NOTE

LET ME SELL MY SONG! THE NEED FOR A DIGITAL FIRST SALE DOCTRINE AMENDMENT TO THE COPYRIGHT ACT

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I. INTRODUCTION

Suppose I had both the e-books and hard copy books of the Harry Potter series. I legally purchased and owned digital copies[1] of the series in addition to hard copies. My sister wanted to read the series after I had finished and I had two choices: I could hand her my hard copies of Harry's adventures or I could e-mail my e-books to her and delete them off my laptop. She did not pay me to borrow the books, but it would not have made a difference if she did. While these two transactions may seem fundamentally the same, the law sees one as legal and the other as copyright infringement.

Although copyright owners generally have an exclusive right to sell or distribute their works,[2] the Copyright Act includes an important exception—the first sale doctrine or right of first sale.[3] This exception allows owners of a

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[1] I do not actually own digital copies of the Harry Potter books so I do not know if the e-books are actually sold or licensed, but for the sake of the hypothetical, assume that the e-books are owned upon purchase. *See infra* Part III.B for a discussion on the difficulties of licensing for digital copies and why that topic is beyond the scope of this article.

[2] 17 U.S.C. § 106(3) (2012).

[3] *Id.* § 109(a). *See* 4 WILLIAM PATRY, PATRY ON COPYRIGHT § 13:36.50 (2012) (stating the first sale doctrine has been codified in § 109(a), though first sale becomes a misnomer because the statute covers all transactions in which title to the copy is parted with). In international agreements, the doctrine is referred to as "exhaustion," as the "distribution right is said to 'exhaust' after the first sale." U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT, 92 n.301 (2001) [hereinafter SECTION 104 REPORT], http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf [http://perma.cc/2E3X-5D7N]. For this article, the first sale doctrine and the exhaustion doctrine should be viewed as equivalent.

particular legal copy of a copyrighted work to dispose of that copy however they wish—they can throw it away, sell it, gift it, lend it—really do whatever they want with that copy.[4] With technological advancements moving more and more copyrighted material into digital formats, consumers may expect the same right of first sale to apply to digital copies. Recently, the District Court for the Southern District of New York ruled that the right of first sale could not apply to digital works because transferring a digital copy of a song, book, or other copyrighted material inherently creates an illegal reproduction, a byproduct that the first sale doctrine does not permit.[5]

This note recognizes the difficulties that arise with applying legislation not meant for today's technology to the commonplace advancements of 2015, but argues that consumer rights in the first sale doctrine are too important to be abandoned simply because consumers are now enjoying copyrighted works in digital formats. Part II goes through the history of the first sale doctrine and attempts to explicitly apply it to digital copies of copyrighted materials. Parts III and IV argue the relevance and inherent importance of the first sale doctrine as a consumer right. Part V provides possible ways to amend the Copyright Act to allow for a digital first sale doctrine. Part V also addresses and alleviates concerns that a digital first sale doctrine would be practically impossible to implement without exposing copyright owners to widespread infringement.

II. HISTORY

In 1790, the first Congress enacted the first United States copyright law.[6] The framers of the Constitution granted Congress the ability to enact copyright law in the text of the Constitution itself.[7] The current Copyright Act, the Copyright Act of 1976, grants to copyright owners a set of exclusive rights in regard to their copyrighted materials.[8] It does so by attempting to strike a balance between copyright owners and users through an allocation of rights.[9] "To promote the Progress of Science and useful Arts,"[10] copyright owners have the exclusive ability to reproduce and distribute their copyrighted works.[11] Section 106 of the Copyright Act lays out a broad scope of

[4] 17 U.S.C. §109(a).

[5] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 648-50, 655 (S.D.N.Y. 2013).

[6] Copyright Act of 1790, 1 Stat. 124.

[7] U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o 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").

[8] 17 U.S.C. § 106.

[9] *E.g.*, Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1247 (2001).

[10] U.S. CONST. art. I, § 8, cl. 8.

[11] 17 U.S.C. § 106(1), (3).

exclusivity for copyright owners,[12] but that scope is limited throughout the Copyright Act by exceptions.[13] One such limitation exists in § 109(a), which states ownership of a particular copy of a copyright-protected work permits lending, reselling, disposing, etc., of the item.[14] This provision is more commonly known as the first sale doctrine or the right of first sale.[15] The right of first sale allows the legal owner of a particular copy of copyrighted material to sell, gift, loan, rent, throw away, or otherwise distribute or dispose of that copy.[16] This section explores the history of the first sale doctrine and then examines how different authorities have attempted to apply the first sale doctrine to digital forms of copyrighted works.[17]

A. The History of the First Sale Doctrine

1. From Property Law

The legal system has given property owners the right to alienate, or sell, their property for over 700 years.[18] Property owners gained the ability to freely alienate their land in 1660 with the abolition of the feudal system.[19] These time-tested principles carried on in Europe with personal property as well as with land.[20]

While the right to alienate property may (like many other principles of law in the United States) have come from England, it is just as important on this

[12] *Id.* § 106.

[13] H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674, 1976 WL 14045.

[14] 17 U.S.C. § 109(a).

[15] *See, e.g.*, Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013). I will use the terms "first sale doctrine" and "right of first sale" interchangeably. When referring to a digital application of § 109, I will use "digital first sale doctrine" and "right of digital first sale" interchangeably.

[16] *See* 17 U.S.C. § 109.

[17] In this article, when referring to any copyrighted work as "digital," I am referring to a fully digitized version of that copyrighted work. This qualifier is meant to differentiate e-versions of songs, movies, and books from copies of the work that, though digital, are stored on a physical medium such as a CD. Phrases such as "digitized copyright work," "digital music file," and "digital copy" all refer to a copy of copyrighted material that is not stored on a physical medium such as a CD, but is instead solely saved to an electronic device's hard drive or is otherwise accessible digitally.

[18] Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385, 404 n.57 (2006) (identifying the Statute *Quia Emptores Terrarum*, 18 Edw., c. I (1290) as "the first legal recognition of the right to alienate real property after the Normal Conquest.").

[19] Tenures Abolition Act 1660, 12 Car. 2, c. 24, § 4 (Eng.).

[20] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 17, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.").

side of the pond. The first treatise on Restraints on the Alienation of Property was published in 1883; it examined and explained both settled and unsettled U.S. law on the subject.[21] The overall conclusion was clear—absolute restraints on alienation of real property were void.[22] Buyers and sellers of goods have repeatedly tested the policy against absolute restraint on alienation of property, but courts continue to show distaste for any attempt to unreasonably prevent the free transfer of property.[23]

A number of reasons exist why restraining alienation of property is detrimental to the parties involved in the transaction and society as a whole. Free transfer of property protects an owner's personal autonomy in his decisions.[24] Ability to destroy property allows an owner to remain autonomous, but permissible transfer of property has the additional benefit of placing property in the hands of the person to whom it has the most value.[25] The Coase Theorem suggests that if there were no transaction costs, goods would always end up with the person who values them most and society as a whole would reach Pareto optimality.[26] Although there is no way to

[21] JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (Boston, Soule and Bugbee 1883).

[22] *Id.* at 192 ("Any provision restraining the alienation, voluntary or involuntary, of an estate in fee simple or an absolute interest in chattels real or personal, whether legal or equitable, is void.").

[23] *See, e.g.*, Blair v. Comm'r, 300 U.S. 5, 13 (1937) (recognizing property as freely alienable absent a valid restraint); Pritchett v. Turner, 437 So. 2d 104, 108 (Ala. 1983) (stating that clauses "in absolute, not partial, restraint of the power of alienation of land conveyed or devised" are void) (quoting Libby v. Winston, 93 So. 631, 632 (Ala. 1922)); Tucker v. Lassen Sav. & Loan Ass'n, 526 P.2d 1169, 1172 (Cal. 1974) (stating that unreasonable restraints on alienation are invalid under the California Civil Code); Morse v. Blood, 71 N.W. 682, 683 (Minn. 1897) (holding that forbidding land to transfer to natural heirs is invalid as a restraint on alienation and against public policy). Academic literature on this subject has also recognized this phenomenon; *see also* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 563-64 (Robert C. Clark et al. eds., 2d ed. 2012) ("[C]ourts have long taken a dim view of attempts to restrain the power of an owner to alienate.").

[24] MERRILL & SMITH, *supra* note 23, at 566 ("Like the powers to abandon or destroy, the power to alienate prevents us from becoming slaves to our property.").

[25] *Id.*

[26] R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) ("[I]f such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production."). *See Coase Theorem*, BLACK'S LAW DICTIONARY (10th ed. 2014). Pareto optimality is achieved when nobody can be made better off without making somebody worse off. *Pareto Optimality*, BLACK'S LAW DICTIONARY (10th ed. 2014). *But see* MERRILL & SMITH, *supra* note 23, at 37 ("Coase in later writings expressed frustration that people mistook his thought experiment to mean that markets achieve efficient results when transaction costs are low. . . . His point was more nearly the opposite: that transaction costs are always positive, and hence we cannot assume that *any* institutional arrangement will generate efficient results.").

realistically eliminate transaction costs, permitting free transfer of property by rejecting restraints on alienation helps society move toward that ideal outcome.[27]

2. In Copyright Law

The Supreme Court first linked the policy against alienation to copyrighted works in 1908.[28] Bobbs-Merrill Co., publisher of the book *Castaway*, printed a notice in each copy of the book stating that the book could not be resold at a price of less than one dollar.[29] The publisher sued the Strauses, doing business as R.H. Macy & Company, for selling copies of *Castaway* at a price of eighty-nine cents without the publisher's consent.[30] The Supreme Court determined that a copyright did not allow a copyright owner to control the price at which a particular copy of work of intellectual property may be resold.[31] The Court's decision in *Bobbs-Merrill Co. v. Straus* created the common law first sale doctrine.[32]

Congress followed suit by drafting the right of first sale into the Copyright Act of 1909, guaranteeing that "[n]othing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."[33] The legislature explained the application of the first sale doctrine in the accompanying House Report, stating that the Committee on Patents "feel[s] that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale."[34] This explanation described the right of first sale codified in § 41 of the Copyright Act of 1909, as an absolute freedom of alienation for any legally obtained article that is the subject of copyright.

When the Copyright Act was overhauled in 1976, the first sale doctrine was codified in § 109 of the Copyright Act of and states, in pertinent part, "the owner of a particular copy or phonorecord lawfully made under this title, or

[27] MERRILL & SMITH, *supra* note 23, at 567.

[28] Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908).

[29] *Id.* at 341.

[30] *Id.* at 342.

[31] *Id.* at 350.

[32] *Id.* ("In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract."). *See* Dan Karmel, *Off the Wall: Abandonment and the First Sale Doctrine*, 45 COLUM. J.L. & SOC. PROBS. 353, 358 (2012).

[33] Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075, 1084 (current version at 17 U.S.C. § 109 (2012)).

[34] CURRIER, TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT, H.R. REP. NO. 60-2222, at 19 (1909).

any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[35] The words changed slightly from the 1909 Act, but the meaning remained the same—owners of lawful copies of articles, which are the subject of copyright, have the freedom to transfer ownership of that copy. The House Report for the 1976 Copyright Act verified that the right of first sale was simply "restate[d] and confirme[d]" with the updated language.[36] This text has been widely interpreted to give legal owners of copies of copyrighted works freedom to transfer ownership of that work so long as there is no valid individual contractual provision preventing that transfer.[37] Since 1976, the Supreme Court has modified and expanded first sale doctrine to encompass foreign works covered by U.S. copyright law.[38]

Because of how Congress drafted the Copyright Act, it is important to recognize the difference between a work and a copy of that work when evaluating rights and exceptions to those rights. In copyright law today, the copyright owner has the exclusive right to reproduce the copyrighted work,[39] to prepare derivative works based on the copyrighted work,[40] to distribute copies of the copyrighted work,[41] and for certain types of work, to publicly perform them,[42] publicly display them,[43] or perform them publicly by digital

[35] 17 U.S.C. § 109(a) continues to say "Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on— (1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or (2) the date of the receipt of actual notice served under section 104A(d)(2)(B), whichever occurs first."

[36] H.R. REP. NO. 94-1476, at 79 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693, 1976 WL 14045.

[37] 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.12 (1997).

[38] Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1358 (2013) (accepting the expansive argument that the words "lawfully made under this title" from section 109 mean "in accordance with" or "in compliance with" the Copyright Act and do not limit application of the first sale doctrine only to those copyrighted works made on U.S. soil); Golan v. Holder, 132 S. Ct. 873, 881-82 (2012) (holding that copyright restoration for foreign works is legal and that copies of those works created before restoration may still be freely transferred within a valid 12-month time frame in accordance with the second sentence to 17 U.S.C. §109(a)).

[39] 17 U.S.C. § 106(1) (2012).

[40] *Id.* § 106(2).

[41] *Id.* § 106(3).

[42] *Id.* § 106(4) (granting the exclusive right to the copyright owner "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly").

audio transmission.[44] The Copyright Act carefully distinguishes between a copyrighted work and a *copy* of a copyrighted work; and so it is important to do so here. The intangible expression an author creates is her *work* and these works are stored in individual *copies*.[45] A *work* itself is not generally defined in the Copyright Act, but the term is used throughout to identify the underlying expression created in a particular piece of copyrightable material.[46]

Freedom of alienation only allows a property owner to distribute his legally owned property.[47] In copyright law that means, for example, the owner of a particular book has the right to sell, gift, destroy, etc. that copy of that book.[48] Freedom of alienation is an exception to the exclusive right to distribute copies of a copyrighted work.[49] This freedom, and the rights generally conferred through copyright law, stem from the general understandings about personal property rights.[50]

B. History of the Right of Digital First Sale

Of course, digital copies of copyrighted works are different from the physical copies that the 94th Congress was considering when it drafted the Copyright Act. These are no longer copies you can touch and hold. They are not photographs you can put in an album, or bound books whose pages you can turn. Because the drafters of the Copyright Act likely did not have digital copies of copyrighted works in mind, they did not directly address them. Thus, it is not clear how such a piece of legislation would treat the resale of digital copies.

Applying the first sale doctrine to digital works presents some unique challenges. In particular, because transferring digital copies often involves a reproduction of the underlying code, one could argue that such a transfer

[43] *Id.* § 106(5) (granting the exclusive right to the copyright owner "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly").

[44] *Id.* § 106(6) (granting the exclusive right to the copyright owner "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission").

[45] *Id.* § 101.

[46] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1332).

[47] *See* GRAY, *supra* note 21, at 8.

[48] These owners must be *rightful* owners. Somebody who illegally photocopies their friend's copy of *Harry Potter and the Prisoner of Azkaban* is not a rightful owner and does not fall under the definition of "owner" used here.

[49] *See* Karmel, *supra* note 32, at 374.

[50] *See, e.g.*, Liu, *supra* note 9, at 1249 ("[O]ur conventional understandings about physical personal property . . . provide the physical baseline upon which copyright law is imposed.").

makes an unauthorized and infringing copy of the copyrighted work.[51] If these reproductions occur automatically with transfer and leave the original intact, transfer of digital copies of a copyrighted work would be impossible without infringement and the first sale doctrine would be inapplicable to any digital form of a copyrighted work. This would be the same as allowing a seller to retain a copy of a book while selling an illegal one. It would be the same as letting somebody photocopy his textbook and sell the illegally reproduced pages. The *ReDigi* court concluded that this is exactly what happens or could happen when somebody sells his digital copy of a song.[52]

1. Digital Millennium Copyright Act

The United States government contemplated the possibility of explicitly extending the first sale doctrine to cover digital media. This is shown by the fact that § 104 of the Digital Millennium Copyright Act of 1998 required the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information to evaluate the expansion of the right of first sale to include digitized copyright works.[53] In 2001, though, the United States Copyright Office ("USCO") did not recommend changing § 109 to include a right of digital first sale, believing that negative aspects of the change would outweigh its benefits.[54] The USCO considered the digital realm too far disconnected from the physical to apply a rule written for physical copyrighted material to digital versions.[55] A strict interpretation of the text, such as this one, stifles the goal of the Copyright Act—to increase access to creative works and to encourage creative individuals to continue to create[56]—but if it's the

[51] *See, e.g.*, *id.* at 1251 ("[S]ending the work will necessarily entail the creation of a copy of the digital pattern of ones and zeros."); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 301 (1996) ("[I]n contrast to the spirit if not the letter of the first sale doctrine, . . . the unlicensed electronic transmission of a work from one person to another does and should constitute an infringement, even if the transmitter has simultaneously deleted his copy from his computer.").

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

[53] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2876.

[54] SECTION 104 REPORT *supra* note 3, at xx. The section headings in the report list the factors the USCO examined: "The Effect of the Development of Electronic Commerce and Associated Technology on the Operation of the First Sale Doctrine"; "The Relationship Between Existing and Emergent Technology, on One Hand, and the First Sale Doctrine, on the Other"; "The Extent to Which the First Sale Doctrine Is Related To, or Premised On, Particular Media or Methods of Distribution"; "The Extent, if Any, to Which the Emergence of New Technologies Alters the Technological Premises upon Which the First Sale Doctrine Is Established"; "The Need, if Any, to Expand the First Sale Doctrine to Apply to Digital Transmissions"; and "The Effect of the Absence of a Digital First Sale Doctrine on the Marketplace for Works in Digital Form." *Id.* at i.

[55] *Id.* at 82-83.

[56] Edward J. Damich, *Our Copyright Code: Continue Patching or Start Rewriting?*, 68

path the USCO is going to take, the Copyright Act needs to be explicitly amended with a right of digital first sale. Without such an amendment courts must determine through common law how the right of first sale would apply to digital copies.

2. The BALANCE Act and Other Proposed Bills

Congress next considered extending the right of first sale to include digital media through the Benefit Authors without Limiting Advancement or Net Consumer Expectations ("BALANCE") Act of 2003.[57] The BALANCE Act, House Bill 1066, recognized "[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."[58]

Zoe Lofgren (D-CA), who introduced the bill, recognized that the current Copyright Act does not strike the appropriate balance between copyright owners and users with respect to digital works.[59] She insisted that "[c]opyright laws in the digital age must prevent and punish digital pirates without treating every consumer as one."[60] To rectify the imbalance, the Act sought to specifically include digital sales under the right of first sale in § 109.[61] The Act also proposed amended language to expand fair use in the digital context.[62] Lastly, it made nonnegotiable license agreements unenforceable if they restricted fair use exceptions.[63] The Act failed to pass in 2003 and Congress never voted on it when it was reconsidered in 2005.[64]

U. MIAMI L. REV. 361, 363 (2014) ("[A] narrow interpretation of statutory language divorced from the larger, practical context of the cases, has produced results that I believe have perverted the purposes of the Copyright Act.").

[57] Gregory Capobianco, *Rethinking* ReDigi*: How a Characteristics-Based Test Advances the "Digital First Sale" Doctrine Debate*, 35 CARDOZO L. REV. 391, 401 (2013) (citing H.R. 1066, 108th Cong. (2003)).

[58] H.R. 1066, 108th Cong. § 2(3) (2003) (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (alteration in original)).

[59] *Id.* § 2(9).

[60] *Id.*

[61] *Id.* § 4 (Suggesting amending 17 U.S.C. § 109 to add "(f) The privileges prescribed by subsections (a) and (c) apply in a case in which the owner of a particular copy or phonorecord of a work in a digital or other nonanalog format, or any person authorized by such owner, sells or otherwise disposes of the work by means of a transmission to a single recipient, if the owner does not retain the copy or phonorecord in a retrievable form and the work is so sold or otherwise disposed of in its original format.").

[62] *Id.* § 3.

[63] *Id.*

[64] Eric Matthew Hinkes, *Access Controls in the Digital Era and the Fair Use/First Sale Doctrines*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 685, 720 (2007) ("This represented an attempt at creating a digital first sale doctrine, but it never left the Subcommittee on Courts, the Internet, and Intellectual Property."). *See* H.R. 4536, 109th

The Senate also proposed two bills in the same term to address technological changes that were not anticipated by the Copyright Act as it stood and still currently stands.[65] Introduced by Ronald Lee Wyden (D-OR), S. 692 was also known as the Digital Consumer Right to Know Act.[66] The bill recognized the risk "that technologies developed to prevent unlawful reproduction and distribution of digital information and entertainment content could have the side effect of restricting consumers' flexibility to use and manipulate such content for reasonable, personal, and noncommercial purposes."[67] In contrast to the BALANCE Act, S. 692 was not proposed to change copyright protection for digital works. Instead S. 692's purpose was to increase consumer awareness about the restrictions on technology to allow consumers to make knowledgeable decisions in their purchases and to incentivize companies to develop new technologies to perfect the balance between consumer flexibility and lawful use.[68] This bill, like so many others,[69] got lost when sent to the Senate Committee on Commerce, Science, and Transportation, and never emerged from Committee debate to see the House floor.[70]

The same year, Sam Dale Brownback (R-KS) introduced the Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003.[71] This bill promoted awareness about technological access and restrictions,[72] as

Cong. (2005) for proposed language during the 2005 reconsideration; *see also H.R. 1066 (108th): Benefit Authors without Limiting Advancement*, GOVTRACK, https://www.govtrack.us/congress/bills/108/hr1066 [https://perma.cc/AMM8-AUUE]; *H.R.4536 (109th): Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2005*, GOVTRACK, https://www.govtrack.us/congress/bills/109/hr4536 [https://perma.cc/F4QM-CLN3].

[65] *See* S. 692, 108th Cong. § 2 (2003); S. 1621, 108th Cong. § 2 (2003).

[66] S. 692 § 1 (2003).

[67] *Id.* § 2.

[68] *Id.*

[69] During the legislative process, an incredible number of bills never reach consideration on the floor once they are sent to committee. It is colloquially said that bills "live or die" in committee. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 5 (2012) ("Over 90% of bills introduced in Congress die in the legislative Labyrinth.").

[70] *S. 692 (108th): Digital Consumer Right to Know Act*, GOVTRACK, https://www.govtrack.us/congress/bills/108/s692 [https://perma.cc/WS38-QUSZ]. *See* ESKRIDGE, *supra* note 69, at 5-6 ("Virtually all bills introduced in Congress are referred initially to a committee for consideration and cannot be voted on until the committee has reported them out. Because a committee's chair controls the committee's staff and agenda, he or she has the power to effectively kill a bill by preventing the committee from considering it.").

[71] S. 1621, 108th Cong. § 1 (2003).

[72] *Id.* § 4 ("The Federal Trade Commission shall, as soon as practicable after the date of enactment of this Act, establish an advisory committee for the purpose of informing the

well as suggested an explicit application of the first sale doctrine to digital media.[73] This bill also died in the Senate Committee on Commerce, Science, and Transportation. If the digital first sale doctrine were to exist, its birth would have to happen through litigation and judicial decisions.

3. Capitol Records, LLC. v. ReDigi, Inc.

In October of 2011, ReDigi, Inc. launched as an "online marketplace for digital used music" offering users the opportunity to sell their legally purchased digital music for credits that could be used to purchase other users' available songs.[74] When a user uploaded a song to ReDigi, ReDigi's Media Manager would verify that the song was legally purchased and then search the user's hard drive for additional copies of the song, requiring the user to delete any additional copies before he would be able to use ReDigi's marketplace for that song.[75] A complying user would then upload his song to ReDigi's Cloud Locker (an online storage server) where it would remain until it was transferred to the purchaser.[76]

Capitol Records, LLC, a recording label owning copyrights in a number of songs bought and sold through ReDigi, brought suit against ReDigi in 2012, claiming that ReDigi's service constituted copyright infringement.[77] ReDigi argued a first sale defense (17 U.S.C. § 109) and alternatively fair use (17 U.S.C. § 107) made the conduct of its business permissible.[78] In a case of first impression, the United States District Court for the Southern District of New York evaluated whether ReDigi's resale market for digital music files was permissible under the first sale doctrine.[79] The court determined that the sale process involved the creation of an unauthorized reproduction of the copyrighted work when the digital music file went from being fixed in one material object (the seller's hard drive) to a new material object (the online Cloud Locker or the buyer's hard drive).[80] As a result, the statutory first-sale

Commission about the ways in which access control technology and redistribution control technology may affect consumer, educational institution, and library use of digital media products based on their legal and customary uses of such products, and how consumer, educational institution, and library awareness about the existence of such technologies in the digital media products they purchase or otherwise come to legally own may be achieved.").

[73] *Id.* § 6 ("Consumer Secondary Markets. –The lawful owner of a digital media product may transmit a copy of that product by means of a transmission to a single recipient as long as the technology used by that person to transmit the copy automatically deletes the digital media product contemporaneously with transmitting the copy.").

[74] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 645-46 (S.D.N.Y. 2013).

[75] *Id.* at 645.

[76] *Id.* at 645-46.

[77] *Id.* at 644-45.

[78] *See* i*d.* at 652-55.

[79] *Id.* at 648.

[80] *See id.* at 650-51.

doctrine, which applies only to the distribution right, did not apply to ReDigi's behavior.

Using the statutory fair use four-factor evaluation,[81] the court also determined that reproductions created by transfers did not qualify as fair use.[82] The court ruled that ReDigi's website did not add anything new to the copyrighted works,[83] that sound recordings are at the heart of what copyright is meant to protect,[84] that the reproductions copy the copyrighted work in its entirety,[85] and that ReDigi's sales directly undercut the original market for digital songs.[86] The court concluded that all fair use factors weighed against granting ReDigi a fair use exception for the file reproductions.[87]

Even though the court ruled against ReDigi in this case, the company also had a patent for sharing, transferring and removing previously owned digital media and so their fight for a resale market for digitized copyright works continues.[88] ReDigi, Inc. is now back up and running with a new interface.[89] This system automatically stores users' iTunes purchases directly in the online Cloud Locker and simply transfers access to that song upon sale of the song.[90] While this system seems to overcome the prohibition on reproduction by never reproducing anything, it still leaves consumers with significantly diminished rights. Users would need to know at the time of purchase that they might want to sell their song in the future. They would also need to decide, at purchase, to use ReDigi for that future potential sale because the song needs to go directly into the Cloud Locker. Furthermore, if the user decided they wanted to keep the song forever, they could not remove it from the Cloud Locker because the transfer would create an illegal reproduction of the song. Lastly, the Cloud Locker is online, so it seems unlikely that a user would be able to listen to his music without Internet access. If users are allowed to also keep their music on an iPod or other portable device, this system does not prevent ReDigi users from keeping a copy of their song. If users are not allowed to take their music on the go, or otherwise control it, are they really owners of it at all?

Even if copyright holders allow this new ReDigi to exist without conflict, the Copyright Act needs a revision to address the practical elimination of first sale rights for digital copies of copyrighted works. While the Copyright Act

[81] *Id.* at 653. *See infra* Part V.A.1.a.

[82] *ReDigi Inc.*, 934 F. Supp. 2d at 653-54.

[83] *Id.* at 653.

[84] *Id.* at 654.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] U.S. Patent No. 8,627,500 B2 (filed Dec. 31, 2010).

[89] Usman Ahmed, Policy Counsel for eBay, Inc, Panelist at the 2014 National Lawyers Convention: Copyright Revision (Nov. 14, 2014), http://www.fed-soc.org/multimedia/detail/copyright-revision-event-video [http://perma.cc/W3WW-NHH8].

[90] *Id.*

should protect authors, it still needs to facilitate widespread availability of copyrighted materials. Effectively prohibiting the resale of digital copies severely stifles this goal.

4. After ReDigi

Following the *ReDigi* decision, Congress gave further attention to the battle over the right of digital first sale and sought input from both sides.[91] In June 2014, the House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on "First Sale Under Title 17" in New York City.[92] The hearing showcased testimony from advocates on both sides of the digital first sale debate.[93] Stephen M. Smith, President and CEO of textbook publisher John Wiley & Sons, Inc., said on behalf of Wiley that digital first sale would "undermine existing businesses and halt the development of new businesses."[94] John Ossenmacher, CEO and founder of ReDigi, Inc., argued for a digital first sale doctrine, explaining, "When we buy a digital song from iTunes or an e-book from Amazon, we expect the deal we've always been offered—to own the song or book until we're done with it and then to take advantage of the free market and resell it, donate it, or give it away."[95] This disagreement perfectly exemplifies the balance that is needed in a digital first sale amendment, between existing businesses and expected individual rights.

The lack of a right of digital first sale has sparked debate outside of the government arena as well. Academics have also weighed in on whether or not the law permits legal owners of copies of digital media to sell those copies. The major copyright treatise *Nimmer on Copyright*, identified four factors that must be present for the legal sale of copyrighted material on a resale market: the copy must have been produced with the authorization of the copyright owner; transferred under the authority of the owner; possessed (before resale) by a lawful owner of the copy; and "simply distributed" by that lawful owner.[96] Nimmer agrees with the Southern District of New York that digitized copyright works must necessarily be reproduced before they are sold and therefore are not "simply distributed."[97]

Another copyright treatise, *Patry on Copyright*, seems critical of the limitation of § 109 first sale rights to transfers of tangible copies only.[98] Noting

[91] *See generally First Sale Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Hearings*].

[92] *See id.* at 1.

[93] *See id.* at 5-6.

[94] *Id.* at 17.

[95] *Id.* at 22.

[96] 2 NIMMER, *supra* note 37, at 252-53, 264.

[97] *Id.* at 249, 253-54, 264.

[98] 4 PATRY, *supra* note 3, §13:23.

the expansion of 17 U.S.C. § 115 to include digital distributions of non-dramatic musical compositions,[99] Patry stated, "the music industry should not be heard to take a contrary view when consumers wish to avail themselves of their section 109 privileges."[100] Congress must take action to clear up this widespread confusion and disagreement.

III. FUTURE RELEVANCE

A. Streaming Services

It is possible that this argument will become moot if users switch to streaming services for digital works. For example, Spotify is aiming to replace declining profits in the music industry with its streaming services[101] and some believe that services like the one it provides will be the future of the music industry.[102] Netflix and Amazon Prime Instant Video are two options that provide a similar service for television shows and films.[103] Even books have their own online streaming companies.[104] The fact of the matter remains, however, that there *are* differences between streaming and owning and those differences are very important. First and foremost, users of streaming services do not own the music, movies, or books they stream. That may seem obvious in the context of this discussion, but it is nonetheless important. Lack of

[99] *Id.* ("One should also take into account the fact that section 115 was substantially rewritten in 1995 to include digital distributions of nondramatic musical compositions, under the theory that such distributions were the equivalent, in every respect, of a hard copy distribution.").

[100] *Id.*

[101] Spotify is a website that offers subscription and free options to listen to millions of songs online. *About Us*, SPOTIFY, https://www.spotify.com/us/about-us/contact/ [http://perma.cc/4AS7-R8SR]; *Spotify Explained*, SPOTIFY, http://www.spotifyartists.com/spotify-explained/ [http://perma.cc/CGT9-QYN4].

[102] Jareen Imam, *Young Listeners Opting to Stream, Not Own Music*, CNN (June 16, 2012), http://www.cnn.com/2012/06/15/tech/web/music-streaming/ [http://perma.cc/2RRA-VNUD] (claiming that streaming will win when users ask the question "why pay for music when you can summon almost any song you want, at any time, for free?"). Rhapsody and Deezer are two other music streaming services similar to Spotify. *Company Info*, RHAPSODY, http://www.rhapsody.com/about [https://perma.cc/4MXR-H3CT]; *About*, DEEZER, https://www.deezer.com/company [https://perma.cc/5LM5-TRR9].

[103] With a subscription to either Netflix or Amazon Prime, users can stream select television shows or movies from a vast library without owning any of the features they choose to watch. *Company Overview*, NETFLIX, https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10476&contentGroup=Company+Facts [http://perma.cc/SR2Q-ANWD]; *About Prime Instant Video*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/?nodeId=201423000 [http://perma.cc/H95W-7ETF].

[104] *About*, OYSTER, https://www.oysterbooks.com/about [http://perma.cc/QPF9-RKKA].

ownership automatically signifies the user has less control over what she can do with the song, show, or book. There is inherent value in owning, having, and keeping digital copies, beyond simply having offline access, which may keep streaming subordinate to downloading even in the future.[105] Additionally, while these services may offer millions of options, they do not offer every song, book, or movie.[106] As an example, in 2014, Taylor Swift pulled almost all of her music off Spotify.[107] Before making this move, Swift criticized streaming along with illegal downloading for hurting artists.[108] It is not unreasonable to think that other artists may share Swift's feelings about streaming hurting artist profits, and remove their own songs from services like Spotify.

B. Purchasing vs. Licensing

Another problem that fans of digital media may face, even if they are granted a right of digital first sale, is the fact that much of digital content "purchased" today is not even really purchased, but is licensed.[109] The

[105] *See* Jeffrey Van Camp, *Spotify, You're Wonderful, But I Have to Quit*, DIGITALTRENDS (Feb. 5, 2013), http://www.digitaltrends.com/computing/why-i-have-to-quit-spotify/ [https://perma.cc/5MU2-JZG2]; Bakari Chavanu, *The Pros And Cons Of Streaming vs Downloading MP3s*, MAKEUSEOF (Oct. 17, 2011), http://www.makeuseof.com/tag/pros-cons-streaming-downloading-mp3s/ [http://perma.cc/S8YL-28L6].

[106] *See, e.g.*, Don Lindich, *Sound Advice: Movie discs still offer some advantages over streaming*, STARTRIBUNE (Oct. 5, 2014, 9:25AM), http://www.startribune.com/sound-advice-movie-discs-still-offer-some-advantages-over-streaming/278047351/ [http://perma.cc/L95N-WCY5]; Lily Rothman, *Here Are the Movies Netflix Just Added — And Why Its Catalog Is Always Changing*, TIME (Jan. 2, 2014), http://entertainment.time.com/2014/01/02/here-are-the-movies-netflix-just-added-and-why-its-catalog-is-always-changing/ [http://perma.cc/8ERY-ERY8].

[107] Charlotte Alter, *Taylor Swift Just Removed Her Music from Spotify*, TIME (Nov. 3, 2014), http://time.com/3554438/taylor-swift-spotify/ [http://perma.cc/7Y4M-G57G].

[108] *Id.*

[109] Dan Gillmor, *The Bruce Willis dilemma? In the digital era, we own nothing*, THE GUARDIAN (Sept. 3, 2012), http://www.theguardian.com/commentisfree/2012/sep/03/bruce-willis-dilemma-digital-era-own-nothing [http://perma.cc/T5KS-HHCX] ("You are only buying a *license to use* the material yourself, and legally that's all."); Joel Johnson, *You don't own your Kindle books, Amazon reminds customer*, NBCNEWS (Oct. 24, 2012, 10:43 AM) http://www.nbcnews.com/technology/you-dont-own-your-kindle-books-amazon-reminds-customer-1C6626211 [http://perma.cc/SH8S-E5G3] ("The core issue might actually be a simple matter of semantics: when we click a digital button that is labelled 'Buy,' we expect that we're actually buying something. But we're not buying anything, we're licensing it."). *See, e.g.*, *Apple Legal, Terms and Conditions*, APPLE, http://www.apple.com/legal/internet-services/itunes/us/terms.html [http://perma.cc/3YYZ-AK7H] ("You shall be *authorized to use* iTunes Products only for personal, noncommercial *use*") (emphasis added).

difficulties this poses to the right of first sale[110] and the legal validity of these licensing agreements in the first place[111] are beyond the scope of this Article and will not be addressed further here.[112] This note assumes that content is legally owned and that the license versus own battle will find these licensing agreements to be enforceable.[113]

IV. POLICY ARGUMENT

As a reminder, the text of the first sale doctrine of the Copyright Act reads, "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[114] Since this text is from the Copyright Act of 1976, it is hopefully undisputed that the congressional drafters who wrote those words did not anticipate the technologically driven world we live in today.[115]

[110] Section 109 only applies to "owners." 17 U.S.C. § 109 (2012).

[111] Opponents of licensing agreements claim the agreements illegally allow sellers to contract around the Copyright Act and are thus preempted by 17 U.S.C. § 301. Maureen A. O'Rourke, *Copyright Preemption After the* ProCD *Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 55 (1997) ("In *ProCD*, the district court held that the shrinkwrap is not a valid contract and, even if it were, its provisions which effectively confer quasi-copyright rights on noncopyrightable data are preempted by the Copyright Act."). *See* ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 659 (W.D. Wis. 1996). Proponents of these licenses consider them to be no different than valid contracts of adhesion. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) ("[W]hether a particular license is generous or restrictive, a simple two-party contract is not 'equivalent to any of the exclusive rights within the general scope of copyright' and therefore may be enforced.").

[112] For a further exploration of the license v. sale debate, there are a number of scholarly articles that discuss the issue. *E.g.*, Brian W. Carver, *Why License Agreements Do Not Control Copyright Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887 (2010); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025 (1998); Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011); Jason A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1 (2004).

[113] I recognize that much of my argument may rest on the license v. sale debate being resolved in favor of "sale," but I believe the underlying concept—that people should be permitted to transfer their property—can be applied in a different way to licensed digital media.

[114] 17 U.S.C. § 109.

[115] Congress only contemplates copyright protection extending to the services in existence at the time. In reference to the growing popularity of internet streaming radio broadcasts only shortly after Congress passed the Digital Performance Right in Sound Recordings Act in 1995, it was clear that they had "failed to anticipate the rapid development of the Internet and its ability to offer perfect digital transmissions to a global audience instantaneously." *Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 9-10 (2004) (statement of David O. Carson, General Counsel, U.S. Copyright Office),

Understanding this disconnect, though, some argue "that copyright law should be interpreted or translated, not literally, but functionally, so as to preserve the substantive rights that [copyright users] formerly enjoyed with physical copies."[116] This sort of functional interpretation best preserves the letter and spirit of what the Copyright Act was intending to do in § 109—preserve an important right of free alienation for copyright users through a carve-out in exclusive copyright owner rights.

The House Report for the Copyright Act of 1909 stated the point effectively and succinctly: "It would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale."[117] As discussed above, restraints on alienation have many social and economic costs.[118] Preventing free transfer of property "has a strong tendency to prevent the improvement of the property or any proper use being made of it, and to prevent the development of the country."[119] The social benefits of putting property in the hands of the people who value it most do not become any less true when that property loses its corporeal representation and becomes digital. Property owners still deserve personal autonomy that comes with free transfer of their digital property. Sure, property owners have the opportunity to delete their songs or e-books, but the economic consequences of such destruction are just as present for digital media as they are for print media. The first sale doctrine helps discourage such abandonment and waste in both cases.[120] Society would be best off putting physical or digital goods in the hands that value them the most.[121]

Creative works sometimes *need* a secondary market to stay alive. Thousands of books, songs, and films stop being commercially available every year.[122] With new books, songs, and films being produced every year, it is entirely plausible that the same sort of effect would occur in a digital market—less profitable pieces of digital media simply will not be sold anymore. This is less likely to occur with digital media since the cost of producing additional copies

http://www.copyright.gov/docs/carson071504.pdf [http://perma.cc/RJ9N-D38J].

[116] Liu, *supra* note 9, at 1251 (citing Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994)). *See* David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1, 31-37 (1996).

[117] H.R. REP. NO. 60-2222, at 19 (1909).

[118] *See supra* Section II(a)(i).

[119] Morse v. Blood, 71 N.W. 682, 683 (Minn. 1897).

[120] Ariel Katz, *The First Sale Doctrine and the Economics of Post-Sale Restraints*, 2014 BYU L. REV. 55, 111 (2014).

[121] *See supra* text accompanying notes 25–27.

[122] Katz, *supra* note 120, at 110 ("Of the more than ten thousand books published in the United States in 1930, only 174 were still in print in 2001. In 1999 alone, Barnes and Noble stated that ninety thousand books went out of print. . . . Losses in film and music are equally dramatic. Only about twenty percent of feature films in the 1920s and fifty percent of feature films made prior to 1950 still survive, and it is estimated that sixty percent of all sound recordings are now not commercially available.").

in digital format is much less costly than publishing physical copies, but the possibility of such a result still exists. If this outcome arose, a marketplace for used copies would then be essential to avoid the cultural loss that comes with the disappearance of creative works.

Furthermore, the possibility of resale encourages individuals to purchase some piece of property by mitigating the risk of it being a useless purchase. A person is more likely to buy a book that she has never heard of if she knows that she can just sell the book later if she does not like it.[123] The Copyright Act aims to facilitate the dissemination of creative works. A fully functioning first sale doctrine is essential to accomplishing that goal. It does not matter whether creativity is expressed in a corporeal form or as ones and zeroes on a hard drive.

V. IMPLEMENTING A RIGHT OF DIGITAL FIRST SALE

The prohibition on resale for digital copies of copyrighted works stifles the Copyright Act's goal of increasing access to copyrighted works. This prohibition may provide great protection for authors and copyright owners, but the Copyright Act must balance the rights of all parties who interact with copyrighted materials.[124] Another proponent of a digital first sale doctrine suggested adding a resale royalty, payable to copyright owners for each resale of a digital copy of copyrighted material.[125] While this system would admittedly help mitigate the risk of potential losses from infringers, it provides a burdensome hurdle for sellers. Also, it runs the risk of increasing resale prices to give copyright owners a gain that they are not entitled to for resale of physical copies of their works. The digital secondary marketplace can function just as well as any other secondary marketplace without providing this kickback for copyright owners.

Treating digital copies of copyrighted works any differently than physical copies under the first sale doctrine creates an imbalance between copyright owners and copyright users. The first subsection examines how the Copyright Act can remedy this imbalance and the second examines the real concerns that arise when consumers are allowed to digitally transfer copyrighted materials.

A. Allowing an Exception for Reproduction in Digital Transfer

Courts have determined that a file is copied in RAM when it is transferred to one physical medium of storage to another.[126] Since *MAI Sys. Corp. v. Peak*

[123] R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 607 (2003).

[124] Theodore Serra, Note, *Rebalancing at Resale:* ReDigi*, Royalties, and the Digital Secondary Market*, 93 B.U. L. REV. 1753, 1787 (2013).

[125] *Id.*

[126] SECTION 104 REPORT, *supra* note 3, at xxi-xxii ("All of the familiar activities that one performs on a computer, from the execution of a computer program to browsing the World Wide Web, necessarily involve copies stored in integrated circuits known as RAM."). *See*,

Computer, Inc. was decided in 1993, holding that "'copying' for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer's RAM,"[127] every court has determined that reproductions held in RAM qualify as a "copy" under the reproduction right in the Copyright Act.[128] Reproductions created in transfer are much more permanent, so if temporary copies held in RAM are considered "fixed" reproductions, copies made in transfer most certainly satisfy the elements for illegal reproduction. District Judge Sullivan came to that very conclusion in the *ReDigi* case.[129] Even if the Supreme Court determines that reproductions held in RAM do not constitute reproduction under the Copyright Act, the more permanent reproductions created with file transfer would still pose a hurdle to a digital first sale doctrine. The Supreme Court would need to be very explicit that underlying coding copied inherently in a transfer is somehow not within the definition of "reproduction" to allow digital media to be bought and sold on a secondary market without trouble. Because of the statutory definition of "fixed,"[130] though, even a ruling from the Supreme Court might not be enough to allow reproductions created during file transfer.

Accepting that a digital file transfer does constitute reproduction under copyright law, owners of legal copies of copyrighted digital works would need an exception to a copyright owner's exclusive right of reproduction to be able to sell their digital media. There are two ways in which the Copyright Act could host such an exception. The first could already exist in the fair use doctrine of §107.[131] The second exception would require the legislature to allow a statutory exemption for reproduction occurring during a digital transfer.

e.g., Capitol Records LLC v. ReDigi, Inc., 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013) (citing A&M Records, Inc. v. Napster, Inc, 239 F.3d 1004, 1014 (9th Cir. 2001)) ("Courts have consistently held that the unauthorized duplication of digital music files over the Internet infringes a copyright owner's exclusive right to reproduce."); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).

[127] *MAI Sys. Corp.*, 991 F.2d at 518.

[128] SECTION 104 REPORT, *supra* note 3, at xxii ("Every court that has addressed the issue of reproductions in RAM has expressly or impliedly found such reproductions to be copies within the scope of the reproduction right.").

[129] *ReDigi, Inc.*, 934 F. Supp. 2d at 648 ("[C]ourts have not previously addressed whether the unauthorized transfer of a digital music file over the Internet—where only one file exists before and after the transfer—constitutes reproduction within the meaning of the Copyright Act. The Court holds that it does.").

[130] 17 U.S.C. § 101 (2012) ("A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.").

[131] *Id.* § 107.

1. Exception Through Fair Use Allowance

a. The Fair Use Test

When a court is examining a claim of potential infringement, the alleged infringer can defend that his use is permissible as fair use.[132] Fair use was born in common law in England when a court said individuals had a right to "fairly adopt part of the work of another" and warned that a court must not "put manacles upon science."[133] Fair use in the United States started as a doctrine of "fair abridgement," making abridgements and criticisms of copyrighted materials permissible.[134] Fair use has since expanded to generally permit otherwise infringing use so long as it benefits society overall and does not unduly burden the copyright owner or threaten the copyright system.[135] Fair use is a freedom-granting doctrine.[136]

ReDigi, Inc. attempted to bring a fair use defense in its case, claiming that reproduction that occurs when a digital file is transferred is a personal use that falls within fair use,[137] but the court ultimately rejected that line of argument.[138] The application of a fair use defense is extremely fact dependent, but the four-part balancing test posed in the Copyright Act remains the same from case to case.[139] In examining a fair use defense, the court must at least consider:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[140]

Looking at these factors, the court must keep in mind that "[t]he ultimate test of fair use . . . is whether the copyright law's goal of 'promot[ing] the

[132] *Id.* ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

[133] Cary v. Kearsley (1803) 170 Eng. Rep. 679 (K.B.) 680.

[134] Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901).

[135] *See* William C. Walker Jr., *Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium*, 43 LA. L. REV. 735, 744 (1983).

[136] Wendy J. Gordon, *Fair Use: Threat or Threatened?*, 55 CASE W. RES. L. REV. 903, 904 (2005) ("Fair use aims, among other things, to assist citizens in deploying copyrighted works as a part of their own expressive activities.").

[137] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 653 (S.D.N.Y. 2013).

[138] *Id.* at 654.

[139] 17 U.S.C. § 107 (2012).

[140] *Id.*

Progress of Science and useful Arts' 'would be better served by allowing the use than by preventing it.'"[141] Additionally, it is important to remember that these factors are preceded by the word "include," meaning these factors are not exhaustive of what a court can consider in determining whether use is fair or not.[142] Historically, fair use analysis is highly dependent upon the facts of the case at hand,[143] but courts often look at the same features of infringing copying when applying this fair use test. That consistency can help dictate what courts find important.

For the first factor, courts tend to focus on the transformative nature of the allegedly infringing use.[144] Courts also examine whether or not the copyrighted material was used in good faith.[145] Additionally, while examining the purpose and character of the infringing use, courts look down on commercial use, though they are clear in saying that use for profit is not dispositive.[146]

[141] Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998) (first quoting U.S. CONST., art I, § 8, cl. 8; then quoting Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1077 (2d Cir. 1992)).

[142] Old Colony Trust Co. v. United States, 438 F.2d 684, 687-88 (1st Cir. 1971) (explaining the statute does not exclude other possible deductions despite listing some exceptions).

[143] H.R. REP. NO. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679, 1976 WL 14045 ("Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.").

[144] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation, . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" (first quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901); then quoting Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990))); *accord* Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 23 (1st Cir. 2000); *Castle Rock Entm't*, 150 F.3d at 142.

[145] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562-563 (1985) ("Also relevant to the 'character' of the use is 'the propriety of the defendant's conduct.' . . . 'Fair use presupposes 'good faith' and 'fair dealing.'" (first quoting 3 NIMMER, *supra* note 37, at § 13.05[A]; then quoting Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968))); *accord Núñez*, 235 F.3d at 23 ("Appellee's good faith also weighs in its favor on this prong of the fair use test." (citing *Harper & Row*, 471 U.S. at 562-63)).

[146] *Campbell*, 510 U.S. at 579 ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."); *Harper & Row*, 471 U.S. at 562 ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1522 (9th Cir. 1992) ("[T]he fact that copying is for a commercial purpose weighs against a finding of fair use . . . . However, the presumption of unfairness that arises in such cases can be rebutted by the characteristics of a

In their examination of the nature of the copyrighted work, courts look at how close the work lies to the heart of copyright protection.[147] Creative works lie closer to copyright's heart and nonfiction or factual works lie further from that core of protection.[148] Courts also look to whether or not the infringing material was previously published, granting a narrower fair use exception to unpublished works.[149]

The third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," is fairly straightforward.[150] It is important to note that when the activity that an infringer is engaging in is permissible, intermediate steps that require complete or substantial copying may be permissible as a necessary part of the process.[151] Lastly, the court examines the effect on the existing market or potential markets by determining whether or not the infringement usurps or replaces the original market.[152] Sometimes, courts require some evidence that a copyright holder was intending to make use of a secondary market before judges will determine if the defendant's is intrusive or not.[153] Together, a balancing analysis of all of these

particular commercial use." (citing *Harper & Row*, 471 U.S. at 562; Hustler Magazine, Inc. V. Moral Majority, Inc., 796 F.2d 1148, 1152 (9th Cir. 1986))).

147 *Campbell*, 510 U.S. at 586 ("This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.").

148 *Harper & Row*, 471 U.S. at 563 ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."); *Castle Rock Entm't*, 150 F.3d at 143 ("[T]he scope of fair use is somewhat narrower with respect to fictional works, such as *Seinfeld*, than to factual works.").

149 *Harper & Row, Publishers*, 471 U.S. at 564 ("The fact that a work is unpublished is a critical element of its 'nature.' . . . Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works." (citing 3 NIMMER, *supra* note 37, at § 13.05[A]; Joseph R. Re, *The Stage of Publication as a "Fair Use" Factor:* Harper & Row, Publishers, Inc. v. Nation Enterprises, 58 ST. JOHN'S L. REV. 597, 613 (1984))).

150 17 U.S.C. § 107 (2012)).

151 *See, e.g.*, *Campbell*, 510 U.S. at 588 ("Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation."); Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 606 (9th Cir. 2000) ("[I]n a case of intermediate infringement when the final product does not itself contain infringing material, this factor is of 'very little weight.'") (citation omitted); *Sega Enters.*, 977 F.2d at 1526 ("The fact that an entire work was copied does not, however, preclude a finding of fair use.").

152 Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) ("[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create."); *Castle Rock Entm't*, 150 F.3d at 145 ("[O]ur concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps or substitutes for the market of the original work.").

153 *See, e.g.*, Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 25 (1st Cir. 2000) ("It is true that [defendant]'s use of the photograph without permission essentially destroys this

factors, and others, determines whether or not otherwise infringing use of copyrighted material is acceptable as fair use.[154]

b. Applying the Fair Use Test to Digital First Sale

At first glance, these four factors do not indicate a favorable result for ReDigi.[155] ReDigi is undoubtedly a for-profit company whose transactions involve copying the entirety of the exact sorts of creative works that copyright law was created to protect.[156] ReDigi was not created to provide a criticism, parody, or educational benefit.[157] It is a store—an online store, but a store nonetheless. The ReDigi Media Manager shows good faith, because it searches a user's hard drive for additional copies of a song for sale and requires the user to delete those copies, however the lack of transformative use of the copyrighted materials for a resale market is likely to overpower any good faith efforts it makes. In some instances, courts have found functional transformation to qualify a work as transformative even when the work itself was not altered.[158] ReDigi might be able to stretch the value of functional transformation to claim that its service allows users to realize value of expression in new ways, but it seems unlikely to succeed. As for the second factor, creative works like books, songs, and films are at the very heart of what the Copyright Act is meant to protect.[159] An analysis of the third factor does not fare any better since a resale market, to be functional, would need to provide the entire book, song, or film. Who wants to buy a middle half hour of *Die Hard*? On the other hand, the effect on the market may be more ambiguous. The sale of used digital media may impose upon the new digital media market, but there is no reason to assume it will impose on the market any more than the market for used CDs or books would interfere with a market for new CDs or books.[160] A well-kept used CD will play its notes just as beautifully as a new CD and a used book will tell its story just as eloquently as

market. There is no evidence, however, that such a market ever existed in this case.").

[154] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.").

[155] *See supra* Section II.B.3 for the *ReDigi* court's evaluation of ReDigi Inc.'s fair use claim.

[156] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 653 (S.D.N.Y. 2013).

[157] *See* 17 U.S.C. § 107 (2012); *Campbell*, 510 U.S. at 588.

[158] Authors Guild, Inc. v. Google, Inc., 954 F. Supp. 2d. 282, 291 (S.D.N.Y. 2013) ("Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books.").

[159] *Campbell*, 510 U.S. at 586.

[160] Liu, *supra* note 9, at 1248 ("[T]he ability to sell a copy of a book to another would appear to reduce the incentives to create works. After all, by selling the book to another individual, I potentially deprive the author of royalties from a sale of the book. The sale is nearly a perfect substitute").

a new one.[161] But, a physical resale market did not come into existence under a fair use exception—it has a statutory exception from exclusive copyright rights.[162]

The only hope for ReDigi comes from the Supreme Court's interpretation of the word "Progress" in the intellectual property clause of the Constitution in *Eldred v. Ashcroft.*[163] The Court determined that in addition to encouraging the creation of new works, copyright law promotes the "Progress of Science" by encouraging actions that further disseminate already-published materials.[164]A market for pre-owned digital works would allow new audiences, who could not afford to pay full price, to gain access to materials at a lower price that they can afford.[165] If a court weighs this factor extremely heavily, it is possible that a judge could determine that allowing the simultaneous reproduction and deletion of a transfer is more beneficial than harmful to copyright.

This analysis goes to show that though it is theoretically *possible* to find a fair use exemption for the reproduction inherent in a digital file transfer, there is also a very strong argument against this being permissible fair use. It is not surprising that the District Court held that ReDigi's activities did not qualify under the fair use exception.[166] Since the right of first sale is so instrumental, it would be better to guarantee that right for digital media through a clear statutory amendment.

2. Exception Through Statutory Amendment

Amending the Copyright Act to accommodate emerging technology is nothing new. The Copyright Act has already been patched a number of times to make up for the gaping holes in the Act with respect to technology.[167] Because it is of such fundamental importance that an individual has control over his or her personal property, and because of the uncertainty that arises

[161] *See infra* Section V.A.2 (discusses the unimportance of the inherent differences between digital and physical copies).

[162] 17 U.S.C. § 109 (2012).

[163] Eldred v. Ashcroft, 537 U.S. 186, 215 (2003).

[164] *Id.* at 206.

[165] I recognize that the *Eldred* Court determined that copyright owners would increase dissemination with more exclusive rights and I am proposing to increase dissemination by decreasing the scope of exclusive rights for copyright owners. The Court in *Eldred* determined that increase of dissemination promoted the progress of science required in the Constitution. *Id.* at 206, 244. Advocates for a right of digital first sale could argue it is more important that more people have access to creative works than to whom the copyright rights go.

[166] Capitol Records, LLC. v. ReDigi Inc., 934 F. Supp. 2d 640, 653-54 (S.D.N.Y. 2013).

[167] The Copyright Act was amended five times for technological reasons: (1) adding "computer program" definition and § 117, (2) the Audio Home Recording Act of 1992, (3) the Digital Performance Right in Sound Recordings Act of 1995, (4) the Digital Millennium Copyright Act, and (5) the Stop Online Piracy Act and the Protect Intellectual Property Act. Damich, *supra* note 56, at 361-63.

from a fair use analysis,[168] the Copyright Act should be amended to explicitly lay out a right of digital first sale.

The fact that some portion of Congress thought new bills like the BALANCE Act were necessary suggests that at least those members of Congress did not believe the law as it stands covers digital sale.[169] Statutory amendments have a real and substantial effect, and members of Congress would not propose an amendment whose purpose was already included in prior law.[170] However, perhaps the failure of previously proposed legislation shows that the majority of Congress did not want to extend the right of first sale to digital media. Courts may look at "subsequent legislative history" (Congressional actions related to a statute that has already passed) to determine legislative intent[171] and may conclude Congress did not intend to include digitized works. Alternatively, the fact that the acts failed may suggest that Congress believed the addition to § 109 duplicated a right already granted by the present language. Interpreters should presume that no two laws are created to accomplish the exact same task,[172] so amending § 109 to specifically include digitized copyright works could be seen as redundant to those members of Congress who believe digitized works are already included in the present language of § 109. The uncertainty here further shows the necessity for legislative action to include digital media within the first sale doctrine exception.

Under the text of the proposed amendments in the BALANCE Act of 2003 or the Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, it is likely that ReDigi's service would have been completely legal.[173] Both of these bills are over ten years old and with technology advancing on a daily basis, it is impossible to deny that an amendment proposed today would meet a different environment than those in 2003. Still, it's important to examine potential reasons why the previous amendments failed. It is possible that the previous attempts to amend the Copyright Act shifted the balance too far toward consumers in an attempt to rectify the control copyright holders have over digital media.[174] This reminds

[168] *See supra* Part V.A.1.a.

[169] *See supra* Part II.B.2.

[170] *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 701 (1995) (quoting Stone v. INS, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, . . . it intends its amendment to have real and substantial effect.")).

[171] *See* Montana Wilderness Ass'n. v. U.S. Forest Serv., 655 F.2d 951, 957 (9th Cir. 1981).

[172] *See* United States v. Alaska, 521 U.S. 1, 59 (1997) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995)) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'").

[173] *See* S. 1621, 108th Cong. § 6 (2003); H.R. 1066, 108th Cong. § 4 (2003).

[174] Serra, *supra* note 124, at 178 (stating that "[e]ven after identifying this threat [of easy transmission to thousands with little or no cost], as well as observing how the Internet and technology have once again 'altered the balance' that copyright seeks, the bill proceeded to

everybody how careful the balance must be between copyright owners and owners of copyrighted materials. Theodore Serra suggests that "any efforts to foster digital secondary markets by broadening the first sale exception to digital works must heed what Register of Copyrights Maria Pallante has termed 'the copyright balancing act.'"[175] Serra believes that to survive this balancing act, a digital first sale amendment "must address not only the growing needs and desires of consumers, but must also reflect the novel risks presented by technology to copyright holders."[176] He's right.

An amendment that accomplishes this goal would not be simple. First, it would expressly grant a right of digital first sale by stating that § 109 also specifically applies to legally obtained digital copies of copyrighted works. To accomplish this expansion functionally, the amendment would need to expressly grant a permissible exception for necessary reproduction that occurs when a digital file is transferred from one hard drive to another. Then, the amendment would need to address copyright owners' concerns by mandating that only one copy of the digital copy can survive any transaction that transfers ownership. The statute could, for example, give a window for a "buffer period" before the digital first sale doctrine would become law during which copyright owners would be responsible for encoding their digital copies with anti-copy protection.[177] Then the statute could mandate that only companies that respect the new anti-copy protection devices can provide a secondary market for digital copies of copyrighted materials.

B. Overcoming the Hurdles of Implementing a Right of Digital First Sale

Inherent in the characteristics of digital media are differences from physically tangible copies of copyright works discussed earlier.[178] None of these differences are unsolvable and they should not prevent the adoption of a right of digital first sale which is so essential to maintaining a balance between copyright law and personal property rights.

1. Preventing Illegal Copying before Sale

There is a large and valid concern that individuals who sell their digital media will be able to retain a copy for themselves and sneakily engage in illegal copyright infringement.[179] ReDigi, Inc. began to address this with its Media Manager program, which would search a user's computer for any

ignore the interests of copyright holders entirely . . . .").

[175] *Id.*

[176] *Id.*

[177] *See infra* Part V.B.1 discusses some possibilities for this.

[178] *See supra* Part II.B.

[179] *Hearings*, *supra* note 91, at 40 (statement of Ed Shems, Illustrator and Graphic Designer) ("I am also concerned that infringement will become even harder to police than it is now. How will we know that all copies of the original file have been deleted before it has been sold or given away under a digital first sale doctrine?").

additional copies of a song the user was attempting to sell.[180] This program shows a valiant effort at a good start, but the Media Manager would not be able to detect copies of the song that the user theoretically stored on an external device, such as a flash drive or an iPod.[181]

Thankfully, technology is at a point where self-monitoring is not unreasonable. There are certain programs–called drivers–that run in the background of every computer; they have the potential to completely destroy a computer if they contain bugs or viruses.[182] Because of the power these programs have, a computer can reject the file, package, or program unless it comes with a digital signature authenticating that it is from a reputable source.[183] The programmer includes the digital signature when he or she is writing code for the program.[184] In creating their digital media, copyright owners could require a similar signature to be present in the files. Then, companies like ReDigi would need to include a program to seek out only authenticated versions of digital media. Admittedly, this could be overcome if the user retained the un-signed copy of the piece of digital media. If all media players require signed copies to permit use, the un-signed copy the user illegally retained would be useless, but the digital first sale amendment would need to regulate all media players in this way.

Alternatively, copyright owners could be held responsible for coming up with their own code that records whether a file is an infringing copy or an original that has been illegally copied.[185] Then, the resale marketplace would know if another copy has been made, even if it is not present on the hard drive at the time a user uploads his file for sale. The marketplace would forbid the sale of any files lacking an original signature and any files that have been marked as being copied. Courts could even make it mandatory for companies who provide a resale market for digital copies to include this type of technology in their services. This would increase responsibility for both the consumer and the copyright owner, because consumers would need to refrain from illegal copying if they want to be able to later sell their digital copies and copyright owners would need to program in tracking elements, but it would allow secondary sales to be limited to legal originals only. This requirement

[180] Capitol Records, LLC. v. ReDigi Inc., 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013).

[181] *Id.*

[182] Special thank you to my good friend Chloë Fleming for explaining this to me. Any mistakes in this are mine and not hers.

[183] *Digital Signatures*, HARDWARE DEVICE CENTER, WINDOWS, https://msdn.microsoft.com/en-us/library/windows/hardware/ff543743%28v=vs.85%29.aspx [http://perma.cc/5DTS-KXU8].

[184] *Id.*

[185] It's entirely possible that this additional responsibility would translate to an increase in original sales prices for copies of digital media to mitigate the additional research and development costs. Increases in prices could encourage illegal infringement over legal purchase.

may reduce an owner's freedom to engage in space shifting (moving a purchased song, for example, between different legally owned devices), though that may not be problematic for higher value items such as movies or books.

A temporary fix is already in place through the online gaming platform called Steam. In 2002, the developer Valve revealed Steam, a platform on which users could purchase and start applications digitally, without having to purchase a CD.[186] When a user purchases access to a game or application through Steam, Steam gives him a key allowing him to play the video game.[187] These keys are transferrable, so when one person is finished with the game, he can sell his access to another user.[188] Steam has set up a protection to ensure that no two people can use the same key.[189] Once the original owner of the key validates the sale of the key to a new user, the original owner can no longer use the software linked to that key.[190] This would solve the space shifting problem because an owner could access his purchased media from any device while he owned it and lose access on every device once he transfers access. With the increased availability of Internet access, this may be a more viable option that allows property owners to retain control over their property while giving copyright owners peace of mind that no device can access material once that access has been sold to a new individual. At the same time, it severely limits a user's freedom regarding their legally purchased property. This system is very similar to, if not the exact same as, ReDigi's new interface.[191] It has the same restraints listed for ReDigi above. Since it seems to circumvent the illegal reproduction problem, it may serve as a temporary solution for now.

This technology could lead to a potential option for other digital resale should reproduction that occurs during such sales become permissible, though. It would be a form of compromise because media providers would need to implement the technology and media users would be limited to selling only songs with the "single user" technology. Additionally, media could only be kept on devices that have Internet capability so the technology could check the key regularly to ensure use is authorized.[192]

If, somehow, there was no way to ensure that a seller has not kept an infringing copy of a song he legally bought, it should not keep him from selling that song. Realistically, there is no current way to check if somebody

[186] Trey Walker, *GDC 2002: Valve Unveils Steam*, GAMESPOT (Mar. 21, 2002), http://www.gamespot.com/articles/gdc-2002-valve-unveils-steam/1100-2857298/ [http://perma.cc/ZA88-EJVN].

[187] Michael A. Shinall, Note, *Software & Copyright Exhaustion: A Proposal to Amend § 117 & Restore Balance to the Copyright System*, 24 ALB. L.J. SCI. & TECH. 365, 397 (2014).

[188] *Id.* at 397-98.

[189] *Id.*

[190] *Id.*

[191] *See supra* Section II(B)(3).

[192] *See supra* Section III(A) (discusses the disadvantage of streaming services requiring an Internet connection).

ripped a copy of the songs off his CD before he sold that CD. Just as there is no way to show that somebody did not photocopy his entire economics textbook before he sold the book to the freshman taking macroeconomics next year. These copying activities are no more illegal, and are just as difficult to monitor, as copying copyrighted digital files but the first sale doctrine protects sales of physical copies of copyrighted works.[193] At some point, we have to make a choice as a society between allowing and not allowing owners to resell the content they purchase. There may be costs, but the importance of the right to control personal property is worth those costs. On this basis, there is no reason a digital first sale doctrine should be impermissible. Additionally, there are, or will be, ways to track and control, when necessary, what happens to a file on a computer.[194] If there is no right of digital first sale, distributors of digital copies of copyrighted works have little incentive to pay programmers to figure out a way to protect a digital copy from illegal copying while allowing transfer of ownership.

2. Interfering with the Primary Market

Another concern arising with the presence of a marketplace for used digital media is that the used media would directly compete with new media.[195] "Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The 'used' copy is just as desirable as (in fact, as indistinguishable from) a new copy of the same work."[196] Opponents in the publishing industry also note the lack of deterioration of digital copies and fear the direct competition used media would pose to new media.[197] Section 109 of the Copyright Act makes no mention of the quality of the copy of copyrighted material to be sold.[198] It does not distinguish between mint condition books and tattered copies that have survived a trip through a washing machine. Regardless of quality of the copy, the legal owner of a copy of copyrighted material may transfer his or her copy as his or her heart desires. Additionally, the quality of used materials in other industries has not foreclosed the existence of a secondary market. For example, there is a vibrant market for used

[193] Admittedly, copying a book takes a considerable amount of time and, as a result, is much less likely to occur than copying a file.

[194] Even if I'm not online, my Boston Public Library app knows when my time is up for a borrowed e-book and I lose access to the book. *Frequently Asked Questions, Borrowing and Circulating Information*, BOSTONPUBLICLIBRARY, https://www.bpl.org/general/circulation/bpl_faq.htm [https://perma.cc/DA7Z-FN69]

[195] SECTION 104 REPORT, *supra* note 3, at 82-83.

[196] *Id.*

[197] *Hearings*, *supra* note 91, at 17 (written statement of Stephen M. Smith, President and Chief Executive Officer, John Wiley & Sons, Inc.) ("There is no difference between a new and a used digital copy: they complete [sic] directly in the marketplace.").

[198] 17 U.S.C. § 109 (2012).

diamonds that are just as flawless at resale as they were when first cut.[199]

3. Physical Transfer v. Digital Transfer

Opponents of the right of digital first sale additionally point to the differences between physical transfer and electronic transfer of the good itself.[200] Physical transfer involves actual costs and the expenditure of time required to move a physical object from one location to another, whereas electronic transfer is nearly instantaneous and requires only a few clicks.[201] There is no qualification in § 109 of the Copyright Act requiring that the used sale of a physical book must be costly. If technology allowed a book to be instantly and easily teleported (without making a copy) from the buyer to the seller, the transaction would not be questioned under the right of first sale as it stands. There is no mention of transaction cost in § 109 at all, so there is no reason to examine that element in relation to digital media either.

When looking at the sale of a book compared to the sale of e-book, the intuitive reaction may be to say the two transactions are inherently different because a book is tangible and an e-book is not. While an e-book lacks paper pages, it should not be treated any differently than a physical book when considering its resale ability. Intangible objects can still be bought and sold on a secondary market. A patent gives to the patent holder a limited monopoly on the patented item.[202] While there is a patent certificate, the patent itself is a grant of right—it is not tangible.[203] Still, individuals and corporations may buy and sell patents freely, transferring the right to the limited monopoly on whatever patented item is at issue.[204] It is possible to have a successful market based off the purchase and sale of pre-owned intangible objects.

VI. CONCLUSION

When drafted, the Copyright Act of 1976 did not account for the technological advances common in today's society. Since its adoption in 1978, the Copyright Act has been amended a number of times to account for advancements and changes in society, technological and otherwise. As it

[199] *Hearings*, *supra* note 91, at 20 (statement of John Ossenmacher, Founder and Chief Executive Officer, ReDigi, Inc.) ("The diamonds are as perfect as they were when they were first cut. Should we no longer allow a used jewelry market because the quality is too good?").

[200] *Id.* at 80-81 (statement of Matthew B. Glotzer, Media Consultant) ("[T]he distribution challenges inherent in physical media addressed by the first sale doctrine do not exist in the electronic realm . . . . Content distribution by a physical technical host . . . is subject to a series of costs . . . . [b]ut electronic delivery is highly efficient, such that these costs are greatly reduced or eliminated outright.").

[201] *Id.*

[202] 35 U.S.C. § 154(a)(1) (2012).

[203] *Id.*

[204] *Id.*

stands now, though, the Copyright Act severely limits rights of individuals by denying a right of first sale to owners of digitized content because of the inherent reproduction that occurs with the transfer of a digital file.

The right of first sale is important because it preserves the centuries-old autonomy granted with free alienation of personal property. In addition to protecting this personal autonomy, a right of first sale has economic and social benefits of placing materials in the hands of individuals who value them the most and by preserving aging content that might otherwise be lost.

Legislators have seen the need to update the Copyright Act for a digital first sale doctrine as shown through their proposed amendments thus far. These amendments failed because they did not retain the appropriate balance between copyright owners' protections and copyright users' rights. The lack of an amendment left it to the judicial system to grant a right of digital first sale doctrine. The *ReDigi* court in 2013 shut down that avenue when it declined to apply the fair use doctrine as it currently stands to digital content because of the inherent reproductions that occur in transfer and denied a fair use exception for those reproductions.

Without a viable avenue to grant a right of digital first sale under the current Copyright Act, the Copyright Act must be amended. The amendment would need to expressly permit otherwise infringing reproductions that are created in the transfer of files. It would also need to create some sort of structure to protect copyright owners from untruthful individuals who may attempt to keep an illegal copy of the book, song, movie, etc. that they are attempting to sell. The prevention of illegal copying before a sale will likely pose the largest hurdle to the implementation of a digital first sale doctrine, but at some point, society needs to make a choice between granting important rights and remaining fearful of illegal activity. The creation of a digital first sale doctrine will serve as motivation for copyright owners to invest in research and development to discover a technological way to discern whether a file has been copied before sale.

The copyright arena needs a digital first sale doctrine. The benefits of having a right of first sale for digital works vastly outweigh the potential risks. With technology constantly evolving and advancing as it is, it is important for laws to allow citizens to progress forward without losing the rights they have reasonably come to expect.