendant was not charged with, "copying, reprinting or rearranging" the material. With this in mind, the court determined that the plaintiff

⁶² 120 F. 631, 631 (2d Cir. 1903).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 46 F. Supp. 717, 717 (S.D.N.Y. 1942) adhered to on reargument sub nom. 17-65, 1942 WL 53407 (S.D.N.Y. July 10, 2042) and adhered to on reargument sub nom. *Fawcett Publications, Inc. v. Elliot Pub. Co., Inc.*, CIV. 17-65, 1942 WL 77313 (S.D.N.Y. July 9, 1942).

⁶⁶ *Id.*

⁶⁷ *Id.* at 717-718,

⁶⁸ *Id.* at 718.

⁶⁹ *Id.*

⁷⁰ *Id.* at 718.

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could not make out a case of infringement.⁷¹ As such, *Fawcett* demonstrates that there is a common law right to adapt and modify lawfully obtained copies.

This right to adapt or modify has limitations. That limitation is reached when an adaptation becomes a new creative work.⁷² This judicially created line balances the right of the copyright holder and the right of the public. On the one hand the public is entitled to take lawfully obtained copies, rearrange them, and resell them as a new collection. On the other hand, when the owner of the copyright does more than rearrange, and makes a new creative work, that is infringement.

Tying together the common law property rights to repair, restore, adapt, and modify, the key element is that there is never duplication. From a policy perspective it makes sense to draw the line for exhaustion at duplication. Within the right to repair a lawfully purchased copy, common sense informs us that a person should be able to do what is necessary to enjoy their purchase. If a page of a book they enjoy is ripped out, they should be able to replace that page; otherwise it can no longer be enjoyed as it was intended. However, while it is reasonable that a person should be able to make repairs so they can enjoy their work, it is not reasonable to completely replicate a book. The same principal can be said with the right to adapt and modify. The owner of multiple lawfully created copies should be able to sell his collection as he sees fit, even if it means selling two copies bound together. On the other hand, to take apart these copies and rearrange them in a way that makes a new creative work, without the authority of the

⁷¹ *Fawcett Publications v. Elliot Pub., Co.* 46 F. Supp. 717, 717 (S.D.N.Y. 1942) adhered to on reargument sub nom. 17-65, 1942 WL 53407 (S.D.N.Y. July 10, 2042) and adhered to on reargument sub nom. *Fawcett Publications, Inc. v. Elliot Pub. Co., Inc.*, CIV. 17-65, 1942 WL 77313 (S.D.N.Y. July 9, 1942).

⁷² *See, Lee v. A.R.T. Co.*, 125 F.3d 580, 583 (7th Cir. 1997) (holding that the defendant did not violate the plaintiff's copyright when they mounted plaintiff's work on ceramic tiles and resold the tile. As such the First Sale doctrine applied), *but See. Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (holding that the tiles were "derivative works" and infringed the copyrights, and the "first sale" doctrine did not apply to the preparation of derivative works).

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copyright holder, goes far beyond the First Sale doctrine and common law property rights. If this were allowed it would cheapen the incentive for copyright holders to make more creative works.

This limitation on the right to repair, restore, adapt, and modify seems reasonable in a world where the copyrighted work is a physical item. However, when the very nature of the copyrighted work requires that it be transferred in its entirety, this limitation becomes an insurmountable obstacle. This is the problem with regard to digital media. As a result of this requirement, almost all of the rights, that are associated with physical copies, do not attach to digital copies.

Part III. The proliferation of technology has withered away the First Sale doctrine

The First Sale doctrine, codified in the Copyright Act as section 109(a), provides for the exhaustion of copyrights after the first sale. This mechanism balances the rights of the copyright holder and the public, and also exists for digital media in section 117 of the Copyright Act. Despite this, exhaustion principles rarely apply to digital media. Part A. of this section will discuss the creation of copyright protections and limitations as applied to digital media. Part B. of this section will discuss how licenses, Digital Rights Management, and inflexible application of the Copyright Act to digital media has withered away any application of the First Sale doctrine, or the common law rights of property.

A. Congress intended to extend the First Sale doctrine to digital media.

In theory, digital media shares many of the same protections as its tangible brethren. Digital media ranges from e-books, to mp3s, to videogames, to computer software, and it includes so much more. When Congress was first tasked to handle how the Copyright Act would address digital media, it did so with computer software. Where, Section 109 of the Copyright Act

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allows for the owner of a lawfully purchased copy to sell or otherwise dispose of their copy.⁷³ Section 117 of the copyright Act maintains the same for computer software.⁷⁴

The current section 117 was drafted as part of the 1976 Copyright Act, and grew out of congressional concerns over the scope of copyright protection for computer programs. In 1976 Congress simply was not equipped to answer the question of what the scope of protection would be for computer programs.⁷⁵ To remedy that Congress enacted into the Copyright Act very broad, catch all, language so that creators of computer software would at least be protected until Congress could determine what copyright protection, if any, computer programs would receive. The original language of section 117 stated in pertinent part that: The title does not afford to the owner ... any greater or lesser rights with respect to ... automatic systems..., than those afforded to works under the law, whether title 17 or the common law or statutes of a State.⁷⁶

The second action Congress took was to establish the National Commission on New Technological Uses of Copyrighted Works (“CONTU”).⁷⁷ CONTU was made up of a panel of experts that studied the relationship between new technologies and copyright protection.⁷⁸ The purpose of this organization was to make recommendations to Congress.⁷⁹ In 1979 CONTU proposed four rights that would generate from ownership, or rightful possession, of a copy of computer software. First, CONTU suggested that copy owners be permitted to create Random Access Memory (RAM) copies.⁸⁰ Second, because computer programs are subject to accidental

⁷³ 17 U.S.C. § 109 (2008).

⁷⁴ 17 U.S.C. § 117 (1998).

⁷⁵ Sherwin Siy, *Copies, Rights & Copyrights: Really Owning Your Digital Stuff*, PKThinks, June 27, 2013, at 7, available at <http://publicknowledge.org/blog/copies-rights-and-copyrights-really-owning-yo>.

⁷⁶ Pub. L. No. 94-553, 90 Stat. 2541, 2565 (1976).

⁷⁷ Pub. L. No. 93-573, 88 Stat. 1873 (1974).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ NATIONAL COMMISSION OF NEW TECHNOLOGY USES OF COPYRIGHTED WORKS, FINAL REPORT 82 (1979).

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deletion, CONTU suggested a right to create archival copies.⁸¹ Third, CONTU recommended granting copy owners the “right to make those changes necessary to enable the use for which it was both sold and purchased,” because operating software changed from device to device.⁸² Last, CONTU endorsed a right of distribution that extended not only to the original purchased copy but also to any exact copies made pursuant to the archival and essential-step privileges.⁸³

In 1980 Congress adopted the recommendations made by CONTU. The revisions to Section 117 were included in the Government Patent Policy Act of 1980.⁸⁴ Congress enacted these recommendations with little to no discussion on the topic. This adoption of the recommendations by CONTU indicates that Congress intended for computer programs to receive the same sort of protection that physical copyrights receive. However, these rights are rarely ever enforced, primarily because the Copyright Act applies to the owners of legally obtained copies, and rarely does the person in possession of digital media own their copy.

B. Despite a clear mandate from Congress, the rights created by CONTU are rarely applied to the possessors of copyrighted digital media.

Despite a clear mandate by Congress to fully extend the principals of exhaustion to computer programs, crafty tactics by copyright holders, and case law favoring those tactics, have left each one of the recommendations by CONTU obsolete. End Users License Agreements (EULA) have made it so possessors of lawfully created copies own licenses, not the actual product. Since CONTU made their recommendations in terms of ownership, the provisions in regard to necessary creation of RAM copies, and archival copies, are by and large worthless.⁸⁵ The proliferation of Digital Rights Management has made it so it is illegal for anyone to

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ H.R. Rep. No. 96-1307 (1980).

⁸⁵ *See. Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1103 (9th Cir. 2010).

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circumvent protections, placed by the copyright holder, on the software. This type of software, if not circumvented, makes it so a type of digital media can only be used in a certain way, and effectively destroyed any right to modify a program to work with different hardware. Last, the recent decision in *Capitol Records, LLC v. ReDigi Inc.*, held that by their very nature, digital copies must be duplicated to be transferred, and there can be no alienation of digital media without copyright infringement.⁸⁶

First, Part 1. of this section will discuss the proliferation of licensing agreements and how they exist inside the framework of the decision in *Bobbs-Merrill*. Then, Part 2. of this section will cover the creation of Digital Rights Management and how it prevents users of digital media from being able to enjoy their copies on different devices. Last, Part 3. of this section will discuss how the recent holding in *Capitol Records, LLC v. ReDigi Inc.*, has made it impossible to alienate digital media without violation copyright law.

1. *Bobbs-Merrill* left the door open for sophisticated licensing agreements to circumvent Copyright Law

EULAs have become a powerful tool for the owners of digital media to circumvent the First Sale doctrine. EULAs are essentially contracts. Typical language from a EULA states: “This software is licensed to you, not sold.”⁸⁷ What does this language mean? Language like this means that the user of a lawfully obtained copy, despite engaging in a hand-to-hand transaction, is not the owner of their copy. This individual is simply the owner of a license; the copyright holder retains ownership of the digital media.⁸⁸ The Supreme Court, in *Bobbs-Merrill*, specifically stated that they decided the case on Copyright grounds.⁸⁹ That is to say, if the two

⁸⁶ 934 F. Supp. 2d 640, 649 (S.D.N.Y. 2013).

⁸⁷ *Siy, supra* at 8.

⁸⁸ *Id.*

⁸⁹ 210 U.S. 339 at 342.

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parties actually contracted to restrict further sales, then the case might have come out differently.⁹⁰

Over a century after the holding in *Bobbs-Merill*, the owners of copyrighted work would start to draft sophisticated licensing agreements, that conformed to the holding of *Bobbs-Merill*, yet effectively circumvented the principals of exhaustion in copyright law. One case in particular was *Vernor v. Autodesk, Inc.*⁹¹ in that case the plaintiff purchased the defendant's software at a garage sale.⁹² The defendant manufactured design software used by architects, engineers, and manufacturers, and offered its software to customers pursuant to an accompanying Service-level Agreement ("SLA"), which customers were required to accept before installing the software.⁹³ The licensing agreement provided that Autodesk retained title to all copies, and the customer had a nonexclusive, non-transferable, license to use it.⁹⁴ The plaintiff purchased a used copy of Autodesk's software at a garage sale, and sold it on eBay.⁹⁵ Autodesk filed a number of takedown notices with eBay related to the plaintiff's eBay listing.⁹⁶ The plaintiff then brought suit seeking a declaratory judgment to establish that he was a lawful owner of the software.⁹⁷

The Ninth Circuit held that the plaintiff was not an owner of the software, and was not entitled to sell copies on eBay.⁹⁸ In doing so the court articulated a three-factor test for distinguishing between a software licensee and an owner of a copy.⁹⁹ Applying the test to Autodesk's SLA, the court held that Autodesk's customer, from whom the plaintiff acquired the

⁹⁰ *Id.*

⁹¹ 621 F.3d 1102, 1103 (9th Cir. 2010).

⁹² *Id.* at 1104.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1105.

⁹⁶ *Id.* at 1105-106.

⁹⁷ *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1106 (9th Cir. 2010).

⁹⁸ *Id.* 1111-1112.

⁹⁹ *Id.* at 1112, 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.

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used copies, was a licensee, and did not own the copies.¹⁰⁰ Accordingly, neither the original customer, who bought the program, nor the plaintiff, could sell, or resell, their copies.¹⁰¹

The holding of this case, on its face appears to conflict with the holding in *Bobbs-Merrill*. In *Bobbs-Merrill*, the defendant was found not to have contracted with the plaintiff.¹⁰² *Vernor* held that the first sale doctrine did not apply.¹⁰³ Autodesk had never actually sold the software to the original customer. As such, the original licensee could never sell the software to the plaintiff. This case demonstrates how *Bobbs-Merrill* held open the possibility for copyright owners to draft sophisticated contracts to avoid exhaustion of their right to distribute. In *Bobbs-Merrill* the plaintiff's agreement provision, within the pages of the book, were not sophisticated enough to bind subsequent purchasers. However *Vernor* demonstrated a contract with language that prevented the original purchaser from owning the copy. As such, that purchaser could never sell the copy, nor could any of the subsequent purchasers.

EULAs have become widely accepted by most courts. As such the rights created by CONTU, to create RAM copies, and archival copies, of a computer program do not necessarily extend to license holders. The recommendations had language crafted for owners of lawfully created copies, not license holders. This conflicts with the common law rights of property, to be able to enjoy a copyrighted work as it was intended. Further, while these rights to make RAM copies, and archival copies are usually included in EULAs,¹⁰⁴ there is no uniformity amongst EULAs from product to product, or company to company, and as such the owner of a licensed digital media may never know when he is violating copyright law.¹⁰⁵ While licensing agreements

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1116.

¹⁰² *See Bobbs-Merrill*, 210 U.S. 339 at 349.

¹⁰³ *Vernor*, 621 F.3d 1102 at 1116.

¹⁰⁴ *Siy, supra* at 8.

¹⁰⁵ *Id.*

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have called into question the rights granted by CONTU in relation to creating necessary copies, the right to make necessary changes to enjoy digital media on different operating software has been destroyed by Digital Right Management.

2. Digital Rights Management makes it impossible to modify software to work on different devices

The Common law property rights connected with exhaustion and the First Sale doctrine are also limited, if not blocked completely, by Digital Rights Management (“DRM”). DRM is software that restricts access and copying of copyrighted works.¹⁰⁶ While DRM is not intended to interfere with First Sale principles, when applied practically it has the same effect.¹⁰⁷ When viewing DRM in the light of the rights created by CONTU, the effect is to preclude the alienation of digital media from device to device. More concerning, however, is that case law does not treat different type of digital media in the same fashion when it comes to DRM.

The case law indicates that taking music from a CD and transferring it to a device, such as an iPad is permissible, while doing the same with a movie on a DVD is not. In *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, The plaintiff, recording industry, attempted to enjoin the manufacture and distribution, by the defendant, of the Rio portable music player.¹⁰⁸ The Rio was a small device that allows a user to download MP3 audio files from a computer and to listen to them elsewhere.¹⁰⁹ The plaintiff brought suit, alleging that the Rio did not meet the requirements under the Audio Home Recording Act of 1992.¹¹⁰ The court determined that, the Rio was not a digital audio recording device subject to the restrictions of the Audio Home Recording Act of 1992, and as such permitted the dissemination of MP3 audio files

¹⁰⁶ *Id.* at 10.

¹⁰⁷ *Id.*

¹⁰⁸ 180 F.3d 1072, 1073 (9th Cir. 1999).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1075.

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from a CD to the Rio media player.¹¹¹ While this case stood for the premise that digital media on CDs could be moved from one device to another, the same concept does not hold true for DVDs.

In *Universal City Studios, Inc. v. Corley*, the plaintiff, Motion picture studios, brought action under Digital Millennium Copyright Act (“DMCA”) to enjoin the defendant from posting software that decrypted movies on DVDs, and from including hyperlinks that made the decryption software available.¹¹² The heart of the lawsuit revolved around the anti-trafficking provision of the DMCA.¹¹³ The technology, that the plaintiff alleged violated the DMCA, was a program called DeCSS.¹¹⁴ DeCSS decrypted the DVD's protection, and allowed users to copy the DVD's files onto the user's hard drive.¹¹⁵

The Second Circuit Court of Appeals was tasked largely with First Amendment Speech questions in this case. However, the court also rendered an opinion on copyright defense grounds.¹¹⁶ The court determined that there was no fair use in replicating the encrypted files in their entirety in near perfect format.¹¹⁷ As such the court affirmed the decision of the lower court granting the injunction against the defendant, and preventing him from posting the decryption software.¹¹⁸

These two cases demonstrate, not only that there is a divide on the way certain types of digital media are treated, but also that in certain circumstances, an individual is not allowed to disseminate his digital media from one device to another. In the case of the person who owns a DVD, if they want to move the software from their computer onto their iPad, or other tablet device, that right is prevented by DRM. While the same person who buys a music CD , can take

¹¹¹ *Id.* at 1081.

¹¹² 273 F.3d 429 (2d Cir. 2001).

¹¹³ *Id. citing*, 17 U.S.C. § 1201 (1999).

¹¹⁴ 273 F.3d 429, 437-38 (2d Cir. 2001).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 459.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

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the songs off of that CD, and place them on their iPad with little to no worries of violating copyright law.

The holding in *Universal City Studios, Inc.*, demonstrates that the right to modify software in order to enjoy the digital media on different devices has been eliminated for certain types of digital media. Furthermore, the concepts in the First Sale doctrine, and the common law right to the alienation of property do not attach to these types of media. When a person buys a book, they can fold the pages, highlight certain text, or cutout certain pages entirely. The owner of the digital copy of that book may have to seek permission to functionality, such as flipping pages on a tablet, or highlighting text in the e-book, or moving the e-book from a Kindle to an iPad.¹¹⁹ These requirements fly in the face of alienation of property principles. While these concerns, in regard to the modification of digital media are disturbing, recent case law has held that the alienation of digital media in its entirety is impermissible.

3. *Capitol Records, LLC v. ReDigi Inc.*, held that there can be no alienation of digital media, because the transfer requires duplication.

Despite CONTU's recommendation, and the subsequent approval by Congress, to include a right to redistribute digital software in Section 117, *Capitol Records, LLC v. ReDigi Inc.*, stands for the premise that there can be no digital media aftermarket.¹²⁰ ReDigi marketed itself as "the world's first and only online marketplace for digital used music."¹²¹ ReDigi invited users to buy, and sell, used digital media at cheaper prices than on iTunes.¹²² Users would upload files to ReDigi's cloud storage, and the file would, in theory, be removed from the user's computer.¹²³

¹¹⁹ *Siy, supra* at 11-12.

¹²⁰ 934 F. Supp. 2d 640 at 649.

¹²¹ *Id.* at 645.

¹²² *Id.*

¹²³ *Id.*

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Upon sale to a customer, the file would be transferred to the customer's computer, and the file from the cloud would be deleted.¹²⁴

The plaintiff claimed that the uploading constituted an unauthorized reproduction and distribution in violation of its copyrights.¹²⁵ The plaintiff argued that the First Sale doctrine did not apply, because a different file was being copied and distributed.¹²⁶ The court stated that the unauthorized duplication of digital music files over the Internet infringes a copyright owner's exclusive right to reproduce.¹²⁷ However, whether the unauthorized transfer of a digital music file over the Internet, where only one file exists before and after the transfer, constitutes reproduction, was an issue of first impression.¹²⁸

The court followed the plain text of the Copyright Act, which states a reproduction occurs “when a copyrighted work is fixed in a new material object.”¹²⁹ Given the plain meaning, the court found that it was impossible to have the same “material object” transfer over the Internet. The Court held that ReDigi infringed Capitol's reproduction rights under any description.¹³⁰ For this reason, the court held that the First Sale doctrine did not apply.¹³¹

The holding in this case follows the plain language of the statute, and in doing so points out the fundamental flaw within section 117 of the Copyright Act. That fundamental flaw is that the concern of the court in the days of *Bobbs-Merrill*, *Doan*, *Harrison*, and the like all focused on duplication. The hallmark to a copyright infringement case was that replication or duplication takes place. However, there is no scenario where digital media can be transferred and not be copied or replicated. This holding, while staying true to the Copyright Act, eviscerates the

¹²⁴ *Id.*

¹²⁵ *Id.* at 650.

¹²⁶ *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 650 (S.D.N.Y. 2013).

¹²⁷ *Id.*

¹²⁸ *Id.* at 651.

¹²⁹ *Id.*

¹³⁰ *Id.* at 652.

¹³¹ *Id.*

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common law rights associated with property. The right to modify and repair was based on the premise that an individual ought to be granted some rights, normally allotted to the copyright holder, in order to enjoy the copy in the manner it was intended. While the previous cases dealing with physical property allowed for minor replications or duplications, the same logic that a minimal amount of copying can take place cannot be tethered to digital media.

Despite having section 117 of the Copyright Act state that digital media can be redistributed, under the plain meaning of the Act, and the holding in *ReDigi*, these copies can never be transferred or redistributed. This could potentially have devastating effects going forward. Businesses like Google, Amazon, Apple, etc. are all moving towards digital media only with no hard copies. Any of these companies who would utilize a cloud-based system are on notice that every single copyrighted item transferred to their cloud would cause them to be infringers.

Part IV. The conflict between the public and Copyright holders, and their potential solutions

As evidenced by the above sections, there is a clear disparity in the way copyrighted physical and digital works are treated. However, simply suggesting that the two should be treated the same, or similarly, is not the answer. While the public would love to alienate their digital media, to do so might adversely affect the copyright holders to the point where they no longer have an incentive to create digital media. The concerns of copyright holders amount to the fact that there really is no such thing as second-hand digital media, and larger economic problems such as piracy. While these are pressing concerns, there are solutions to this problem that would allow the public to alienate their copies without fear of infringing copyright and at same time creating incentives for copyright holders.

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Part A. of this section will discuss the controversy between the public and copyright holders. Part B. of this section will discuss possible solutions to the problem, including the addition of all forms of digital media into the Copyright Act, making uniform EULA's, and allowing for the alienation of licenses, as opposed to the alienation of ownership.

- A. Copyright holders demand more rights, which limit the alienation of the public, because the nature of digital media makes it incredibly easy to copy, and distribute, without the permission of the copyright holder

The controversy that surrounds the application of common law property rights of alienation of digital media, stem from the fact that it only requires a single click on a mouse pad to illegally copy and distribute copyrighted work. To start with, copyright holders originally utilized licensing agreements during the time period when it was uncertain that computer software was going to receive copyright protection.¹³² As such, licensing agreements were created for the creators of computer programs to have any rights at all.¹³³ After it became certain that digital media would be entitled to copyright protection, EULAs were utilized because of the ease with which digital media could be distributed without permission.

The ease of copying is a result of the advancements within the entertainment industry. Advancements in technology have made the ability to make perfect copies of copyrighted work a reality.¹³⁴ Prior to the 1990's motion picture studios had made movies available for viewing at home in "analog" format. Movies in this format were placed on videotapes, which could be played on a videocassette recorder ("VCR").¹³⁵ With analog movies, every time a copy is created, the quality deteriorates.¹³⁶ As such, after several copies the quality was poor enough as

¹³² *Softman Prods Co. v. Adobe Sys.*, 171 F. Supp.2d 1075, 1083 (C.D. Cal. 2001).

¹³³ *Id.*

¹³⁴ *See, Diamond*, 180 F.3d 1072 at 1073. (discussing the growth of digital media, and the problems that have come from advancements in technology as they relate to motion pictures).

¹³⁵ *Id.*

¹³⁶ *Id.*

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to make the copied movie less of an attraction to pirates.¹³⁷ This same theory is readily applicable to music.¹³⁸ Audiocassettes suffered from the same problems of deterioration as videocassettes.¹³⁹ These problems of deterioration evaporated with the advent of digital media.

Around the 1990s movie industries began to utilize DVDs. The benefit to DVDs was that they could store a substantially higher amount of information, and they could store much higher quality videos.¹⁴⁰ The problem with DVDs was that the information on them was easily accessible to pirates.¹⁴¹ In order to evade this problem, the Movie industry went at lengths to secure protection for the media on these disks ,and to create encryption for them.¹⁴² Congress shared this concern, and in 1998 enacted the anti-trafficking provisions of the DMCA. Congress enacted this provision with the vision of stopping piracy before the work was even copied.¹⁴³ The real intent behind the entertainment industry lobbying for this Act, and Congress approving these measure for limitation on copyrighted work, is that there is no such thing as second hand digital media.

Given the advancements in the entertainment industry, it is fair to say that there is no such thing as secondhand digital media. This is because when a digital version of a copyrighted work is duplicated, there is no deterioration in the quality. As such, the existence of a secondhand market, such as the one described in *ReDigi*, presents a significant harm to copyright holders. In other words, under a scheme like the one in *ReDigi*, a secondhand market sells, what is essentially, the same exact product as the original. The secondhand market could sell the “used” media at a fraction of the price of the original. This would remove any incentive the

¹³⁷ *Id.*

¹³⁸ *See, Corley*, 273 F.3d 429 at 436. (discussing the growth of digital media, and the problems that have come from advancements in technology as they relate to the music industry).

¹³⁹ *Id.*

¹⁴⁰ *See, Diamond*, 180 F.3d 1072 at 1073.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

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copyright holder had to create digital works. While the incentives of copyright holders are important, they must be balanced against the intent of the copyright act, which is to provide creative works to the public.

It is clear that the 1976 copyright act intended to include the same alienation rights, under the first sale doctrine, that exists for physical copyrighted works, to digital media. As already indicated, those rights exist mostly in name only. Given the monumental concern voiced by both Congress, and the entertainment industry, it is easy to see why those rights have been dampened. However, allowing such a broad extension of rights, avoiding exhaustion principles seems irreconcilable with the purpose of the Copyright Act.¹⁴⁴ It should be remembered that the monopolies granted to copyright holders are limited in nature, and while creative work should be encouraged and rewarded, the incentives to create must ultimately serve the cause of promoting the broad public availability of various arts.¹⁴⁵ Further, technology has advanced to the point that it has created an ambiguity in the Act, and the Act should be interpreted in a light that benefits society as a whole.¹⁴⁶ There is an ambiguity present in the Act, because the 1976 Copyright Act intended for alienation rights to be extended to digital media. However, to just simply construe the Copyright Act in favor of the public would do a large disservice to the entertainment industry. As such, there are several possible solutions to the problem.

B. Solutions

There are a couple possible solutions to remedy the absence of any alienation rights, including the First Sale doctrine, in digital media. Part 1. Discusses the inclusion of all types of digital media within the ambit of the Copyright Act. Part 2. Discusses the creation of uniform EULAs, and Part 3. Discusses the alienation of access rights, as opposed to ownership rights. All

¹⁴⁴ *Sony Corp.*, 464 U.S. 417 at 429.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

three of these solutions would return some rights that are associated with the common law rights of property to the act, while continuing to incentivize copyright holders to create digital works.

1. The inclusion of all forms of digital media within the copyright act

Include all forms of digital media into the copyright act, as opposed to just computer programs is the first possible solution. As discussed earlier, when Congress address the issue of how digital media would be dealt with, in the Copyright Act, it did so with computer programs.¹⁴⁷ The world of digital media extends far beyond computer programs, and includes MP3s, e-books, digital movies, and so much more. However, the lack of uniformity within the copyright act has allowed for the creation of inconsistent opinions. As discussed earlier, with regard to DRM, CDs and DVDs are treated differently when their contents are alienated to different devices.¹⁴⁸ Making of this tiny alteration to the copyright act would allow for the alienation of digital media by the public, while at the same time allowing for conduct that the entertainment industry already wishes to happen for its products.

2. Making EULAs uniform to include users and not just owners

The prevalence of EULAs has become troublesome for software owners, because many consumers end up agreeing to several, non-uniform, agreements before sitting down and opening their digital media. Take a computer program for instance. If a person buys a computer program from a retail store, they agree that they cannot return the product once it has been opened.¹⁴⁹ After that, once they put the disk into their computer they are greeted with an EULA which states you may not use this program without agreeing to this License Agreement. The EULA states that

¹⁴⁷ See NAT'L COMM'N NEW TECHN. USES COPYRIGHTED WORKS, *supra* at 82.

¹⁴⁸ See *Diamond*, 180 F.3d 1072 at 1073, (allowing for the alienation of MP3s between devices), *but See. Corley*, 273 F.3d 429 at 436, (disallowing the dissemination of programs that would allow users to move their DVDs from device to device).

¹⁴⁹ Best Buy, Return & Exchange Policy, available at <http://www.bestbuy.com/site/help-topics/return-exchange-policy/pcmcat260800050014.c?id=pcmcat260800050014> (last visited Dec. 2, 2013).

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the user of this software has been licensed this software they do not own it. The problem now is that if they disagree with the license they cannot return it back to the retail store, because they opened the package. If they agree to the license and want to sell it in the future that option is foreclosed as well. Since every software creator uses their own EULA there is no uniformity among the contracts.

If Congress were to mandate that EULAs be changed from user to owner, it would immediately end any fear that an innocent user could be sued for Copyright infringement. Further, making EULA's uniform would ensure that the purchaser of a copyrighted product is not accidentally infringing one EULA while abiding by another. This solution would benefit the public by allowing a contracting system more in line with the common sense principals of property law, and not the complex algorithm that EULA's have become. Additionally, this would still incentivize the creators of the copyrighted work by reducing the cost of litigation, by not having to worry about innocent infringers.

3. Allowing for the transfer of licenses, as opposed to the transfer of ownership

The last solution would require that copyright owners allow for users to transfer licenses of digital media, or Congress mandate that the owners of lawfully purchased copies be allowed to transfer licenses. The decision in *ReDigi* essentially held that there could be no transfer of digital media whatsoever. The current law gives an incentive to copyright holders that they were never intended to have. Copyright holders control the market, and there are no alternatives for buyers to go to. There are no second hand markets, and it allows for Copyright holders to charge unreasonable prices. Copyright law makes it difficult for the public to access creative works, and cuts against the original reason why the Copyright Act was created in the first place. By transferring licenses, users would not have to worry about making copies. If a license was

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transferred, theoretically the new owner of the license could re-download the work, while the owner of the media could delete it from the original users computer. This scenario would effectively manage rights, without turning innocent parties into infringers.

Part V: Conclusion

The Copyright Act was intended to balance the rights of copyright holders and the public. Copyright holders were only to receive an incentive so that they would continue to make creative works. When copyrighted work existed in a primarily tangible format, the current Act was able to strike that balance. The laws of property, and copyright exhaustion, allowed users to freely dispose of their work as they pleased. However, in a digital age Copyright creators have legitimate fears that their work will be infringed without their permission. In trying to protect the rights of Copyright holders, alienation principles are no longer applied for digital works. This conclusion is unrealistic given that a digital version of a copyrighted work should not be treated differently than the physical counterpart. In order to remedy these problems, solutions such as including all digital media within the copyright act, making EULAs uniform, and allowing for the alienation of access can be easily enacted. These solutions would return some of the rights associated with the alienation of personal property to digital media, while still allowing an incentive for copyright holders to create digital media.