March 2016

ReDigi and the Resale of Digital Media: The Courts Reject a Digital First Sale Doctrine and Sustain the Imbalance Between Copyright Owners and Consumers

Monica L. Dobson

COMMENT: ReDigi and the Resale of Digital Media: The Courts Reject a Digital First Sale Doctrine and Sustain the Imbalance Between Copyright Owners and Consumers

*Monica L. Dobson**

I. Introduction 180
II. The First Sale Doctrine 181
A. History 182
B. Congressional Amendments to the First Sale Doctrine 184
1. The BALANCE Act 184
2. The DMCA 185
C. The Courts' Interpretations of the First Sale Doctrine and Infringing Acts Related to Digital Media 186
1. Circumventing Technologies 187
2. File Sharing Platforms 188
III. The Unique Concerns Generated by Digital Media 188
A. Distinguishing Characteristics 188
1. Substantive Differences 189
2. The Licensing Distinction 190
B. Concerns of Copyright Owners 192
1. Piracy 192
2. Loss of Market Share 193
3. The Copyright Office Recommended No Digital First Sale Doctrine 194
C. Concerns of Consumers 196
IV. The *ReDigi* Case 197
A. Background of the Case 198
B. Precedent and Policy 200
1. The Courts Have the Authority and Ability to Declare a Digital First Sale Doctrine 200
2. The Court's Interpretation Yields Impractical Results 202

3. The Statute's Purpose and Plain Language Permit a Digital First Sale Doctrine 203
4. The Prospect of a Digital First Sale Doctrine Does Not Conflict with Prior Case Law.....204
V. Solutions to the Digital Media Dilemma.....206
VI. Conclusion.....209

I. INTRODUCTION

A dilemma between consumers and copyright owners has existed for some time.[1] How much protection is required to facilitate the creation of new works without alienating consumers? If copyright owners are afforded fewer rights, they will experience reduced revenues and be less motivated to create additional works.[2] Conversely, if creative works are so highly protected, many consumers will be unable to afford access to these works. Excessive intellectual property rights will lead to an unbalanced, inefficient society with a lack of innovation.[3]

The first sale doctrine, originally created by the courts,[4] has successfully balanced these two competing interests in the past. However, the advent and increasing popularity of digital media, coupled with the uncertainty of the first sale doctrine's applicability to digital media, shifted the balance in favor of copyright owners at the dramatic expense of consumers. Lack of proper technology and the United States Copyright Office's disapproval to extend the first sale doctrine to digital media has led to failed Congressional attempts to amend the law. In light of modified forward-and-delete technology,[5] it is time for copyright law to emerge into the 21st century.

Part II of this comment will explain the history of the first sale

* Candidate for J.D. / LL.M. in Intellectual Property, University of Akron School of Law, 2015; B.A. Government, California State University, Sacramento, 2010. The Author would like to thank her husband, Louis, for his support, and the members of the *Akron Law Review* for their comments and assistance in editing and publishing this Comment.

1. "[Sorting this dilemma] involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

2. PAUL GOLDSTEIN & R. ANTHONY REESE, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 22 (7th ed. 2012).

3. *Id.*

4. *See generally* Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).

5. *See infra* note 7.

doctrine, observe how Congress has modified the doctrine over time, and examine how the courts have interpreted the doctrine in light of various technological innovations. Part III will address the problems associated with digital media and examine the concerns of both copyright owners and consumers surrounding a digital first sale doctrine. Part IV will discuss the recent federal district court case, *Capitol Records, LLC v. ReDigi Inc.*,[6] which dealt with the issue of the first sale doctrine's applicability to digital media, and explain why the court missed a prime opportunity to improve copyright law and ensure its compatibility with current technology. Part V offers a concise Congressional solution to expressly allow the first sale doctrine's application to digital media, paired with some practical restrictions, to effectively balance the interests of both copyright owners and consumers. Part VI concludes that the first sale doctrine is currently broad enough to incorporate digital media in order to enhance consumer rights in the modern age. However, as the courts have declined to take up the issue, Congress can create an expressly balanced "digital first sale doctrine,"[7] implementing subtle solutions to curtail the concerns of copyright owners.

II. THE FIRST SALE DOCTRINE

Section 106 of the 1976 Copyright Act expressly affords copyright owners a list of exclusive rights: reproduction, preparation of derivative works, distribution, and public performance or display.[8] The first sale doctrine, articulated in section 109 of the 1976 Copyright Act, limits the exclusive right of distribution to the initial sale or transfer of a copyrighted work.[9] Consequently, consumers may make subsequent

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

7. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 79 (2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf [hereinafter DMCA REPORT].The term "digital first sale doctrine" is frequently used in connection with this topic. It references a potential defense to copyright infringement that would allow transfer of a digital work over the Internet to another consumer and then removal of the digital work from the seller's electronic device. *Id.* at 48 n.272.

8. 17 U.S.C. § 106 (1976). This section also articulates that these rights are subject to and limited by the exceptions listed in sections 107 through 121 of this title. *Id*. Copyright owners retain the exclusive right to reproduce new copies of songs, including digital versions. *See* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 160 (3d Cir. 1984) (holding that the creation of the first sale doctrine did not generate a "waiver of all the exclusive rights found in section 106" of the Copyright Act); *see also* United States v. Moore, 604 F.2d 1228, 1232 (9th Cir. 1979) (finding that the copyright owner's copying and publishing rights "remain intact," despite the reduction in vending rights).

9. Section 109(a) of the Copyright Act provides, in pertinent part: "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

transfers without permission from the copyright owner and are not subject to any restrictions by the copyright owner.[10]

A. History

The Constitution grants Congress the power to "promote the progress of science and the useful arts."[11] The first copyright provision codified by Congress provided authors of maps, charts, and books the "'sole right and liberty of printing, reprinting, publishing and vending.'"[12] In 1908, the United States Supreme Court interpreted the scope of a copyright owner's rights in *Bobbs-Merrill Co. v. Straus*[13] and rejected a publisher's attempt to control the price for which consumers could resell the books.[14] The Court acknowledged the limits of copyright law and found that there was no such protection for copyright owners after the initial sale (or disposal) of a particular copy of the work.[15]

The judicial holding in *Bobbs-Merrill* effectively created the first sale doctrine. Congress codified the doctrine in section 27 of the Copyright Act of 1909.[16] This codification was not meant to change the existing law but to expressly recognize the distinction "between the material object and the right to reproduce copies thereof."[17] Under the first sale doctrine, a consumer may transfer a physical embodiment of a copyrighted work, but the subsequent possessor has rights only to the physical copy or material; the copyright itself is not transferred.[18]

The first sale doctrine is currently codified in section 109 of the Copyright Act of 1976 (Copyright Act) and largely resembles the

---

of that copy or phonorecord." 17 U.S.C. § 109(a).

10. *Id.*

11. Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 529 (1972).

12. Brian Mencher, Comment, *Digital Transmissions: To Boldly Go Where No First Sale Doctrine Has Gone Before*, 10 UCLA ENT. L. REV. 47, 50 (2002) (quoting the first United States Copyright Act, ch. 15, § 3, 1 Stat. 124(1790)).

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

14. *Id.* at 351.

15. *Id.*

16. Katherine Elizabeth Macdonald, Comment, *Speed Bump on the Information Superhighway: Slowing Transmission of Digital Works to Protect Copyright Owners*, 63 LA. L. REV. 411, 420 (2003).

17. *Id.* (quoting H.R. REP. NO. 2222 (1909)).

18. Section 202 of the Copyright Act of 1976 provides: "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." 17 U.S.C. § 202 (1976).

original codification from 1909.[19] Congress, however, made alterations and updates to accommodate for technological advances and to ensure the purpose of the Copyright Act continues to be satisfied.[20] Intellectual property law, including copyright protection, seeks to balance the rights of creators with the rights of individual consumers.[21] The first sale doctrine furthers this goal by balancing copyright owners' rights in protecting their works with the property interests of consumers,[22] and it has struck a favorable equilibrium between these competing interests.

The public benefits from this limitation because the first sale doctrine reduces a copyright owner's monopoly over copyrighted works, allowing for secondary markets to legally operate.[23] Secondary markets greatly benefit consumers by fostering competition, which decreases prices and increases access to copyrighted works.[24] In addition, the doctrine promotes privacy. Individual privacy rights are respected because consumers do not need to notify copyright owners each time a transfer is made.[25] Consumers can transfer works privately and anonymously; this is especially beneficial when the works contain provocative or stigmatizing content.[26]

Copyright owners also maintain adequate protection under the first sale doctrine; it is limited in scope and only applicable to the expressly enumerated right of distribution.[27] There are two important limitations to the first sale doctrine. First, the particular copy being transferred must have been legally created.[28] Second, the person transferring the copy

19. *Compare* 17 U.S.C. § 41 (1909), *with* 17 U.S.C. § 109 (1976).

20. Because copyright law is a "difficult balance between the interests of authors . . . in the control and exploitations of their writings . . . on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, [the governing laws] have been amended repeatedly." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

21. Susan A. Mort, *The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 197 (1997).

22. *See* Victor F. Calaba, *Quibbles 'N Bits: Making a Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. & TECH. L. REV. 1, 4 (2002).

23. *See* Jonathan C. Tobin, *Licensing as a Means of Providing Affordability and Accessibility in Digital Markets: Alternatives to a Digital First Sale Doctrine*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 167, 171 (2010).

24. *See* Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 894 (2011).

25. *See* Stephen B. Popernik, Note, *The Creation of an "Access Right" in the Ninth Circuit's Digital Copyright Jurisprudence*, 78 BROOK. L. REV. 697, 731 (2013).

26. *See* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1009 (1996).

27. Calaba, *supra* note 22, at 15. The right of distribution is defined in section 106(3) of the Copyright Act as the right to "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[.]" 17 U.S.C. § 106(3).

28. 17 U.S.C. § 106. The copyright owner has the exclusive right to reproduce a copyrighted

must be the owner of the copy; a licensee of a particular copy is not allowed to make such a transfer.[29] Both of these limitations enhance a copyright owner's ability to exercise control over his or her intellectual property.

B. Congressional Amendments to the First Sale Doctrine

1. The BALANCE Act

The Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act was the legislature's express attempt to create a digital first sale doctrine.[30] The purpose of the proposed BALANCE Act was to restore the traditional balance between copyright owners and individual consumers in society.[31] The BALANCE Act sought to amend the first sale doctrine by expressly allowing for an owner of a lawfully-obtained digital work to dispose of that work on the condition that the owner did not keep a copy.[32] However, the proposed bill never left the Subcommittee on Courts, the Internet, and Intellectual Property.[33]

Section 4 of the BALANCE Act would have extended the first sale doctrine to certain digital works, effectively creating a digital first sale doctrine.[34] The bill proposed multiple other amendments to the Copyright Act, arguably removing too many protections for copyright owners.[35] Thus, Congress attempted, and failed, to properly address the issue of applying the first sale doctrine to digital media with the

work; thus, the copy must have been created by the copyright owner or with the copyright owner's permission.

29. 17 U.S.C. § 109. The copy must be lawfully owned by the transferor.

30. The BALANCE Act was a bill in the House of Representatives, which recognized that the increasing developments in digital technology required updating the copyright law. *See* H.R. 1066, 108th Cong. § 2(5) (2003).

31. *See* 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, 721 (2007).

32. H.R. 1066, 108th Cong. § 4 (2003).

33. Hinkes, *supra* note 31, at 720.

34. Steve P. Calandrillo & Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 385-86 (2008).

35. Section 3 of the BALANCE Act would have amended section 107 of the Copyright Act to allow fair use through digital transmission. *See* H.R. 4536, 109th Cong. § 3(a) (2005). Section 5 of the BALANCE Act amended section 1201 of the Copyright Act, which would allow circumvention (prohibited by the DMCA) that enabled fair use. *See id.* § 5. Further, an additional section, section 123, would have been added to the Copyright Act to provide for limitations on exclusive rights and permissible uses of digital works. *See id.* § 3(b)(1). The BALANCE Act narrowed copyright protections, stating that it would not constitute copyright infringement to reproduce a lawfully obtained digital work for either archival purposes or display on a digital media device. *Id.*

BALANCE Act.[36] Subsequently, Congress adopted a "wait-and-see" approach.[37]

2. The DMCA

The Digital Millennium Copyright Act (DMCA) was enacted by Congress in 1998[38] for two distinct purposes. First, Congress desired to implement the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996,[39] which required the adoption of legislation prohibiting the circumvention of encryption technology.[40] Second, Congress aimed to modernize copyright law in light of developing digital technologies.[41] Primarily, Congress was concerned with increased piracy due to the ease of copying and distributing digital media.[42] The DMCA "prohibits the trafficking in or use of technologies designed primarily to circumvent access controls."[43] An access control measure prevents unauthorized access to a particular work.[44] Circumvention of access controls constitutes copyright infringement under the DMCA, and such circumvention generally leads to copying digital media, which is also copyright infringement.[45]

The DMCA did not extend its prohibition to copy control measures.[46] A copy control measure refers to "technological measures that control or prevent the exercise of [exceptions to copyright infringement]."[47] These exceptions are limitations to a copyright owner's exclusive rights, including a consumer's rights under the first sale doctrine, and are defenses to copyright infringement.[48] However, these activities could theoretically result in liability under a statute that prohibited circumvention of copy control measures, even though they

36. *See generally* H.R. 1066, 108th Cong. (2003).

37. Eurie Hayes Smith IV, *Digital First Sale: Friend or Foe?*, 22 CARDOZO ARTS & ENT. L.J. 853, 860 (2005).

38. 17 U.S.C. § 1201 *et seq.* (2000).

39. World Intellectual Property Organization, Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 121.

40. Macdonald, *supra* note 16, at 422.

41. Tobin, *supra* note 23, at 179-80.

42. S. REP. NO. 105-190, at 8 (1998). Current copyright law was deemed inadequate due to the increasing popularity of the internet, the advent of digital media, and the growing number of households with personal computers capable of reproducing digital media both easily and flawlessly. Calaba, *supra* note 22, at 18.

43. Tobin, *supra* note 23, at 180.

44. Macdonald, *supra* note 16, at 423.

45. *Id.*

46. DMCA REPORT, *supra* note 7, at 11.

47. *Id.*

48. *Id.*

are otherwise permissible under the first sale doctrine or another copyright infringement exception.[49] Therefore, the drafters of the DMCA chose not to prohibit the circumvention of copy control measures.[50] The DMCA was meant to be minimalist legislation, so the drafters elected not to overprotect copyrights.[51]

C. The Courts' Interpretations of the First Sale Doctrine and Infringing Acts Related to Digital Media

The United States Supreme Court initially formed and applied the first sale doctrine in *Bobbs-Merrill*.[52] However, courts have revisited and made various subsequent interpretations of the doctrine since its codification in 1909, most recently in *Kirtsaeng v. John Wiley & Sons, Inc.*[53] On March 19, 2013, the Supreme Court handed down a monumental decision in *Kirtsaeng* that expanded the first sale doctrine in favor of consumers by denying copyright protection to works originally purchased outside the United States.[54] The Supreme Court found that this holding struck the proper balance between copyright owners and consumers.[55] The Supreme Court reasoned that copyright owners would still be adequately protected because the first sale doctrine has caused limited harm to them, while greatly benefitting consumers.[56]

Courts have begun to examine cases that deal with digital media transfers and whether such transactions violate a copyright owner's express rights. The specific issue of whether the transfer of digital media files over the internet, where only a single file exists prior to and after the transfer, constitutes reproduction under the Copyright Act was not addressed prior to *ReDigi*.[57] However, similar issues that concern the conundrum of outdated copyright law clashing with new technologies, including issues of file sharing platforms and circumventing technologies, have been presented to various courts in the United States.

49. *Id.*

50. *Id.* Congress sought to protect consumers from infringement when incidental digital copies are created during the use and storage of digital media. *See* U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 2 (1998), *available at* http://www.copyright.gov/legislation/dmca.pdf.

51. Macdonald, *supra* note 16, at 422.

52. *See* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908).

53. *See generally* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

54. *See id.* at 1355-56.

55. *Id.*

56. *Id.* at 1366.

57. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013).

1. Circumventing Technologies

In *Sony Corp. of America v. Universal City Studios, Inc.*, the United States Supreme Court addressed the issue of whether the seller of a video tape recorder could be held liable for contributory infringement because consumers of the product could use the device to create illegal copies.[58] Sony developed and marketed a Betamax video tape recorder, which it sold at various retailers.[59] Universal City Studios sued Sony, alleging that this technological advancement permitted acts of copyright infringement.[60] The Court determined that the decision hinged on whether the video tape recorder was capable of significant non-infringing uses.[61]

The Court focused its reasoning around the substantial non-infringing use of private time-shifting in the home, which is "the practice of recording a program to view it once at a later time, and thereafter erasing it."[62] The record on appeal indicated that time-shifting expanded the viewing audience, and many producers did not object to time-shifting for private use.[63] Private time-shifting constituted fair use, a defense to copyright infringement embodied in section 107 of the Copyright Act,[64] and thus shielded Sony from liability.[65] The Court held that Sony could not be liable for contributory infringement, as a seller of a circumventing technology, if the consumers of the technology did not engage in infringing activity by using the video tape recorder.[66]

58. *See* Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417, 457 (1984) (Blackmun, J., dissenting).

59. *Id*. at 422.

60. *Id*. at 420.

61. *Id*. at 442.

62. *Id*. at 423, 442.

63. *Id*. at 444. Time-shifting expanded the potential viewing audience for cable programs because viewers who were occupied during the original broadcast could record the programs to view at a more appropriate or convenient time. *Id*. at 423.

64. Section 107 of the Copyright Act provides: "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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (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." 17 U.S.C. § 107 (2012).

65. *Sony Corp.*, 464 U.S. at 442.

66. *Id.* at 446-47.

2. File Sharing Platforms

In *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit Court of Appeals addressed the issue of peer-to-peer file-sharing with respect to copyright infringement.[67] Peer-to-peer file-sharing networks, including Napster, permitted users to download digital media from a central server without obtaining permission from the copyright owner.[68] Napster specifically allowed users to upload their digital content to a server, which was then housed in an online library and accessible to all Napster users.[69] Other users could then search, view, and download the content that fellow users uploaded.[70] The digital content housed in the uploaded files, however, also remained on the original user's computer.[71] A&M Records and other plaintiffs, including Capitol Records, sued Napster for copyright infringement, alleging that Napster's business platform violated their exclusive rights of reproduction and distribution.[72]

The Ninth Circuit held that the unauthorized *duplication* of digital music files over the internet infringed on a copyright owner's exclusive right to reproduce his or her own works.[73] Specifically, the court stated that Napster users who upload files to the server for other users to copy violate the distribution right, and those users who download the digital copyrighted works violate the reproduction right.[74]

III. THE UNIQUE CONCERNS GENERATED BY DIGITAL MEDIA

A. Distinguishing Characteristics

Digital media embodied in an electronic device is generally considered a phonorecord within the meaning of the Copyright Act.[75] The term *phonorecord* refers to the material object in which sounds are

67. *See* A&M Records v. Napster, Inc., 239 F.3d 1004, 1012-13 (9th Cir. 2001).

68. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919-20 (2005). Peer-to-peer networks allow computers to communicate directly with other computers, without the use of an intermediary server. Peer-to-peer network users benefit from increased efficiency because the files do not have to travel through a central server and are thus not subject to glitches in the server. *Id.* at 920.

69. *A&M Records*, 239 F.3d at 1011-12.

70. *Id.* at 1012.

71. *Id.* at 1011-12.

72. *Id.* at 1013.

73. *Id.* at 1014.

74. *Id.*

75. *See, e.g.*, Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013) (discussing that a phonorecord is simply any material object in which a sound is fixed or embodied). When an individual downloads a digital media file to a "hard disk," this constitutes the creation of phonorecord. *Id.* at 649.

first fixed.[76] A work is *fixed* in a material object if it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[77]

Digital media can be considered quasi-property because it has finite characteristics[78] and exists in encoded form, requiring specific software and hardware to stream.[79] As certain software and hardware become obsolete, the digital media relying on those devices will no longer be operational, and original media will need to be purchased on updated software or new hardware devices.[80] Five years is the average lifetime of "most electronic storage media."[81]

Although digital media is similar to traditional analog media in some respects, it is very different in other facets. Digital media does not degrade in the same manner as analog media;[82] digital media can be duplicated and distributed more easily than analog media;[83] and the transfer of digital media is often characterized as a license,[84] a technical distinction that could render the first sale doctrine's application moot.

1. Substantive Differences

Copyright owners assert that there is no such thing as "used" digital media because media in this form does not degrade over time in the same manner that physical copies do.[85] Physical copies deteriorate with time and are traditionally resold at lower prices than new goods. Digital media, however, does not possess the same corporeal qualities as physical goods;[86] therefore, digital media is not "used" in the same

76. 17 U.S.C. § 101 (1976). However, the Copyright Act excludes sounds associated with a motion picture from the definition of *phonorecords*, and instead defines these works as *copies*. Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is* Galoob *a Mirage, or Does the Form(gen) of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991, 995 n.16 (2004).

77. 17 U.S.C. § 101.

78. *See* Hayes, *supra* note 37, at 857 (finding that digital media is quasi-property because it has a finite lifespan, relying on the material object in which the digital file is embodied).

79. *See* JEFF ROTHENBERG, AVOIDING TECHNOLOGICAL QUICKSAND: FINDING A VIABLE TECHNICAL FOUNDATION FOR DIGITAL PRESERVATION 2 (1999), *available at* http://www.clir.org/pubs/reports/reports/rothenberg/pub77.pdf.

80. *Id.*

81. Hayes, *supra* note 37, at 857.

82. Henry Sprott Long III, *Reconsidering the "Balance" of the "Digital First Sale" Debate: Re-examining the Case for a Statutory Digital First Sale Doctrine to Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183, 1192 (2008).

83. Tobin, *supra* note 23, at 177.

84. Calaba, *supra* note 22, at 9.

85. DMCA REPORT, *supra* note 7, at 82.

86. Tobin, *supra* note 23, at 171.

sense.[87] There is effectively no difference between new and used digital media, but the used digital files could still be sold for a lower price simply because they are categorized as used.[88]

However, digital media can still be worn, albeit in a different fashion, due to its unique nature. Digital files require a medium in order to be viewed or used and thus rely on the medium in which it is stored in order to be useful to a consumer.[89] Mediums used to access digital media are physical goods and possess many of the same characteristics as other physical goods, including the ability to degrade over time.[90] Further, the codes that allow the digital media to be "read" by software can become obsolete over time, as technology rapidly changes and advances in the modern digital age.[91]

2. The Licensing Distinction

There is debate whether the transfer of digital media constitutes a sale or a license.[92] Transferring digital media from copyright owners to consumers has been characterized as both providing a license to the consumer, where the copyright owner may continue to dictate how the media can be used, and as a sale to the consumer, where the consumer may use the media free from restrictions.[93] In order for the first sale doctrine to apply to digital media, the transfer must be a sale.[94] Under

87. Andrew Harmeyer, *Can Digital Music Files Really Be Considered "Used?"— Online Market Place ReDigi Sued by Capitol Records*, COLUM. BUS. L. REV. (Feb. 2, 2012, 10:29 PM), http://cblr.columbia.edu/archives/11955.

88. *See, e.g.*, Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 646 (S.D.N.Y. 2013) (describing ReDigi's business model, which allows users to purchase "used" digital media for 59 to 79 cents per digital song).

89. Long, *supra* note 82, at 1193.

90. Common mediums used today to access digital media files include personal computers, mp3 players, and cellular telephones. A user must employ a physical good in order to access the digital media. Hayes, *supra* note 37, at 856.

91. Long, *supra* note 82, at 1193.

92. John P. Uetz, Note, *The Same Song and Dance:* F.T.B. Productions, LLC. v. Aftermath Records *and the Role of Licenses in the Digital Age of Copyright Law*, 57 VILL. L. REV. 177, 178 (2012).

93. *See generally* Maureen Steimer, Note, *Restoring the Balance: Bringing Back Consumer Rights in* UMG Recordings v. Augusto *by Reaffirming the First Sale Doctrine in Copyright Law*, 16 VILL. SPORTS & ENT. L.J. 313 (2009) (discussing the unresolved distinction between a sale and a license).

94. Section 109(d) of the Copyright Act states that the first sale defense does not apply to copies or phonorecords that were acquired "by rental, lease, loan, or otherwise, without acquiring ownership of it." 17 U.S.C. § 109(d). A license falls under this category because the consumer does not acquire ownership of the copyrighted work. Licensing is a method by which copyright owners allow consumers access to a particular copyrighted work without actually giving up ownership rights. Therefore, copyright owners maintain control over the work because the consumer does not have the right to dispose of the product without the copyright owner's consent. *See* Jennifer Lahm,

section 109(a) of the Copyright Act, a consumer must possess a lawfully made copy or phonorecord to be legally allowed to sell or dispose of that particular copy or phonorecord.[95] Therefore, the first sale doctrine is a defense which may be applied where the alleged copyright infringer *owns* the physical object embodying the copyrighted material.[96] An alleged infringer who only has a license to the copyrighted work does not own the object embodying the work and may not freely dispose of it.[97]

To determine whether a first sale occurred, courts consider multiple factors: (1) whether the copyright owner specifies that a consumer is granted a license, (2) whether the copyright owner significantly restricts the consumer's ability to transfer the media, and (3) whether the copyright owner imposes "notable use restrictions."[98] These factors are only considerations, none of which are dispositive;[99] however, courts have found a transfer constitutes a license where the agreement imposes "significant restrictions" on the consumer's rights.[100] For example, a transfer likely constitutes a license when a copyright owner denotes that the media must be returned at a specific date or destroyed after a certain period of use.[101]

Courts have generally agreed that the transfer of software constitutes a license agreement;[102] however, the issue of whether digital

---

Comment, *Buying a Digital Download? You May Not Own the Copy You Purchase*, 28 TOURO L. REV. 211, 212 (2012).

95. Section 109(a) of the Copyright Act currently states, "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." 17 U.S.C. § 109(a).

96. *See* Lothar Determann & Aaron Xavier Fellmeth, *Don't Judge a Sale by Its License: Software Transfers Under the First Sale Doctrine in the United States and the European Community*, 36 U.S.F. L. REV. 1, 7 (2001). When an author sells a copy of his copyrighted work, the author no longer retains control over subsequent sales or disposals of that particular work. It is said that the author's rights have been "exhausted." *Id.* at 14, *see also* Vernor v. Autodesk, Inc., 621 F.3d 1102, 1108 (9th Cir. 2010) (finding that if the copyright owner's initial transfer was a "first sale," then the consumer's subsequent resale of the item would be protected by the first sale doctrine).

97. *See* Calaba, *supra* note 22, at 9-10. Under a license structure, the particular copy is not "sold," but merely "licensed" to a user. The first sale doctrine does not apply to a licensed work because the copyright owner has not sold that work, and the consumer is purely a licensee, retaining no rights under the first sale doctrine.

98. *Vernor*, 621 F.3d at 1110-11.

99. *Id.* at 1108.

100. Wall Data Inc. v. Los Angeles Cnty. Sheriff's Dept., 447 F.3d 769, 785 (9th Cir. 2006).

101. *See* United States v. Wise, 550 F.2d 1180, 1190 (9th Cir. 1977).

102. Maureen B. Collins, *Crossing Parallel Lines: The State of the First Sale Doctrine After* Costco v. Omega, 8 BUFF. INTELL. PROP. L.J. 26, 42 n.121 (2012); *see, e.g.*, *Vernor*, 621 F.3d at 1110 (holding that "a software user is a licensee rather than an owner where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions").

music is licensed or sold to the consumer has not yet been legally settled.[103] If either the legislature or the courts determine that transferring digital media constitutes a sale, the first sale doctrine could presumably apply as a defense to copyright infringement.

B. Concerns of Copyright Owners

1. Piracy

Piracy consists of the "unauthorized use of another's production, invention, or conception," including "illicit reprinting or reproduction of a copyrighted book or print or unlawful plagiarism."[104] Copyright owners are concerned that there is an increased opportunity for piracy with digital media because, unlike with analog media, consumers can easily retain copies for themselves after selling a copy as an "original."[105] Facilitating piracy effectively erodes the exclusive right of reproduction enjoyed by the copyright owner. Digital media can be effortlessly duplicated and distributed to virtually anywhere in the world with a few "clicks" on the computer.[106]

Although a digital first sale doctrine arguably permits a system that may promote piracy, the ability to pirate works exists regardless of whether such a doctrine is implemented. However, the first sale doctrine does not limit a copyright owner's right to reproduction,[107] and this exclusive right would remain intact even if the doctrine is applied to digital media.[108] To be sure, it would still be illegal for a person to make multiple copies without the copyright owner's permission.[109] Consumers

103. Uetz, *supra* note 92, at 178.

104. WILLIAM M. SHERNOFF & SHARON J. ARKIN, NEW APPLEMAN LAW OF LIABILITY INSURANCE § 17.06(2)(c) (2013). *See also* BLACK'S LAW DICTIONARY 1266 (9th ed. 2009) (defining "piracy" as "the unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law.") Piracy, as used in reference to digital media and copyright law, includes activities such as downloading music from peer-to-peer networks (file sharing) and burning copies of a copyrighted work (music, motion pictures, or electronic books).

105. DMCA REPORT, *supra* note 7, at 79.

106. *Id.* at 82. However, other forms of music media, including compact discs, do not contain DRM or CMS technology, and the music from these discs can easily be copied in violation of the Copyright Act. *See* Long, *supra* note 82, at 1198. DRM (Digital Rights Management Technology) is calculated to "tether" the use of the particular media to the original purchaser. *Id.* at 1184. CMS (automated digital copyright management system) generally comprises a series of codes that are encrypted onto a digital media file, and the codes enforce copyright laws, including prohibiting copying. *See* Justin Graham, *Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape*, 2002 STAN. TECH. L. REV. 1, 29 (2002). No solution is perfect.

107. 17 U.S.C. § 109(a) (1976) (referencing only section 106(3), the distribution right).

108. Long, *supra* note 82, at 1199.

109. Section 109 of the Copyright Act does not apply to the reproduction right, and creating

would effectively lose their access to and privilege to use the digital media once it was sold, which is essentially the same outcome as with selling physical copies of media.

Legal safeguards are in place to dissuade piracy. Past trends demonstrate that once the government begins to prosecute individual acts of piracy, the illegal activity curtails.[110] Copyright enforcement has successfully deterred many users from illegally downloading and transferring digital media.[111] A copyright owner may bring a civil suit against an individual committing piracy; the judgments can be expensive and similarly act to deter piracy.[112] Consumers of digital media would be effectively dissuaded from retaining a copy of a digital file after selling or transferring it to another user, as this would similarly constitute copyright infringement.

2. Loss of Market Share

Copyright owners are also concerned that consumers who resell their digital media will charge lower prices for their "used" media, causing copyright owners to be edged out of their own market.[113] Copyright owners may see their works devalued due to companies presenting their platforms as functioning secondary markets, while actually operating in the primary market.[114] A secondary market has a greater impact on the primary market with digital media than for physical media due to the distinctions between the two.[115]

It is possible that secondary markets may instead increase the value of digital media in the primary market by ensuring the consumer maintains the right to dispose of the work in any manner deemed

---

multiple copies of a copyrighted work continues to constitute copyright infringement under section 106. 17 U.S.C. §§ 106, 109.

110. *See* Hayes, *supra* note 37, at 857 (citing Lee Graham, Press Release, *Consumers Delete Large Numbers of Digital Music Files from PC Hard Drives*, NPD GROUP (Nov. 5, 2003), https://www.npd.com/press/releases/press_031105.htm). The press release provides data showing that after the Recording Industry Association of America (RIAA) threatened to prosecute copyright infringers who were illegally downloading digital works, 1.4 million households erased all digital music files. Further, unlawful downloading activity declined by nearly 40%.

111. Hayes, *supra* note 37, at 857.

112. *See, e.g.*, Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 489, 515 (1st Cir. 2011) (Sony sued an individual defendant for copyright infringement after defendant illegally downloaded Sony's music from peer-to-peer file sharing platforms. Sony won the lawsuit, receiving a judgment for $675,000.).

113. David Streitfeld, *Imagining a Swap Meet for E-Books and Music*, N.Y. TIMES, Mar. 7, 2013, http://www.nytimes.com/2013/03/08/technology/revolution-in-the-resale-of-digital-books-and-music.html?_r=0.

114. *Id.*

115. DMCA REPORT, *supra* note 7, at 11.

sufficient.[116] Consumers may be willing to spend more on original copyrighted works because they can recover a portion of the expense by subsequently reselling the media.[117] A copyright owner would have to determine whether to charge a higher price for digital media, assuming consumers would pay more because they can recoup some of the cost upon resale, or charge a lower price, effectively competing with the "used" versions of their digital media.

An increase in market competition will only facilitate consumer markets,[118] and any concern about competition should be outweighed by the benefits to consumers and businesses in free market capitalism.[119] Copyright owners would not have to worry about overly competitive prices or strong competition from users reselling their digital media because of the nature of the free market.[120] Online retailers currently allow individuals to sell textbooks or other merchandise through their websites and charge the seller a certain percentage of the sale as compensation.[121] Websites that would allow users to resell their digital media would likely charge a similar fee to sellers.[122] This fee structure would ensure that most users selling their digital media would charge the most competitive price.[123]

3. The Copyright Office Recommended No Digital First Sale Doctrine

Opponents of a digital first sale doctrine may reference the United States Copyright Office's 104 Report (Section 104 Report), which recommended that Congress not expand the first sale doctrine to digital

116. Harmeyer, *supra* note 87.

117. *Id.*; *see also* Theodore Serra, Note, *Rebalancing at Resale: ReDigi, Royalties, and the Digital Secondary Market*, 93 B.U.L. REV. 1753, 1778 (2013).

118. Mencher, *supra* note 12, at 62.

119. *See* Perzanowski & Schultz, *supra* note 24, at 895 (noting that forcing copyright owners to compete in secondary markets for digital media "provides its own incentives to create and innovate").

120. A digital first sale doctrine may also benefit copyright owners in the secondary market because a digital copyright owner could potentially raise the prices on original media sold in the primary market. Serra, *supra* note 117, at 1778. This is true because consumers will recoup some of the excess cost upon resale in the secondary market. *Id*.

121. *See, e.g.*, *Participation Agreement*, AMAZON (last visited Nov. 2, 2014), *available at* http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib?ie=UTF8&nodeId=1161302.

122. Streitfeld, *supra* note 113.

123. ReDigi charges a fee of 60% of the purchase price for every digital song sold through its Media Manager software. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 646 (S.D.N.Y. 2013).

media.[124] In 2001, the Copyright Office conducted an initial study on the application of the first sale doctrine to digital media, considering arguments for and against the proposal.[125] The Copyright Office's analysis revolved around the perceived distinctions between physical and purely digital media.[126]

Ultimately, the Copyright Office recommended against a digital first sale doctrine due to the inherent differences between analog and digital media.[127] The Section 104 Report denoted that the Copyright Office would not recommend modifying the law unless there was a "demonstrated need for the change that outweighs the negative aspects of the proposal."[128] Additionally, the Section 104 Report further indicated that no such need was apparent at that time.[129] Despite its recommendations, however, the Copyright Office acknowledged that the issues may require further consideration at some point in the future if such concerns materialized.[130]

"Forward-and-delete" technologies, which are programs that effectively remove a digital work from a seller's device after transfer, was discussed and criticized in the Section 104 Report.[131] The Copyright Office found that relying on a forward-and-delete scheme was not feasible because such adequate technology did not exist at the time the Section 104 Report was written.[132] Appropriate technology would need to be "persistent and fairly easy to use"[133] to be adequate in the eyes of the Copyright Office; otherwise, the technology would be too expensive, and the cost would inevitably fall on consumers.[134]

Congress chose not to take action in the creation of a digital first sale doctrine after the Copyright Office recommended against it;[135] however, the Copyright Office did not completely foreclose the

124. Section 104 of the DMCA required the U.S. Copyright Office to analyze the prospect of a digital first sale doctrine and submit its findings in a report. Mencher, *supra* note 12, at 58.

125. DMCA REPORT, *supra* note 7, at 11.

126. Mencher, *supra* note 12, at 57.

127. The Copyright Office cited several inherent differences between digital media and traditional analog media: (1) digital media does not degrade in the same manner, if at all, as analog media; (2) digital media can be more easily copied and transferred than analog media, leaving open the possibility to increased piracy; and (3) a secondary market for digital media work will cause indefinite harm to the market for the original copyrighted works. *See* DMCA REPORT, *supra* note 7, at xix.

128. *Id.* at xx.

129. *Id.*

130. *Id.*

131. Mencher, *supra* note 12, at 59.

132. DMCA REPORT, *supra* note 7, at 163.

133. *Id.* at 130.

134. *Id.* at 98.

135. Hayes, *supra* note 37, at 860.

application of the first sale doctrine to digital media. Adequate technology, as defined by the Copyright Office, has been developed since the Section 104 Report was written,[136] and there is currently such a need for change that overshadows the negative facets of a digital first sale doctrine. The issue has materialized in the courts and is ripe for Congressional review because modern consumers have begun to purchase an increasing amount of digital media, and the copyright laws may not be robust enough to compensate for this technological revolution.[137]

C. Concerns of Consumers

Consumers largely support applying the first sale doctrine to digital media because, otherwise, consumers have no meaningful manner in which to dispose of a portion of their goods in the modern world.[138] Further, the unrestricted alienability of personal property is a foundation of American jurisprudence.[139] Consumers expect to be able to dispose of their property as they see fit, and digital media is no exception.[140] When consumers "purchase" digital media from a website, they expect to own that media.[141] The button says "buy now," but the consumer is effectively only renting the digital media because the copyright owner maintains significant control over the product after the first sale.[142] The courts created the first sale doctrine to expressly enforce an implicit limitation on the distribution right, whereby a copyright owner could control only the first distribution of a copyrighted work.[143] The first sale doctrine may be appropriately applied to digital media in light of

136. *See* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 645-46 (S.D.N.Y. 2013) (describing ReDigi's version of forward-and-delete technology that automatically detects duplicate copies of a single digital file after the file has been uploaded to ReDigi's server for resale).

137. Long, *supra* note 82, at 1190 (citing Nick Wingfield & Merissa Marr, *Apple Computer Aims to Take Over Your Living-Room TV*, WALL ST. J. (Sept. 13, 2006, 12:01 AM), http://online.wsj.com/news/articles/SB115808098293160780); *see also* Perzanowski & Schultz, *supra* note 24, at 890 (finding that digital music downloads are increasing while CD sales are decreasing).

138. Michael R. Mattioli, *Cooling-Off & Secondary Markets: Consumer Choice in the Digital Domain*, 15 VA. J.L. & TECH. 227, 247 (2010) (discussing the fact that many college students purchase textbooks in hard copy form so that they can resell the textbooks at the end of the semester and that there is no meaningful way to dispose of digital versions of these same textbooks).

139. Mencher, *supra* note 12, at 61.

140. Long, *supra* note 82, at 1200.

141. *Id.* at 1198.

142. Streitfeld, *supra* note 113.

143. *See* Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 351 (1908) (finding that the authority to control subsequent sales by a consumer was not a right afforded by copyright law or within Congress' intent to enact).

consumer expectations and the doctrine's intended limitation on the distribution right.

Not only are private individual consumers at a loss without a first sale doctrine to protect their property rights in the modern digital world, but the issue is affecting businesses as well. Various companies are attempting to create innovative platforms that permit consumers to sell and purchase their "used" digital media online.[144] These platforms advance technology and sync with modern consumer trends. Recently, Amazon acquired a patent on a system for a secondary market for digital media.[145] This system mimics ReDigi's secondary market model, which was stifled by the court's narrow interpretation of the first sale doctrine, discussed below in Part IV. Both systems involve a version of innovative "forward-and-delete" technology.

New "forward-and-delete" mechanisms make a digital first sale doctrine feasible, while balancing the interests of copyright owners. "Forward-and-delete" devices are a technological means by which businesses can ensure consumers are not retaining copies of sold digital media because the programs utilizing this technology will automatically delete the transferred digital media or will virtually do so.[146] Under this scheme, consumers can sell or transfer their legally acquired digital media, and only one copy of the file exists at the end of the transaction.[147]

IV. THE *REDIGI* CASE

The court in *ReDigi* could have applied the first sale doctrine to

144. These innovative companies include Apple, ReDigi, and Amazon. On March 7, 2013, the United States Patent and Trademark Office published Apple's application for a patent for a secondary digital marketplace. Streitfeld, *supra* note 113. Apple's platform allows users to sell or transfer digital movies, digital music, e-books, and software to other users by transferring the files. *Id*. This method allows only one copy to exist at any given time, and only one user is able to access that single copy at any given time. *Id*. Apple describes the process by which the digital media is exchanged as a transfer of the particular digital file; therefore, no reproduction occurs. *Id*. *See also infra* note 159 (describing ReDigi's company model) and note 145 (describing Amazon's patented secondary marketplace for digital media). Both Amazon's and Apple's platforms include a "data store" system. Each user's media is maintained in a personalized store, and the system automatically deletes the digital file from the original owner's store upon transfer to another user. Streitfeld, *supra* note 113.

145. Secondary Market for Digital Objects, U.S. Patent No. 8,364,595 (filed May 5, 2009) (issued Jan. 29, 2013) [hereinafter Amazon Patent]. This innovative system is similar to ReDigi's platform that was struck down by the court. Amazon describes this system as "[a]n electronic marketplace for used digital objects. Digital objects including e-books, audio, video, computer applications, etc., purchased from an original vendor by a user are stored in a user's personalized data store." *Id*. at [57].

146. DMCA REPORT, *supra* note 7, at 81-82.

147. *Id*. at 82.

digital media. However, the court failed to apply the first sale doctrine in this seemingly appropriate case, expressly stating that the decision to expand the law must be both determined by and implemented by Congress.[148] ReDigi's business model incorporates numerous methods that do not condone illegal proliferation of copyrighted works; it simply provides consumers with a legitimate means to dispose of their lawfully obtained digital media in the modern world.[149] ReDigi's methods include a form of modern forward-and-delete technology, a system for discerning illegal activity, and the use of penalties for unlawful acts.[150]

The court in *ReDigi* found that the first sale doctrine could not apply to digital media because the method of transferring digital media necessarily implicated the reproduction right, as a new copy is unavoidably created.[151] While this may be true in a technical sense, the result cannot logically be what Congress intended because the consequences are absurd. Although courts have held that these necessary temporary copies are fixed copies under the Copyright Act,[152] Congress granted a fair use exception to the incidental temporary copies created and stored in RAM[153] during streaming.[154] In creating this necessary exception, the legislature established that these temporary copies are not subject to copyright infringement.[155] The logic behind this exception could reasonably be extended to the incidental copies that are necessarily created when digital media files are transferred between users in order to circumvent the absurd effects that result from the *ReDigi* court's strict interpretation of the Copyright Act.[156]

A. Background of the Case

ReDigi presents itself as "the world's first and only marketplace for digital used music."[157] ReDigi first launched its website in October 2011, inviting consumers to sell any legally acquired digital media and

148. *See* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 655-56 (S.D.N.Y. 2013) (determining that Congress must extend the first sale doctrine to digital media).

149. *Id*. at 645.

150. *Id*.

151. *Id*. at 649-50.

152. *See* MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993).

153. "RAM [random access memory] can be simply defined as a computer component in which data and computer programs can be temporarily recorded." *Id.*

154. DMCA REPORT, *supra* note 7, at 57.

155. *Id.*

156. The *ReDigi* court recognized that reproduction necessarily occurring when files are transferred to different locations on devices would be protected under various doctrines or defenses. *See ReDigi*, 934 F. Supp. 2d at 651.

157. *Id.* at 645.

buy used digital music from others for less than the new version on iTunes.[158] ReDigi's original business model required a consumer to download "Media Manager"[159] to a computer prior to selling any digital media.[160] Media Manager subsequently detected and compiled a list of digital music files from the computer, and the consumer could then upload the digital songs to ReDigi's server to be sold.[161] Once sold to another user, Media Manager did not automatically delete the digital media file from the seller's computer, but the software detected duplicates and prompted the seller to delete the file or be suspended from using ReDigi.[162] The issue in *ReDigi* focused on interpretations of how this server functioned in relation to copyright law and the manner in which digital media was transferred by ReDigi's software.[163]

Capitol Records brought suit against ReDigi in the Southern District of New York for copyright infringement under the Copyright Act.[164] Capitol Records insisted that ReDigi's business plan inherently required that new copies of each file be created, a right purely reserved for the copyright owner, in order to transfer the digital work from the seller's computer to ReDigi's server and subsequently from the ReDigi server to the buyer's device.[165] ReDigi argued that its secondary market business model was protected by the first sale defense because the transfers merely involved "migrating" a digital music file from the seller's computer to the buyer's computer.[166]

The court granted summary judgment in favor of Capitol Records after determining ReDigi engaged in copyright infringement and after declining to apply the first sale doctrine to digital media.[167] The court reasoned that because the transfer of digital media created a new copy of

158. *Id.*

159. "Media Manager" is a program used by ReDigi that scans the consumer's computer and creates a list of digital songs that qualify for resale. A file is only eligible if it was originally purchased in digital form from either iTunes or ReDigi. The Media Manager software continually monitors the consumer's computer, and any attached devices, to ensure that the consumer does not retain copies of digital songs already sold. When a lingering copy is found, the consumer is prompted to delete the copy or be suspended from the database. *See id.*

160. *Id.*

161. *Id.*

162. *Id*. at 650 n.5.

163. Capitol Records asserted that ReDigi's system infringed its reproduction and distribution rights; however, ReDigi claimed its business actions were protected by the fair use and first sale doctrines. *Id.* at 647.

164. *Id.* at 646-47. Capitol Records first sought to shut down ReDigi's secondary market through a preliminary injunction; however, the federal judge denied this request. Streitfeld, *supra* note 113.

165. *ReDigi*, 934 F. Supp. 2d. at 645-46.

166. *Id.* at 645.

167. *Id.*

the work, and the Copyright Act expressly reserved this right for the copyright owner, the first sale doctrine did not apply to digital media.[168] Additionally, the court declined to hold that the first sale doctrine became ambiguous in light of digital media.[169] In so holding, the court misconstrued the first sale doctrine and failed to apply it as a defense in an appropriate case. The court's holding created highly unbalanced precedent that significantly disfavors modern-age consumers.

B. Precedent and Policy

1. The Courts Have the Authority and Ability to Declare a Digital First Sale Doctrine

The court in *ReDigi* chose not to modify the law and determined that any changes to the first sale doctrine would need to come expressly from Congress.[170] In deferring the decision to the legislature, the court reasoned that Congress possesses "the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."[171] The court found that it could not permit a blanket adoption of a digital first sale doctrine when Congress has not yet chosen to do so.[172]

The Constitution assigns Congress the duty of defining the limits of protection that should be granted to copyright owners in order to provide the public with appropriate access to their work product.[173] Once Congress defines the limits, however, it is the duty of the courts to interpret what the law is.[174] The *ReDigi* court's strict perception that Congress must change the copyright law is unwarranted, as the court has the duty to interpret the law as it currently exists and apply the law to contemporary issues.[175]

---

168. *Id.* at 655.

169. *Id.*

170. *Id.* at 660.

171. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984). The Court also stated that "[s]ound policy, as well as history, support[ed] [its] consistent deference to Congress when major technological innovations alter the market for copyrighted materials." *Id.*

172. *ReDigi*, 934 F. Supp. 2d at 660.

173. *Sony Corp.*, 464 U.S. at 429.

174. The U.S. Supreme Court has recognized that once Congress has defined the limits of the law, it is "the province and duty of the [courts] to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

175. The courts are required to apply the current copyright laws to new technology, even though Congress may eventually "take a fresh look at [the issue]." *See Sony Corp.*, 464 U.S. at 456. Although Congress is equipped to resolve conflicts of new technology and the law, it is the court's task is to resolve such issues "in the light of ill-fitting existing copyright law" in the meantime. *Id.*

Additionally, the first sale doctrine was originally a common law principle, which Congress later codified and added to the Copyright Act.[176] In creating this important doctrine, the court interpreted the then-existing Copyright Act and found that the law did not afford copyright owners continued protection over a particular copy of a work under the distribution right once the initial disposal of that copy was made.[177] Curiously, in *ReDigi*, the court chose not to interpret the *judicially* created doctrine without initial clarification from Congress; however, Congress has already endorsed a broad interpretation of copyright law by the courts.[178]

The *ReDigi* court failed to apply the essential concept of media neutrality, which encourages courts to broadly construe copyright laws in order to compensate for the frequent advancements in technology.[179] The concept of media neutrality refers to the theory that a copyright owner's rights remain identical whether the media is fixed in digital or analog form.[180] Under this concept, it logically follows that a consumer should also enjoy the same rights despite the form in which the media exists. Media neutrality affords courts the flexibility to expand copyright law in order to facilitate its application to new technological advancements.[181]

Congress adopted the principle of media neutrality after the United States Supreme Court's narrow decision in *White-Smith Music Publishing Co. v. Apollo Co.*[182] In revamping the Copyright Act, Congress broadened its scope by adding the language "now known or later developed" in order to incorporate existing and future methods in which copies or phonorecords can be fixed.[183] By inserting this language into the various definitions within the Copyright Act, Congress expressly left the statute open to both interpretation and application to new technologies.[184] Forward progress should be encouraged, and the courts need to reaffirm this policy through broad interpretations and the concept of media neutrality. It would be time consuming, costly, and

---

at 457 (Blackmun, J., dissenting).

176. Macdonald, *supra* note 16, at 420.

177. Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350 (1908).

178. Deborah Tussey, *Technology Matters: The Courts, Media Neutrality, and New Technologies*, 12 J. INTELL. PROP. L. 427, 428 (2005).

179. *Id.*

180. *Id.*

181. *Id.*

182. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908).

183. 17 U.S.C. § 101 (defining *copies* and *phonorecords*).

184. Congress also defined "'device', 'machine', or 'process' [as] one now known or later developed." 17 U.S.C. § 101 (1976).

counterproductive for Congress to reconvene and deliberate on the copyright laws each time a new technology emerges.

2. The Court's Interpretation Yields Impractical Results

The first sale doctrine was enacted prior to the conception of media in a purely digital form.[185] The *ReDigi* court found that the statute did not necessarily exclude digital works because the owner of a particular phonorecord, "be it a computer disk, iPod, or other memory device," may sell that phonorecord to which the digital media was originally downloaded.[186] The court recognized that selling the entire media device may be impractical, but it did not produce an absurd result.[187]

Although the statute may literally apply to digital media, the court incorrectly determined that this conclusion did not create an absurd result.[188] Consumers generally store digital media on personal computers, iPods, or cellular telephones, and it is illogical for a consumer to sell the entire technological device each time he or she wishes to dispose of digital media files. The buyer may only want to purchase the digital media embodied in the device, not the owner's multitude of other personal files or programs, but because the buyer must purchase the entire electronic device, the buyer would unavoidably pay a disproportional amount to receive the desired media file. Granted, the purchaser would also receive the electronic device, but this market structure is impractical and cumbersome.[189]

Transferring digital media with this approach would be costly and undesirable in comparison to the market for traditional analog media. Not only would purchasers have to pay a high price, but the sellers would have to purchase a new electronic device each time they made a sale. Again, because electronic devices tend to be expensive, this result is impractical and absurd. The result would ultimately lead to a sustained monopoly, which conflicts with the Copyright Act's general purpose of facilitating a *temporary* monopoly, and fails to sufficiently balance the

185. *Id.*

186. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 656 (S.D.N.Y. 2013).

187. *Id.* Courts should avoid a literal application of a statutory provision that would lead to unintended consequences or an absurd result whenever the statute may be reasonably interpreted in a manner that is consistent with the legislative purpose. *See* Maine v. Thiboutot, 448 U.S. 1, 20 (1980); *see also* Value Vinyls, Inc. v. United States, 568 F.3d 1374, 1379 (Fed. Cir. 2009).

188. *ReDigi*, 934 F. Supp. 2d at 656 (finding that, although transferring the entire electronic device in order to dispose of digital media files was "onerous," the limitation was not absurd).

189. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting) (concluding that consumers will lose if the seller's price is too high and the individual buyer cannot afford to purchase the work).

rights of consumers against the rights of copyright owners.[190] An additional purpose of the Copyright Act is to promote innovation;[191] however, the statute no longer encourages innovation if each company that invents a technology with the purpose of functioning in the modern market is found liable for copyright infringement.[192]

The *ReDigi* court also weighed more heavily the concerns of copyright owners against the concerns of consumers.[193] Traditionally, however, in viewing reward to a copyright owner as an ancillary consideration to public benefit, copyright laws generally favor the consumer.[194] The Supreme Court determined that the "'*primary* object[ive] in conferring the monopoly [on copyright owners] lie[s] in the general benefits derived by the public from the labors of authors.'"[195] Consequently, the court should have afforded more weight to the apprehensions of consumers before simply finding that the concerns of copyright owners overpower the court's ability to apply the first sale doctrine to digital media. Additionally, for the reasons provided and discussed in Part III above, the court's concerns regarding the inability of digital media to degrade and the effects of digital media on market competition are misplaced.[196]

3. The Statute's Purpose and Plain Language Permit a Digital First Sale Doctrine

The court applied dictionary definitions to various statutory terms and narrowly construed those definitions to find that ReDigi's business model was inherently infringing at its core.[197] The court defined the word *reproduction* to mean "to produce again" or "to cause to exist again or anew."[198] Specifically, the court focused its analysis on the

190. *Id.* at 429 (noting that copyright law is intended to promote public access to copyrightable works and provide a "limited period of exclusive control" to the copyright owner).

191. *See* Macdonald, *supra* note 16, at 414 (stating that stimulating artistic creativity to benefit the public is the primary purpose of copyright law).

192. Amazon received a patent for a secondary market for digital media in January 2013 and has yet to implement this technology. *See* Amazon Patent, *supra* note 145.

193. *ReDigi*, 934 F. Supp. 2d at 656 (citing DMCA REPORT, *supra* note 7, at 11) (determining that copyright owners would be negatively impacted by various factors).

194. United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

195. *Id.* (emphasis added) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)). *See also Sony Corp.*, 464 U.S. at 432 (finding that creative works should be incentivized for the ultimate purpose of "broad public availability").

196. *See supra* Part III.

197. *ReDigi*, 934 F. Supp. 2d at 655 (finding it impossible to sell digital music using ReDigi's server without necessarily creating additional copies of the copyrighted work in violation of the Copyright Act).

198. *Id*. at 650.

finding that the creation of a new material object constituted copyright infringement, and not merely the creation of an additional material object.[199]

The dictionary definitions provided by the court are literal and rigid, and other common definitions could easily yield a different interpretation and an opposite result in the outcome of the case. Where multiple interpretations exist, the court must embrace the interpretation that does not produce an illogical result;[200] therefore, the court erred in *ReDigi* by selecting the rigid definitions that led to an impractical outcome. Contrary to the dictionary definition selected by the court, the term *again* is also defined as "once more" or "in *addition*."[201] Therefore, superimposing the relevant definitions, *reproduction* means "to produce in addition." Moreover, the term copy is defined as "one *in a series of* reproductions."[202] Either of these dictionary definitions shifts the focus to additional copies rather than simply any new copy. In selecting the appropriate definition, the court should have looked at whether the transfer of digital media on ReDigi's server was more like selling a single used album or burning an additional copy.[203]

It is also important to consider that the Copyright Act is primarily concerned with the broader issue of the creation of multiple copies, not the creation of a new copy when only one copy exists before and after the transformation, because the statute's main purpose is to "secure [for copyright owners] the right of *multiplying copies* of the work."[204] With this purpose and the alternative definitions in mind, the first sale doctrine is written broadly enough to apply to digital media in a more traditional sense than requiring sale of an entire electronic device.

4. The Prospect of a Digital First Sale Doctrine Does Not Conflict with Prior Case Law

Although, there is limited authority on the issue presented in *ReDigi*,[205] the court misuses the appropriate existing precedent. The

199. *Id*. at 649.

200. *See* United States v. Ryan, 284 U.S. 167, 175 (1931) (stating that "all laws are to be given sensible construction").

201. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 23 (11th ed. 2004) (emphasis added).

202. *Id*. at 276.

203. James Rosenfeld & Eric Feder, DAVIS WRIGHT TREMAINE LLP, *The* Aereo *and* ReDigi *Decisions: Courts Continue to Wrestle with the Application of Copyright Law to the Redistribution of Digital Content* (Mar. 9, 2013), http://www.dwt.com/The-Aereo-and-ReDigi-Decisions-Courts-Continue-to-Wrestle-With-the-Application-of-Copyright-Law-to-the-Redistribution-of-Digital-Content-04-09-2013/.

204. Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350-51 (1908) (emphasis added).

205. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013) (stating

ReDigi court cited *London-Sire Records, Inc. v. Doe 1* as supporting precedent for the proposition that a digital transfer creates a new phonorecord each time it is transferred to a different device.[206] In *London-Sire Records*, the court addressed whether users of peer-to-peer software violated the distribution right.[207] The court focused its analysis and narrowed its holding to the fact that users were creating *multiple* copies of one digital music file.[208] The court in *ReDigi* dismissed the notion that the court in *London-Sire Records* was concerned with multiple copies of a copyrighted work and admitted to expanding the holding in *London-Sire Records* to include the creation of any new copy as infringement.[209] The *ReDigi* court did not cite any prior case that agreed with this expanded interpretation.

The court in *ReDigi* also distinguished the case from *C.M. Paula Co. v. Logan*.[210] The defendant in *C.M. Paula* used chemical compounds to lift images from greeting cards and impress these images on plaques, which were subsequently sold for profit.[211] The court in *C.M. Paula* reasoned that infringement did not occur in that case because if the defendant wished to make and sell 100 pieces of work, the defendant would have to purchase 100 different copyrighted works to do so.[212] The *ReDigi* court erroneously distinguished the case from *C.M. Paula*. The theory behind the process used by ReDigi is no different than the theory behind the non-infringing product in *C.M. Paula* because if a consumer wishes to sell 100 songs using ReDigi's server, the consumer would have to legally purchase 100 songs. ReDigi's software does not permit users to keep a copy of a digital work after transfer to another user. Moreover, the creation of additional copies from one original is not permitted without the copyright owner's consent.[213]

The *ReDigi* court incorporated *Sony Corp. of America v. Universal*

---

that the exact issue presented was one of first impression for the court and had not yet been litigated in any jurisdiction).

206. *Id.* "When a user on a peer-to-peer network downloads a song from another user, he receives into his computer a digital sequence representing the sound recording. That sequence is magnetically encoded on a segment of his hard disk (or likewise written on other media.) With the right hardware and software, the downloader can use the magnetic sequence to *reproduce* the sound recording. The electronic file (or, perhaps more accurately, the appropriate segment of the hard disk) is therefore a 'phonorecord' within the meaning of the statute." London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 171 (D. Mass. 2008) (emphasis in the original).

207. *London-Sire*, 154 F. Supp. 2d at 166.

208. *Id.* at 169.

209. *ReDigi*, 934 F. Supp. 2d at 650.

210. *See generally* C.M. Paula Co. v. Logan, 355 F. Supp. 189 (N.D. Tex. 1973).

211. *Id.* at 190.

212. *Id.* at 190-91.

213. 17 U.S.C. § 106. Specifically related to this discussion, a consumer could not create 100 copies from one lawfully obtained digital media file and sell those 100 copies to various purchasers.

City Studios, Inc., introduced and discussed in Part II.C above, and determined that ReDigi was incapable of a non-infringing use by design.[214] In *Sony*, the Supreme Court struck the proper balance between protection and innovation, finding that providing equipment capable of creating copies did not constitute copyright infringement, so long as the equipment was largely used for legitimate purposes.[215] This holds true even if the copying device may also be used for infringing purposes; the device simply must be "merely capable of substantial non-infringing uses."[216] The *Sony* Court acknowledged that some users will take the unlawful route, but the Court did not find this persuasive when holding otherwise would burden the majority of consumers.[217]

If the proposition that Congress did not intend the incidental copying of digital files during transfer to constitute copyright infringement where only one file exists before and after the transaction is accepted, ReDigi's platform design is certainly capable of substantial non-infringing uses. ReDigi is set up so that users can transfer their copy of a certain media file to another user, but the original users cannot retain a copy of that digital file on their device.[218] Although ReDigi does not automatically delete the digital files from the seller's computer upon transfer, these files are detected by ReDigi's software and the user is prompted to delete the file or be suspended from using the server.[219] While some users may not delete their original copies and choose to remain suspended from ReDigi's server, common sense dictates that most users will likely comply with the rules in order to maintain the ability to sell or transfer their digital media to other users. Therefore, ReDigi's equipment is capable of substantial non-infringing uses, and ReDigi cannot be held liable for copyright infringement under *Sony*.

V. SOLUTIONS TO THE DIGITAL MEDIA DILEMMA

As previously outlined in this comment, the courts have the ability to determine that the first sale doctrine applies to digital media for three major reasons: (1) Congress added broad language to the Copyright Act; (2) the policy to promote innovation is stifled without a digital first sale doctrine; and (3) prior case law does not bar this conclusion. The issue

214. *ReDigi*, 934 F. Supp. 2d at 659.

215. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

216. *Id.*

217. *Id.* at 444 (finding that an injunction depriving consumers of equipment "capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law").

218. *ReDigi*, 934 F. Supp. 2d at 645.

219. *Id.*

came before a federal court, and the court chose not to extend this essential doctrine to digital media, explicitly deferring to Congress on the issue.[220] Due to the major policy implications—including the creation of a sustained monopoly, the expectations of consumers, and the potential harm to copyright owners—Congress must take up the issue and implement clear legislation that allows for digital media to be sold and transferred in the same manner as traditional analog media. The two may have different physical characteristics, but technology is always changing; therefore, the laws must similarly evolve and afford the appropriate rights to individuals. The wait-and-see approach, previously adopted by Congress regarding the issue of a digital first sale doctrine, is no longer a viable plan.

In the meantime, scholars, interest groups, and the legislature have all proposed various solutions to the digital media dilemma.[221] Initially, Congress should expressly determine that the transfer of digital media is a sale because of the growing importance of digital media in the modern world, and without this threshold conclusion, the digital first doctrine cannot exist.[222] Additionally, I propose that Congress should modify the Copyright Act to expressly permit the "creation" of a copyrighted digital work for the purpose of transferring that particular copy so long as only one copy exists after the transaction. In addition, Congress should clarify that the seller must own a legally purchased copy to be able to transfer it.

The National Telecommunications and Information Administration

220. Capital Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 660 (S.D.N.Y. 2013).

221. *See, e.g.*, Mencher, *supra* note 12, at 66 (discussing a "container" solution, which would allow the music industry to control the distribution of digital media); DENA CHEN ET AL., PUBLIC KNOWLEDGE, PROVIDING AN INCIDENTAL COPIES EXEMPTION FOR SERVICE PROVIDERS AND END-USERS 15 (2011), *available at* http://www.publicknowledge.org/files/docs/craincidentalcopies.pdf (suggesting a solution that would bring the necessary incidental copying of phonorecords for lawful transfers out of the scope of copyright infringement); *see also* Hayes, *supra* note 37, at 859 (proposing a solution where consumers would be allowed to decide whether to purchase the digital media or license the digital media and discussing that by purchasing the media, the consumer would have the benefit of the first sale doctrine and be able to legally sell their media to other individuals; however, the consumer would have no recourse if the digital file was to become corrupted or obsolete). This article additionally explains that if the consumer chooses to license the media, the digital files would not be subject to the first sale doctrine because the consumer would not actually own the media; however, the consumer may enjoy other benefits at the copyright owner's discretion. *Id.* These benefits may include the copyright owner providing the media in multiple formats to ensure the issue of obsoleteness did not affect the consumer. *Id.* at 860.

222. *See, e.g.*, Skyla Mitchell, Note, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1290 (2007) (finding it imperative that the licensing issue with digital music be addressed by Congress, although not necessarily that digital music transfers be labeled as a sale); Uetz, *supra* note 92, at 190 (stating that the courts have confused the various meanings of the word "license" and further confused the difficult question of whether a transfer of digital music constitutes a sale or a license).

proposed similar language to implement a digital first sale doctrine.[223] This language would have constituted section 109(f) of the Copyright Act, but it was ultimately removed from the final version of the DMCA.[224] The proposed language stated, in relevant part: "[t]he authorization for use set forth in subsection (a) [the first sale doctrine] applies where the owner of a particular copy or phonorecord in a digital format lawfully made under this title . . . distributes the work by means of transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. The reproduction of the work, to the extent necessary for such performance, display, distribution, is not an infringement." H.R. 3048, 105th Cong. § 4 (1997).

This change would permit the transfer of digital media without interfering with the intended result of copyright protection. I would narrow this proposal by including language dictating that the seller must engage in a digital media transfer via software that ensures substantial compliance with this provision, requiring the seller not to retain a copy of the digital file after the transfer has been completed. Such software can ensure that copyright laws are followed and provide assurance for copyright owners.

ReDigi's software, Media Manager,[225] would sufficiently comply with this provision, and it would ensure added piece of mind for copyright owners. Additionally, both Amazon and Apple have proposed secondary digital media markets that institute "the cloud," which would essentially erase the digital media off of all devices the owner has by eliminating the owner's ability to access the media.[226] These protections would ensure substantial compliance with the proposed modification because it would make certain that only one user "owns" the file, through permitted access, at any given time.

The overall purpose of the first sale doctrine has enduring value in the digital age, and the application of the doctrine to digital media can be effectively regulated through such technology,[227] including ReDigi's method or the "cloud lockers" used by Amazon and Apple.[228]

223. Graham, *supra* note 106, at 50.

224. *Id.*

225. *See supra* note 159 (discussing the process in which ReDigi's Media Manager software operates).

226. Streitfeld, *supra* note 113.

227. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 332 (2013).

228. Cloud lockers can store digital media on an external hard drive that may be accessed by users through the Internet. Phillip Pavlick, Comment, *Music Lockers: Getting Lost in a Cloud of Infringement*, 23 SETON HALL J. SPORTS & ENT. L. 247, 253 (2013). A user may only access his or

Businesses implementing these technologies should be encouraged to create additional safeguards that protect copyright owners and facilitate a secondary market similar to the one enjoyed in the physical world.

VI. CONCLUSION

The dilemma between consumers and copyright owners concerning the appropriate amount of protection for copyrighted works has been debated for centuries. Both Congress and the courts have attempted to strike the proper balance between the two conflicting sides. However, in *ReDigi*, the court struck an imbalance, stifling innovation with a rigid interpretation and throwing off the equilibrium between consumers and copyright owners with respect to copyrighted works. Applying the first sale doctrine to digital media would once again restore the proper balance between consumers and copyright owners; otherwise, consumers do not have a reasonable mode in which to meaningfully dispose of a growing portion of personal property in the modern age.

Arguably, the advent of digital media has rendered parts of the Copyright Act unclear, especially with respect to the first sale doctrine. However, the language of the first sale doctrine is broad and encourages application of the doctrine to digital media, and this application comports with the growth in modern technology.[229] Further, the courts have the authority to apply the first sale doctrine to digital media, without further invention or change from Congress, because Congress has expressly allowed for the Copyright Act to be applied to new creations of media.[230]

Both Congress and the courts have the authority and resources to address the issue of a digital first sale doctrine, but neither has taken any significant action. Modern consumers are at a loss, while copyright owners are enjoying an unprecedented growing monopoly. The court's ruling in *ReDigi* has solidified the status quo for now, but change must be on the horizon in order to restore the balance between copyright owners and consumers. As the courts have shifted the responsibility of sorting out this issue to the legislature, it is time for Congress to revisit the Copyright Act and make the necessary changes to ensure that consumers have control over their property and that creative works continue to pervade society.

---

her own digital media using a personal password. *Id.* at 254.

229. Tussey, *supra* note 178, at 487.

230. *See* 17 U.S.C. § 102(a) (1976).