

DIGITAL DOMINO EFFECT: THE EROSION OF FIRST SALE PROTECTION FOR VIDEO GAMES AND THE IMPLICATIONS FOR OWNERSHIP OF COPIES AND PHONORECORDS

“For the record, I’m usually neither a fan nor a critic of Blockbuster Entertainment or its stores,” began staff columnist Jack Nease in the August 16, 1989 edition of the *South Florida Sun-Sentinel*.¹ Nease considered himself an impartial videotape consumer with memberships at multiple video rental outlets, but a recent bit of news had drawn the *Sun-Sentinel* business columnist’s ire and forced him to depart from this neutral stance.²

“I’m not impartial in the *Nintendo v. Blockbuster* fight,” Nease wrote. “Blockbuster is absolutely, completely, unqualifiedly wrong in this dispute.”³ The dispute in question has largely been forgotten in the annals of history, and Nease was likely only aware of it because it was occurring in his backyard, as Blockbuster is headquartered in South Florida.

In 1989, Nintendo of America, the preeminent video game company at the time,⁴ was locked in a bitter legal dispute with Blockbuster Entertainment, the largest video rental outlet in the country.⁵ At issue in this litigation was one of Blockbuster’s business practices which Nintendo, as well as Nease, considered reprehensible: Blockbuster was buying Nintendo games and renting them out to consumers.⁶ This was permissible

1. Jack Nease, *Blockbuster Blind To Value Of Copyright*, SOUTH FLORIDA SUN-SENTINEL, Aug. 16, 1989, at 1D, available at 1989 WLNR 2825023.

2. *Id.*

3. *Id.*

4. *Nintendo Company, Ltd. History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/nintendo-company-ltd-history/> (last visited Nov. 12, 2012). When Nease’s article was published, Nintendo had “an almost 80% share of the \$3.4 billion home video game market.” *Id.*

5. Lane Kelley, *Rental Firms Win Game Edge*, SOUTH FLORIDA SUN-SENTINEL, Sept. 19, 1990, at 3D, available at 1990 WLNR 3811498.

6. *Id.*

due to an exception in the Copyright Act known as the first sale doctrine, which allows individuals to freely distribute copies of copyrighted works they have lawfully purchased.⁷

At the time, the legality of such a practice with respect to video games was in question. One year later, the House Judiciary Committee approved a bill called the Computer Software Rental Amendments Act (“CSRAA”)⁸ which outlawed the rental of computer software but carved out an important exception for video games,⁹ which were played on consoles used for a “limited purpose”¹⁰ and through which copying of games was difficult if not impossible.¹¹ Thus, a secondary market for video games was created, and consumers were able to play games cheaply for significant periods of time without having to purchase them.

“What Blockbuster is doing may be completely legal but it is not right,” Nease wrote at the time.¹² More than twenty years later, these words were echoed in a different dispute by the same video game industry that had fought to stop video game rentals.

By 2010, video game companies had begun to decry a practice that retailers like GameStop, the nation’s largest video game retailer,¹³ had come to rely on to drive profits: buying back used games from consumers, then offering them for a marked-up price.¹⁴ The reason for the game companies’ ire was that, thanks to first sale, they saw no monetary return from this practice.¹⁵ For a time, the companies could only sit on the outside looking in while used games generated revenue for GameStop hand over fist.

That same year, the Ninth Circuit in Washington handed down a landmark ruling in *Vernor v. Autodesk*.¹⁶ There, the court ruled that Timothy Vernor, a veteran eBay seller, had committed copyright infringement by selling copies of computer software on the popular auction

7. See 17 U.S.C. § 109 (2006).

8. Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134-37 (codified at 17 U.S.C. § 109(b)(1)(A) (2006)).

9. *Id.* at 5135.

10. *Id.*

11. Kelley, *supra* note 5.

12. Nease, *supra* note 1.

13. *GameStop Corp. History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/gamestop-corp-history/> (last visited Nov. 12, 2012).

14. See Randy Nelson, *GameStop States Its Case for Used Games and Trade-Ins to Developers*, JOYSTIQ (Jan. 16, 2009), <http://www.joystiq.com/2009/01/16/gamestop-states-its-case-for-used-games-and-trade-ins-to-develop/> (discussing GameStop’s argument that store credits consumers were receiving from games they traded in were largely driving sales of new titles).

15. *Id.*

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

site.¹⁷ Though Vernor claimed his sales were protected by the first sale doctrine, the court ruled that this was not so because Autodesk, the creator of the software, had included a license with the software that outlined significant use restrictions imposed upon any purchaser.¹⁸ As a result, no “sale” had taken place, and Vernor had merely purchased a license—subject to whatever restrictions the copyright holder saw fit to impose.¹⁹ The court’s ruling created a simple, three-part guide²⁰ for a copyright holder to create a license that would negate first sale protection—a guide that has already been followed by many game companies.²¹

In addition to this new end run around the first sale doctrine, technological progression has turned video game systems into powerful devices more akin to personal computers than the game consoles of old, which were termed “limited purpose computers.”²² This calls their status under the CSRAA’s video game rental exception into question.

The end result is that under current law and due to technological change, secondary markets for video games are no longer protected by the first sale doctrine.²³ While certain measures can be taken to save the doctrine and keep these markets alive, doing so is ultimately futile because technology will only continue to evolve—and in a digital economy dominated by downloading and streaming media, first sale will have no logical application at all. This is because media is becoming increasingly ephemeral, divorced from the constraints of physical objects like optical discs.²⁴ This shift from physical to digital has no logical home in the framework of first sale, which was created at the turn of the 20th century with the free alienation of purely physical objects in mind. The resulting digital domino effect will rapidly change the traditional understanding of copy ownership. Consequently, the temptation to revise copyright law to save this cherished doctrine will be strong. The video game industry,

17. *Id.* at 1105-06.

18. *Id.* at 1103-04.

19. *Id.*

20. *Id.* at 1111.

21. See, e.g., *World of Warcraft End User License Agreement*, BLIZZARD ENTERTAINMENT (Aug. 20, 2012), http://us.blizzard.com/en-us/company/legal/wow_eula.html (granting the user a license rather than title).

22. See Lewis Stevenson, *Fair Circumvention: A Judicial Analysis for the Digital Millennium Copyright Act Using the Playstation 3 As a Case Study*, 21 S. CAL. INTERDISC. L.J. 681, 684 (2012); 17 U.S.C. § 109(b)(1)(B) (2006).

23. It should be noted that these scenarios are independent and sufficient; put simply, one can occur without the other and serve as a potential death knell for secondary markets on its own. This comment thus analyzes two routes arriving at the same destination.

24. David A. Costa, *Vernor v. Autodesk: An Erosion of First Sale Rights*, 38 RUTGERS L. REC. 213, 224 (2010-11), available at http://lawrecord.com/files/38_Rutgers_L_Rec_213.pdf.

however, possesses many unique quirks—including a focus on new games over old and an increasing digital availability of classic titles to download—that in many ways insulate it from the problems that secondary markets for other forms of media are confronted with as a result of technological change. First sale's benefits, consequently, are not uniform across all media. Ultimately, the industry's growing pains in the face of disruptive technology demonstrate that a larger conversation needs to take place concerning the ongoing purpose of copyright law in a world where copies of video games will become increasingly irrelevant.

Part I of this comment traces the history of secondary markets in the video game industry. It begins with the first sale doctrine's creation in 1909, then addresses challenges that computer programs presented in the 1980s. From there, it discusses the advent of video game rentals in the late 1980s, followed by the meteoric rise of the used games market in the 2000s and the problems it created for game companies.

Part II details the issues currently facing the rental and used games markets by examining the technological evolution of game consoles, analyzing the *Vernor v. Autodesk* ruling, and applying *Vernor*'s three-step license test to a current video game end user license agreement.

Part III argues that digital downloads and streaming media will continue to present problems even if the rental and used game markets can be saved because neither downloading nor streaming fall under first sale protection. This comment will argue that any attempts to shoehorn them into first sale are ultimately wrongheaded. Part III concludes by examining and critiquing possible ways to save secondary markets for video games and also arguing that the video game industry is in some ways insulated from such a loss.

I. RENTALS AND USED GAME SALES: A HISTORY OF SECONDARY MARKETS

Video games, like other forms of media, have long benefited from secondary markets that allow consumers to acquire secondhand copies. Such markets exist in spite of copyright law's granting a bundle of exclusive rights to authors, including the right to distribute their works to the public at large.²⁵ This is because there are limitations and qualifications to many of the rights, and the right of distribution is no different.

An author's ability to control distribution of his or her work of authorship is limited by a concept known as the first sale doctrine. This

25. 17 U.S.C. § 106(3).

doctrine was first fully set forth in *Bobbs-Merrill Co. v. Straus*.²⁶ There, the Supreme Court held that a copyright holder has a right to sell his or her works initially at a fixed price of his or her choosing, but this right to control the sale of the works ends after the initial transfer of title.²⁷ This concept was officially codified in § 109 of the Copyright Act of 1976.²⁸ Section 109 says, “The owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.”²⁹

Commentators have theorized that by codifying this concept, Congress intended to protect consumers from restraints on the alienation³⁰ of personal property.³¹ Yet the first sale doctrine has limitations of its own. For example, it does not apply to individuals who have acquired a work through “rental, lease, loan or otherwise, without acquiring ownership of it.”³² Furthermore, because the doctrine does not apply to someone who merely possesses a copy without actually having acquired ownership, congressional intent suggests that terminable contractual agreements like licenses may allow copyright-holders to circumvent first sale entirely and control all distribution of their works.³³

As technology evolved and physical media gave way to digital media, the first sale doctrine’s conceptual framework faced challenges. In addition to allowing people to sell copies of which they have lawfully acquired ownership, first sale also gives the owners of copies the freedom to license or rent them to others.³⁴ This became a problem when easily copied computer software arrived in the 1980s. As computer software took off, software companies were concerned that allowing consumers to rent their software would foster an explosion in software piracy due to the fact that

26. 210 U.S. 339, 350-51 (1908). The Bobbs-Merrill company published and sold a novel called *The Castaway*. *Id.* at 341. Printed below the copyright notice in copies of this book was an additional provision: “The price of this book is \$1 net. 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.” *Id.* The case arose when the defendants bought copies of *The Castaway* and sold them at retail for 89 cents per copy. *Id.* at 342.

27. *Id.* at 350.

28. 17 U.S.C. § 109(a).

29. *Id.*

30. “A transfer of the title to property by one person to another; conveyance.” Definition of *Alienation*, DICTIONARY.COM, <http://dictionary.reference.com/browse/alienation?s=t> (last visited Nov. 12, 2012).

31. Costa, *supra* note 24, at 215-16.

32. 17 U.S.C. § 109(d).

33. See Costa, *supra* note 24, at 216.

34. See 17 U.S.C. § 109(a).

computer programs could be copied much more easily than physical products like books or compact discs.³⁵ Essentially, someone could rent a piece of software, install it, and copy it to their hard drive, all without ever buying a copy.

To assuage this concern, Congress passed the CSRAA³⁶ in 1990, which limited first sale protection for computer software by giving an exclusive “rental right” to the owners of copyrights in computer software.³⁷ This eliminated secondary rental markets in computer software, so that the only way for users to acquire computer software was to actually purchase it.³⁸

Meanwhile, a related battle over the extent of first-sale protection was being waged in Florida courts between video game giant Nintendo and video rental upstart Blockbuster.³⁹ While the CSRAA was being debated and drafted, Nintendo had sued Blockbuster for copyright infringement, claiming that its practice of buying Nintendo games and renting them to consumers was cannibalizing game sales.⁴⁰ Nintendo was concerned about a provision in the CSRAA dealing specifically with video game rentals, now commonly called the “Nintendo Exception.”⁴¹

This exception allows consumers to rent video games subject to a few qualifications.⁴² First, it refers to video game consoles as “limited purpose computers” which are used to play video games and may be used for other

35. William N. Hughet, *The Computer Software Rental Amendments Act of 1990: A Solution to the Problem of Pirating Computer Programs or an Exercise in Futility?* 16 J. Corp. L. 931, 932-936 (1991) (“The illegal copying costs only the price of a diskette and requires no detailed knowledge of how the copied software functions.”). Copying of compact discs was technically possible as early as the late 1980s, and companies like Meridian Data, Optical Media International, and Reference Technology were commercially selling CD recording devices by 1990—albeit at prices ranging from \$14,000 to \$35,000. Bob Starrett, *The History of CD-R*, Roxio.com, (Jan. 17, 2000), <http://web.archive.org/web/20021001073205/http://www.roxio.com/en/support/cdr/historycdr.html>. This was, of course, a welcome change from the \$149,000 that the first CD recorder fetched in the United States, but CD copying nonetheless remained a cost-prohibitive venture. *Id.* It was not until 1995, when Hewlett-Packard released the 4020i half-height 2x recorder (manufactured by Philips) at the “then unheard-of” price of \$995 that consumers were able to copy CDs at a somewhat affordable price. *Id.* By 2000, CD recorders were priced around \$149 and some even sold for \$99. *Id.*

36. Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134-37 (codified at 17 U.S.C. § 109(b)(1)(A) (2006)).

37. 4 STEVEN Z. SZCZEPANSKI & DAVID M. EPSTEIN, ECKSTROM’S LICENSING IN FOREIGN & DOMESTIC OPERATIONS § 19:118 (2012). A rental right allows a copyright owner to authorize or prohibit the rental, lease or lending of originals or copies of his or her works of authorship. *Id.*

38. See Hughet, *supra* note 35, at 955-58.

39. Kelley, *supra* note 5.

40. *Id.*

41. *Industry History*, ENTERTAINMENT MERCHANTS ASSOCIATION, <http://www.entmerch.org/press-room/industry-history.html> (last visited Nov. 12, 2012).

42. 17 U.S.C. § 109(b)(1)(B) (2006).

purposes.⁴³ The catch is that those other purposes cannot involve the copying of computer software.⁴⁴ When the CSRAA was enacted, this provision made practical sense because copying video games was “virtually impossible” with the technology then available to the average consumer.⁴⁵ Ultimately, because consoles like the Nintendo Entertainment System (“NES”) were used only to play video games, they truly were “limited purpose computers” because they could play proprietary computer cartridges and do nothing else.⁴⁶ Following the CSRAA’s passage in 1990, the video game rental market thrived, bringing in over \$200 million in revenue for Blockbuster in 2008.⁴⁷

The secondary markets for video games extend beyond rentals to a practice more in line with what first sale exists to protect: the sale of previously-owned games. This practice speaks directly to first sale in that consumers trade in old games for a price below what they initially paid and retailers then sell them back to others at a significant markup.⁴⁸ Game companies see no revenue from this, resulting in retailers pocketing the difference at a substantial profit.⁴⁹

Used games have been sold for decades. One of the first large-scale used game retailers was Funcoland, which at one point boasted that over 90% of its sales came from used games.⁵⁰ Funcoland was later acquired by GameStop when the latter acquired all of its competitors to become the pre-

43. *Id.*

44. H.R. REP. NO. 101-735, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6940.

45. Karl Vick, *Super Mario Ruled Intellectual Property*, ST. PETERSBURG TIMES, Sept. 22, 1990, at 8A, *available at* 1990 WLNR 1770752.

46. *See id.*

47. Mark Brohan, *Blockbuster Gets Ready to Play in the Online Game-Rental Market*, INTERNET RETAILER (May 27, 2009), <http://www.internetretailer.com/2009/05/27/blockbuster-gets-ready-to-play-in-the-online-game-rental-market>.

48. Michael Lowell, *Used Video Games: The New Software Piracy (Second Edition)—Part Two: Becoming the Stop for Games*, LEARN TO COUNTER (Mar. 30, 2012), <http://www.learntocounter.com/used-video-games-the-new-software-piracy-part-two/> [hereinafter Lowell, *Part Two*].

49. Michael Lowell, *Used Video Games: The New Software Piracy (Second Edition)—Part Three: The Feeling of Being Used*, LEARN TO COUNTER (Mar. 30, 2012), <http://www.learntocounter.com/used-video-games-the-new-software-piracy-part-three/> [hereinafter Lowell, *Part Three*]; Nelson, *supra* note 14. The intense venom directed by the gaming industry and some observers toward the used games market is especially odd considering that used music stores have thrived for decades using a similar model with no controversy. One possible explanation is that games cost significantly more money than vinyl records and CDs so the resulting price markup is viewed as being more inherently unfair.

50. *Funco Inc. History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/Funco-Inc-Company-History.html> (last visited Nov. 12, 2012).

eminent video game retailer.⁵¹ Following this acquisition, GameStop began selling used games in larger quantities and offering special trade-in deals.⁵²

This new strategy significantly affected the company's bottom line. Gaming industry observer Michael Lowell noted that in 2009 41% of all money spent at GameStop was spent on new video games, accounting for 21% of GameStop's gross profits.⁵³ Meanwhile, 26% of all money spent by GameStop customers was spent on used games, yet used games accounted for 46% of gross profits.⁵⁴ Game companies were indifferent about the used games market for years, but as it became more profitable—to the tune of \$2.4 billion in used game revenue for GameStop in 2009⁵⁵—publishers developed hostile attitudes.⁵⁶ Quantic Dream, developer of the 2010 Playstation3 (“PS3”) title *Heavy Rain*,⁵⁷ claims that it lost millions in sales to the used games market.⁵⁸ And Mike West, co-developer of *Fable III*,⁵⁹ recently opined that the used game market's ability to negatively affect sales was potentially more damaging to the industry than piracy.⁶⁰

Most prescient of all were Obsidian Entertainment co-founder Chris Avellone's thoughts on the potential for digital distribution of games and its

51. *Company History*, GAMESTOP, http://news.gamestop.com/about_us/company_history (last visited Nov. 12, 2012).

52. Lowell, *Part Two*, *supra* note 48.

53. Lowell, *Part Three*, *supra* note 49.

54. *Id.*

55. Michael Lowell, *Used Video Games: The New Software Piracy (Second Edition)—Part One: Introduction*, LEARN TO COUNTER (Mar. 30, 2012), <http://www.learntocounter.com/used-video-games-the-new-software-piracy-part-one/>.

56. *Id.*

57. *Heavy Rain* invited players to investigate the rampaging “Origami Killer,” focusing heavily on character interaction and storytelling through revolutionary graphical design. The game was both praised and criticized for this aesthetic emphasis, as it often came at the expense of interactivity. *See* Review of *Heavy Rain*, THESIXTHAXIS (Feb. 15, 2010), <http://www.thesixthaxis.com/2010/02/15/review-heavy-rain/>.

58. Alexander Swilinski, *Heavy Rain Developer Estimates \$13M Loss on Second-Hand Sales*, JOYSTIQ (Sept. 12, 2011), <http://www.joystiq.com/2011/09/12/heavy-rain-developer-estimates-13m-loss-on-second-hand-sales/>. Quantic Dream's co-founder, Guillaume de Fondaumiere, deduced this by observing that nearly three million Playstation Network accounts were playing *Heavy Rain*, yet only two million copies had been sold at retail. *Id.*

59. *Fable 3*, LIONHEAD STUDIOS, <http://lionhead.com/fable-3/> (last visited Nov. 12, 2012). *Fable III* is the latest installment of a role-playing series in which players assume the role of an adventurer who can eventually become a king or queen. The game and series place a heavy emphasis on the player's individual choices, which affect whether his or her character has a “good” or “evil” disposition and appearance. *Id.*

60. Geoff Gasior, *Developer: Used-Game Sales More Costly Than Piracy*, THE TECH REPORT (May 19, 2011), <http://techreport.com/discussions.x/20977>.

effect on the used games market, specifically his hope that “digital distribution stabs the used games market in the heart.”⁶¹

Lacking the legal means to attack the used games market, game companies have tried instead to damage it through market-based tactics. Often, companies will supply special bonuses to customers who pre-order new copies of games. These include special downloadable add-on content like new levels, character costumes, or maps only available to initial purchasers of games⁶² as well as “online passes” to similar content.⁶³ Recently, rumors have also surfaced that Microsoft is toying with implementing technology in its next Xbox console that would actually lock out used games and prevent them from being played on multiple machines.⁶⁴

Thus, there has historically been no love lost between video game publishers, rental companies like Blockbuster, and used game retailers like GameStop. Yet companies like Nintendo, Activision, and Electronic Arts are largely powerless to reclaim what they perceive as lost revenue because Blockbuster, GameStop, and others have the law on their side. But as technology evolves and law catches up with the digital world, this will soon change.

61. Jonathan Grey Carter, *Obsidian Hopes “Digital Distribution Stabs the Used Games Market in the Heart,”* THE ESCAPIST (Dec. 12, 2011), <http://www.escapistmagazine.com/news/view/114721-Obsidian-Hopes-Digital-Distribution-Stabs-the-Used-Game-Market-in-the-Heart>.

62. Michael Lowell, *Used Video Games: The New Software Piracy (Second Edition)—Part Four: A Programmed Response*, LEARN TO COUNTER (Mar. 30, 2012), <http://www.learncounter.com/used-video-games-the-new-software-piracy-part-four/>.

63. Kevin Parrish, *UbiSoft Nuking Used Game Sales With Uplay*, TOM’S HARDWARE (July 15, 2011), <http://www.tomshardware.com/news/DRIVER-San-Francisco-Uplay-Passport-Project-Ten-Dollar-PC-Gaming,13091.html>. “Online passes” have become popular in recent games like Electronic Arts’ *Mass Effect 2*; these grant initial purchasers access to add-on content and sometimes are even required for online play. *Id.*

64. Chris Kohler, *Why ‘Xbox 720’ Might Reject Used Games*, GAME|LIFE (Jan. 25, 2012), <http://www.wired.com/gamelifelife/2012/01/xbox-720-used-games/>. The only thing stopping such a system from being widely implemented is the fact that not all Xbox 360 owners have their consoles connected to the internet—though 73% of the user base is connected, and if implemented, such a system would still have a significant effect. *Id.*

II. GAME OVER: FIRST SALE NO LONGER PROTECTS VIDEO GAME SECONDARY MARKETS

A. *The Nintendo Exception's Inapplicability to Modern Game Consoles*

When the CSRAA was passed in 1990, Nintendo's NES was the dominant video game console in the United States.⁶⁵ While the NES was state-of-the-art for its time, it was, by modern standards, a simple machine designed for the singular purpose of playing video games.⁶⁶ It thus fit comfortably into the CSRAA's video game rental exception as a "limited purpose computer." While there is no uniform definition of the term, limited purpose computers have been identified as machines dedicated to a small number of functions.⁶⁷ The NES could do nothing but play proprietary cartridges designed to work with it. Not long after the CSRAA's passage the industry gradually moved away from such proprietary formats to more universal forms of media.⁶⁸

This movement intensified with the release of Sony's Playstation 2 ("PS2") in 2000. The PS2 was the first console with the ability to play DVD movies thanks to a built-in DVD drive.⁶⁹ Sony marketed the console not only as a highly advanced gaming system, but also as one of the cheaper DVD players on the market.⁷⁰ As a result of its tremendous success, the PS2 played a pivotal role in the adoption of DVD as the dominant form of home video.⁷¹

65. See STEVEN L. KENT, *THE ULTIMATE HISTORY OF VIDEO GAMES* 347 (1st ed. 2001). The NES was so successful that by 1990 Nintendo sales alone accounted for one-tenth of the Japanese-American trade deficit. *Id.*

66. See Alex Kidman, *Vintage Tech: Looking Back at the Nintendo Entertainment System*, PC TECH & AUTHORITY (Apr. 28, 2010), <http://www.pcauthority.com.au/News/173237,vintage-tech-looking-back-at-the-nintendo-entertainment-system.aspx>.

67. EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 93 (2000), available at <http://www.edwardsamuels.com/illustratedstory/isc4.htm>.

68. KENT, *supra* note 65, at 450. When the CSRAA was passed, Nintendo's top competitor, Sega, was designing a machine that would play CD-ROM discs. *Id.* at 450-51. This machine was released in 1992 as the Sega CD add-on for its Genesis console. *Id.* Nintendo also attempted to develop a CD-ROM add-on of its own with Sony as a partner, but this project ultimately never saw the light of day. *Id.* at 451-53.

69. *PlayStation 2 System Features*, PLAYSTATION.COM, <http://us.playstation.com/ps2/features/index.htm> (last visited Nov. 12, 2012).

70. See KENT, *supra* note 65, at 580. Sony Computer Entertainment America President and COO Kazuo "Kaz" Hirai stressed the importance of the PS2's ability to play DVDs and potential as a home entertainment hub by declaring that the PS2 was "not the future of video game entertainment, [but] the future of entertainment period." *Id.*

71. Brett Elston, *Six Reasons the PS2 is the Best System of All Time*, GAMESRADAR (Oct. 26, 2010), <http://www.gamesradar.com/six-reasons-the-ps2-is-the-best-system-of-all-time/>.

Additionally, along with Sega's Dreamcast,⁷² the PS2 was one of the first consoles to offer internet connectivity.⁷³ This connectivity was initially only used for online multiplayer games, but once consoles incorporated built-in hard drives, the functionality of game systems exploded. The Xbox 360 and PS3, released in 2005 and 2006 respectively, were armed with built-in hard drives (the smallest being 20GB) and ready to connect to broadband networks right out of the box.⁷⁴

In the years since their release, these machines have received numerous updates, enabling them to download additional content and game add-ons, download full games without having to go to a brick-and-mortar retailer, play movies and TV shows on services like Netflix, Hulu, and Amazon Instant Video, act as media centers for playing music and video, and even act as social media hubs for services like Facebook, Twitter, and Sony's *Second Life*-esque Playstation Home service.⁷⁵ Recently, Microsoft added on-demand TV service to the Xbox 360 from providers like Verizon, Comcast, ESPN, and HBO.⁷⁶

While the CSRAA amendment to § 109 indeed says that limited purpose computers may be used for purposes other than playing video games,⁷⁷ the dynamic has clearly shifted. The prevailing business model now classifies game machines as "entertainment systems that happen to play video games" rather than mere "video game systems."⁷⁸ The only reason anyone would have bought an NES in 1990 would have been to play video games. Today, it is common for consumers to purchase video game

72. Dreamcast was Sega's attempt to win back consumers after the failure of its Saturn console. See Kent, *supra* note 65, at 573. Backed by then-state-of-the-art technology and a library of well-reviewed games, it was nonetheless crushed by the technologically superior PS2. See *id.* at 579. Internet connectivity ended up being the machine's lasting legacy, as it was the first console to have a built-in modem and a dedicated network, SegaNet, for playing games online. *Id.*

73. *A History of Video Game Consoles*, TIME BUSINESS, <http://www.time.com/time/interactive/0,31813,2029221,00.html> (last visited Nov. 12, 2012) (click year 2000).

74. Keith Shaw, *Xbox 360 vs. PS3 vs. Wii*, NETWORK WORLD (Jun. 7, 2010), <http://www.networkworld.com/news/2010/060710-xbox-360-vs-ps3-vs.html>.

75. *Playstation 3 Features*, PLAYSTATION.COM, <http://us.playstation.com/ps3/features> (last visited Nov. 12, 2012); *Microsoft Xbox 360 Elite: Review (120GB)*, C|NET, http://reviews.cnet.com/consoles/microsoft-xbox-360-elite/4505-10109_7-32390552-2.html?tag=rvwBody (last visited Nov. 12, 2012).

76. David Hinkle, *Microsoft Reveals Xbox 360 TV Partners, Including Comcast, Verizon, HBO*, JOYSTIQ (Oct. 5 2011), <http://www.joystiq.com/2011/10/05/microsoft-reveals-xbox-360-live-tv-partners-including-comcast/>.

77. See 17 U.S.C. § 109 (2006).

78. See Michael Lowell, *The Decline Of Console Video Games Is Upon Us*, LEARN TO COUNTER (Oct. 11, 2011), <http://www.learnntocounter.com/the-decline-of-console-video-games-is-upon-us/>.

systems for a multitude of purposes *other* than playing games.⁷⁹ For example, Microsoft's partnerships with streaming video services like Netflix and Hulu as well as cable providers like HBO and ESPN make the Xbox 360 a viable replacement for cable television entirely.⁸⁰

But the most obvious example of game consoles evolving beyond "limited purpose computers" is the myriad ways in which they now resemble general purpose computers. For example, when it was first released the PS3 allowed users to install the Linux operating system and essentially turn the console into a general purpose computer.⁸¹ Moreover, games require numerous updates and patches to even play in the first place, and consoles frequently require firmware updates for bug fixes and new features.⁸² This has become such a fact of life for consoles that one commentator crudely noted that video game consoles are now just essentially "shitty PCs."⁸³

Consequently, the frequent need for downloadable updates is actually what takes modern game consoles outside the "limited purpose computer" realm entirely. As previously noted, the § 109 amendments allow limited purpose computers to be used for purposes other than playing video games.⁸⁴ However, the House of Representatives Judiciary Committee notes on the CSRAA explicitly clarified that these additional purposes could not involve the copying of computer software.⁸⁵ This may seem like an odd qualification in today's technological world where uploads, downloads, and streaming are facts of life, even on cellular phones, but when the CSRAA was enacted the idea of a video game console being able to copy software was a radical concept.

Early video game consoles, for instance, had games built into their circuitry, meaning games were restricted to the mechanism in which they were embodied.⁸⁶ Eventually, machines were created that could play

79. Robert Seidman, *One in Five Consumers Use Game Systems to Watch TV or Movie Content at Least Once a Month*, TV BY THE NUMBERS (Oct. 21, 2010), <http://tvbythenumbers.zap2it.com/2010/10/21/one-in-five-consumers-use-game-systems-to-watch-tv-or-movie-content-at-least-once-a-month/69019/>.

80. Hinkle, *supra* note 76.

81. Alan Dang, *Sony's PS3 Drops Linux; Why You Should Care*, TOM'S HARDWARE (Apr. 1, 2010), <http://www.tomshardware.com/news/ps3-playstation-3-linux-john-carmack,10035.html>. Unsurprisingly, Sony axed this feature with a firmware update in spring 2010 due to fears that users would turn their PS3s into hubs for hacking and piracy. *Id.*

82. Lowell, *The Decline*, *supra* note 78.

83. *Id.*

84. 17 U.S.C. § 109(b)(1)(B)(ii) (2006).

85. H.R. REP. NO. 101-735, *supra* note 44, at 9.

86. KENT, *supra* note 65, at 98.

multiple games through the use of removable cartridges.⁸⁷ The copying of video game software was difficult for the average consumer due to this cartridge format, and there was no way to copy anything during the use of the console itself.⁸⁸

The advent of internet-connectivity and hard drives altered this reality. Constant firmware updates require users to download and copy computer software just to make games work on a user's machine regardless of whether they are rented or purchased.⁸⁹ Users are also able to download new levels, add-ons, maps, character outfits, and so on.⁹⁰ Additionally, consumers can even download games available at retail directly to their consoles,⁹¹ and they can also manage and transfer their games onto USB storage devices.⁹² While this is not copying in the sense of being able to directly copy games for the purposes of piracy during regular use, it is nonetheless the copying of computer programs, which § 109 strictly forbids.⁹³

In light of these new realities, the gaming industry could attempt to kill off the rental market through legal action by arguing that modern game consoles no longer fit into the Nintendo Exception's statutory carve-out. Why it has yet to do so is anyone's guess. One possible reason could be that the video game rental market is a tiny blip in the industry's overall annual revenue; as such, it would not make sense to initiate costly, time-consuming litigation to eliminate something relatively miniscule.⁹⁴ The industry also has a more financially lucrative and arguably injurious secondary market to contend with.

87. *Id.* (discussing the Fairchild Camera and Instrument console Channel F, the first console to use interchangeable cartridges).

88. SAMUELS, *supra* note 67, at 79-80, 93.

89. Lowell, *The Decline*, *supra* note 78.

90. *PlayStation 3 Features*, *supra* note 75.

91. Eric Qualls, *Xbox 360 Games on Demand FAQ*, ABOUT.COM, <http://xbox.about.com/od/xbox360faqs/a/Xbox-360-Games-On-Demand-Faq.htm> (last visited Nov. 12, 2012).

92. *USB Storage Device Support for Xbox 360*, XBOX, <http://www.xbox.com/en-US/storage> (last visited Nov. 12, 2012).

93. 17 U.S.C. § 109(b)(1)(A) (2006).

94. Blockbuster made \$200 million in video game rental revenue in 2008, while GameFly, its mail-order competitor, made \$30 million. Brohan, *supra* note 47. By contrast, the video game industry made \$18.6 billion in revenue in 2010, a "down year" for the industry. Olivia Oran, *Video Game Industry Sales Fall in 2010*, THE STREET (Jan. 14, 2011), <http://www.thestreet.com/story/10974455/video-game-industry-sales-fall-in-2010.html>.

B. *Vernor v. Autodesk: Contracting Around the First Sale Doctrine*

In May 2005, Washington state resident Timothy Vernor purchased a copy of Autodesk Inc.'s AutoCAD software at a garage sale.⁹⁵ Vernor was a veteran of the eBay selling process, having sold more than 10,000 items on the popular auction website.⁹⁶ He planned to do the same with the AutoCAD software he purchased and subsequently put it up for sale on the site.⁹⁷

eBay was quickly hit with a take-down notice from Autodesk, which claimed that Vernor would be infringing on the company's copyright if he sold the software.⁹⁸ After eBay quickly took the auction offline, Autodesk informed Vernor that he had not acquired full rights in a copy of Autodesk's software, but had only acquired a license to use it for certain contractually specified purposes; thus, any resale of the software would constitute copyright infringement because a license is not protected by the first sale doctrine.⁹⁹ Vernor filed a counter-notice under the Digital Millennium Copyright Act ("DMCA") contesting the validity of the copyright infringement claim.¹⁰⁰ Autodesk did not respond to Vernor's counter-notice, eBay reinstated the auction, and Vernor eventually sold the software to another buyer.¹⁰¹

In 2007, Vernor attempted to sell four more copies of Autodesk software that he had purchased at an office sale.¹⁰² The first three sales followed the same take-down and counter-notice process as the 2005 sales, but when Vernor tried to sell the fourth copy, eBay suspended his account due to his repeated clashes with Autodesk.¹⁰³ Vernor wrote a letter to Autodesk, claiming that he had a right to sell the software under the first sale doctrine, and Autodesk's counsel responded by telling Vernor to stop selling the software.¹⁰⁴

Vernor once again filed a counter-notice, which Autodesk did not answer, and Vernor's account was reinstated. This time, however, he did not sell any additional copies of Autodesk's software because he was

95. *Vernor v. Autodesk*, 621 F.3d 1102, 1105 (9th Cir. 2010).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1106.

102. *Id.*

103. *Id.*

104. *Id.*

worried about having his account suspended again.¹⁰⁵ He then brought suit against Autodesk for a declaratory judgment to establish that his resale of Autodesk's software was protected by the first sale doctrine and, consequently, did not infringe Autodesk's copyright.¹⁰⁶

Autodesk based its copyright infringement claim on a software license agreement ("SLA") that AutoCAD users must accept¹⁰⁷ before installing the software; customers who do not accept the license are given the option of returning AutoCAD for a full refund.¹⁰⁸ The SLA states that Autodesk retains title to all copies and that the customer has a non-exclusive, non-transferable license to use the software.¹⁰⁹ It also imposes significant use restrictions on consumers.¹¹⁰ If the SLA is enforceable, consumers do not acquire title to the software when they purchase it; instead, they receive a mere license to use it, which is terminable at any time.¹¹¹

The sale/license distinction may not affect a user's ability to operate the software, but it does affect their ability to resell it because the Copyright Act explicitly clarifies that licenses, leases, and lending do not fall within the framework of the first sale doctrine.¹¹² Consequently, when *Vernor* eventually made its way to the Ninth Circuit Court of Appeals, the court was asked to determine whether Autodesk sold copies of its software to customers or simply licensed them to use it.¹¹³ At the time, the court's answer had the ability to drastically alter the first sale doctrine forever.

While license agreements have commonly been tied to electronic products like software, the *Vernor* court recognized that, depending on just what these agreements said, they could potentially enhance a copyright-holder's rights and diminish those of a (presumed) owner.¹¹⁴ In reaching its decision, the *Vernor* court examined *United States v. Wise*, a case in which

105. *Id.*

106. *Id.* *Vernor* was so concerned about his account being suspended because he actually relied on his eBay sales for income. *Id.*

107. The SLA at issue in *Vernor* was a classic shrinkwrap contract. *See id.* at 1104. These contracts are so named because they are often enclosed inside boxes and consumers cannot read them until they open the product. *Costa, supra* note 24, at 218. Opening it, however, typically constitutes acceptance of the terms within. *Id.* Many have argued that this amounts to a contract of adhesion that is unfair by its very nature, but courts have held that shrinkwrap contracts will be enforced so long as they do not contain "unfair or objectionable terms." *Id.* at 218-19; *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

108. *Vernor*, 621 F.3d at 1104.

109. *Id.*

110. *Id.*

111. *Id.* at 1116.

112. 17 U.S.C. § 109(b)(1)(A) (2006).

113. *Vernor*, 621 F.3d at 1107.

114. *Id.* at 1111-12.

the Ninth Circuit was asked to determine whether copyright owners had in fact executed sales when they transferred their motion pictures to third parties subject to written distribution agreements.¹¹⁵

In *Wise*, the same court found that contracts that contain “multiple restrictions on use, resale, [and] the reservation of title . . . combined with the ‘general tenor’ of the agreements” create licenses.¹¹⁶ The *Wise* court also considered various factors in determining whether an agreement created a license, including whether the agreement was labeled a license, whether the copyright owner retained title, and the nature of post-sale restrictions.¹¹⁷

After examining the method that the *Wise* court undertook, the *Vernor* court created a simplified three-part test for determining whether a copyright-holder has created a license through an agreement.¹¹⁸ First, the agreement must explicitly specify that it grants the user a license.¹¹⁹ Second, the agreement must “significantly restrict” the user’s ability to transfer the software.¹²⁰ Lastly, jumping off the second point and going a step further, the agreement must impose “notable use restrictions.”¹²¹ Such “notable use restrictions” could be something like telling users that they could only install a piece of software a set number of times or to a certain set of computers.¹²²

Commentators have expressed varying levels of concern with regard to the *Vernor* decision. David Costa, an intellectual property practitioner in Florida, believes that the *Vernor* holding gives copyright-holders a “cookbook recipe” for creating a license agreement that will completely

115. *Id.* at 1108. Woodrow Wise, the owner of Hollywood Film Exchange and the defendant in the case, sold copies of copyrighted films to film collectors. *United States v. Wise*, 550 F.2d 1180, 1183-84 (9th Cir. 1977). He would send lists of films for sale to these collectors, and each list had a restriction printed on it stating that the films were to be used for “home showings only.” *Id.*

116. Costa, *supra* note 24, at 217.

117. *Id.* at 216-17.

118. *Vernor*, 621 F.3d at 1111.

119. *Id.*

120. *Id.*

121. *Id.*

122. See, e.g., Diana A. Vernik et al., *Music Downloads and the Flip Side of Digital Rights Management Protection*, 30 *MARKETING SCIENCE* 1011, 1011-12 (2011), available at <http://static.arstechnica.net/2011/10/10/2011-10-10-VernikDRM.pdf> (online pagination differs). Such a restriction would be an example of Digital Rights Management (“DRM”). *Id.* DRM typically restricts the number of times a user may install software and/or the number of machines on which he or she can do so, or whether the user is able to make additional copies of the product. *Id.* Consumers tend to be hostile toward this practice, and some industry observers believe that it actually encourages rather than deters piracy. *Id.*

abrogate first sale.¹²³ The end result, he argues, is the promotion of “increasingly broad and restrictive licenses” included in products under the auspices of preventing piracy but in fact serving to hinder “historically legitimate, culturally beneficial, and economically efficient secondary markets.”¹²⁴

The Supreme Court of the United States denied a writ of certiorari for *Vernor* on October 3, 2011, leaving courts outside of the Ninth Circuit free to discount *Vernor*.¹²⁵ As of now, though, *Vernor* is binding precedent in the Ninth Circuit, and media companies can confidently experiment with draconian licensing agreements without fear that such restrictive provisions will be unenforceable. The Ninth Circuit’s simple criteria for creating a license agreement allow media companies to impose whichever use restrictions they please for purposes ranging from thwarting piracy to discouraging secondary markets.¹²⁶ Existing license agreements contained with popular games demonstrate that such experimentation has already begun.¹²⁷

Rockstar Games, the creator of hit games like *Grand Theft Auto*, *Red Dead Redemption*, and *L.A. Noire*, includes an agreement with its products that is a prime example of the licensing practices that commentators like Costa fear.¹²⁸ Rockstar’s End User License Agreement (“EULA”) has existed since before *Vernor* was decided and was last modified prior to *Vernor*.¹²⁹

The EULA is unambiguous, beginning with an all-capital-letters declaration that “THIS SOFTWARE IS LICENSED, NOT SOLD,” easily satisfying the first prong of the *Vernor* license test.¹³⁰ Additionally, the

123. Costa, *supra* note 24, at 213.

124. *Id.* at 224.

125. *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 105 (2011) (mem.).

126. Notably, the *Vernor* decision paid scant attention to federal preemption. Such an issue could arise, for instance, if a particular license agreement would create a license rather than a sale and this somehow conflicted with federal policy as outlined in § 109. *Vernor*, 621 F.3d at 1115. *Vernor* addressed preemption briefly in a discussion of an amicus brief submitted by the American Library Association (“ALA”). *Id.* The ALA argued that ruling in favor of Autodesk would undermine § 109 by encouraging other industries to adopt similar licensing agreement policies and undermine secondary markets for countless works of authorship. *Id.* The court declined to examine the issue in-depth, noting that its decision was consistent with precedent beginning with *Wise* and continuing to the present. *Id.* The court then concluded the discussion by inviting Congress to revise first sale as it sees fit (a common refrain in the opinion). *Id.*

127. See, e.g., *Rockstar Games End User License Agreement*, ROCKSTAR GAMES, <http://www.rockstargames.com/eula> (last revised March 31, 2010).

128. *Id.*

129. *Id.*

130. *Id.*

agreement emphasizes that Rockstar retains all right, title, and ownership to the software.¹³¹

Moving to the second prong of the *Vernor* test, the Rockstar EULA significantly restricts a purchaser's ability to transfer software.¹³² Interestingly, the EULA does allow for users to transfer a copy to another individual (albeit not commercially) provided that the person transferring the software completely divests him or herself of possession.¹³³ However, this is subject to qualifications that games may have certain "special features," which are not available to an individual who acquires a secondhand copy.¹³⁴

Lastly, the Rockstar EULA imposes numerous use restrictions on purchasers, particularly apparent in the ten-part "License Conditions" section of the agreement.¹³⁵ In addition to the various restrictions on sale, transfer, lease, and lending, the EULA contains numerous restrictions on what licensees can do with their software.¹³⁶ In fact, the only right that the EULA explicitly grants to a licensee is "gameplay on a single computer or gaming unit," provided that it is for a non-commercial purpose.¹³⁷ Within the ten-part license conditions are various restrictions on an individual's right to make copies of the software, their ability to install the software on more than one computer or gaming unit at a time, as well as the restriction that, if there are multiple copies of one piece of software, only one of them may access certain "special features" at a time.¹³⁸ This is similar to the draconian Digital Rights Management ("DRM") contained within the hit PC game *Spore*, which governed how many times purchasers could install a particular piece of software and proved problematic for families with

131. *Id.* Rockstar's retaining of all right, title, and ownership to the software comports with one of the factors that the *Wise* court looked to in determining whether an agreement created a license rather than a sale; specifically, the *Wise* court examined whether a copyright owner retained title to his or her work of authorship in the agreement in question. *United States v. Wise*, 550 F.2d 1180, 1190-92 (9th Cir. 1977).

132. *Rockstar Games End User License Agreement*, *supra* note 127. The "License Conditions" section of the EULA lists the myriad restrictions placed on a consumer's ability to transfer Rockstar software. *Id.* Among these is an agreement not to "distribute, lease, license, sell, rent, or otherwise transfer or assign the Software, or any copies of the Software, *without the express prior written consent of Licensor.*" *Id.* (emphasis added).

133. *Id.* This provision of the EULA mirrors one of the bedrock principles behind a proposed digital first sale doctrine. *See infra* Part III.A.

134. *Rockstar Games End User License Agreement*, *supra* note 127. This is the same sort of deterrence that video game companies engage in in order to discourage people from buying used games. *See Parrish*, *supra* note 63.

135. *See Rockstar Games End User License Agreement*, *supra* note 127.

136. *Id.*

137. *Id.*

138. *Id.*

multiple computers who purchased the game.¹³⁹ The inability to back up, make copies, or install games multiple times are significant use restrictions sanctioned by *Vernor*.¹⁴⁰

Lest it seem that the *Vernor* court took delight in crafting its “cookbook recipe” of a licensing test, the opinion hints at an ironic feeling of helplessness. The decision, which has the effect of restricting consumers to the confines of licensing agreements, was written by a court which itself felt boxed in by precedent and outmoded law.¹⁴¹ The decision challenges Congress to revise and update the first sale doctrine to deal with a world in which licensing is becoming more and more common.¹⁴²

As Costa notes, however, a delicate balance must be struck between the interests of consumers and copyright holders.¹⁴³ Skewing too far in one direction would significantly restrict a consumer’s ability to use something he or she lawfully purchased, while veering too far in the other may potentially encourage piracy in the absence of strong copyright protection.¹⁴⁴ Costa proposes that Congress prohibit the creation of “unilateral contract[s] of adhesion” through the insertion of a few key phrases in a licensing agreement or shrinkwrap contract.¹⁴⁵

The caveat to Costa’s proposal, however, is that it deals only with transfers of ownership where physical media are involved.¹⁴⁶ Costa’s proposal is a sound one that strikes at the heart of the problem *Vernor* creates, but it says nothing of a future where digital content reigns supreme and physical media is an outmoded concept embraced by few beyond collectors and enthusiasts. Should this situation come to pass, as technological progress suggests is increasingly likely, the question will not be whether first sale should apply to X or Y media or situation. The question will instead be whether first sale has any relevance whatsoever.

139. *Former Maxis Man: Spore DRM is a Screw Up*, SPONG (Sept. 9, 2008), <http://spong.com/article/16171/Former-Maxis-Man-Spore-DRM-is-a-Screw-Up>. *Spore*’s DRM was so reviled by consumers upon the game’s 2008 release that many believe the DRM actually “encouraged thousands to get their copy illegally.” Vernik, *supra* note 122, at 1024.

140. Such restrictions may also raise significant fair use concerns.

141. *Costa*, *supra* note 24, at 225.

142. *Id.*

143. *Id.* at 225-26.

144. *See id.*

145. *Id.* at 226.

146. *Id.* (“Congress should prohibit the creation of a license . . . when there is a concomitant transfer of physical media.”).

III. DIGITAL MEDIA AND FIRST SALE: GETTING AN ANSWER BY CHANGING THE QUESTION

A. *Beyond Round Pegs in Square Holes: Digital Media's Relevance to the First Sale Framework*

When first sale was created near the turn of the twentieth century, it necessarily only dealt with the distribution of physical copies of copyrighted works.¹⁴⁷ Indeed, one of the broad policy considerations at the core of first sale is a desire to give effect to the common law rule against restraints on the alienation of personal property.¹⁴⁸ Courts have repeatedly held and the Copyright Office itself has pointed out that the tangible nature of a copy is a “defining element” of first sale critical to its rationale.¹⁴⁹ Consequently, laws dealing with transferring physical objects are easy to conceptually grasp because they directly implicate the transfer of a physical object from one person to another.¹⁵⁰

Due to this focus on tangible objects, one might initially think that trying to fit digital and streaming media into the first sale framework is like trying to fit a round peg into a square hole. Yet the reality is far more dramatic than this simple analogy for a few reasons. Chief among these is the nature of transferring a digital copy versus the manner of transferring tangible copies. A physical transfer implicates only one of the exclusive rights recognized by copyright law: the exclusive right of distribution. A digital transfer, however, involves a copy being made and given to a recipient, thus violating the exclusive right of reproduction.¹⁵¹ Thus under current copyright law any transfer of digital ownership would technically constitute copyright infringement by violating an owner's exclusive right to reproduction of his or her work.¹⁵²

Proponents of revising the first sale doctrine in light of technological changes have long recognized this issue and have come up with an interesting manner of combatting it. In 1997, Congressmen Dick Boucher and Tom Campbell proposed the Digital Era Copyright Enhancement

147. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908).

148. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT xix (2001), available at http://www.copyright.gov/reports/studies/dmca/dmca_study.html (follow “Volume 1” hyperlink).

149. *Id.*

150. See *id.*

151. *Id.*

152. *Id.* at 80.

Act.¹⁵³ This bill, among other things, contained proposed revisions to § 109 of the Copyright Act, which codifies the first sale doctrine.¹⁵⁴

The proposal amounts to what is essentially a “digital first sale doctrine”¹⁵⁵ that tackles some of the issues addressed in the article head-on. The key component of this proposal is its attempted resolution of the distribution/reproduction problem identified previously.¹⁵⁶ The bill states that a full transfer of ownership for purposes of first sale protection when digital files are involved does not occur unless or until the party transferring title “erases or destroys” his or her copy of the transferred file at “substantially the same time” as the transfer.¹⁵⁷ Building on this idea, there have been proposals for technology that would essentially do the same thing via automated processes.¹⁵⁸ This is often referred to as “forward and delete” technology.¹⁵⁹

While the Boucher-Campbell bill ultimately did not pass, the divestment of ownership idea and forward and delete technology have stayed alive in the years since.¹⁶⁰ The Rockstar EULA, for one, contains a similar provision stressing that a user may transfer a copy of a lawfully purchased game so long as he or she completely divests him or herself of ownership.¹⁶¹ Additionally, there is a pending case in New York involving a company called ReDigi, whose business model allows users to re-sell purchased MP3 copies of music.¹⁶² Key to ReDigi’s argument is its contention that its systems conform to the traditional understanding of the first sale doctrine through forward and delete mechanisms.¹⁶³

153. H.R. 3048, 105th Cong. (1997).

154. *Id.* at § 4.

155. *See id.*

156. The proposed language for § 109 read:

(f) The authorization for use set forth in subsection (a) applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title, or any person authorized by such owner, performs, displays, or distributes the work by means of transmission to a single recipient, *if that person erases or destroys his or her copy or phonorecord at substantially the same time.* The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement. *Id.* (emphasis added).

157. *Id.*

158. U.S. COPYRIGHT OFFICE, *supra* note 148, at 81-82. The Boucher-Campbell bill, by contrast, required each seller to take an “additional affirmative step” to delete the files. *Id.*

159. *Id.* at 48.

160. *See infra* Part III.C.

161. *Rockstar Games End User License Agreement, supra* note 127.

162. David Kravets, *Judge Refuses to Shut Down Online Market for Used MP3s*, WIRED (Feb. 7, 2012), <http://www.wired.com/threatlevel/2012/02/pre-owned-music-lawsuit-2/>.

163. Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion for a Preliminary Injunction at 14-17, *Capitol Records LLC v. ReDigi, Inc.*, No. 12-cv-0095(RJS)(AJP) (S.D.N.Y. 2012), 2012 WL 2281961. In its Response, ReDigi describes how the re-selling process works

While the Boucher-Campbell bill and its progeny, from a practical perspective, keep first sale alive in the digital world by applying its basic underpinnings as best they can, there are many issues with creating a digital first sale doctrine.

One of digital first sale's most glaring flaws arises out of the nature of "new" and "used" digital copies. If it is hard to see how new and used digital copies are any different it is because they are not. Digital copies are completely identical no matter how long someone has "owned" them.¹⁶⁴ Unlike a videotape, CD, DVD, video game cartridge, book, or any other tangible media, a "used" digital copy neither degrades nor shows signs of wear and tear over time.¹⁶⁵ Consequently, with no tangible difference between a new and used copy, there is no incentive to pick one over the other because they are equally desirable.¹⁶⁶

The only distinguishable difference between a "new" and "used" digital copy would be in comparative price—and this is where the digital first sale concept collapses under its own weight. There is no reason why new and used digital copies should be priced any differently from one another since they are otherwise identical. This is often not the case with physical products.¹⁶⁷ Used physical objects are almost always valued lower than new ones for myriad reasons: from aesthetic, to functional, to even health and safety.¹⁶⁸

A side-effect of this pricing conundrum is that it flies in the face of another one of first sale's underlying policy concerns. One of the principles guiding the *Bobbs-Merrill Co. v. Straus* court was the idea that copyright law should be primarily concerned with adhering to its grant of power in the Constitution.¹⁶⁹ Following *Bobbs-Merrill*, first sale has become one of the primary aids to reaching the goal set forth in the Constitution by creating secondary markets that allow for the exchange of works and consequently

and stresses that no copying takes place when one user sells an MP3 to another. Additionally, the Response also says that once an MP3 is sold, the seller can no longer access it on ReDigi's site nor can they access it through their iTunes account. *Id.*

164. U.S. COPYRIGHT OFFICE, *supra* note 148, at 82.

165. *Id.*

166. *Id.*

167. *Id.*

168. Walecia Konrad, *Bargains on Used Goods May Prove Costly*, N.Y. TIMES, July 26, 2011, at D6, available at 2011 WLNR 14752488.

169. U.S. CONST. art. I, § 8, cl. 8 ("To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.").

ideas among people, often at reduced prices.¹⁷⁰ These markets also allow access to hard-to-find, sometimes out-of-print works.¹⁷¹

Neither of these concerns is served by a digital first sale doctrine. First, if there is no incentive for sellers to offer their “used” digital goods for a lower cost, they will most likely sell them at the same price as the fair market value.¹⁷² There would then be absolutely no difference between the two markets. In fact, this lack of difference would make a secondary market inherently self-defeating; without the benefit of a lower price, there’s little or even no reason someone wouldn’t just buy something directly from the original owner.¹⁷³ Thus, the very nature of identical digital files makes a secondary market in their sale ultimately pointless.¹⁷⁴

Moreover, unless forward and delete technology is uniformly implemented in all digital files, it will be impossible to know if sellers are following the letter of the digital first sale doctrine.¹⁷⁵ In addition to the difficulty of enforcement, it could potentially be costly to implement such a uniform technological change in all digital files being sold, not to mention those that have already been sold over the course of many years.¹⁷⁶

Lastly, to create a digital first sale doctrine with forward and delete technology would essentially amount to the government imposing a distribution model by forcing the digital market to conform to the age-old tangible goods model.¹⁷⁷ The Copyright Office, in its report on the DMCA, notes that the old “sale” model arose out of necessity—specifically, it came to be because individual products were manufactured and then parted with so that the works could be exploited.¹⁷⁸ The Office points out further that neither of these concepts (manufacturing or parting way with copies for

170. See Costa, *supra* note 24, at 226.

171. *Id.*

172. See Ted Cohen, *Supply and Demand in the Age of Infinite Supply*, THEMUSICVOID (Oct. 7, 2009), <http://www.themusicvoid.com/2009/10/supply-and-demand-in-the-age-of-infinite-supply/>.

173. See *id.*

174. There may exist a scenario, though, where a secondary market for digital copies would be efficient. If prices were viewed as being based on levels of individual interest, for instance, there could exist incentive for someone to pay a lower price for a secondhand digital copy. In this scenario, someone who is not as interested in a song or movie may pay less money to acquire a “used” copy from a friend or even a stranger rather than paying full price on a service like iTunes. The obvious counter, however, is that this could only really apply in a scenario where the digital copy in question is being sold by iTunes or whomever for a substantial price. Put a different way, a consumer may not see much incentive to pay 50 cents rather than 99 cents for an iTunes song, but he or she may well pay \$5 rather than \$10 for a digital copy of a movie.

175. See U.S. COPYRIGHT OFFICE, *supra* note 148, at xix.

176. *Id.*

177. *Id.* at 91-92.

178. *Id.* at 91.

exploitation) applies to digital copies.¹⁷⁹ A digital file is neither manufactured in the same manner, nor is a copy actually parted with.¹⁸⁰ The pricing concept of supply and demand then may not even apply because supply is never an issue for infinitely available digital copies.¹⁸¹

The end result is that digital files cannot be shoehorned into first sale as it is currently understood. Not only are new and used digital files identical, their secondary markets are also self-defeating, enforcement methods relating to their sale are difficult, and market pressures are hard to quantify.¹⁸² Due to these myriad differences, digital media's interplay with first sale isn't actually like trying to put a round peg in a square hole. Rather, digital media ends up being so far outside first sale's conceptual framework that attempting to fit the two together would make about as much sense as trying to fit the national anthem into a square hole. As Wolfgang Pauli would say, "It's not even wrong."¹⁸³

B. The Impact of Streaming Media on the Nature of Entertainment Consumption

Subscription streaming services in film, television, music, and video games have shifted the copyright narrative entirely. In recent years, services in these media industries have emerged and given consumers something which, until the popular adoption of high-speed internet connections, had been unimaginable: on-demand access to media ranging from the latest Coldplay song to Ingmar Bergman's *The Seventh Seal*.¹⁸⁴

In *United States v. American Society of Composers, Authors, & Publishers*,¹⁸⁵ the court defined a "stream" in the music context as "an electronic transmission that renders [a] musical work audible as it is received by the client-computer's temporary memory."¹⁸⁶ Unlike a digital download, which is transmitted and then played at another time, a hallmark of streaming is that its "performance" is simultaneous with transmission

179. *Id.* at 91-92.

180. *Id.* at xviii-xix.

181. *See* Cohen, *supra* note 172.

182. *See id.*

183. Pauli was a theoretical physicist who once read a colleague's paper and found it to be so wildly off-base that he reportedly remarked, "This isn't right. It's not even wrong." Michael Shermer, *Wronger Than Wrong*, SCIENTIFIC AMERICAN (Oct. 16, 2006), <http://www.scientificamerican.com/article.cfm?id=wronger-than-wrong>.

184. *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 187-88 (2d ed. 2003).

185. 627 F.3d 64 (2d Cir. 2010).

186. *Id.* at 74.

and it does not require delivery of any sort of copy.¹⁸⁷ Users can then treat the streaming media like they would traditional media, being able to fast-forward, pause, and rewind, thanks to a cached copy of the media stored in the streaming device's temporary memory.¹⁸⁸ The result is a seamless experience allowing users to experience whatever they want whenever they want.¹⁸⁹

While streaming has been a fact of life for some time in the music, television, and film industries, it is still a nascent enterprise in the gaming industry, albeit a growing one. A company called OnLive recently launched a cloud-based game service that streams games to a user's television or computer.¹⁹⁰ The service operates like other streaming services, storing games off-site and making them available to play on-demand.¹⁹¹ This is done through a small set-top receiver box that is not actually a dedicated game console.¹⁹² The service has already garnered significant attention, in part because the company has managed to license popular games like *Assassin's Creed II* and *Batman: Arkham City*.¹⁹³ Additionally, GameStop has begun to realize that digital distribution and cloud gaming may threaten its business model and has taken preemptive measures to join the streaming fray.¹⁹⁴

Regardless of the industry and type of media in question, the hurdles that streaming presents for first sale are quickly apparent just in an explanation of how the technology operates. Namely, aside from ephemeral copying through the caching process, the exclusive right of reproduction is not implicated in the streaming context.¹⁹⁵ Put another way, no one is

187. *Id.*

188. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 123 (2d Cir. 2008). The Second Circuit was confronted with the issue of whether cached "copies" made to facilitate remote-storage DVRs constituted fixations under the Copyright Act violating the exclusive right of reproduction. *Id.* at 127. The court held that the copies, which were embodied for less than 1.2 seconds, were too "ephemeral" to properly be considered fixed for more than a transitory duration. *Id.* at 128-30. The reproduction right is thus not implicated in streaming technology, though it remains to be seen just what the threshold is for an "ephemeral" reproduction. *Id.*

189. *See id.* at 123.

190. *The Onlive Game System*, ONLIVE, <http://www.onlive.com/game-system> (last visited Nov. 12, 2012).

191. *Id.*

192. *Id.*

193. *Games*, ONLIVE, https://www.onlive.com/games/featuredgames#&tab=all_games&filter=Individual_Games (last visited Nov. 12, 2012).

194. Blake Ellison, *GameStop Cloud PC/Console Gaming Service Enters Testing*, GEEK.COM (Aug. 19, 2011), <http://www.geek.com/articles/games/gamestop-cloud-console-gaming-service-enters-testing-20110819/>. GameStop recently purchased a cloud gaming service in order to augment its overall business model and gaming offerings. *Id.*

195. *Cartoon Network*, 536 F.3d at 129-30.

actually receiving a copy of a piece of media while streaming.¹⁹⁶ The user simply turns off the device or service when they are finished like they would a television broadcast. If they like what they have experienced, they can recommend the movie they have watched, music they have listened to, or game they have played to a friend, family member, or colleague. However, with a service like this, rather than letting someone borrow a copy or encouraging them to track one down, the user tells the person “It’s on Netflix,” or “It’s on Spotify,” and they can instantly go and experience the work at their leisure.¹⁹⁷

Instant, affordable access to vast amounts of content may sound like a consumer’s dream come true. In some ways this is accurate. Streaming, like digital downloading, does not contend with supply problems.¹⁹⁸ The classic story of going to the video store to rent a movie only to find it checked out is completely non-existent in the digital context. The technology has literally created a magic box full of content available at any time for a reasonable price.¹⁹⁹ Once again, however, there is no such thing as a free lunch.

The lack of any first sale applicability drives a tremendous wedge between streaming and entertainment utopia. The reason video rental services existed, for instance, was because rental stores were able to buy copies of movies and then continually rent them.²⁰⁰ This was lucrative in large part because it was cheap, as no expensive licensing agreements needed to be entered into in order to carry movies at rental outlets.²⁰¹

Streaming services do not have this option because of a complete lack of copy distribution. Instead, if any exclusive right is implicated by streaming, it would be the public performance right.²⁰² Crucially, there is

196. *See id.*

197. Provided they have the same subscription service. Some services offer particular content on an exclusive basis, frustrating consumers who already subscribe to one service. Tim Stevens, *Criterion Collection Now Streaming on Hulu Plus*, ENGADGET (Feb. 15, 2011), <http://www.engadget.com/2011/02/15/criterion-collection-now-streaming-on-hulu-plus-maybe-sanjuro-a/>.

198. *See* Cohen, *supra* note 172.

199. *Id.* Subscription services like Netflix start at \$7.99, while Apple and Amazon offer individual movies and TV shows for between \$2 and \$5—comparable to the price for a rental from a Blockbuster retail location. Christina Warren, *5 of the Best Streaming Media Services Compared*, MASHABLE (Feb. 14, 2011), <http://mashable.com/2011/02/14/streaming-media-comparison/>. Stanford Law Professor Paul Goldstein has famously termed such a magic box of content a “Celestial Jukebox.” GOLDSTEIN, *supra* note 184, at 187.

200. Matthew Yglesias, *Thank the “First Sale Doctrine” for Video Rentals*, THINK PROGRESS (Sep. 19, 2011), <http://thinkprogress.org/yglesias/2011/09/19/322959/thank-the-first-sale-doctrine-for-video-rentals/?mobile=nc>.

201. *Id.*

202. *United States v. Am. Soc’y of Composers, Authors, & Publishers*, 627 F.3d 64, 74 (2d Cir. 2010). It is highly questionable, however, whether an individual streaming a video or song in

no exception in the Copyright Act for public performance comparable to the exception that first sale creates for the distribution right.²⁰³ As a result, copyright holders must be compensated for public performances of their works of authorship.²⁰⁴ In the streaming context, this means that content providers like Netflix and Spotify must negotiate licenses with copyright holders in order to provide consumers with the content they desire.²⁰⁵ Moreover, because content availability in streaming depends on negotiated licenses, content providers are free to negotiate with whomever they wish and set prices however they choose.²⁰⁶

The end result of such a model is that content providers are forced to pay large sums of money just to show single films or televisions series. This can quickly become cost-prohibitive, despite creative attempts to get around the problem.²⁰⁷ Consumer confusion is also a necessary consequence of this economic model, because one content provider may secure the right to show a film or films or play certain artists' music, forcing consumers to pick between competing services in order to decide how to experience all of the media they want.²⁰⁸ This is assuming, though, that consumers can get what they want on the services available to them.

their home and also controlling playback can properly be considered a "public" performance. *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 281 (9th Cir. 1989) (holding that hotel guests renting movies in lobby and watching them in hotel rooms was not a public performance because hotel rooms are "places where individuals enjoy a substantial degree of privacy, not unlike their own homes."); *Columbia Pictures Indus. v. Redd Horne*, 749 F.2d 154, 158-59 (3d Cir. 1984) (finding public performance where store employee, rather than individual user, was the person initiating movie playback and thus "performing" the work).

203. *Columbia Pictures Indus. v. Redd Horne*, 749 F.2d 159-60. There are many exceptions to public performance in the Copyright Act, but these exceptions are extremely narrow and fact-specific, mainly dealing with educational and instructional contexts. 17 U.S.C. § 110 (2006). None are analogous to first sale's general provision allowing uninhibited distribution of purchased copies. *Compare id.*, with 17 U.S.C. § 109(a) (2006).

204. *Am. Soc'y of Composers*, 627 F.3d at 71.

205. Julianne Pepitone, *Netflix's Vanished Sony Films Are an Ominous Sign*, CNN MONEY (Jul. 11, 2011), http://money.cnn.com/2011/07/08/technology/netflix_starz_contract/index.htm.

206. *Id.*

207. *Id.* In the early days of streaming, Netflix secured a lucrative deal with the Starz! cable network which allowed Netflix to stream movies from Starz!'s library. *Id.* This library included popular hits like *Toy Story 3*. Richard Lawler, *Starz Play Movies Disappear from Netflix Streaming This Week*, ENGADGET (Feb. 27, 2012), <http://www.engadget.com/2012/02/27/netflix-starz-play>. The deal operated as a backdoor to cheaply allow Netflix to show popular movies without having to negotiate separate licenses with movie studios themselves, instead relying on Starz's existing agreements. *See id.* Once streaming became more lucrative, Starz and the studios pulled their support, negotiations broke down, and Netflix lost more than 800 films from its streaming library. *Id.*

208. *See Warren*, *supra* note 199.

The necessary trade-off in a streaming model is a complete loss of user control over content. This does not seem to be so at first glance; after all, the consumer is now empowered to watch whatever he or she wants at any time he or she pleases.²⁰⁹ The drawback is that the consumer may only experience what is made available to him or her.²¹⁰ Similar to how a consumer could only experience the movies, music, or games they had in their possession, users of streaming services can only experience what the content company has made available to them on its servers.²¹¹ In a streaming context, the consumer cannot simply walk down to the store and purchase more movies or music or borrow games from friends. They are completely at the whim of the copyright holder and content provider, waiting for licensing deals to be hashed out, and hoping that there is not an exclusivity agreement keeping their favorite media tied up in a competing service that they do not subscribe to.²¹² Though media is still available in forms other than streaming, were this method of content delivery to become the norm it would give copyright holders unprecedented control over their works of authorship, potentially thwarting the Constitutionally-stated goals of copyright law in the United States.²¹³

Ultimately, as streaming becomes more prevalent in each branch of media it shifts copyright away from its traditional interpretation. Rightly or wrongly, there is a general assumption that policing the unauthorized copying of works is the linchpin of copyright law.²¹⁴ This is understandable, considering that the word “copy” appears in the name

209. *Id.*

210. *See* Stevens, *supra* note 197.

211. *See id.* Netflix’s recent negotiations with studios have demonstrated that there is only so much money to go around. Pepitone, *supra* note 205. In 2010, the company spent \$180 million on licenses for streaming content. *Id.* That number is projected to surpass \$2 billion in 2012 even while Netflix loses content from various companies like Disney and Sony. *Id.*

212. *See* Stevens, *supra* note 197. This is not to say that copies do not inflict their own limits as well. For instance, if someone wanted a copy of *The Legend of Zelda* in 1988 and Toys R’ Us or Blockbuster did not have copies, the consumer was out of luck.

213. In a perverse twist, Netflix lost Sony movies in the Starz! deal because the agreement included a cap on viewers of Sony movies. Pepitone, *supra* note 205. Once enough viewers watched Sony movies on Netflix through Starz! Play, the contract became null. *Id.* The counterintuitive result was that viewers were not allowed to watch what they wanted because the content was too popular. Suppression of popular expression is likely not what the Founders had in mind for American copyright law.

214. *See* Ernest Miller & Joan Feigenbaum, *Taking the Copy Out of Copyright*, in REVISED PAPERS FROM THE ACM CCS-8 WORKSHOP ON SECURITY AND PRIVACY IN DIGITAL RIGHTS MANAGEMENT 233, 233 (Tomas Sander ed., 2002), available at <http://www.cs.yale.edu/homes/jf/MF.pdf> (unpaginated); *see also* Shyamkrishna Balganes, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1668-69 (2012) (recognizing that all of the exclusive rights conferred by copyright law revolve in some way around copying).

“copyright.”²¹⁵ If media were to shift to a large-scale streaming model, however, this interpretation would change entirely. Instead of worrying about violations of the reproduction right, the right of public performance would suddenly become the new “linchpin” of copyright. Such a shift would necessitate a new understanding of what copyright law is meant to do.

The age-old understanding has been that copyright was to promote social progress by giving authors control over their works.²¹⁶ Courts have interpreted this to mean that copyright is intended to incentivize authors to create new works because they can expect to be compensated and will also have the ability to exploit these works as they wish.²¹⁷ Conversely, exceptions like fair use and first sale have historically balanced out the copyright holder’s rights.²¹⁸ These exceptions encourage the transformative use and dissemination of works of authorship, which in turn spreads ideas and incentivizes further creation.²¹⁹

Based on the drawbacks to streaming discussed previously, it would seem that this goal is entirely thwarted by giving copyright holders so much control over their works. In a roundabout way, this is not entirely accurate. A shift toward streaming media would certainly affect the dissemination of copies simply because there would no longer be a need for them. Yet the works themselves, once they became available on streaming services, would be available to anyone using the service whenever they pleased. The expressions contained within these works would suddenly be given tremendous visibility at the cost of ten dollars or so per month. Instead of having to track down copies, a consumer with access to a service like Netflix or Spotify can open himself up to all manner of new works of authorship at the push of a button. Arguably, this fulfills copyright’s historical aims to an extent never before seen.

This illusion of access is just that. Consumers may be able to freely utilize media available to them on-demand, but the cost of that availability,

215. See Miller & Feigenbaum, *supra* note 214, at 233; Balganes, *supra* note 214, at 1669.

216. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

217. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

218. Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 892 (2011).

219. *Id.* at 898-99 (2011). First sale also incentivizes authors to create new works to compete with secondary markets. *Id.* at 895.

as discussed previously, may be prohibitively high.²²⁰ Availability of content would suddenly be completely subject to corporate checkbooks and bottom lines, rather than individual consumers deciding to sell used movies and music at Amoeba on a given day.²²¹ Without copies to sell and re-sell, consumers are forced to wait while content providers negotiate deals for popular content.²²² Companies like Netflix, in fact, have already let less-popular content fall by the wayside as they attempt to free up funds to negotiate costly deals for popular television shows and films.²²³ The inevitable consequence of such a business model is that content providers pay hand over fist for popular content to keep the business running and the doors open, neglecting lesser-known works that have just as much if not more social value.²²⁴

Obviously the world is not so black and white; physical copies still exist in some form and will likely continue to for the foreseeable future. The technological and legal challenges presented by streaming media, however, further demonstrate the questions that continue to arise about first sale's continuing relevance.

C. *Saving First Sale: Marching Forward, Looking Backward*

Despite proposals set forth which seek to protect first sale from the shocks of massive technological change, there currently exists no satisfactory way to keep the classic first sale doctrine alive in a digital world. This is not to say that such an effort is fruitless, nor that it would be impossible to create some sort of secondary market for digital products. The problem is that the current understanding of first sale is intertwined with physical objects and their distribution.²²⁵ As discussed previously, the way that the law is currently written, with its focus on copies changing

220. Netflix recently agreed to a streaming deal with Dreamworks Animation that reportedly is worth \$30 million *per film*. Brooks Barnes & Brian Stelter, *Netflix Secures Streaming Deal With DreamWorks*, N.Y. TIMES, Sept. 25, 2011, at B1, *available at* 2011 WLNR 19504932.

221. *See, e.g., id.* (noting Netflix's loss in the right to stream Walt Disney Studios and Sony Pictures content as a result of failed renegotiations).

222. *See supra* notes 205-06 and accompanying text.

223. Anthony Kaufman, *The Decline of Indies on Netflix: Were They Amputated with The Long Tail?*, INDIEWIRE (Sept. 27, 2011), http://www.indiewire.com/article/the_death_of_indies_on_netflix_greatly_exaggerated_or_just_another_mistake.

224. Due to prohibitive licensing costs, Netflix has started to focus more on streaming television shows than films, demonstrating how market pressures can greatly impact what is available to consumers under such a content delivery model. Greg Sandoval, *Roger Ebert Says Netflix Has Stopped Buying Indie Films* (Mar. 5, 2012), http://news.cnet.com/8301-31001_3-57390525-261/roger-ebert-says-netflix-has-stopped-buying-indie-films/.

225. *See supra* Part III.A.

hands and ownership divesting completely, is at odds with the digital world at its most basic level.²²⁶ Consequently, existing proposals to “save” first sale are forced to take all of this into account—with varying degrees of success.²²⁷

Professors Ernest Miller and Joan Feigenbaum set forth one such proposal in 2001, at the tail end of the digital first sale debate and prior to the advent of streaming media.²²⁸ Feigenbaum and Miller rightly recognized that first sale by its very nature is concerned with physical objects due to the property concerns created by copyright.²²⁹ They note that countless objects may have copyrighted material on them, such as a lamp with a haiku printed on it, and the lack of first sale would potentially stop any of these objects from being sold at any time.²³⁰ Due to the common law’s concern with free alienation of personal property, such a result is strongly disfavored, thus creating the need for a right of free distribution following an exhaustion of rights.²³¹ Once again, the inescapable problem with digital copies is that due to their nature reproduction is necessarily implicated when distribution takes place.²³² Thus, they argue that applying the reproduction right to digital works is both illogical and improper if there is to be any practical application of first sale in this context.²³³

Feigenbaum and Miller’s proposal to deal with this paradoxical problem is simultaneously obvious and unworkable. The solution is simple: infringement in the digital copy context should not be focused on unauthorized reproductions. Instead, it should deal with unauthorized distributions of copyrighted works.²³⁴ The proposal further clarifies that private distributions of digital copies should not be actionable under this new model and instead focus on public distribution of copyrighted digital

226. See *supra* Part III.A.

227. Compare Miller & Feigenbaum, *supra* note 214, at 233 (arguing that applying the reproduction right to digital works is both illogical and improper), with Perzanowski & Schultz, *supra* note 218, at 892 (arguing that the full measure of copyright exhaustion should be applied to digital works).

228. Miller & Feigenbaum, *supra* note 214, at 233.

229. *Id.* at 238.

230. *Id.*

231. *Id.* at 238-9. The concept of exhaustion theorizes that a creator of intellectual property is “exhausted” of his rights in a particular object when he divests ownership of it. Perzanowski & Schultz, *supra* note 218, at 891. In the copyright context, the only right that is exhausted upon sale is that of distribution. *Id.* The exhaustion of the distribution right is a necessary component of first sale. *Id.*

232. See *supra* notes 151-52 and accompanying text.

233. Miller & Feigenbaum, *supra* note 214, at 242.

234. *Id.*

works.²³⁵ In this context, a public distribution would involve giving copyrighted works to a person or group of people outside of one's friends, family, or colleagues.²³⁶

Under this model, Feigenbaum and Miller argue, a girl emailing her father an MP3 would not be liable for any infringement because if the reproduction right is ignored in this context, she is merely sending the file to her father, a member of her immediate family, in a private setting outside of the prying eye of the law.²³⁷ By contrast, if she were to post the file on a website, the record industry and authorities would be more likely to take notice and police her conduct because it occurred in "public" and was offered to strangers.²³⁸ Ultimately, Feigenbaum and Miller argue that this proposal is preferable to enforcement via the reproduction right for two reasons: first, that there is no evil in unauthorized reproduction until a distribution of those copies is made.²³⁹ And second, it is difficult for copyright holders to police unauthorized reproductions and determine when they are happening—unlike a public distribution, which is readily apparent.²⁴⁰

Theoretically, this seems a sound approach. But if the aim is to preserve first sale as it is currently understood, then the Feigenbaum and Miller's proposal does not go far enough. Feigenbaum and Miller claim that their proposal saves many of the benefits of first sale by avoiding a "copy-centric" approach, thereby encouraging free distribution of digital copies.²⁴¹ This may be true on a smaller scale, but because the proposal targets public distribution of digital works, it is counterintuitive. By policing public distribution, this proposal would stop secondary markets from being created.²⁴² Without the ability to make distributions of purchased works to the public, the only conceivable secondary market would be between friends, family members, and colleagues. Such a limited form of first sale would not promote many of the doctrine's benefits.²⁴³

For instance, a member of the general public would be unable to stumble upon something on his own on eBay under this proposal. Such a

235. *Id.*

236. "To perform or display a work 'publicly' means—(1) To perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; . . ." 17 U.S.C. § 101 (2006).

237. Miller & Feigenbaum, *supra* note 214, at 243.

238. *Id.*

239. *Id.* at 242.

240. *Id.* at 243.

241. *Id.* at 237.

242. See Perzanowski & Schultz, *supra* note 218, at 903-04.

243. *Id.* at 897.

model would also necessarily entail an ad hoc determination of what would constitute a public distribution in the digital copy context. Where would the line be drawn for friends and colleagues? Would Facebook friends count? Twitter followers? What about a private, password-protected message board?

The consequence of this proposal is a world lacking in transactional clarity.²⁴⁴ Aaron Perzanowski and Jason Schultz observe that the absence of first sale could create an environment where different pieces of media such as the latest *Twilight* movie or Lady Gaga album may have completely different use restrictions written into them.²⁴⁵ Some may only be watchable or listenable at night, some during the day, and most important of all some may be able to be resold under certain conditions while others could not be.²⁴⁶ Consumers would thus have to wade through confusing and complex restrictions in figuring out what they could and could not sell and essentially take a chance and hope for the best.²⁴⁷

The proposal creates a similar problem albeit in a different manner by making it unclear to whom a product can be distributed. This causes consumers to hesitate before transferring a product, for fear that what they are doing may constitute a public distribution. People have many definitions of “friend” and “colleague.” One’s friend may be another’s acquaintance, and another may consider someone who works in the same field but whom they do not personally know a “colleague.” As Perzanowski and Schultz note, first sale creates a baseline understanding that lacks such idiosyncratic restrictions.²⁴⁸

Shying away from a focus on reproduction would solve the problems inherent in a digital first sale model, but replacing this with a focus on public distribution would do nothing more than create a new restriction on alienation which confines information dissemination to a private, underground world.²⁴⁹ Such a result swings far in the direction of

244. Transactional clarity is achieved when consumers are able to freely sell and acquire secondhand copies without having to worry about high information and transaction costs borne by complex licensing arrangements and mechanisms controlling what can and cannot be sold. *Id.* at 896-97. DRM is a good example of this.

245. *Id.* at 896.

246. *Id.*

247. *Id.* at 896-97.

248. *Id.* at 897. See also Molly Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 885-86 (2008) (analogizing non-possessory property interests that attach to land to evolving restrictions on intangible digital property).

249. Perzanowski & Schultz, *supra* note 218, at 896-97 (concluding that if resale of digital goods in the secondary market is disallowed, consumers will have to choose between not selling the product or “willfully ignoring” the consequences of selling it illegally).

appeasing copyright holders while having the appearance of an equitable solution.

Perzanowski and Schultz make a proposal of their own which is more fundamentally sound but only goes as far as the confines of first sale will allow.²⁵⁰ Their argument is that the full measure of copyright exhaustion should be applied to digital works in order to give them all of the same benefits and protections that analog works receive from first sale.²⁵¹ They are quick to clarify that this should not be seen as giving owners of copies unbridled license to freely distribute unauthorized reproductions.²⁵² They propose differentiating between copies made for personal, perhaps archival use, and copies that are “freely distributed” to others while the original owner retains copies for himself.²⁵³ Perzanowski and Schultz suggest doing this by treating a digital copy as a “single unit for the purposes of exhaustion.”²⁵⁴ This harkens back to the forward and delete technology discussed in conjunction with digital first sale.²⁵⁵ One reason they feel this will work is that if an infringement action were to arise, the burden would be placed on the person who sold the digital copy to prove that he or she had deleted any and all copies upon sale.²⁵⁶

By focusing on common law principles of exhaustion and applying them to copyright, Perzanowski and Schultz make a far more persuasive argument for applying first sale to a digital marketplace.²⁵⁷ They point out that in *Bobbs-Merrill Co. v. Straus* the court relied on a common law theory of exhaustion which “looked to the basic purposes of copyright protection, the necessity of balancing the interests of rights holders and the public, and the specific facts presented to address gaps in the statutory scheme and ease copyright’s core tension between incentives for creation and the accessibility and enjoyment of creative works.”²⁵⁸ This is similar to the fact-intensive approach employed by the fair use doctrine.²⁵⁹ The outcome of imposing such a theory on the alienation of digital copies will be that the benefits of first sale in the analog world will then extend to digital copies,

250. *Id.* at 889.

251. *Id.* at 936-37.

252. *Id.* at 937.

253. *Id.*

254. *Id.*

255. *Id.* at 938.

256. *Id.* at 939.

257. *Id.* at 935-36.

258. *Id.* at 930.

259. *Id.*

among them the benefits of access, preservation, privacy, transactional clarity, increased innovation, and platform competition.²⁶⁰

Perzanowski and Schultz's approach is the closest that the current understanding of first sale can get to protecting digital copies. Even so, it still attempts to solve issues presented by new technology by treating it the same way as old technology.²⁶¹ This is a mistake that media companies have repeatedly made in the past decade, most notably through the music industry's choice to fight vicious battles with file-sharing services like Napster rather than understanding and embracing new distribution models.²⁶² Movie studios are making a similar mistake right now with digital locker technology and the Ultraviolet digital download and streaming service. Ultraviolet is a "digital locker" that allows consumers to purchase or rent a digital download of a movie or television show, which is then stored off-site in the cloud, ready to be accessed by the user with any number of devices ranging from a laptop to a smartphone.²⁶³ The service offers a number of options to consumers, including the option to download a copy of a movie and essentially "own" it—at an eyebrow-raising price.²⁶⁴ Studios like Paramount are charging upwards of \$20 for single downloads of new movies like *Green Lantern* and older titles like *Braveheart* and *Chinatown*.²⁶⁵ Such an economic model tries to treat the pricing model for digital downloads like those of physical copies instead of offering affordable prices to consumers.²⁶⁶ The end result is a service that prices

260. *Id.* at 894-901.

261. *Id.* at 936 (suggesting that courts apply traditional exhaustion principles to digital works).

262. Bob Sullivan, *Napster or Not, File Swaps Continue*, MSNBC.COM (Oct. 14, 2002), http://www.msnbc.msn.com/id/3078539/ns/technology_and_science-tech_and_gadgets/t/napster-or-not-file-swaps-continue/ ("The big news for the industry is, consumers are continually becoming more accustomed to downloading music for free . . . Every day somebody starts their digital music experience creates a serious challenge for fee-based services. [The industry] eventually will have to climb walls they are allowing to be built right now."). Despite Napster's demise, illegal file-sharing continued unabated. *Id.*

263. Rob Boirun, *Is UltraViolet the Answer to a Digital Copy of a Movie?*, BURNWORLD.COM (Oct. 13, 2011), <http://www.burnworld.com/blog/ultraviolet-answer-digital-copy-movie/>.

264. Eric Gruenwedel, *Analyst Blasts Pricing on Paramount "Disc-Free" UV Movies*, HOME MEDIA MAGAZINE (Jan. 27, 2012), <http://www.homemediamagazine.com/paramount/analyst-blasts-pricing-paramount-disc-free-uv-movies-26251>.

265. Dan Rayburn, *Studios Still Don't Get It: Paramount Charging \$20 to Stream 10+ Year Old Movies*, STREAMINGMEDIABLOG.COM (Jan. 25, 2012, 2:30 PM), http://blog.streamingmedia.com/the_business_of_online_vi/2012/01/studios-still-dont-get-it-paramount-charging-20-to-stream-10-year-old-movies.html.

266. *See id.* ("At some point, the studios are going to get burned just like the music industry did and while they spend a lot of time complaining about piracy, they need to wake up and realize

digital downloads like DVDs or Blu-rays one would purchase at Best Buy—albeit with a number of restrictions on when and how they can watch as well as a confusing set-up process involving the creation of multiple accounts online.²⁶⁷ Such a service flies in the face of the relative ease and affordability consumers have become accustomed to with streaming services, not to mention digital downloads in general.²⁶⁸ By forcing an outdated pricing model and method of distribution on a high-tech service, studios have created a tremendous handicap for the adoption of new technology.²⁶⁹

Moreover, both Feigenbaum and Miller's and Perzanowski and Schultz's proposals advocate either ignoring or exhausting the reproduction right for digital works.²⁷⁰ Yet a persistent, intense fear of unauthorized copying of digital works is precisely what drives policy regarding ownership and transfer of digital works and has done so since the CSRAA was first enacted.²⁷¹ To expect copyright holders and large media companies to stand idly by and essentially give up the reproduction right is far too idealistic for at least the foreseeable future.

In spite of the difficulty or perhaps impossibility inherent in applying first sale to digital copies and the streaming world, all hope may not be lost for video games. This is because even though the proposals to save first sale in a digital context are not entirely satisfactory, the gaming industry is uniquely capable of preserving many of the benefits of first sale even without any statutory support.

D. *Video Games Without First Sale: Extra Lives*

The first sale benefits outlined by Perzanowski and Schultz do not necessarily all apply to the video game industry. Perhaps the best example of this comes in the availability of older, classic games. *Chrono Trigger*, released for the Super Nintendo Entertainment System ("SNES") in 1995, is one of the most sought-after games on secondary markets.²⁷² For some

that consumers are demanding digital content, for a fair price. So far, the studios are not willing to give it to them and over time, [studios are] going to see their business models crumble.").

267. Janko Roettgers, *UltraViolet Reviewers Hate Hollywood's Digital Locker*, GIGAOM (Oct. 20, 2011), <http://gigaom.com/video/ultraviolet-bad-reviews/>.

268. See Rayburn, *supra* note 265.

269. *Id.*

270. See *supra* notes 234, 251 and accompanying text.

271. See *supra* notes 35-36 and accompanying text.

272. Brian Rowe, *Sealed Chrono Trigger Fetching Absurdly Stupid Price*, GAMEZONE (Sept. 27, 2011), http://www.gamezone.com/news/sealed_chrono_trigger_fetching_absurdly_stupid_price1. A sealed copy of the game can sell for more than \$600 on eBay. *Id.*

time, the only way to get a copy of this game was by scouring sites like eBay and hoping to find a used copy for a reasonable price.²⁷³ In 2008, however, the game was re-released for the Nintendo DS, and in 2011 it was released for the iPhone, making it more readily and cheaply available to consumers than at any time since its 1995 release.²⁷⁴ Now, entire generations of younger gamers who have heard of the game but missed out²⁷⁵ due to age or financial inability to buy expensive copies are able to get ahold of the game—without the aid of a secondary market.²⁷⁶

With the advent of internet-ready consoles equipped with hard drives, video game players can now download classic games no longer available at retail for relatively low prices.²⁷⁷ Numerous older, hard-to-find games have also been released for the iPhone and iPad, making them even more available than they were when they were initially released.²⁷⁸ Having

273. See Danny Cowan, *Instant Rarity: Are Those “Rare” Games Really Worth The Dough?*, IUP.COM (Jun. 26, 2006), <http://www.iup.com/do/feature?pager.offset=1&id=3151658>. Sometimes, games acquire an illusion of rarity due to demand outstripping supply. *Id.* The result is that some games will see their asking prices in secondary markets skyrocket when in fact thousands of copies are available. *Id.*

274. Sergehjs Cuhrajs, *From Angry Birds to Infinity Blade: Is iOS Good Enough for Hardcore Gaming?*, UNWIRED VIEW (Mar. 1, 2012), <http://www.unwiredview.com/2012/03/01/from-angry-birds-to-infinity-blade-is-ios-good-enough-for-hard-core-gamers/>.

275. Unlike music, film, TV, and literature, it is far easier to “miss out” on a video game title because the industry is laser-focused on new content. Oscar Langford, *Do People Still Buy Used Games?*, MASONIC GAMER (Sept. 13, 2012), <http://masonicgamer.com/do-people-still-buy-used-games/>. Whereas a film buff may go to Blockbuster to rent *Casablanca*, a video gamer does not go to Gamestop or Blockbuster to pick up a copy of *The Legend of Zelda* in a fit of nostalgia. See *id.* The game is an old title on an outdated console that is no longer commercially available. Moreover, if one did come across an old *Zelda* cartridge, they would also need an NES console on which to play it. The same problem does not present itself to nearly the same degree in other media markets, where the focus is on a wider range of works of authorship over a longer period of time, rather than on games that came out in the last six months to a year. *Id.* As a result, video game secondary markets indeed provide cheap access to consumers, but this access is largely constrained to a very recent window of time. *Id.* (noting games only have a “decent trade-in value” while “brand new”). See also Cowan, *supra* note 273 (noting that game prices on the secondary market skyrocket “within weeks of initial release”).

276. See Cowan, *supra* note 273.

277. Jason Schreier, *PSN’s Classic JRPGs: What Holds Up?*, JOYSTIQ (Nov. 11, 2011), <http://www.joystiq.com/2011/11/11/psns-classic-jrpgs-what-holds-up/>. Japanese role-playing games like *Chrono Trigger*, often the most sought-after classic games in secondary markets, are widely available on downloadable services for prices under \$10. *Id.*

278. Ben Kuchera, *Sonic CD Remains Fun, Fast, and Now Includes the Japanese Soundtrack*, ARS TECHNICA (Dec. 14, 2011), <http://arstechnica.com/gaming/2011/12/sonic-cd-remains-fun-fast-and-now-includes-the-japanese-soundtrack/>. One of the more interesting stories of a lost game being found again is *Sonic CD*, a cult classic game originally released for the Sega CD in 1993. *Id.* It was recently released with a \$5 price tag on the Playstation Store, Xbox Live Arcade, and Apple App Store. *Id.* (“*[Sonic CD]* was always a game that people enjoyed, but it was never all that easy to find. Until now.”).

games readily available for relatively cheap prices on services like the App Store, Xbox Live, and the Playstation Network is preferable to the price-gouging that occurs when games acquire “rare” status on auction sites like eBay.²⁷⁹ This juxtaposition is just one example of how video game secondary markets can inadvertently thwart some of the benefits of first sale and how a digital world can help remedy such a problem.

In addition to this increasing ability to acquire older games without the use of secondary markets, the rise of mobile gaming has led to low price points and new business models for downloadable games that make the need to lend and borrow games less prevalent.²⁸⁰ One of the reasons that iOS and Android revenue stunningly overtook dedicated handheld game system revenue from systems by Sony and Nintendo was that iOS and Android games are far cheaper.²⁸¹ This flood of cheap and free games that encourage gamers to spend money on virtual goods have created a new environment which may spell the end of consumers paying \$25 or more for a cartridge.²⁸²

While some of these games are simple affairs like *Angry Birds* and *Temple Run*, more robust games like the *Infinity Blade* series and epic role-playing games like *Chaos Rings* retail for higher prices, though still far lower than console and handheld games.²⁸³ Thus, services like the App

279. See Cowan, *supra* note 273 (“Resellers often scour release lists for titles that could potentially carry high demand and have low production numbers, then buy up new stock accordingly. Once rarity has been established, it is then a simple matter of taking these copies to eBay and raking in the profit.”).

280. Brian X. Chen, *Playing at No Cost, Right into the Hands of Mobile Game Makers*, N.Y. TIMES (Mar. 18, 2012), <http://www.nytimes.com/2012/03/19/technology/game-makers-give-away-freemium-products.html>. The “freemium” model championed by successful iOS games like *Temple Run* is growing as a business model for gaming. *Id.* Developers offer the initial game for free, then give gamers the option of purchasing upgrades within the game. *Id.* In *Temple Run*, players collect coins to upgrade their character but have the option to purchase more coins with actual money, thus speeding up the process. *Id.* Zynga’s *FarmVille* and Capcom’s *Smurfs Village* operate on similar models and have made their publishers millions. *Id.* As much as 65% of overall App Store revenue may derive from free games which charge for extra in-game goods. *Id.*

281. Peter Farago, *Is It Game Over for Nintendo DS and Sony PSP?*, FLURRY (Nov. 9, 2011), <http://blog.flurry.com/bid/77424/Is-it-Game-Over-for-Nintendo-DS-and-Sony-PSP>. Whereas Android and iOS games often sell for a dollar or take advantage of the aforementioned “freemium” model, handheld games for the Sony PSP and Nintendo DS cost upwards of \$40. *Id.* Over the past few years, consumers have fled toward cheaper mobile phone and tablet games in droves. *Id.*

282. *Id.*

283. Andrew Podolsky, *Chaos Rings Review*, SLIDETOPLAY (Apr. 19, 2010), <http://www.slidetoplay.com/story/chaos-rings-review>. *Chaos Rings* is an acclaimed role-playing game for iOS from Square Enix, the creators of *Final Fantasy* and *Chrono Trigger*. *Id.* It is the first fully-realized role-playing game from the company to appear on a mobile platform. *Id.* While its price point of \$12.99 is higher than most iOS games, it is still significantly lower than games for systems like the PSP and Nintendo DS. *Id.*

Store and Xbox Live Arcade sell digital titles at low prices that are available to consumers without any supply issues.²⁸⁴ Consequently, users have access to a bountiful and growing amount of titles without the aid of a secondary market.²⁸⁵ Clearly, the market is adapting to a digital environment and adjusting accordingly. Though not every benefit of first sale will survive the coming change, these developments bear watching before any radical attempts to rewrite copyright law are undertaken.

Thus, while many will call for legislation to save norms like first sale, the better choice is to wait and see what the market bears out. Technology has evolved so rapidly that any legislative solution risks becoming obsolete quickly. For instance, if a digital first sale doctrine were implemented in the late 1990s, it would have been completely unequipped to deal with streaming media a few years later. The benefits of first sale are undoubtedly important, but taking measures like treating digital copies as physical objects to conform to the age-old first sale framework risks making the same mistake content companies made for years. The result was that technological growth was restricted and consumers were driven away. Moreover, the focus should now be less on trying to save first sale and more on trying to figure out a way to combat the incredible power copyright holders have gained through the use of negotiated licenses for streaming media.²⁸⁶

Ultimately, this will require a conversation about what role copyright should play in a digital economy. Copyright has been in a tug of war with the rights of copyright holders and consumers for over 300 years.²⁸⁷ Any revision of copyright must account for this and decide what purpose copyright will serve going forward—will it be a tool for encouraging the dissemination of ideas, or will it act as a shield to protect copyright holders in a world where the line between legitimate use and infringement blurs more each day? In the former scenario, concepts like first sale rule the day, but authors may see less of a return for their work when digital copies are so freely available. In the latter scenario, copyright may shift away from any social purpose and become a rigid property right that discourages innovation in the name of policing infringement.

284. See *supra* note 181 and accompanying text.

285. See *supra* note 181 and accompanying text. As mentioned previously, in a digital marketplace there is no scramble for shelf space. Consequently, digital games have a longer hypothetical “shelf life” than physical copies, giving users far greater access for a longer period of time.

286. The dangers of copyright holders having unprecedented power also exists in the digital download context. After all, a gamer may only download what a company makes available on a download service, and this can be taken away at any time.

287. See Costa, *supra* note 24, at 222, 226.

IV. CONCLUSION

The Nintendo Exception's demise and the rise of licensing agreements illustrate the video game industry's growing pains in the face of disruptive technology. Yet the issues that the industry faces and will face in the future affect all media. Applying old ways of thinking to digital media will only be a short-term fix because the inevitable march toward digital distribution and streaming will lead to a world where first sale is irrelevant. While calls to protect first sale will grow louder as challenges multiply, nothing less than a wholesale revision of copyright law and a new understanding of copy ownership will solve these issues. Moreover, the gaming industry will not be crippled by a loss of first sale protection due to the increasing availability of hard-to-find games on downloadable services as well as pricing and distribution models which make the existence of secondary markets less vital.

In the meantime, the digital dominos continue to fall. Despite the changes brought on by the potential loss of secondary markets, care must be taken to see how the market reacts and what consumer tastes ultimately turn out to be. It is possible that in the video game industry, at least, first sale will not be missed as much as in other industries like publishing and film.

For that reason, imposing first sale, its quirks and constraints on a digital video game industry at this early stage in the shift away from physical media would not be right. To quote Wolfgang Pauli once more, it would be so off base as to not even be wrong.

*Mark C. Humphrey**

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