

An Exploration of Consumer Rights in Digital Property

I. Background on Digital Property Rights

In the American legal tradition, physical property has long been protected by a well-developed corpus of individual private property rights. But, despite the country's whole-hearted embrace of intellectual property rights and digital media, the same cannot be said of digital assets which, to date, have been treated as largely unownable.¹ Indeed, the very notion of "digital assets" did not enter the common parlance until the early 1990s, when it was used to refer, primarily, to corporate trade secrets and intellectual property stored in digital form.² Since that time, however, consumers, as well as corporations, have begun to amass large stores of digital assets in connection with their use of online services and the term has come to also describe: "[w]eb sites, domain names, photos, electronic accounts, and other assets that exist only in digital form,"³ including "emails, documents, images, audio, video, and similar digital files."⁴

To date, regulation and legal theorizing surrounding these new forms of consumer property has been largely ad hoc, and apply in only very limited circumstances. Online service providers, such as Yahoo! and Facebook, for example, have sought to define the scope of consumer rights to the digital asserts that they manage through contract law and/or the end user license agreements ("EULAs") they require users to agree to upon registering for their services. Generally, these agreements only provide users with a license to access their services and digital assets, but not

¹ Casey Alt, Sean Moss-Pultz, Amy Whitaker, & Timothy Chen, *Defining Property in the Digital Environment*, Bitmark (Nov. 29, 2016), <https://insights.dcg.co/defining-property-in-the-digital-environment-4ec3b9b79403>.

² See, e.g., John T. Soma & Charles P. Henderson, Encryption, Key Recovery, and Commercial Trade Secret Assets: A Proposed Legislative Model, 25 RUTGERS COMPUTER & TECH. L.J. 97, 97 (1999).

³ Joseph M. Mentrek, Estate Planning in a Digital World, 19 OHIO PROB. L.J. 195, 195 (2009).

⁴ Evan Carroll, Digital Assets: A Clearer Definition, DIGITAL ESTATE RES. (Jan. 30, 2012), <http://www.digitalestateresource.com/2012/01/digital-assets-a-clearer-definition/>.

An Exploration of Consumer Rights in Digital Property

substantial property rights in those assets. Yahoo! for example, provides that with respect to its e-mail services: “You agree Yahoo! provides you only with the right to access your account”⁵ These terms provide consumers with only very limited rights in their digital assets and have been found to preclude users from transferring their digital assets upon their death, as they would be entitled to in the case of physical property.

In 2005, for example, when the family of a deceased United States marine sued Yahoo! to access his online e-mail account, a probate court upheld the “nontransferability” clauses of Yahoo!’s EULA, and denied the family the right to access the account.⁶ A similar conclusion was reached by a California federal district court that quashed an order requiring Facebook to turn over the contents of a deceased individual’s Facebook account to their family citing the Stored Communications Act, 18 U.S.C. § 2707, which prohibits the unauthorized disclosure of consumer data by online service providers. Apple, Amazon, Barnes & Noble, and Google have not yet been sued to determine the ownership of digital music in the event of a user’s death, but similar licensing arrangements are included in the user agreements of online music services such as iTunes, which provides: “Apple grants you a personal, non-exclusive, non-transferable, limited privilege to enter and use the Site,”⁷ so we can expect that the result will be the same as a matter of contract law. In response, some states, including, Connecticut, Idaho, Indiana, Oklahoma, Rhode Island, and Virginia, have passed legislation seeking to displace common law contract

⁵ Yahoo! Global Communications Additional Terms of Service for Yahoo! Mail and Yahoo! Messenger cl. 4, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/mail/en-us/> (last visited December 16, 2019)

⁶ Justin’s Family Fights Yahoo! over Access to His E-Mail Account, LANCE CORPORAL JUSTIN MARK ELLSWORTH, <http://www.justinellsworth.net/email/detnewsapr.htm> (last visited December 20, 2019).

⁷ Legal Information & Notices, APPLE (Nov. 20, 2009), <http://www.apple.com/legal/terms/site.html>

An Exploration of Consumer Rights in Digital Property

principles in this area and have allowed administrators to take control over a decedent's account but, without, further "judicial interpretation, however, it is not clear if this law would cover digital music files."⁸

As such, a consumer seeking to vindicate their rights in their digital assets, such as their digital music files, is left with only a hodge-podge of state legislation or contract terms upon which to base their claim. Usually, under these circumstances, a consumer might be able to turn to generalized federal law but, perhaps the most applicable federal law, The Copyright Act, has been found, at least in part to be inapplicable to digital music files. As recently as 2018, for example, in *Capitol Records, LLC v. ReDigi Inc.*, the Second Circuit Court of Appeals affirmed a federal district court decision holding the "first sale doctrine," a common copyright principle in the context of physical property, to be inapplicable to an online reseller of digital music files.⁹

II. The *ReDigi* Decision

The defendants in *ReDigi* operated an online company that facilitated the resale of digital music files purchased legally through iTunes.¹⁰ The systems operated in a fashion that made concerted efforts to prevent the illegal duplication of digital files that a user offered for sale.¹¹ First, the user was required to install software on their computer that would analyze the digital file to verify that it was originally purchased lawfully from iTunes, then scan for indications of tampering.¹² If the software deemed the file was lawfully purchased, it would be marked as an

⁸ Caludine Wong, Can Bruce Willis Leave His iTunes Collection to His Children?: Inheritability of Digital Media in the Face of EULAs, 29 Santa Clara High Technology Law Journal 4, 752 (May 23, 2013).

⁹ *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018).

¹⁰ *Id.* at 652.

¹¹ *Id.*

¹² *Id.*

An Exploration of Consumer Rights in Digital Property

“eligible file” for resale, and would begin the process of migrating the data from the user’s computer to the ReDigi cloud server.¹³ ReDigi created a new method to process data to prevent a file from existing simultaneously on the user’s computer and the ReDigi server – essentially, the file would be broken down into “data packets,” where ReDigi’s system created a “transitory copy” of each packet in the initial purchaser’s computer buffer.¹⁴ Upon copying (or “reading”) a packet into the initial purchaser’s computer buffer, ReDigi’s software would delete that packet of the digital file from the initial purchaser’s device.¹⁵ Once all the packets of the file were transferred to ReDigi’s server, the file had been entirely removed from the user’s device.¹⁶ The packets were then reassembled on ReDigi’s server to be resold.¹⁷ As a result of this process “the entire file never exists in two places at once.”¹⁸ As a means to guard against the retention of duplicated digital files, ReDigi’s software would continuously monitors the user’s computer and connected devices to detect duplicates.¹⁹ When a user attempted to upload a file to ReDigi’s server, ReDigi “prompt[ed]” her to delete any pre-existing duplicates that the software detected.²⁰ If ReDigi detected that the user has not deleted the duplicates, ReDigi blocked the upload of file.²¹ If a duplicate of a previously uploaded file was detected, ReDigi would prompt the user to authorize ReDigi to delete that duplicate from her personal device and, if authorization was not granted, the

¹³ *Id.* at 653.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 654.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

An Exploration of Consumer Rights in Digital Property

user’s account would be suspended.²² Both the plaintiff and defendant in the case agreed that the measures ReDigi put in place to guard against duplication of files were not foolproof, and that methods existed for users to obfuscate the detection of duplicate files – e.g., a duplicate CD, thumb drive, secondary computer, or third-party cloud service unconnected to the computer that ran the ReDigi software could be used to store digital files that had been sold through ReDigi.²³

The court in *ReDigi* found that the method of transferring files constituted an illegal reproduction of a because it violated the plaintiff’s exclusive control of reproduction under 17 U.S.C. §106(1) because ReDigi was effectively creating a new copy of the file during the data migration.²⁴ ReDigi raised the argument that the digital files should have been considered “material objects” under 17 U.S.C. §101, and therefore qualified for protection under 17 U.S.C §109(a), which stipulates that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord...”²⁵ The court rejected this argument, however, finding that the even if the phonorecord was protected under §109(a) it would still be an unlawful reproduction of the file. In making this determination, the court relied heavily on narrow statutory interpretation of §106(1) and a rejection of fair use under Section 107 of The Copyright Act.²⁶

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 656.

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

²⁶ *ReDigi Inc.*, 910 F.3d at 660.

An Exploration of Consumer Rights in Digital Property

While the Second Circuit ultimately affirmed the district court’s ruling in favor of the plaintiffs, it may have also encouraged legislative action in saying: “As for whether the economic consequences of ReDigi’s program are beneficial and further the objectives of copyright, we take no position. Courts are poorly equipped to assess the inevitably multifarious economic consequences that would result from such changes of law.”²⁷

III. The First Sale Doctrine Should Be Applied to Digital Property

As a result of the first sale doctrine, generally, copyright holders may not control or benefit from a secondary sale of most copyrighted materials.²⁸ However, when it comes to digital property, a copyright holder has the power to control the first sale *and* restrict secondary sales. This isn’t the case for other intellectual property rights, like patents, where the doctrine of exhaustion prohibits the patentee from extending his or her right to control the patent after an authorized sale.²⁹ For the sake of clarity and predictability, The Copyright Act must be modernized to ensure the first sale doctrine is applied uniformly to digital property.

The difference in treatment of physical and digital copyrighted materials in the *ReDigi* opinion hinged on deterioration and the value of a copy in secondary sales markets.³⁰ Essentially, a “used” digital file is identical to the original, while a “used” printed book or physical record

²⁷ *Id.* at 665.

²⁸ The Copyright Act, 17 U.S.C §109(a) (2008).

²⁹ See e.g., *United States v. Unis Lens Co.*, 316 U.S. 241, 62 S.Ct. 1088, 86 L.Ed. 1408 (1942) (holding that “A patentee is free to set the price and negotiate contracts with purchasers, but may not, ‘by virtue of his patent, control the use or disposition’ of the product after ownership passes to the purchaser.”); *Impression Products Inc. v. Lexmark International Inc.*, 137 S. Ct. 1523, 1531 (2017) (holding that a legal sale exhausted the patentee’s rights in that item. A license may require the licensee to impose a restriction on purchasers, but the only recourse for the licensee is through contract law).

³⁰ *ReDigi Inc.*, 910 F.3d at 662.

An Exploration of Consumer Rights in Digital Property

would deteriorate with use, thus lowering its value.³¹ This claim, while true, does not justify expanding restrictions of downstream sales of legally purchased digital files at the expense of consumers. The legal sale of a copyrighted work benefits both the copyright holder (who is compensated for the sale of the copyrighted work) and the consumer (who has a property right in that copy, and may use the item, sell it, or will it to a loved one). In the case of physical forms of media, like a CD or book, the copyright owner has the right to control the first sale but cannot control any legal subsequent sales. This same principle should apply to digital sales, where the copyright holder is compensated for the original sale, and the consumer then has the right to use or sell the property as he or she sees fit.

The *ReDigi* decision also finds a fatal flaw in the fact that the defendant could not completely prevent the user from retaining illegal copies of digital files.³² However, this argument fails to acknowledge that piracy issues exist in any secondary sale market, for example a person selling a used book could have made a photocopy before selling the original book, or a person selling a CD could have duplicated it before selling the original. Yet, despite the possibility of piracy, these markets still thrive.³³ It would be wiser to allow a legal secondary market for digital media, even if it is not perfect. Under the *ReDigi* business method, the consumer could not sell an illegal copy of the digital file, and *ReDigi* made great efforts to ensure that illegal copies did not exist on the seller's computer. Ultimately, regardless of how many precautions a secondary market

³¹ *Id.*

³² *Id.* at 658.

³³ Jonathan Margolis, *How Unwanted Second-hand Books Became Big Business*, FINANCIAL TIMES (Aug. 21, 2016), <https://www.ft.com/content/76f14f5c-648b-11e6-8310-ecf0bddad227>.

An Exploration of Consumer Rights in Digital Property

business takes, there will always be a chance that a seller made an illegal copy of a digital file prior to sale, just as a used book store cannot be positive a customer didn't make an illegal photocopy of the book they are offering for resale, but the perfect should not be the enemy of the good when it comes to innovation.

IV. Does the Shift Toward Subscriptions Models Eliminate Digital Property Rights for Consumers?

Undeniably, markets are seeing a shift away from the discrete sales of a digital copies in favor of a subscription model.³⁴ Microsoft Office products offer a great illustration of the differences in consumer rights in a purchase versus subscription context.

When a consumer purchases a discrete copy of Microsoft Office, though they may have paid for the software, what they actually purchased was a license to use the application. Essentially, they paid for the rights to use the software according to guidelines determined by the copyright owner, Microsoft. Microsoft continues to hold the copyright, giving it the sole legal authority power to sell, distribute, copy and/or change the content of the software. When a consumer purchases software they are not buying the ownership rights to the software but a license to use the software according to the EULA.³⁵ Per the Microsoft EULA for the 2016 version of Office Desktop, the software license is single use. Meaning, the purchaser may only install the software on one device (which they control), and the software cannot be use by multiple users at the same time. However, transfer to a third party is permitted if certain conditions are met: "You

³⁴ Alex Moersen, *Are there Too Many Subscription Services?*, INNOVATION & TECH TODAY, (Feb. 24, 2020), <https://innotechtoday.com/streaming-subscriptions/>.

³⁵ Vangie Beal, *Is Software Ownership the Same as Licensing?*, WEBOPEDIA, (Jun. 24, 2010), https://www.webopedia.com/DidYouKnow/Hardware_Software/OwningSoftware.asp.

An Exploration of Consumer Rights in Digital Property

may...transfer the software to a device owned by someone else if (i) you are the first licensed user of the software and (ii) the new user agrees to the terms of this agreement. Every time you transfer the software to a new device, you must remove the software from the prior device. You may not transfer the software to share licenses between devices.”³⁶ In theory, this means a consumer could resell the license to the Microsoft Office software if (1) they are the first licensed user of the software, and (2) they remove the software from their device. This freedom to resell is restricted only to the original purchaser, however, so the first sale doctrine does not apply to the software license.

Microsoft introduced its subscription-based model, Office 365, to all customers in 2011.³⁷ Under the subscription model consumers have no right to control the software license, and in the event that they cancel their subscription they will no longer have access to the software.³⁸ There is no transfer to third-party provision in the Office 365 EULA, however, depending on the particular subscription a consumer purchases they may be able to run the program on multiple devices within the boundaries set out in the EULA.³⁹ For instance, Office 365 for home use allows use by “you and five (5) additional members of your household,” where Office 365 for personal limits use to only the subscriber.⁴⁰

³⁶ *Microsoft Software License Terms Office 2016 Desktop*, MICROSOFT, (Last updated Sep. 2017), https://www.microsoft.com/en-us/Useterms/Retail/Office/2016HomeAndStudent/Useterms_Retail_Office_2016HomeAndStudent_ENG.htm.

³⁷ Ingram Leedy, *Understanding Microsoft's Subscription Model: Why Software is Shifting from License to Subscription, and Why It's a Good Thing*, PROTECTED TRUST, (May 20, 2019), <https://blog.protectedtrust.com/software-moving-subscription-model>.

³⁸ *Supplement to Microsoft Services Agreement*, MICROSOFT, (Last updated Oct. 2018), https://www.microsoft.com/en-us/Useterms/Retail/Office365/Home/Useterms_Retail_Office365_Home_English.htm.

³⁹ *Id.*

⁴⁰ *Id.*

An Exploration of Consumer Rights in Digital Property

Similarly, a consumer who uses a streaming service to listen to music has no ownership rights in the music they listen to.⁴¹ The consumer has no transfer rights, and if the consumer cancels their subscription, they will no longer have access to the content on the service, including any personalized playlists or libraries of songs they curated using the platform.⁴² The music on streaming platforms cannot be played outside of the platform.⁴³ While some services allow users to download a song or playlist to their device for offline listening, the content can only be accessed using the platform application.⁴⁴

V. What do Consumers Really Want?

Consumers today have hundreds of streaming services to choose from in music, video, software, videogame, and book markets.⁴⁵ Some studies even suggest that a majority of consumers prefer the “usership” model over the ownership model and don’t give much, if any, thought to their property rights in the things they are spending money on.⁴⁶ Given the speed with which technology changes and the desire to stay up-to-date in the cultural zeitgeist, there are compelling arguments to be made for subscription models. For example, a consumer who pays a monthly fee for a subscription service has access to the latest version of software or a library of entertainment content

⁴¹ *Spotify Terms and Conditions of Use*, SPOTIFY, (Feb. 7, 2019), <https://www.spotify.com/us/legal/end-user-agreement/#s5>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Alex Moersen, *Are there Too Many Subscription Services?*, INNOVATION & TECH TODAY, (Feb. 24, 2020), <https://innotechtoday.com/streaming-subscriptions/>.

⁴⁶ Vala Afshar, *5 trends driving end of ownership and growth of subscription economy*, ZDNET, (Jul. 22, 2019), <https://www.zdnet.com/article/5-trends-driving-the-end-of-ownership-and-the-growth-of-the-subscription-economy/>.

An Exploration of Consumer Rights in Digital Property

as soon as it is released, rather than having to purchase individual updates as they become available.

However, some, like myself, argue that shifting to a purely subscription-based model of digital entertainment hurts consumers.⁴⁷ Not simply in their right control the digital content they spend money on, but in a metaphysical way as well.⁴⁸ As Shelley Hepworth contended: “when people build up music collections over decades, specific songs, artists and albums become connected to certain periods of life, capturing memories as effectively as polaroids.”⁴⁹ People used to maintain access to music by owning records, cassette tapes, CDs, or digital files. Perhaps their library contained a beloved remix or a special live recording that was released on a limited basis – once it was in their library, the version they maintained was not subject to change based on the whims of a service provider. But this is no longer the case given that streaming services control the content listeners can access. For instance, a streaming service may offer limited discographies, a particular version of a song or album, or it may choose to remove certain content from the platform entirely, leaving listeners with a hole in their library. At present, listeners can fill these gaps by purchasing digital music files from sales markets like iTunes. However, if a service like iTunes is replaced by a streaming-only service, as is Apple’s plan, a consumer’s music library will be limited to the content provided by the streaming service they subscribe to.⁵⁰

⁴⁷ Shelley Hepworth, *Streaming spells the end of the 'ownership' era of music, but are we ready to let go?*, THE GUARDIAN, (Feb. 1, 2020), <https://www.theguardian.com/music/2020/feb/02/streaming-spells-the-end-of-the-ownership-era-of-music-but-are-we-ready-to-let-go>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Andrew Hayward, *iTunes shutting down: when and why it's happening*, TECHRADAR, (Aug. 16, 2019), <https://www.techradar.com/news/itunes-shutting-down-when-and-why-its-happening>.

An Exploration of Consumer Rights in Digital Property

VI. Conclusion

The lack of uniformity in the application of the first sale doctrine is a hinderance to innovation derived from predictable and equal application of the law. When courts intervene in unpredictable ways, businesses are less likely to innovate for fear of decisions like *ReDigi*, where a company with a novel idea was forced out of business and into bankruptcy because of an unexpected application of statutory language.⁵¹ The court in *ReDigi* implied that a legal secondary sale market for digital files may exist in the future, but failed to elaborate on how it could be done.⁵² With uncertainty in the application of the first sale doctrine to digital files and the negative outcome for the defendants in *ReDigi* it is unlikely any company would be willing to take the risk of finding out exactly how to satisfy the vague requirements of the court without facing a similarly undesirable outcome. Therefore, it is incumbent upon the legislature to make necessary clarifications and updates to The Copyright Act to ensure uniform application of the first sale doctrine and end the chilling effects of uncertainty on innovation in the music business. That said, while these changes would certainly be helpful in clarifying consumer rights in their digital property, the shift toward subscription-based services may indicate that society is willing to part with the concept of digital ownership entirely.

⁵¹ *ReDigi Inc.*, 910 F.3d at. at 655.

⁵² *Id.* at 659.