

January 14, 2014

Re: Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy. Docket: 130927852-3852-01.

I am an attorney admitted to the state bars of Connecticut and Massachusetts. I studied at the University of Connecticut School of Law where I earned a J.D. with intellectual property certificate. I have worked with entrepreneurs through the UConn Business School and UConn Law IP Clinic. I am also a published writer and have contributed to open source software projects. I am submitting these comments on the application of the first sale doctrine to digital goods as both a consumer and producer of intellectual property.¹

Technical Background

When the first sale doctrine was conceived most copyrighted works were distributed in a physical form. News articles were printed on paper and music was pressed into records. Over the past two decades this paradigm has shifted. Personal computers allow individuals to download music, movies, and books in minutes and seconds. The copies people can download are perfect replicas, not degraded audiocassettes, videocassette tapes, or photocopies. The challenge of regulating distribution is further compounded by the fact that the cost of creating these perfect copies is often less than a penny and requires little effort on the part of a pirate.²

Content companies have developed a multitude of technologies to deliver digital copies of their wares. The first modes of technology are floppy and compact diskettes. Like videocassettes or books this mode requires the user to obtain physical media to insert into their computer. The computer then makes a copy or plays the content directly from the media. For the most part, users can easily sell and dispose of the physical media to a

¹ These comments are adopted from research conducted for my upper-class writing requirement at UConn. The paper titled *The First sale Doctrine and Digital Copies* is accessible at <http://www.scribd.com/doc/168720117/Copyright-and-a-Digital-First-Sale-Doctrine>.

² This refers to the marginal cost of making copies using free software like Bit Torrent. Before making the copies the pirate would have to purchase a computer and Internet access.

third-party if they no longer want it.³ However some companies have taken the position that this is not legal.⁴

The next mode of technology allows for the delivery of content downloaded over the Internet by the user and retained by them in the same manner they own their records or books. Amazon developed its Kindle eBook reader which allows users to download electronic copies of books from Amazon's online store and view them instantly on a screen that displays text at a quality comparable to printed paper. Apple developed its iPod to allow users to listen to digital music purchased from its iTunes store. Both of these technologies embed digital rights management to ensure users do not make copies and provide no mechanism for the sale or transfer of the copies.⁵ Generally users cannot transfer or resell the digital copies stored on their devices.⁶ However, a company called ReDigi has recently made headlines for offering a marketplace for individuals to resell their digital music files. ReDigi lets owners of files sell and transfer them to other ReDigi users and to make money when they sell those copies. The ReDigi software makes sure that the original owner does not keep a copy on his or her own computer. The owners of ReDigi argue that their technology is legal under current doctrine, but the record companies dispute that assertion.

The newest mode of delivering digital goods involves storing them on a remote server and accessing the stored data in real time from a client computer. This manner of storing content is commonly referred to as the cloud. Instead of keeping music, movies, or other content on your local hard drive it is streamed in real time over the Internet. Examples of cloud computing technology include the music service Spotify and Apple's iCloud. However this technology is not limited to music; it can also be used to serve software. For example Google Docs allows people to edit spreadsheets or documents just as they can with Microsoft's Office software. Since the software or music being served does not reside on a user's machine the user does not have a copy that he can use to engage in a first sale. The majority of these services are offered as part of a monthly or annual subscription

³ See Copyright Act, 17 USC § 109(a) (2006) (suggesting that the practice of reselling used software, music, and movies in a physical medium is acceptable).

⁴ See *Microsoft Corp. v. David Zamos*, 2004 WL 3145786 (N.D. Ohio) (Zamos was sued for selling an educational copy of Microsoft software on eBay after his school bookstore declined to accept it as a return, Zamos countersued and after much negative publicity Microsoft settled). The resale of used video games and music is more common. See, e.g., *Pre-Owned Games*, GameStop, <http://www.gamestop.com/preowned>; Half.com, <http://www.half.com>.

⁵ See Jeremy Toeman, *Where's the Kindle Used eBookstore?*, Living Digitally (May 18, 2009), <http://www.livedigitally.com/2009/05/18/wheres-the-kindle-used-ebook-store/>.

⁶ See, e.g., *iTunes Terms and Conditions*, Apple, <http://www.apple.com/legal/itunes/us/terms.html>; *Kindle License Agreement and Terms of Use*, Amazon, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib?ie=UTF8&nodeId=200506200.

package. As long as you subscribe to the service you have access to the content or software. Once your subscription runs out then you lose access to the entire music library or to the software programs you were using.

Despite the lack of ability to engage in a first sale these platforms are proving to be popular due to the advantages that the companies provide to their subscribers.⁷ For example, users of Spotify need not pick and choose which songs they purchase; they have access to the entire licensed library of music. Users of Apple's iTunes in the Cloud service can re-download any song they have previously purchased from the iTunes music store. Furthermore any applications that were purchased from Apple's App Store are automatically upgraded to the latest version when they are released. No longer are users required to go to the retail store and buy the next upgrade.

Nimmer, in his treatise, concurred with the view that software in the cloud is not sold to a consumer and therefore not subject to the first sale defense.⁸ He also noted that companies might be able to place components of their software in the cloud to prevent consumers from reselling it. This practice of combining elements of cloud and non-cloud computing platforms to prevent first sale use of software has already emerged in the field of online video games. Electronic Arts, a video game producer, has created a system it calls Project Ten Dollar. The project is a coupon program that rewards people who purchase new games with downloadable content and upgrades.⁹ Individuals that buy used copies are then given the option to pay ten dollars to get the same goods. Project Ten Dollar represents a significant potential source of revenue since a third of all games sold in the United States are sold second-hand. Therefore while Electronic Arts would not completely prevent second-hand sales of its software, it is able to capture some of the revenue that was previously lost from those sales.

Digital rights management technology that is able to control and prevent the copying of computer files is also creating a new set of challenges for the first sale doctrine. Digital rights management allows the owner of a copyright to determine how, when and how often a buyer can use digital content that has been copyrighted (or not). The use of this technology raises novel issues about the possibility of the secure technology outliving the copyright term of the data that it protects.¹⁰ These concerns have been blunted somewhat by the fact that many of these technologies have been defeated or companies have chosen to scale back their usage of them. However, in spite of the fact that the technologies have

⁷ See G.F., *There's room yet in the cloud*, *The Economist* (Aug. 24, 2010), <http://www.economist.com/blogs/babbage/2010/08/dropbox>.

⁸ 2-8 Nimmer on Copyright § 8.12

⁹ Cliff Edwards, *Electronic Arts: Lost in an Alien Landscape*, *Businessweek* (Feb. 10, 2011), http://www.businessweek.com/magazine/content/10_08/b4167064465834.htm.

¹⁰ See Lawrence Lessig, *Code v 2.0* 6 (Basic Books 2006).

been defeated, the Digital Millennium Copyright Act prohibits the circumventing of these technological protection measures unless the protections fall under one of the exemptions granted by the Librarian of Congress.¹¹

Digital rights management comes in many forms. Apple utilizes it on its videos in a form called Fairplay. Amazon has its on its kindle books in a form called AZW. It is also integrated into displays in a form known as HDCP. HDCP creates a secure link between a video output and input source so that you cannot capture the digital video signal from your computer or DVD player and then record it. These technologies are mostly seamless to users, but some individuals may notice them, such as the case of a person who has downloaded iTunes music purchases to multiple computers. Also the protection technology is especially noticeable when you digitally rent content, as the DRM will remove the files from your computer after a certain time period has expired.

Congress Should Amend the Copyright Statute to Address the Sale/License Dichotomy

In order to create certainty in the marketplace and protect the rights of consumers and businesses Congress should enact a statute that clarifies when digital goods are sold as opposed to being licensed. Congress should further amend the Copyright Act to allow for the resale of digital goods by consumers using existing digital rights management mechanisms. Congress is empowered to do this under both the Commerce Clause and the Copyright Clause in the Constitution.¹²

The first component of the statute should address when digital goods are sold or licensed. This section should be strive to respect current practices by treating services that host their content on remote servers (in the cloud) as a license because from a consumer standpoint they are more like a cable television service than buying a movie at the store. On the flip side, when the consumer downloads a full copy of the digital good onto his computer or other device, and is not required to pay additional money to utilize that copy, the transaction should be treated as a sale. This proposal might draw some criticisms from business groups that would prefer to treat the sale of software as a license so they can exert more control over it, but generally it conforms with current consumer expectations.¹³

Furthermore section 109 of the Copyright Act should be amended to allow for the resale of digital goods that are sold. The amendment should address the issues created by the Digital Millennium Copyright Act by requiring that companies that manage the ownership of digital goods through their locking mechanisms be required to allow

¹¹ Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

¹² U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. I, § 8, cl. 8.

¹³ See Mike Masnick, *Court Says Reselling Software Is Okay*, TechDirt (May 22, 2008 11:11 AM), <http://www.techdirt.com/articles/20080522/0016171201.shtml>.

transfer of the title to the good through its digital locking mechanism. It should require that when a company no longer maintains the central server that manages the title to the digital goods, that the constituent digital goods be unlocked so that the alienability of the goods remains unimpeded.

This solution would create minimal additional costs for companies that already utilize a central system to manage to the ownership of digital goods that are sold to consumers. Furthermore it preserves the rights of consumers to resell their goods without forcing companies to make it easy for consumers to create unlimited digital copies.

Why Digital Goods Should Be Sold Instead of Licensed

Realistically the majority of licenses attached to digital goods are long, unread, and even if they are read they are not completely understood.¹⁴ This lack of understanding has become a cultural phenomena with parodies of it appearing on Saturday Night Live and South Park.¹⁵ Consumers accept licenses without an actual understanding of their terms. This lack of understanding cries out for the kind of standardization of transaction terms that was largely solved by the Uniform Commercial Code. When consumers purchase software they should not be surprised by terms that restrict their ability to use it.

This problem is demonstrated in the current regime when a consumer wants to return opened software or movies. Many retailers will not accept returns of DVDs, CDs, and box software if it was opened.¹⁶ This policy has lead to complaints and bad will by consumers.¹⁷ By characterizing software as a sale and allowing returns it may increase the goodwill towards retail businesses and software vendors. Furthermore using existing technology the retail stores can notify the software vendor that the software has been returned so that they can easily disable copies of the returned version from their central server. Current technology would allow the sellers to disable returned software and there is no need for software vendors or retailers to characterize the transaction as a license to allow them to do so. This would alleviate concerns about software pirates that might buy a copy of the software, burn a copy to their own disc, and then return the original.

¹⁴ See Umika Pidaperthy, *What you should know about iTunes' 56-page legal terms*, CNN (May 6, 2011), http://articles.cnn.com/2011-05-06/tech/itunes.terms_1_itunes-users-terms-apple-users?s=PM:TECH.

¹⁵ Mike Masnick, *How Did the iTunes Terms of Service Become a Cultural Phenomenon All its Own?*, TechDirt (June 16, 2011), <http://www.techdirt.com/articles/20110509/02553714208/how-did-itunes-terms-service-become-cultural-phenomenon-all-its-own.shtml>.

¹⁶ See, e.g., *Best Buy Store Exchange & Return Policy*, Best Buy, <http://www.bestbuy.com/site/Help-Topics/In-Store-Return-Policy/pcmcat204400050028.c?id=pcmcat204400050028>.

¹⁷ See, e.g., ToddG, *Policy[sic] for returning software?*, Best Buy Community (Jan. 2, 2009 10:47 PM), <http://forums.bestbuy.com/t5/Best-Buy-Geek-Squad-Policies/Policy-for-returning-software/td-p/7377>.

Some businesses may raise concerns that the proposed revision to section 109 requiring companies to allow the resell of software might be too burdensome. Companies that manage their software using activation servers like Microsoft would also be required to have a mechanism for users to transfer the title to the software. Many companies have not implemented this. However some companies have already pioneered similar technology. When Barnes & Noble introduced its NOOK eBook reader it included a technology called LendMe. LendMe allows users of the NOOK reader to lend and borrow books from each other. Even though the eBooks are digital goods a central server manages their title and users can let their friends borrow their books for a limited period of time. Amazon followed suit by adopting this technology to their Kindle reader and now they allow users to loan their eBooks for 14 days. Both of these implementations are limited to titles where the publisher authorizes this activity and the lending of the book is temporary. Apple also has setup its digital rights management software to allow for activation and deactivation of the right to use digital goods on various computers by the user provided they input their Apple ID. However Apple does not allow a transfer of the license for its digital goods to another Apple ID. In spite of this, there does not appear to be any technical reason that digital goods cannot have their titles permanently transferred if Amazon, Apple, or any other company allowed it.¹⁸

Finally treating the sale of digital goods as a sale instead of a license and allowing for their resale is more economically efficient. Consumers already know what to expect when they purchase a product and do not need to worry about reading pages of legalese before buying physical copies of books, movies, or music. So why would we require them to do so before purchasing the digital versions of the same goods? Furthermore there is a large market for used media such as Half.com, eBay, and Amazon's used marketplace. These marketplaces allow for Pareto efficient outcomes because goods that have diminished utility to one party are transferred to another party who value the product more highly.¹⁹

The way the technology currently functions, the idea that someone would delete their music after selling it appears to be a fiction. However the idea that people are not sharing their software or content with their friends is also a fiction. If Congress strengthens first sale and allows companies like Apple and Amazon to regulate it with their DRM technologies, copy protection will be more palatable for consumers. They may be more willing to take risks by purchasing things they are not sure they will want, knowing they can sell them to third-parties if the product does not meet their expectations or if they are only using it for a short period of time.

¹⁸ See TJ Luoma, *Customers with multiple Apple IDs frustrated by Apple's "no consolidation" policy*, TUAW (Jun 17 2011 8:40 AM), <http://www.tuaw.com/2011/06/17/multiple-apple-ids-frustrated-by-apples-no-consolidation-policy/>.

¹⁹ David A. Costa, *Vernor v. Autodesk: An Erosion of First Sale Rights*, 38 Rutgers L. Rec. 223 (2010).