

DEATH OF THE SECONDARY VIDEO-GAME MARKET: NATURAL CAUSES, OR EUTHANASIA?

Mathew Golden

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INTRODUCTION

The fact that technology is evolving faster than the law is no longer a novel concept.¹ Nor are the problems inherent in a market without adequate jurisprudence under-theorized.² However, the effects of these issues are still coming to fruition.

The used video-game market³ is, or will very soon be, a useful case-study for an intellectual property market without adequate controls on the

1. Manav Tanneeru, *Can the law keep up with technology?*, CNN, Nov. 17, 2009, 10:08 AM, http://articles.cnn.com/2009-11-17/tech/law.technology_1_libel-digital-content-law-and-technology?_s=PM:TECH.

2. *See, e.g.*, *Flo Healthcare Solutions, LLC v. Kappos*, 697 F.3d 1367, 1381 (Fed. Cir. 2012) (noting the importance of predictability of the law in the area of patent law).

3. For the purposes of this article, a used video-game is a tangible item, containing the majority of a video-game’s code, that has already been played by an end-user.

inalienability of property rights. Unlike real property, publishers⁴ of software products are able to implement built-in controls on the resale of their products. Due to this control, owners of software, whether in the form of a tangible copy of the code or a license to use the software, can only rarely transfer all of what they own to another purchaser.

As this paper will demonstrate, the restrictions grew more effective as technology increased. During this build-up period, a large market for software resale developed. Soon, however, publisher-imposed technological restrictions on the alienability of software will render its resale economically impractical and maybe even impossible. Although the used video-game submarket is in all likelihood doomed to fail when software is no longer distributed in any physical medium, ploys by publishers attempt to hasten its death. Retailers⁵ lack legal recourse to invalidate these anti-alienation measures that publishers created. Thus, this scenario serves as a useful platform to address fundamental issues concerning the alienability of intellectual property rights, an issue that currently divides the federal Courts of Appeals.

This article focuses on the development of the used video-game market in order to demonstrate the above suggestions and comments. Part I explains the stakes of this area of the law by outlining the size and scope of the video-game market and used video-game submarket. Part II chronicles previous attempts by publishers to restrict the resale of video games and explains why they were ineffectual. Part III details modern publisher strategies that more directly attempt to limit the resale of video-games. Finally, Part IV addresses the current state of the law regarding the alienability of intellectual property and suggests improvements to the Copyright Act to provide mechanisms to guard its policy of protecting alienability in an age where technological measures have shifted the balance of power from consumers to authors.

I. THE STAKES – SCOPE OF THE VIDEO-GAME MARKET AND USED VIDEO-GAME SUBMARKET

The video-game market occupies an enormous portion of the entertainment industry and is one of the few markets in this field that

4. For the purposes of this article, a video-game publisher, as opposed to a designer, is the entity responsible for marketing, funding of design, and dissemination of a video-game to either end-users or retailers.

5. For the purposes of this article, a video-game retailer is an entity that purchases tangible copies of video-games from a publisher and sells those copies to an end-user. At times, this article will use “retailer” and “GameStop” interchangeably due to GameStop’s prevalence in the video-game market.

continues to grow rather than contract.⁶ The revenue from a single blockbuster video-game title rivals that of blockbuster movies.⁷ Similarly, the total revenue generated by the entire video-game market is close to the total revenue generated by the film industry.⁸ The video-game market has grown out of its roots of targeting male children as consumers; forty percent of video-game consumers are female.⁹ Additionally, sixty-seven percent of households play video-games, and nearly fifty percent of video-game consumers are between the ages of eighteen and forty-nine.¹⁰

GameStop is the largest retailer of video-games in the world.¹¹ In 2009, forty-two percent of GameStop's gross profits came from selling used video-games, which generated \$543.5 million in revenue.¹² GameStop employs a particular scheme to earn large profits from used video-games. First, GameStop solicits individuals to "trade-in" their video-games.¹³ GameStop then sells those video-games at a large mark-up – usually around five dollars less than what the game would sell for new.¹⁴ As a result, GameStop has created a large profit margin¹⁵ with respect to

6. Tim Cross, *All the world's a game*, THE ECONOMIST, Dec. 10, 2011, available at <http://www.economist.com/node/21541164>.

7. Compare Ana Douglas, *Here Are The 10 Highest Grossing Video Games Ever*, BUSINESS INSIDER, June 13, 2012, 9:13 PM, <http://www.businessinsider.com/here-are-the-top-10-highest-grossing-video-games-of-all-time-2012-6?op=1> (showing the highest grossing video-game, World of Warcraft grossed "over \$10 billion"), with *Highest Grossing Movies*, FINDTHEBEST, <http://highest-grossing-movies.findthebest.com/1/1/Avatar> (last visited Apr. 16, 2014) (showing the highest all-time grossing film listed, Avatar, grossed \$2.78 billion worldwide).

8. Compare *How Much Do You Know About Video Games?*, ESRB.ORG, <http://www.esrb.org/about/video-game-industry-statistics.jsp> (last visited Mar. 17, 2013) [hereinafter *How Much Do You Know About Video Games?*] (indicating that video games generated \$10.5 billion in revenue in 2009), with Grady Smith, *Box office report 2012: Film industry climbs to a record-breaking \$10.8 billion*, ENTERTAINMENT WEEKLY (Dec. 31, 2012, 12:38 PM), <http://insidemovies.ew.com/2012/12/31/box-office-report-2012/> (noting that movie theaters sold an estimated total of \$10.84 billion worth of tickets domestically in 2012).

9. *Id.*

10. *How Much Do You Know About Video Games?*, *supra* note 8.

11. *About GameStop*, GAMESTOP, http://news.GameStop.com/about_us (last visited Apr. 16, 2014).

12. Yukari Iwatani Kane & Miguel Bustillo, *Used Games Score Big for GameStop*, THE WALL STREET JOURNAL (Jan. 21, 2009, 12:01 AM) <http://online.wsj.com/article/SB123249378212700025.html> [hereinafter Iwatani & Bustillo].

13. *Trade Offers*, GAMESTOP, <http://www.GameStop.com/collection/trade-in> (last visited Apr. 16, 2014) [hereinafter *Trade Offers*].

14. See, e.g., *Assassin's Creed III*, GAMESTOP, <http://www.GameStop.com/xbox-360/games/assassins-creed-iii/99633> (last visited Apr. 16, 2014) (displaying Assassin's Creed III on sale for \$19.99 new, \$14.99 used, as of May 3, 2014).

15. See Iwatani & Bustillo, *supra* note 12 (noting that used video-games were expected to account for twenty-three percent of GameStop's revenue, while they had accounted for

used video-games.

GameStop's method of selling used video-games is somewhat contentious. Some consumers believe that GameStop's policies are designed to take advantage of consumers by offering trade-in prices substantially below what the used video-game is worth.¹⁶ Moreover, video-game publishers resist the used video-game market generally because they receive no share of the revenue from this market.¹⁷

No matter what position one takes on the benefits of GameStop's trade-in system, eliminating the used video-game market in its entirety would severely damage the viability of the video-game retail industry.¹⁸ For now, GameStop sees sales of physical used games as profitable.¹⁹ However, with about fifty percent of its profits under attack,²⁰ GameStop and other retailers are completely reversing their direction in preparation for a future without used video-game sales. GameStop has been quietly shifting the bulk of its resources away from retail towards a digital business

forty-two percent of its gross profits).

16. See GameStop *Trade-In Program a Scam?*, THE RED DRAGON (July 31, 2013), <http://twthereddragon.com/gamestop-trade-in-program-a-scam/> (discussing how much money consumers are leaving on the table by taking certain deals); Jason Schreier, *Extreme GameStop Pricing Leaves Some Fans Calling Scam*, KOTAKU (Aug. 12, 2013, 1:00 PM), <http://kotaku.com/extreme-gamestop-pricing-leaves-some-fans-calling-scam-1108627828> (discussing how the original price of a game was fifty dollars but since the supply could not meet the demand the used copies were selling for eighty-nine dollars).

17. Bill D. Herman, *Breaking and Entering My Own Computer: The Contest of Copyright Metaphors*, 13 COMM. L. & POL'Y 231, 248 (2008) [hereinafter Herman]. GameStop originally attempted to refute this assertion by arguing that it only accepts in-store credit, which would in turn spur more purchases of new video-games. See Symposium, *Selected Material from 2010 Game Business Law – International Summit on the Law and Business of Video Games: The Future of Digital Distribution*, 13 SMU SCI. & TECH. L. REV. 139, 149 (2010) (noting that seventy percent of what consumers get in store credit goes to new games). Now that GameStop accepts cash for trade-ins, however, this argument is greatly diminished. *Trade Offers*, *supra*, note 13.

18. Not to mention the damage it would cause to consumers. Publishers eventually stop producing old video-games, at which point used versions are the only way to obtain copies. See, e.g., Christopher Riley, *The Need for Software Innovation Policy*, 5 J. ON TELECOMM. & HIGH TECH. L. 589, 616-17 (2007) (discussing how "the video game industry is characterized by a short shelf life"). This is also problematic where publishers no longer support certain features, such as the ability to play online. Matthew Humphries, *Online Pass buyers lose out as EA announces server shutdowns*, GEEK.COM (Mar. 19, 2012, 9:16 AM), <http://www.geek.com/articles/games/online-pass-buyers-lose-out-as-ea-announces-server-shutdowns-20120319/>.

19. Symposium, *Selected Material from Game Business Law – International Summit on the Law of Business and Video Games: Paying and Playing*, 15 SMU SCI. & TECH. L. REV. 179, 205 (2012) [hereinafter *Paying and Playing*] ("GameStop has a huge profit margin on used games . . .").

20. Iwatani & Bustillo, *supra*, note 12.

model.²¹ GameStop planned to close 250 retail stores in 2013²² and has acquired several companies with digital distribution experience.²³ Thus, GameStop's own actions provide a dim forecast for video-game retail without the ability to sell used video-games.

II. PAST ATTEMPTS TO LIMIT VIDEO-GAME RESALE

Publishers have been attempting to limit the resale of video-games for almost as long as video-games have been commercially available. However, until recently, these attempts have been ineffectual for a variety of reasons. This section demonstrates that, as technology evolved, publishers gained more control over the distribution of their video-games and accordingly were able to enact tighter controls on resale. This section also details the previous attempts to limit video-game resale and explains why those attempts were ineffective, thereby allowing the used video-game market to grow without appealing for a change in the law. The following section details current and forthcoming methods of controlling resale and why they pose a greater threat to the used video-game market.

A. "NOT FOR RESALE" STICKERS

The first attempt to limit the resale of video-games was placing "Not for Resale" stickers on copies of their video-games.²⁴ These stickers were intended to prevent retailers from separating and individually selling merchandise that was intended to be sold in bundle packs or along with consoles.²⁵ However, the stickers also succeeded, whether intentionally or not, in convincing at least some consumers that selling the game second-

21. See Dean Takahashi, *Retailer GameStop buys its way into digital distribution of games*, VENTUREBEAT, Mar. 31, 2011, 5:32 PM, <http://venturebeat.com/2011/03/31/retailer-gamestop-buys-its-way-into-digital-distribution-of-games/> (noting GameStop's budget allocation of \$70 million for store openings compared to its \$100 million allocated for digital initiatives).

22. Alexander Sliwinski, *GameStop closing 250 'unprofitable' stores, opening over 60 locations in 2013*, JOYSTIQ, Feb. 13, 2013, 5:30 PM, <http://www.joystiq.com/2013/02/13/gamestop-closing-250-unprofitable-stores-opening-over-60-loc/>.

23. *Id.*

24. See, e.g., *Sonic the Hedgehog Not For Resale NFR – Sega Genesis*, SUPER VIDEO GAME STORE, <http://supervideogamestore.ecrater.com/p/13766963/sonic-the-hedgehog-not-for-resale> (last visited Feb. 23, 2013) (providing an example of such a sticker).

25. C. Walters, *Gamestop Selling 'Not For Resale' Game Bundle, Overpriced Of Course*, CONSUMERIST, Jan. 13, 2009, <http://consumerist.com/2009/01/13/GameStop-selling-not-for-resale-game-bundle-overpriced-of-course/>.

hand would be illegal.²⁶

Ultimately, these stickers prevented these games from entering the used video-game market. Although retailers kept the games together to sell new as bundles, the retailers were willing to buy back copies of games sold in these bundles and sell them used.²⁷ Thus, providing games in bundle packs marked “Not for Resale” proved ineffectual in keeping those games out of the used video-game market.

B. CD-KEYS

Publishers also began implementing CD-keys into their games. These keys would prevent installation of a computer game without entering a valid code.²⁸ Moreover, if multiple installations occurred with the same CD-key, only one instance of that game could access the internet at a time.²⁹

CD-keys’ impact on the used video-game market was only tangential. The primary purpose of these codes was to prevent piracy.³⁰ Simply copying the game’s data would be insufficient to play it fully if a would-be pirate could not also generate a valid CD-key. However, selling a used video-game with CD-key protection would be problematic; the purchaser would either need to purchase a new CD-key from the publisher or somehow ensure that the previous owner would refrain from using that CD-key. While these options might be possible at the individual level, they would be complicated at the retail level. A retail store would not likely be able to ensure that most sellers refrain from using the CD-key that they sold. Moreover, purchasing a new CD-key for each used sale of CD-key protected games would greatly diminish profits on those games. Accordingly, CD-keys impacted the used video-game market, perhaps unintentionally, due to practical concerns with selling used copies of those

26. See, e.g., brendan_ross, et al., Comments in Video Games and Consoles Discussion Board to *Can I sell a game that has "Not For Resale" on the disc?*, EBAY, <http://forums.ebay.com/db1/topic/Video-Games-And/Can-I-Sell/5200017625> (last visited Apr. 12, 2014) (inquiring into whether a consumer is allowed to resell a game sporting a “Not for Resale” sticker).

27. Douglas Havermore, *Publishers Fume as GameStop Continues to Sell Not For Resale Games*, SCRAPE TV, Apr. 3, 2009, <http://scrapetv.com/News/News%20Pages/Games/Pages-2/Publishers-fume-as-Gamestop-continues-to-sell-not-for-resale-games-Scrape-TV-The-World-on-your-side.html>.

28. Davidson & Assocs. v. Jung, 422 F.3d 630, 633-35 (8th Cir. 2005).

29. *Id.*

30. See, e.g., Nicole Cozma, *How to recover lost product keys on Windows 7*, CNET, Sept. 26, 2011, 9:50 AM, http://howto.cnet.com/8301-11310_39-20111033-285/how-to-recover-lost-product-keys-on-windows-7/ (discussing how product keys protect from piracy).

games.

C. DOWNLOADABLE CONTENT

Although the concept of downloadable content was originally innocuous, publishers began to use it to attack the used video-game market. As the use of the Internet became standard for gaming, publishers began to sell additional content, dubbed “downloadable content,” for their games through the Internet.³¹ When used this way, downloadable content was simply an alternative distribution mechanism for the expansion pack³² concept; the code would be distributed online rather than through a physical copy.

Over time, however, downloadable content gained a secondary function as a means to reduce the alienability of already-made content. As downloadable content became popular, consumers started to believe that some downloadable content was being withheld from new copies of video-games to be sold separately at a later date.³³ The concept is especially pronounced in the instance of “day-1 DLC,” where the publisher would make downloadable content available on the same day that the video-game becomes available to purchase from retailers.³⁴ According to some publishers, this downloadable content is developed during the period after the game’s final code is finalized and before the game’s release date.³⁵ However, data-miners have discovered that in some instances, at least some code for the downloadable content is present on the game’s disc,³⁶ which gives consumers to the impression that content is merely being withheld from a game to be sold separately.³⁷

“Day-1 DLC” is not the only offender, although it demonstrates the concept most effectively. Even downloadable content scheduled to be sold

31. Silicon Knights, Inc. v. Epic Games, Inc., No. 5:07-275, 2011 U.S. Dist. LEXIS 147633, at *11 n.10 (E.D. N.C. Dec. 22, 2011).

32. An expansion pack is software that provides additional content for a pre-existing video-game. *Expansion Pack*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/ExpansionPack> (last visited May 10, 2014); *Expansion Pack*, WORDNIK, <http://www.wordnik.com/words/expansion%20pack> (last visited May 10, 2014).

33. William Usher, *BioWare Encourages Other Developers To Embrace Day-1 DLC*, GAMING BLEND, Aug. 17, 2012, 12:57 AM, <http://www.cinemablend.com/games/BioWare-Encourages-Other-Developers-Embrace-Day-1-DLC-45801.html>.

34. *Id.*

35. *Id.*

36. Heather McLellan, *Day-One DLC Files Appear on Mass Effect 3 Discs*, THE ESCAPIST, Mar. 8, 2012, 4:17 PM, <http://www.escapistmagazine.com/news/view/116234-Day-One-DLC-Files-Appear-on-Mass-Effect-3-Discs>.

37. *Id.*

well after a game's release has been found in some cases to be present, in nearly complete form, on the game's disc by data-miners.³⁸

If not for limiting market forces, this strategy would be somewhat effective in limiting a major problem that publishers have with the used game market – their inability to generate revenue from used video-game sales.³⁹ Aside from generally increasing the revenue generated from any given video-game release, diverting more of a game's content to online distribution causes less of the game's overall content to be alienable, or capable of resale. Thus, by diverting more of a game's content to downloadable content, a publisher can ensure revenue from each distinct purchaser of a game, whether they purchase the game used or new.

However, a powerful market force limits widespread diversion of game content to downloadable content – that of consumer backlash.⁴⁰ Consumers can challenge what they view as the underhanded business tactic of charging extra money for what they believe should be content included in the purchase of the game disc. Aside from expressing opinions on various Internet outlets, consumers have launched two successful campaigns against these publisher tactics. First, consumers engage in a practice called “review bombing,” wherein a user reviews a video game on a website, such as Metacritic, giving the game a very low score and complaining in the review of the underhanded tactic.⁴¹ Another campaign involved complaining to the Better Business Bureau, which in at least one circumstance resulted in a noticeable rating drop for a major company.⁴² For example, data-miners searched the contents of the disc for Capcom's

38. Sebastian Haley, *Street Fighter X Tekken features MIA, 14 DLC characters already on the disc*, VENTUREBEAT, Mar. 7, 2012, 11:29 AM, <http://venturebeat.com/2012/03/07/sf-x-tekken-issues/>.

39. Herman, *supra* note 17.

40. Erik Kain, *The Problem With BioWare's Mass Effect 3 Day-One DLC And The Importance Of Building Brand Trust*, FORBES, Mar. 10, 2012, 10:57 AM, <http://www.forbes.com/sites/erikkain/2012/03/10/the-problem-with-biowares-mass-effect-3-day-one-dlc-from-ashes/>.

41. See Tom Phillips, *Metacritic culls review-bombing users*, EUROGAMER, Sept. 23, 2011, <http://www.eurogamer.net/articles/2011-09-23-metacritic-culls-review-bombing-users> (discussing how a popular review site deleted accounts that were used to bomb review scores); *Mass Effect 3*, METACRITIC, <http://www.metacritic.com/game/playstation-3/mass-effect-3> (last visited May 3, 2014) (displaying a critic score of ninety three [out of 100], and a user score of 4.7 [out of ten]). See also Mynter, *User review of Mass Effect 3*, METACRITIC, <http://www.metacritic.com/game/playstation-3/mass-effect-3> (last visited Feb. 20, 2013) (“The day-one DLC makes this a [zero out of ten] title. Under NO circumstances should it be okay for developers to release day-one DLC unless itâ [sic]”).

42. Brenna Hillier, *Capcom's Better Business Bureau rating downgraded by three ranks*, VG24/7, Apr. 12, 2012, 12:42 AM, <http://www.vg247.com/2012/04/12/capcoms-better-business-bureau-rating-downgraded-by-three-ranks/> [hereinafter Hillier].

game *Street Fighter X Tekken*.⁴³ This search revealed nearly complete versions of characters that Capcom earlier announced would be available as paid downloadable content.⁴⁴ Although Capcom attempted to justify the inclusion of the characters on the disc of the game,⁴⁵ consumer complaints to the Better Business Bureau for this tactic ended in a substantial rating drop and ultimately a loss of Better Business Bureau accreditation.⁴⁶

Whether on-disc downloadable content is a beneficial business tactic is open for debate.⁴⁷ However, due to consumer backlash, widespread diversion of video-game content to a traditional paid downloadable content format seems unlikely to occur. Thus, this tactic is an unlikely solution for publishers to undermine the used video-game market.

III. MODERN RESTRAINTS ON VIDEO-GAME RESALE

Although the aforementioned tactics were unsuccessful in completely circumventing the used video-game market, some recently implemented and potentially forthcoming tactics more directly attack the capability to resell video-games. This section describes these tactics, while the following section explains the difficulty in attacking these tactics.

A. ONE-TIME USE CODES

One tactic that publishers have employed is locking some game content behind a one-time use code. Sometimes stylized as a “reward program” for purchasers of new copies of games,⁴⁸ these codes are only included in new copies of a video-game, and the codes are invalid after

43. *Street Fighter X Tekken: 12 new characters coming to consoles, PC this fall*, CAPCOM-UNITY http://www.capcom-unity.com/brelston/blog/2012/03/05/street_fighter_x_tekken:_12_new_characters_coming_to_consoles_pc_this_fall (last visited May 10, 2014).

44. *Id.*

45. *Id.*

46. Hillier, *supra* note 42; *See also* *Capcom U.S.A. Inc.*, BETTER BUSINESS BUREAU, <http://www.bbb.org/greater-san-francisco/business-reviews/video-games-wholesale-and-manufacturers/capcom-usa-in-san-mateo-ca-189796> (last visited Apr. 17, 2014) (“THIS BUSINESS IS NOT [Better Business Bureau] ACCREDITED”).

47. Kyle Orland, *Op-ed: Why on-disc downloadable content isn't the crime it's made out to be*, ARS TECHNICA, Oct. 11, 2012, 6:50 PM, <http://arstechnica.com/gaming/2012/10/op-ed-why-on-disc-downloadable-content-isnt-a-big-deal/>.

48. *See* David Philip Graham, *Mortal Kombat 9, First Sale, and the Power of Clever Lawyers*, DPG AT LAW, Jan. 20, 2013, <http://dpgatlaw.com/mortal-kombat-9-first-sale-and-the-power-of-clever-lawyers/> [hereinafter Graham] (describing the “so-called [first] purchaser reward program”).

their initial use.⁴⁹ The codes unlock access to additional content, whether it be characters and stages⁵⁰ or the ability to play online.⁵¹ Purchasers of used copies of these video-games would need to purchase the online pass directly from the publisher, which usually costs around ten dollars.⁵²

As time went on, the scope of the limited content increased.⁵³ Originally, the codes unlocked tangential content, such as extra levels and extra characters.⁵⁴ These codes eventually prevented the ability to access the Internet in order to play online with or against other players,⁵⁵ which is considered by many to be a core functional feature for video-games.⁵⁶

If left unchecked, publishers could expand the scope of the restricted content and the price of the codes in order to make used video-game purchases nonsensical for any video-game consumer.⁵⁷ So long as the

49. *Id.*

50. *See, e.g., The Stone Prisoner*, DRAGONAGE.BIOWARE.COM, <https://dragonage.bioware.com/dao/addon/> (last visited Apr. 17, 2014) (enter age then scroll down to “The Stone Prisoner”) [hereinafter *The Stone Prisoner*].

51. *See, e.g., Jim Sterling, Mortal Kombat to get online pass system*, DESTRUCTOID, Mar. 30, 2011, 10:00 AM, <http://www.destructoid.com/mortal-kombat-to-get-online-pass-system-197568.phtml> (explaining an online pass scheme where buyers of used games must purchase a code in order to access a game’s online multiplayer function).

52. *Results for “online pass,”* GAMESTOP, <http://www.GameStop.com/browse?nav=16k-3-online+pass,28zu0> (last visited Apr. 17, 2014) (listing a series of online passes for \$9.99).

53. And in some circumstances, the price of the code increased as well. *See, e.g., Jim Sterling, SOCOM 4 to really screw over secondhand customers*, DESTRUCTOID, Apr. 18, 2011, 8:20 AM, <http://www.destructoid.com/socom-4-to-really-screw-over-secondhand-customers-199049.phtml> (noting the price of SOCOM 4’s online pass to be \$14.99); *Sony’s Online Pass for ModNation Racers PSP is \$14.99 in NA*, GALAXY NEXT DOOR <http://galaxynextdoor.com/post/634485659/sonys-online-pass-for-modnation-racers-bsp-is-14-99> (last visited May 10, 2014) (noting another online pass selling for \$14.99).

54. *The Stone Prisoner*, *supra* note 50.

55. *See, e.g., JC Fletcher, Mass Effect 3’s multiplayer tied to Online Pass*, JOYSTIQ (Oct. 12, 2011, 2:00 PM) <http://www.joystiq.com/2011/10/12/mass-effect-3s-multiplayer-tied-to-online-pass/> (noting how online play for Mass Effect 3 will be controlled by online pass).

56. *See Graham, supra* note 48 (noting how important online play is going to be a then newly announced video game).

57. Indeed, this has happened in at least one case. During the period that the online pass for ModNation Racers for the PSP was available, the discrepancy between the new and used prices was always less than \$14.99, the price of the online pass. *Compare supra* note 53 (noting the online pass for ModNation Racers PSP to be \$14.99 when it was available) with *ModNation Racers Prices PSP PRICE CHARTING*, <http://videogames.pricecharting.com/game/psp/modnation-racers> (last visited May 8, 2014) (showing that the price for ModNation Racers never surpassed \$14.99). Anyone who considers online play to be an indispensable feature would buy the game new rather than used.

consumer is informed of the price discrepancy,⁵⁸ a consumer would never purchase a used video-game under this regime. However, market forces have again intervened to prevent this practice from severely damaging the secondary video-game market. Due to negative reaction from consumers, some publishers have ultimately decided that the online pass system is not worth pursuing.⁵⁹ Thus, like the “day-1 DLC” scheme, market forces check this option.⁶⁰

B. CONSOLE-LOCKED GAMES

The next generation of video game consoles has the capability to prevent consumers from playing used video-games.⁶¹ SONY has developed the technology to mark video-games in such a way as to tie them to particular consoles or electronic accounts, thereby preventing the games’ use on other consoles or electronic accounts.⁶² Microsoft has announced similar capability.⁶³ As a result, both systems have the ability to outright forbid or charge extra fees for using pre-owned video games.

Perhaps keeping in mind the DIVX fiasco,⁶⁴ SONY and Microsoft

58. And the burden to inform consumers likely falls on GameStop. *See, e.g., Collins v. GameStop*, No. 10-1210, 2010 U.S. Dist. LEXIS 88878 at *1 (N.D. Ca., Aug. 6, 2010) (class-action challenge for failure to inform about the one-time use code). In settling the case, although GameStop admitted no wrongdoing, it agreed to reimburse consumers in California for the cost of content included in new versions of the game where GameStop did not inform the consumer that the used version of the game did not contain that content. *www.GameStopSettlement.com - GameStop Downloadable Content Class Action Settlement*, CLASS ACTION SETTLEMENT NEWS, Jun. 5, 2012, 2:35 AM, <http://www.classactionsettlementnews.com/www-gamestopsettlement-com-gamestop-downloadable-content-class-action-settlement>.

59. *Online pass has been discontinued, and its requirement for older games will be eliminated*, EA, Sept. 20, 2013, 6:02 PM, <http://help.ea.com/en/article/online-pass-has-been-discontinued/>.

60. *See supra* Part II. C.

61. Matt Peckham, *Will the Playstation 4 Play Used Games? Maybe, Maybe Not*, TIME TECH, Feb. 21, 2013, <http://techland.time.com/2013/02/21/will-the-playstation-4-play-used-games-maybe-maybe-not/>.

62. *See* U.S. Patent App. No. 13/611243, available at <http://appft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PG01&p=1&u=%2Fnetacgi%2FPTO%2Fsrchnum.html&r=1&f=G&l=50&s1=%2220130007892%22.PGNR.&OS=DN/20130007892&RS=DN/20130007892> (describing SONY’s system of potentially using “permission tags” for gameplay).

63. *How Games Licensing Works on the Xbox One*, XBOX WIRE, June 6, 2013, 3:02 PM, <http://news.xbox.com/2013/06/license>.

64. DIVX was home video viewing technology designed to replace the videocassette recorder and compete with the DVD player. DIVX technology failed in part due to consumer backlash against similar restraints on the secondary market for home videos. *See*

both tried to wait until their competitor announced restrictions on playing used video-games so that the other would bear the brunt of a public relations crisis.⁶⁵ SONY's responses were initially cryptic. When asked whether SONY was planning to employ such technology, Shuhei Yoshida, president of SONY's worldwide studios, dodged the question, responding only that used video-games can work on Playstation 4 hardware.⁶⁶ However, he never indicated what SONY's intentions were regarding implementation of a device to restrict access to used video-games.⁶⁷ Based on this early response, SONY might not have used the device at all, might have used it to charge a fee to transfer the license to play a video-game to another console or electronic account, or might have used it to prevent playing used video-games on other consoles or accounts altogether.⁶⁸

Microsoft ultimately broke first and announced that their system, Xbox One, would support charging fees for license transfers if a game's publisher so requested.⁶⁹ The announcement resulted in massive consumer backlash.⁷⁰ In order to placate consumers, Microsoft rescinded the license policy, thereby promising the ability to play used games on the Xbox One without an additional fee.⁷¹ Thus, although technology enables consoles to prevent use of pre-owned video-games, market forces keep this option in check.

DIVX Dies a Tortured Death: Where Was the Consumer Benefit?, L.A. TIMES, June 17, 1999, available at http://wps.prenhall.com/wps/media/objects/472/484140/aus_itns/itnx1_DIVX.html (describing consumer backlash on Divx due to needing to pay to re-authorize the license to view content after forty eight hours); Stephanie Miles, *Behind death of Divx were angry customers*, CNET (June 17, 1999, 6:40 AM), http://news.cnet.com/Behind-death-of-Divx-were-angry-customers/2100-1040_3-227248.html (arguing consumer backlash was a large factor in the failure of DIVX).

65. Nigam Arora, *Microsoft Gives In To Gamers On Xbox One Used Games, Connection Requirement*, FORBES, June 19, 2013, 6:07 PM, <http://www.forbes.com/sites/nigamarora/2013/06/19/microsoft-gives-in-to-gamers-on-xbox-one-used-games-connection-requirement/> [hereinafter Arora] (describing the holdout as "a game of chess").

66. Ben Gilbert, *Used games will function on PlayStation 4, but there's a mysterious caveat*, ENGADGET, Feb. 21, 2013, 2:34 PM, <http://www.engadget.com/2013/02/21/yoshida-used-games-caveat/>.

67. *Id.*

68. *Id.*

69. See Arora, *supra* note 65 ("Sony was smart to let Microsoft make the first move and alienate gamers.").

70. *Id.*

71. *Id.*; *Your Feedback Matters – Update on Xbox One*, XBOX WIRE, June 19, 2013, 2:00 PM, <http://news.xbox.com/2013/06/update>.

C. PURELY DIGITAL DISTRIBUTION

Finally, some publishers distribute their games solely in digital format, bypassing a tangible medium altogether. This process is already commonly employed for a variety of game platforms including PC,⁷² iPhone,⁷³ Xbox Live Marketplace,⁷⁴ Playstation Store,⁷⁵ and Steam.⁷⁶ As data storage and internet technology has increased, distributing games in purely digital format has become more and more common, and many commentators expect that games will be distributed solely in this format sometime in the future, eliminating the need for retail stores.⁷⁷

No used video-game submarket can exist in a market where video-games are only distributed via non-transferrable licenses to use the game's code.⁷⁸ Even if somehow those licenses became transferrable, whether through a change in the law or otherwise, the licenses would likely not be transferred physically at a retail store. Thus, purely digital distribution marks a definite endpoint to the used video-game retail market.

IV. ATTACKING THE RESTRAINTS ON VIDEO-GAME RESALE

As noted above,⁷⁹ the eventuality of purely digital distribution of video-games will likely mark the end of retail sales of used video-games.

72. See, e.g., *StarCraft II®: Wings of Liberty NOW ON SALE!*, BATTLE.NET, <http://us.battle.net/en/info/digital-purchase> (last visited Mar. 30, 2013) (advertising a PC video-game being available for purchase via digital download).

73. See, e.g., *Game*, PANDAAPP, http://download.pandaapp.com/?controller=iphone&action=category&c_id=16&f_iphone_able=1 (last visited Mar. 30, 2013) (offering iPhone video games for purchase via download).

74. Eric Qualls, *Xbox 360 Games on Demand FAQ*, ABOUT.COM, <http://xbox.about.com/od/xbox360faqs/a/Xbox-360-Games-On-Demand-Faq.htm> (last visited Mar. 30, 2013) (“A great feature of the Xbox 360 is that you can purchase full digital version Xbox 360 and original Xbox games on the Xbox Live Marketplace.”).

75. *Playstation® Store*, PLAYSTATION.COM, <http://us.playstation.com/psn/playstation-store/> (last visited Mar. 30, 2013) (“[D]iscover the games . . . you want, and remotely upload them to your platform of choice at the touch of a button.”).

76. *Featured Items*, STEAM, <http://store.steampowered.com/> (last visited Mar. 30, 2013) (advertising video-games for sale via digital download through Steam's IP-managing software client).

77. See, e.g., *Paying and Playing*, *supra* note 19 at 203 (discussing that a majority of games in the future will likely be digitally downloaded).

78. See, e.g., *Rockstar Games End User License Agreement*, ROCKSTAR GAMES (last revised Oct. 1, 2013), <http://www.rockstargames.com/eula> (“Subject to this Agreement and its terms and conditions, Licensor hereby grants you the nonexclusive, non-transferable, limited, and revocable right and license to use one copy of the Software for your personal non-commercial use for gameplay on a single [g]ame [p]latform. . .”).

79. *Supra* Part III. C.

However, again discussed above, publishers continually search for methods to threaten to prematurely destroy the used video-game market. Given that the used video-game submarket is still highly profitable to retailers and useful to consumers, GameStop and other video-game retailers have incentive to challenge the legality of these practices. Even delaying the demise of the used video-game submarket by one year would likely be worth the cost. Moreover, GameStop could use this opportunity to, at the height of its power, leave a lasting, precedential impression to form the legal foundation for a world where digital distribution of software is the norm.

In addition, addressing these issues would promote consumer rights at a point in time where technological measures threaten to render infringement practically impossible, and by extension, legal protections obsolete. Now that the balance of power between publisher and consumer is inverted, the Copyright Act must switch functions and begin to protect the interests of consumers.

This section details the applicability of the doctrines of first sale and copyright misuse, two policies within copyright law relevant to alienability. Both of these doctrines represent pro-consumer policies and attempt to limit the power of publishers. However, as noted below, these doctrines serve only as a defense to infringement and cannot be affirmatively invoked to prevent conduct such as the one-time use codes. In a world where primary infringement is almost impossible, these doctrines should be expanded if their pro-consumer policy goals are to survive in the digital age.

A. FIRST-SALE DOCTRINE

The first-sale doctrine is a property right that allows an owner of a copyrighted work to resell or discard his or her copy of that work.⁸⁰ This doctrine operates as an exception to a copyright holder's exclusive right to distribute a copyrighted work.⁸¹ The first-sale doctrine is a crucial balancing mechanism between the primary goals of copyright law. On the one hand, artists need to be granted a limited monopoly in order to encourage continued development of works.⁸² On the other hand, personal property rights disfavor restrictions on the alienation of property; property law generally allows owners of property to dispose of it without restraint.⁸³

80. 17 U.S.C. § 109 (2008).

81. *Brilliance Audio, Inc. v. Haight Cross Commc'ns*, 474 F.3d 365, 373-74 (6th Cir. 2007).

82. *Id.*

83. *Id.*

Thus, the first-sale doctrine is an important limitation on the monopoly power granted to the copyright holder because it allows just enough monopoly power to incentivize the creation of works while still protecting consumers' fundamental property rights.⁸⁴

Despite its importance in striking the balance between the monopoly power of a copyright holder and the personal property rights of a consumer, courts have held that the first-sale doctrine is a default rule, not a mandatory rule. Consequently, private contracts are a significant limitation on the first-sale doctrine, allowing for the protections offered by the doctrine to be bargained away. The seminal case on this topic is *ProCD, Inc. v. Zeidenberg*.⁸⁵ In *ProCD*, ProCD sold its telephone directory software subject to a licensing agreement forbidding commercial use of the software.⁸⁶ Zeidenberg challenged the legality of the licensing agreement, arguing that private contracts within the scope of the Copyright Act are preempted by the Act.⁸⁷ The Seventh Circuit ruled against Zeidenberg, holding that the Copyright Act's preemption clause is limited to state law preemption rather than preemption of private agreements.⁸⁸ The Seventh Circuit listed potential advantages of allowing private agreements regarding the sale and use of copyrighted works.⁸⁹

Following *ProCD*, courts began to allow private contracts to override the first-sale doctrine. Courts now make a distinction between whether the software is "owned" by the purchaser and whether the purchaser merely holds a license to use the software.⁹⁰ If a purchaser buys a full copy of the software, then he or she is an "owner" under the Copyright Act and thus is protected by the first-sale doctrine.⁹¹ On the other hand, if the purchaser buys only a non-transferrable license to use the software, then the purchaser is not an "owner" and cannot invoke the first-sale doctrine.⁹²

This metric has evolved to become decidedly anti-purchaser over time. Originally, courts were willing to look beyond the terms of a license agreement to the "economic realities" of the transfer to determine whether

84. *See id.* (noting that the common law typically disfavors restraints on alienation).

85. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

86. *Id.* at 1450.

87. *Id.* at 1453.

88. *Id.* at 1454.

89. *Id.* at 1455 (noting that enforcement of a "license may even make information more readily available, by reducing the price ProCD charges to consumer buyers.").

90. *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1151 (9th Cir. 2011).

91. 17 U.S.C. § 109 (2008) ("[t]he owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . .").

92. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010).

a sale or licensure occurred.⁹³ For example, in *Softman Products Co. v. Adobe Systems, Inc.*, Adobe sold portions of software subject to a similar license agreement in *ProCD*.⁹⁴ However, the court looked beyond the terms of the license agreement to determine whether the transaction was a sale or licensure.⁹⁵ It found that the transaction was a sale due to “circumstances surrounding the transaction,” wherein the purchaser paid for the software at the time of the transaction in order to obtain perpetual use and also assumed the risk for the product being damaged or lost.⁹⁶ However, the Ninth Circuit took another approach a decade later in *Vernor v. Autodesk*.⁹⁷ In *Vernor*, the Ninth Circuit declared the following factors for determining whether a transaction is a sale or licensure for first-sale doctrine purposes: (1) the copyright holder specifies that the user is granted a license; (2) the agreement significantly restricts the user’s ability to transfer the software; and (3) the agreement imposes notable use restrictions on the user.⁹⁸ These factors do not look to the “realities” of the transaction; they merely look to the face of a license agreement for specific terms, which if present causes the entire transaction to be labeled a “license” rather than a “sale.”⁹⁹ Thus, a software publisher need only include a piece of paper with boilerplate licensing terms to transform any software transaction into a licensure.¹⁰⁰ Due to the popularity of these “shrinkwrap agreements,” the applicability of the first-sale doctrine to software is limited.

For video-games sold subject to a license agreement, there is a strong argument that the *Vernor* approach is undesirable and should be discarded in favor of a more holistic view of a software transaction. As noted above, the purpose of the first-sale doctrine is to protect consumers’ property rights, particularly the right to alienate property.¹⁰¹ This purpose is undermined when the reality of a software exchange is a sale in every

93. *Softman Prods. Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1084-86 (C.D. Cal. 2001).

94. *Id.*

95. *Id.*

96. *Id.* at 1085.

97. 621 F.3d 1102.

98. *Id.* at 1110-11.

99. *See Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1156 (9th Cir. 2011) (applying the *Vernor* factors by looking only to the terms of Autodesk’s licensing agreement to conclude that the software transfer was a licensure rather than a sale).

100. *See generally* Matthew J. Turchyn, *It Looks Like a Sale; It Quacks Like a Sale. . . But It’s Not? An Argument for the Application of the Duck Test in a Digital First Sale Doctrine*, 5 J. BUS. ENTREPRENEURSHIP & L. 31 (2011) [hereinafter Turchyn] (proposing a more case-by-case analysis as to whether a transaction is a sale or licensure).

101. *Brilliance Audio, Inc. v. Haight’s Cross Commc’ns*, 474 F.3d 365, 373-74 (6th Cir. 2007).

sense except for the accompanying license agreement preventing resale. Moreover, the only purpose that at least some of these agreements serve is to shut out the secondary market for software, which is exactly what the first-sale doctrine is designed to prevent. Thus, video-game license agreements that serve no purpose other than to prevent resale would be a useful platform to argue against the overly narrow *Vernor* approach to sale versus licensure agreements.¹⁰²

Admittedly, not all software licensing agreements regarding video-games should be discarded. Some types of video-games, such as massive multiplayer online role-playing games, require software licensures in order to be viable.¹⁰³ However, the *Softman* approach would likely be able to account for these fundamentally different (and useful) types of licenses while still excising those that serve no purpose other than to prevent resale.

Using an example to illustrate the limitations of this doctrine, attacking the one-time use codes via the first-sale doctrine would be tricky even if video-game sales do render the purchaser an “owner.” Although the one-time use code does allow for resale of the video-game disc itself, it prevents resale of certain portions of the game’s code.¹⁰⁴ However, it does not necessarily follow that a purchaser of a video-game disc is entitled to, or owns, all of the code on that disc.¹⁰⁵ Rather, the purchaser likely only owns a copy of that exact embodiment of the software, which could prevent access to a portion of code on a video-game disc.¹⁰⁶

There are also some undesirable externalities in holding that the purchaser of a video-game is entitled to all of the code on the disc. There are legitimate reasons to lock some of a video-game’s code away from the user, either temporarily or permanently. For example, unlockable content is an effective way to incentivize players to continue playing a video-game.¹⁰⁷ Moreover, locking certain content from player access might be a

102. See Turchyn, *supra* note 100 at 45-47 (arguing in favor of the *Softman* approach for determining whether a transfer of software is a sale or license).

103. These types of games require a pay-to-play model, wherein the consumer must continually pay a monthly fee in order to access the game. *Pay to Play*, GIANT BOMB, <http://www.giantbomb.com/pay-to-play/3015-1364/> (last visited Apr. 20, 2014). These monthly fees are necessary to offset the maintenance costs for the game, such as running a large amount of game servers and periodically releasing new content to play. *Id.*

104. *Supra* Part III. A.

105. See, e.g., Graham, *supra* note 48, (noting that the first sale might not be construed by courts to include content locked by the one-time use code because that content is stylized as a “reward” to first purchasers).

106. *Id.*

107. David Sirlin, *A Few Things About Street Fighter 4*, SIRLIN.NET, Feb. 21, 2009, 10:24 PM, <http://www.sirlin.net/blog/2009/2/22/a-few-things-about-street-fighter-4.html?currentPage=2> (“I’m fully aware that casual players love unlocks, and that’s why non-essential content like costumes, movies, icons, and titles are all perfectly fine to give as

last-minute artistic choice.¹⁰⁸

Furthermore, attacking the one-time use codes via the first-sale doctrine would be a temporary solution at best. Publishers could easily move the portions of the software subject to the one-time use code off of the disc and distribute that code only digitally. Accordingly, even if the first-sale attack on one-time use codes is successful, it would not do much to broaden consumer rights.

Overall, it is unlikely that the first-sale doctrine in its current embodiment, an affirmative defense to copyright infringement,¹⁰⁹ is meant to be used to invalidate business tactics outside of the context of a claim of copyright infringement. Technical barriers render infringement is difficult or impossible to achieve, and thus the defense would not be presented. However, the policy concerns behind the first-sale doctrine are the most applicable to publishers' restraining resale of video-games and are the best place to turn to advocate for a change in the law. These policies are also useful in conjunction with a copyright misuse argument, as described below.

B. COPYRIGHT MISUSE DOCTRINE

The copyright misuse doctrine is a more promising platform to launch an attack restraints on software alienability. The copyright misuse doctrine is a judicially-created defense to copyright infringement, imported from its mirror-image in patent law.¹¹⁰ The purpose of the doctrine is to prevent holders of copyrights from leveraging their limited copyright to control areas outside of the monopoly granted by copyright protection.¹¹¹

As an initial matter, the copyright misuse doctrine, like the first-sale doctrine, is an affirmative defense to copyright infringement.¹¹² Because the doctrine is a judicially created equitable remedy with no basis in the Copyright Act, courts have declined to recognize offensive use of the doctrine as a cause of action absent allegations of infringement.¹¹³

Despite the inability to use the doctrine offensively, the copyright

rewards for playing 1p content.”).

108. See, e.g., Tor Thorsen, *Confirmed: Sex minigame in PS2 San Andreas*, GAMESPOT, July 15, 2005, <http://www.gamespot.com/news/confirmed-sex-minigame-in-ps2-san-andreas-6129301> (describing a sex mini-game on the disc of Grand Theft Auto: San Andreas, where the scandalous game was rendered inaccessible to players).

109. Vernor v. Autodesk, Inc., 621 F.3d 1102, 1106-07 (9th Cir. 2010).

110. Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1157 (9th Cir. 2011).

111. *Id.*

112. Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 846 (Fed. Cir. 1992).

113. *Id.*; Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1090 (9th Cir. 2005); Lava Records LLC v. Amurao, 354 Fed. App'x 461, 463 (2d Cir. 2009).

misuse doctrine is a stronger tool to combat copyright misuse because the remedy is more powerful and has relevance when no infringement is present. Whereas successful invocation of the first-sale doctrine only provides a defense against the defendant's infringement, successful invocation of the copyright misuse doctrine renders the copyright holder incapable of enforcing its copyright during the period of misuse.¹¹⁴ For comparison, proof of the inequitable conduct defense in patent law renders the patentee's patent unenforceable.¹¹⁵ The only difference for copyright misuse is that the unenforceability of the copyright is temporally limited to the period of misuse.¹¹⁶ Similarly to the inequitable conduct defense, the copyright holder cannot derive any benefit from its copyright through the period of misuse. Thus, while perhaps smaller than an atomic bomb, the copyright misuse doctrine is capable of causing serious damage to a copyright holder beyond the scope in which that defense is brought.

Perhaps due to the severity of the remedy, and certainly in part due to the doctrine's judicial genesis, the copyright misuse doctrine is used sparingly. While the infringer need not prove an actual antitrust violation, the courts tend to direct their attention to whether the copyright holder's license prevents the licensee from using any other competing product.¹¹⁷ For example, in *Practice Management Information Corp. v. American Medical Association*, the Ninth Circuit found copyright misuse as a matter of law.¹¹⁸ In that case, the American Medical Association licensed a coding system to the Health Care Financing Administration subject to a license agreement that forbade use of any other coding system.¹¹⁹ Because the license agreement plainly forbade using competing coding systems, the Ninth Circuit granted judgment as a matter of law in favor of the defendant.¹²⁰

Again, this section applies the doctrine to the one-time use codes to illustrate the difficulties with the doctrine as it currently exists. On one hand, the one-time use codes might satisfy the plain letter of the copyright

114. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 941 (9th Cir. 2010) *amended by MDY Indus., LLC v. Blizzard Entm't, Inc.*, No. 09-15932 2011 U.S. Dist. WL 538748 at *1 (9th Cir. Feb. 17, 2011).

115. This defense has been called the "'atomic bomb' of patent law" by the Federal Circuit. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1288 (Fed. Cir. 2011) (citing *Aventis Pharma S.A. v. Amphastar Pharm., Inc.*, 525 F.3d 1334, 1349 (Fed. Cir. 2008) (Rader, J., dissenting)).

116. *MDY Indus., LLC*, 629 F. 3d at 941.

117. *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1157-58 (9th Cir. 2011).

118. *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 520-21 (9th Cir. 1997).

119. *Id.*

120. *Id.*

misuse doctrine. It is likely true that new video-games and used video-games are in competition with each other; otherwise, publishers would not have bothered to develop the measures discussed above. On the other hand, as has been done in the past, courts might look at specific copyright holders and determine whether these tactics restrict use of other video-game copyright holders' works. The restraint on competing products is fundamentally different here; the competition restrained is that produced by the derivative market for the copyright holder's own work, whereas the competition restrained in prior cases is the use of comparable works by other copyright holders.

Even if the current copyright misuse doctrine does not apply, the doctrine is a promising target for legal reform by removing its judicial straightjacket. Without any judicial apprehension in applying their own concocted doctrine, copyright misuse would be able to deliver on its sweeping promises to confine copyright monopolies to the limitations envisioned in the Copyright Act. Thus, a strong argument can be made that Congress should adopt the copyright misuse doctrine into the Copyright Act, allowing for offensive use of the doctrine. Such adoption would remedy the major defect in the current doctrine; it would not be as explosive because one party could sue offensively, limiting the remedy to damages and it would give the copyright holder notice and an opportunity to correct the misuse. More importantly, offensive copyright misuse could give the Copyright Act the mechanism that it is missing to preserve its envisioned limitations, such as an inability to prevent resale, that have been eroded away by private ordering.¹²¹ Given that the balance of power between publishers and consumers has shifted radically in favor of publishers due to technological developments, this mechanism is necessary to enforce these policies when infringement is no longer possible.

The used video-game market would be a good platform to launch this argument. Several business tactics are clearly primarily intended to limit resale of video-games, thereby directly undermining the protections envisioned by the Copyright Act's first-sale doctrine. Whether via litigation in order to cause the judiciary to expand the copyright misuse doctrine or via lobbying for Congress to do the same, these tactics, which are designed specifically to undermine a core policy concern in the Copyright Act, highlight the need for reform if a policy of alienability of property is to survive into the digital era.

121. See Stephen Zinda, *Preserving the Copyright Balance: Why Copyright Misuse Should Invalidate Software Licenses Designed to Prohibit Resale and Oust Service Market Competition*, 48 HOUS. L. REV. 1241, 1256 (2012) (arguing for expansion of the copyright misuse defense to cover licenses intended to circumvent the first-sale doctrine).

Neither the first-sale doctrine nor the copyright misuse doctrine is likely to invalidate the anti-alienation measures described above. However, the attacks on the used video-game market might demonstrate how both of these doctrines fail to deliver on their broader promises of limiting copyright monopolies and ensuring the ability to alienate property. Thus, the practices in the secondary video-game market are the most likely candidates to launch an argument for reform.

CONCLUSION

Although the used video-game market may be on its deathbed due to impending purely digital distribution, lawmakers must be cautious not to inadvertently condone euthanizing it. When video-games are distributed purely in digital format without a tangible medium, then at that time the used video-game market might have outlived its usefulness and deserve to be neglected. Until then, the used video-game market is profitable and useful to retailers and consumers alike. Moreover, the legal treatment of the used video-game market could set the standard going forward into a world with substantially less physical property and much more intellectual property. As the same problem—technological innovation making infringement and resale impossible or economically unfeasible—spreads to other markets, such as sale of movies, television shows, and miscellaneous applications, the issues in the used video-game market will be especially salient, and the potential precedent set by it could be enormously valuable in the future.

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