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# **The End of Ownership**

## **Personal Property in the Digital Economy**

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# Notes

## 1 Introduction

1. Brad Stone, "Amazon Erases Orwell Books from Kindle," *New York Times*, July 17, 2009, <http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html>, accessed June 14, 2015.

2. If you borrowed a hard copy of this book from a friend or the local library, you are benefitting from their property right to lend the book. We discuss libraries in depth in chapter 6.

3. Paul Bentley, "How a Third of Bestselling Ebooks Cost More Than the Same Title in Hardback," *Daily Mail* (London), September 30, 2012, <http://www.dailymail.co.uk/sciencetech/article-2211022/How-bestselling-ebooks-cost-MORE-title-hardback.html>, accessed June 14, 2015.

4. Mark King, "Amazon Wipes Customer's Kindle and Deletes Account with No Explanation," *Guardian* (UK), October 22, 2012, <http://www.theguardian.com/money/2012/oct/22/amazon-wipes-customers-kindle-deletes-account>, accessed June 14, 2015.

5. Peter Cohen and Jeff Livingston, "More Than Half of U.S. Public Schools Don't Have Adequate Wireless Access," *Atlantic*, November 13, 2013, <http://www.theatlantic.com/education/archive/2013/11/more-than-half-of-us-public-schools-dont-have-adequate-wireless-access/281410/>, accessed June 14, 2015

6. Nate Hoffelder, "Scholastic to Close Storia eBookstore; Customers Could Lose Access to Their eBook Purchases," *The Digital Reader* (blog), July 27, 2014, [http://the-digital-reader.com/2014/07/27/scholastic-close-storia-ebookstore-customers-will-lose-access-ebook-purchases/#.U\\_ffdvSE-a5](http://the-digital-reader.com/2014/07/27/scholastic-close-storia-ebookstore-customers-will-lose-access-ebook-purchases/#.U_ffdvSE-a5), accessed June 14, 2015.

7. "Kindle Store Terms of Use," Amazon Digital Services, Inc., last modified September 6, 2012, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950>, accessed June 14, 2015.

8. Ibid.
9. "Conditions of Use," Amazon Services LLC, last modified December 5, 2012, <http://www.amazon.com/gp/help/customer/display.html?nodeId=508088>, accessed June 14, 2015.
10. See, e.g., Ron Wyden, "Regulatory Hardball about Software," *Wall Street Journal*, October 13, 2015, <http://www.wsj.com/articles/regulatory-hardball-about-software-1444776652>, accessed November 27, 2015.
11. Julie Bosman, "Publisher Limits Shelf Life for Library E-Books," *New York Times*, March 14, 2011, <http://www.nytimes.com/2011/03/15/business/media/15libraries.html>, accessed June 14, 2015; Jeremy Greenfield, "What Is Going on with Library E-Book Lending?" *Forbes*, June 22, 2012, <http://www.forbes.com/sites/jeremygreenfield/2012/06/22/what-is-going-on-with-library-e-book-lending/>, accessed June 14, 2015.
12. Michael Kelley, "Random House Says Libraries Own Their Ebooks," *LJ Insider* (blog), *Library Journal*, October 18, 2012, <http://lj.libraryjournal.com/2012/10/opinion/random-house-says-libraries-own-their-ebooks-lj-insider>, accessed June 14, 2015.; Peter Brantley, "Random House Did Not Mean Own, Exactly," *PWxyz* (blog), *Publisher's Weekly*, October 23, 2012, <https://web.archive.org/web/20150626112010/http://blogs.publishersweekly.com/blogs/PWxyz/2012/10/23/just-another-word/> (site discontinued), accessed June 14, 2015.
13. Matt Buchanan, "Five Stores That Hosed Customers with DRM," *Gizmodo* (blog), April 28, 2008, <http://gizmodo.com/384741/five-stores-that-hosed-customers-with-drm>, accessed June 14, 2015; Jon Healey, "Yahoo Pulls An MSN Music (Only Faster)," *Bit Player* (blog), *Los Angeles Times*, July 23, 2008, <http://opinion.latimes.com/bitplayer/2008/07/yahoo-pulls-and.html>, accessed June 14, 2015. Walmart later reversed course: Antone Gonsalves, "Wal-Mart Reverses Decision to Shutdown Digital Music DRM Servers," *InformationWeek*, October 10, 2008, <http://www.informationweek.com/wal-mart-reverses-decision-to-shutdown-digital-music-drm-servers-/d/d-id/1072848>, accessed June 14, 2015.
14. Julie Jacobson, "Perils of DRM: What Happens to Your Digital Content if the Provider Goes Out of Business?" *CEPro*, June 5, 2009, [http://www.cepro.com/article/print/what\\_happens\\_to\\_your\\_digital\\_content\\_if\\_the\\_provider\\_goes\\_out\\_of\\_business/](http://www.cepro.com/article/print/what_happens_to_your_digital_content_if_the_provider_goes_out_of_business/), accessed June 14, 2015.
15. Julie E. Cohen, "The Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace," *Connecticut Law Review* 28 (Summer 1996): 981–1039, 982; R. Anthony Reese, "The First Sale Doctrine in the Age of Digital Networks," *Boston College Law Review* 44 (March 2003): 577–652, at 584.
16. Henry Miller's novel was banned upon its initial release in 1934. The book was finally held not to be obscene by the Supreme Court three decades later in *Grove Press v. Gerstein*, 378 U.S. 577 (1964).

17. The album by rap group 2 Live Crew was declared obscene months after its release and after 1.7 million copies had been sold. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 582 (S.D. Fla. 1990), *rev'd sub nom. Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). That determination was later reversed on appeal.
18. Nearly two decades after the release of this Academy Award-winning film, it was deemed obscene by a judge in Oklahoma City who demanded copies be confiscated by local authorities. That decision too was eventually overturned. See *Camfield v. City of Okla. City*, 248 F.3d 1214, 1217 (10th Cir. 2001).
19. Iain Thompson, "Adobe Spies on Readers: EVERY DRM Page Turn Leaked to Base over SSL," *Register* (London), October 23, 2014, [http://www.theregister.co.uk/2014/10/23/adobe\\_updates\\_digital\\_editions\\_encryption/](http://www.theregister.co.uk/2014/10/23/adobe_updates_digital_editions_encryption/), accessed June 15, 2015.
20. Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State* (New York: Metropolitan Books, 2014).
21. Throughout this book, we have opted to use the gender-neutral singular "they" wherever possible. See Jeff Guo, "Sorry, grammar nerds. The singular 'they' has been declared Word of the Year," *Washington Post*, January 8, 2016, <https://www.washingtonpost.com/news/wonk/wp/2016/01/08/donald-trump-may-win-this-years-word-of-the-year/>, accessed March 16, 2016.
22. R. H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (October 1960): 1–44, at 15–28.
23. Thomas W. Merrill and Henry E. Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle," *Yale Law Journal* 110 (October 2000): 1–70, at 40–42.
24. Arthur Pigou, *The Economics of Welfare* (1920; repr., New York: Palgrave Macmillan, 2013), 184–185.
25. For better or worse the 2014 film, *The Interview*, was initially withheld from distribution due to fears over its criticism of North Korea. Drew Harwell and Ellen Nakashima, "Hackers' Threats Prompt Sony Pictures to Shelve Christmas Release of 'The Interview,'" *Washington Post*, December 17, 2014, [https://www.washingtonpost.com/business/economy/top-movie-theater-chains-cancel-premiere-showings-of-the-interview/2014/12/17/dd1bdb2a-8608-11e4-9534-f79a23c40e6c\\_story.html](https://www.washingtonpost.com/business/economy/top-movie-theater-chains-cancel-premiere-showings-of-the-interview/2014/12/17/dd1bdb2a-8608-11e4-9534-f79a23c40e6c_story.html), accessed June 15, 2015. Disney maintains a "vault" of films that are unavailable for home viewing, in part as a means of introducing scarcity and driving demand, but also in part to ensure that films like 1946's *Song of the South* remain unseen if not forgotten. Jason Sperb, *Disney's Most Notorious Film: Race, Convergence, and the Hidden Histories of Song of the South* (Austin: University of Texas Press, 2012).
26. Eric von Hippel, *Democratizing Innovation* (Cambridge, MA: MIT Press, 2005).

27. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 446 n.27 (1984).
28. See 17 U.S.C. § 504(c) (2012).
29. The Pirate Bay, for those unfamiliar, is a popular site that allows users to contribute and locate torrent files that facilitate the often unauthorized distribution of copyrighted material.

## 2 Property and the Exhaustion Principle

1. Brad Dashoff and John Antonacci, "Understanding Real Property Interests and Deeds," *ABA GPSolo Law Trends & News* 7, no. 4 (Summer 2011), [http://www.americanbar.org/newsletter/publications/law\\_trends\\_news\\_practice\\_area\\_e\\_newsletter\\_home/2011\\_summer/real\\_property\\_interests\\_deeds.html](http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/2011_summer/real_property_interests_deeds.html), accessed June 15, 2015.
2. For a more detailed exposition of these devices, see Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes* (Huntington, NY: Juris Publishing, 2004), 287.
3. The courts have imposed some important limitations on the power of real property owners to saddle future generations with restrictions on the use of that property. Racially restrictive covenants, which prohibited the sale of real estate to nonwhites, were deemed unconstitutional in *Shelley v. Kraemer*, 334 U.S. 1 (1948).
4. Christina Mulligan, "A Numerus Clausus Principle for Intellectual Property," *Tennessee Law Review* 80 (Winter 2013): 235–290, at 251–252.
5. Courts have historically proven hostile to servitudes on chattels due to their tendency to provide insufficient notice, restrain alienation, limit future unforeseen usability, and impose high information costs on subsequent purchasers. See Zechariah Chafee Jr., "The Music Goes Round and Round: Equitable Servitudes and Chattels," *Harvard Law Review* 69, no. 7 (May 1956): 1250–1264, at 1261; Molly Shaffer Van Houweling, "The New Servitudes," *Georgetown Law Journal* 96 (2008): 885–950, at 897–898.
6. See, e.g., *De Mattos v. Gibson* (1858) 4 De G&J 276 (Eng.); *Taddy & Co. v. Sterious & Co.* (1904) 1 Ch. 354 (Eng.); *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907); *Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); Van Houweling, "The New Servitudes." But see Glen O. Robinson, "Personal Property Servitudes," *University of Chicago Law Review* 71 (Fall 2004): 1449–1523 (arguing in favor of servitudes on personal property).
7. Christina Mulligan, "Personal Property Servitudes on the Internet of Things," *Georgia Law Review* (forthcoming).
8. *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907).

9. J. K. Rowling, *Harry Potter and the Deathly Hallows* (New York: Arthur A. Levine Books, 2007), 417–418.
10. Exhaustion also plays a role in trademark law, where it permits the resale of authentic goods without the trademark holder's permission. See generally Yvette Joy Liebesman and Benjamin Wilson, "The Mark of a Resold Good," *George Mason Law Review* 20 (Fall 2012): 157–205.
11. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).
12. 17 U.S.C. § 102(a) (2012).
13. *Ibid.*, § 106.
14. See 35 U.S.C. § 154(a)(2) (2012); 17 U.S.C. § 302(a) (2012).
15. Thomas Jefferson to Isaac McPherson, 13 August 1813, in *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb and Albert Ellery Bergh (Washington, DC: Thomas Jefferson Memorial Association, 1905), 334.
16. Joshua A.T. Fairfield, "Virtual Property," *Boston University Law Review* 85, no. 4 (October 2005): 1047–1102.
17. William Blackstone, *Commentaries on the Laws of England*, ed. John L. Wendell, vol. 2 (New York: Harper & Bros., 1857), 1.
18. See Albert W. Alschuler, "Rediscovering Blackstone," *University of Pennsylvania Law Review* 145 (November 1996): 30–32.
19. John Locke, "Of Property," chap. 5 in *Second Treatise of Government*, ed. Jonathan Bennett (2010), [http://www.earlymoderntexts.com/assets/pdfs/locke1689a\\_1.pdf](http://www.earlymoderntexts.com/assets/pdfs/locke1689a_1.pdf), accessed June 16, 2015.
20. *Hegel's Philosophy of Right*, trans. T. M. Knox (London: Oxford University Press, 1820).
21. Joseph Campbell, *The Hero with a Thousand Faces* (New York: Pantheon Books, 1949).
22. The Copyright Act exempts certain public performances of audiovisual works from liability so long as, among other things, the diagonal screen size is no greater than fifty-five inches. Seriously. 17 U.S.C. § 110(5)(B) (2012).
23. Unlike the term "publicly" as used on the public performance and display rights, the phrase "to the public" as used in the distribution right is undefined in the Copyright Act. Few cases have considered the implications of that phrase.
24. Thad Moore, "Here's Why Atari Fans Just Spent \$100,000 on Video Games from a Dump," *Washington Post*, September 4, 2015, <https://www.washingtonpost.com/news/the-switch/wp/2015/09/04/heres-why-atari-fans-just-spent-100000-on-video-games-from-a-dump>, accessed November 25, 2015.

25. *Ibid.*, § 109(c), 90 Stat. at 2549 (current version at 17 U.S.C. § 109[c] [2012]).
26. *Ibid.*, at § 117, 90 Stat. at 2565 (current version at 17 U.S.C. § 117 [2012]).
27. *Clemens v. Estes*, 22 F. 899 (D. Mass. 1885).
28. *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894).
29. *Doan v. Am. Book Co.*, 105 F. 772 (7th Cir. 1901).
30. *Kipling v. G. P. Putnam's Sons*, 120 F. 631 (2d Cir. 1903).
31. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).
32. 1909 Copyright Act: An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, ch. 320, § 41, 35 Stat. 1075, 1084 (1909).
33. Copyright Act of 1976, Pub. L. No. 94-553, § 109, 90 Stat. 2541, 2548–49 (1976) (current version at 17 U.S.C. § 109 [2012]).
34. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).
35. There are half measures between the full international exhaustion regime the Court adopted in *Kirtsaeng* and the place-of-manufacture rule endorsed by *Wiley*. Some countries have adopted regional exhaustion where a sale in one country exhausts rights in a defined number of neighboring territories, but not the world at large. Ariel Katz, “The First Sale Doctrine and the Economics of Post-Sale Restraints,” *Brigham Young University Law Review* 2014, no. 1 (2014): 57–142, at 75. Another option suggested in Justice Kagan’s concurring opinion in *Kirtsaeng* would preclude unauthorized importation of a lawfully sold copy, but once it reached the United States would recognize the first sale doctrine. *Kirtsaeng*, 133 S. Ct. at 1372–1373 (Kagan, J., concurring).
36. Katz, “The First Sale Doctrine,” 82.
37. Leah Shaver, “Copyright and Inequality,” *Washington University Law Review* 92 (2014): 132 (“When asked why they do not read more often, respondents overwhelmingly cite the affordability and availability of books as the primary barriers. The most common answers include: ‘Books are expensive’ (45 percent), ‘Books are so expensive that you cannot afford to buy them’ (33 percent).”).
38. Shamnad Basheer et al., “Exhausting Copyrights and Promoting Access to Education: An Empirical Take,” *Journal of Intellectual Property Rights* 17 (2012): 335–344, at 340.
39. Carolyn Bigda, “Money-saving Tips for College Students,” *Chicago Tribune*, August 11, 2015, <http://www.chicagotribune.com/business/yourmoney/sc-cons-0813-started-20150810-column.html>, accessed November 25, 2015.

40. Ben Popken, "College Textbook Prices Have Risen 1,041 Percent Since 1977," *NBC News*, August 6, 2015, <http://www.nbcnews.com/feature/freshman-year/college-textbook-prices-have-risen-812-percent-1978-n399926>, accessed November 25, 2015.
41. Jonathan Band and Jonathan Gerafi, *Profitability of Copyright-Intensive Industries* (Washington, DC: infojustice.org, 2013), PDF report, <http://infojustice.org/wp-content/uploads/2013/06/Profitability-of-Copyright-Industries.pdf>, accessed July 6, 2015.
42. Ibid.; Heather Morrison, "Chapter Two: Scholarly Communication in Crisis," in "Freedom for Scholarship in the Internet Age" (doctoral dissertation, Simon Fraser University, 2011), <https://web.archive.org/web/20150828020037/http://pages.cmns.sfu.ca/heather-morrison/chapter-two-scholarly-communication-in-crisis/> (site discontinued), accessed July 6, 2015; see also "Of Goats and Headaches," *Economist*, May 26, 2011, <http://www.economist.com/node/18744177/>, accessed July 6, 2015 (noting Elsevier's 36 percent profit margins).
43. Mark J. Perry, "The Public Thinks the Average Company Makes a 36% Profit Margin, Which Is about 5X Too High," *AEIdeas*, April 2, 2015, <https://www.aei.org/publication/the-public-thinks-the-average-company-makes-a-36-profit-margin-which-is-about-5x-too-high>, accessed July 6, 2015.
44. It's worth noting that the college textbook market is particularly susceptible to insensitivity to rising prices since those who make decisions about which books are required in a course, namely professors, don't pay for them.
45. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).
46. Fred R. Byers, "Care and Handling of CDs and DVDs—A Guide for Librarians and Archivists" (Gaithersburg, MD: National Institute of Standards and Technology, 2003), <http://www.itl.nist.gov/iad/894.05/docs/CDandDVDCareandHandlingGuide.pdf>, accessed July 6, 2015; "Preserving CDs and DVDs," National Archives of Australia, <http://www.naa.gov.au/records-management/agency/preserve/physical-preservation/CDs-and-DVDs.aspx>, accessed November 15, 2015.
47. Chuck Philips, "Compact Disc War Headed for the Court," *Los Angeles Times*, July 31, 1993, [http://articles.latimes.com/1993-07-31/entertainment/ca-18861\\_1\\_compact-discs](http://articles.latimes.com/1993-07-31/entertainment/ca-18861_1_compact-discs), accessed November 15, 2015.
48. Ibid.
49. James Lardner, *Fast Forward: Hollywood, the Japanese and the VCR Wars* (New York: W. W. Norton, 1987), 179.
50. Joshua M. Greenberg, *From Betamax to Blockbuster: Video Stores and the Invention of Movies on Video* (Cambridge, MA: MIT Press, 2010), 119.

51. "Terms of Use," Beachbody, LLC, last modified July 18, 2014, [https://www.beachbody.com/product/about\\_us/terms\\_of\\_use.do](https://www.beachbody.com/product/about_us/terms_of_use.do), accessed July 6, 2015.
52. See 17 U.S.C. § 109(b) (2012).
53. Ellen Forman, "Nintendo Zaps Blockbuster Reproduction of Game Instructions Spurs Copyright Lawsuit," *Sun Sentinel* (Fort Lauderdale), August 13, 1989, [http://articles.sun-sentinel.com/1989-08-13/business/8902250572\\_1\\_nintendo-blockbuster-video-games](http://articles.sun-sentinel.com/1989-08-13/business/8902250572_1_nintendo-blockbuster-video-games), accessed July 6, 2015; Henry Gilbert, "Lawsuits That Altered the Course of Gaming History," *GamesRadar*, February 4, 2014, <http://www.gamesradar.com/lawsuits-changed-gaming/>, accessed July 6, 2015.
54. Robert Purchase, "Lionhead: Pre-owned Worse Than Piracy," *Eurogamer*, May 17, 2011, <http://www.eurogamer.net/articles/2011-05-17-lionhead-pre-owned-worse-than-pc-piracy>, accessed July 6, 2015.
55. John Gaudiosi, "GameStop President Tony Bartel Talks Xbox One, PlayStation 4, Used Games and Pre-Orders," *Forbes*, May 21, 2013, <http://www.forbes.com/sites/johngaudiosi/2013/05/21/gamestop-president-tony-bartel-talks-xbox-one-playstation-4-used-games-and-pre-orders/>, accessed July 6, 2015.
56. Hidehiro Inooka, "Electronic Content Processing System, Electronic Content Processing Method, Package of Electronic Content, and Use Permission Apparatus," US Patent 9,183,358, filed September 12, 2012, issued November 10, 2015, <http://www.google.com/patents/US20130007892>, accessed November 15, 2015.
57. Timothy Geigner, "Microsoft Capitulates, Removes Online DRM from Xbox One," *Techdirt*, June 19, 2013, <https://www.techdirt.com/articles/20130619/13581923535/microsoft-capitulates-removes-online-drm-xbox-one.shtml>, accessed July 6, 2015.
58. Wesley Yin-Poole, "Fallout: New Vegas Dev Hopes Digital Distribution 'Stabs Used Game Market in the Heart,'" *Eurogamer*, December 13, 2011, <http://www.eurogamer.net/articles/2011-12-13-fallout-new-vegas-dev-hopes-digital-distribution-stabs-used-game-market-in-the-heart>, accessed July 6, 2015.
59. See Daniel Gross, "Does a Free Download Equal a Lost Sale," *New York Times*, November 21, 2004, <http://www.nytimes.com/2004/11/21/business/yourmoney/does-a-free-download-equal-a-lost-sale.html>, accessed July 6, 2015.
60. Jordan Kahn, "Eddy Cue: Apple Passed 35 Billions Songs Sold on iTunes Last Week, 40 Million iTunes Radio Listeners," *9to5Mac*, May 28, 2014, <http://9to5mac.com/2014/05/28/eddy-cue-apple-passed-35-billions-songs-sold-on-itunes-last-week-40-million-itunes-radio-listeners/>, accessed March 15, 2016.
61. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 467 (C.D. Cal. 1979).

### 3 Copies, Clouds, and Streams

1. In China, books were printed as early as the late sixth century. And around 1050, Pi Sheng developed movable type, hundreds of years before Gutenberg. John Scales Avery, *Information Theory and Evolution* (Singapore: World Scientific Publishing, 2012), 138–139.

2. For book publishers, the desire to control the press was rooted in economic concerns. Without competition, they could make a tidy sum. But for governments, control over the printing press was a powerful tool for suppressing criticism. Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change* (Cambridge, UK: Cambridge University Press, 1980).

3. For more on the history of Venetian and English printing privileges, see Maurizio Borghi, “A Venetian Experiment on Perpetual Copyright,” in *Privilege and Property: Essays on the History of Copyright*, ed. Ronan Deazley, Martin Kretschmer, and Lionel Bentley (Cambridge, UK: Open Book Publishers, 2010), 137–155; Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1995).

4. Rose, *Authors and Owners*, 14.

5. Prior to the Copyright Act of 1909, authors could generally control public performances of unpublished works. See *Ferris v. Frohman*, 223 U.S. 424 (1912) (applying the Copyright Act of 1891).

6. *Pope v. Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (1741).

7. *Stephens v. Cady*, 55 U.S. 528 (1853).

8. See, e.g., *Parton v. Prang*, 18 F. Cas. 1273 (C.C.D. Mass. 1872) (No. 10,784); *Pushman v. New York Graphic Society*, 39 N.E.2d 249 (N.Y. 1942).

9. Copyright Act of 1976, at § 202, 90 Stat. at 2568–69 (current version at 17 U.S.C. § 202 [2012]).

10. “iTunes Music,” Apple, Inc., <http://www.apple.com/itunes/music/>, accessed March 13, 2016 (noting a library of forty-three million songs); Jordan Kahn, “Eddy Cue: Apple Passed 35 Billion Songs Sold on iTunes Last Week, 40 Million iTunes Radio Listeners,” *9to5Mac*, May 28, 2014, <http://9to5mac.com/2014/05/28/eddy-cue-apple-passed-35-billion-songs-sold-on-itunes-last-week-40-million-itunes-radio-listeners/>, accessed March 13, 2016; “iTunes Store Top Music Retailer in the US,” Apple Press Info, April 3, 2008, <https://www.apple.com/pr/library/2008/04/03iTunes-Store-Top-Music-Retailer-in-the-US.html>, accessed March 13, 2016 (noting that iTunes “became the largest retailer in the US based on the amount of music sold during January and February 2008”).

11. Jim Milliot, "BEA 2013: The E-book Boom Years," *Publisher's Weekly*, May 29, 2013, <http://www.publishersweekly.com/pw/by-topic/industry-news/bea/article/57390-bea-2013-the-e-book-boom-years.html>, accessed June 15, 2015; Marisa Bluestone, "U.S. Publishing Industry's Annual Survey Reveals \$28 Billion in Revenue in 2014," *Publishers.org*, June 10, 2015, <http://publishers.org/news/us-publishing-industry-s-annual-survey-reveals-28-billion-revenue-2014>, accessed June 15, 2015.
12. Alexandra Alter, "The Plot Twist: E-Book Sales Slip, and Print Is Far from Dead," *New York Times*, September 22, 2015, <http://www.nytimes.com/2015/09/23/business/media/the-plot-twist-e-book-sales-slip-and-print-is-far-from-dead.html>, accessed November 18, 2015.
13. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013).
14. The Supreme Court of Canada came to a different conclusion in a case involving the transfer of images from posters to canvases without the copyright holder's consent. *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34 [2002], 2 S.C.R. 336 (Can.). The Court determined that image was "was not reproduced" but "transferred from one display to another" (338).
15. See Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028–29 (1980) (current version at 17 U.S.C. § 117 [2012]).
16. "Term and Conditions," Apple, Inc., last modified October 21, 2015, <http://www.apple.com/legal/internet-services/itunes/us/terms.html>, accessed November 18, 2015.
17. Or not. See *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977).
18. 134 S. Ct. 2498, 2508 (2014).
19. See *White-Smith Music Publ'g. Co. v. Apollo Co.*, 209 U.S. 1 (1908).
20. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).
21. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993).
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#### 4 Ownership and the Fine Print

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45. For an example of how the Ninth Circuit has utilized objective facts in determining the presence or absence of a first sale, see *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977).
46. See Unordered Merchandise Act, 39 U.S.C. § 3009(b) (2012). Unordered merchandise "may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender."
47. The *Vernor* test is also inconsistent with the result in *Augusto*. Applied to the promotional CDs, each prong of the *Vernor* test is satisfied: (1) UMG characterized the transaction as a license; (2) it prohibited recipients from transferring the discs to others; and (3) it confined them to personal noncommercial use of the discs.
48. See, e.g., *DSC Commc'ns Corp. v. DGI Techs.*, 81 F.3d 597 (5th Cir. 1996); *Krause v. Titleserv, Inc.*, 402 F.3d 119 (2d Cir. 2005).
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58. See Wendy Gordon, "Intellectual Property as Price Discrimination: Implications for Contract," *Chicago-Kent Law Review* 73 (1998): 1367–1390, at 1383–1390 (noting that secondary markets are often much better at price discrimination than single monopolistic ones).
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## 5 The “Buy Now” Lie

1. See Lanham Act, 15 U.S.C. §§ 1051–1141n (2013).
2. *Ibid.*, § 43, 15 U.S.C. § 1125; Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2013).
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14. In addition, states have adopted their own consumer protection laws prohibiting deceptive trade practices such as false or misleading advertisements. And most

outlaw unfair acts or practices. See, e.g., California Business & Professions Code § 17200.

15. Lanham Act § 43(a). Courts interpreted section 43(a) as creating a sui generis tort of false advertising. Although not all courts were quick to reach that conclusion, they eventually reached something approaching consensus. With the Trademark Law Revision Act of 1988, Congress codified the prevailing judicial reading, dividing section 43(a) into two subsections. The first establishes liability for the infringement of unregistered marks and trade dress. The second creates claims for false advertising and product disparagement. See Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 132, 102 Stat. 3935, 3946 (1988) (current version at 15 U.S.C. § 1125[a] [2013]).

16. Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (2013).

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18. Lanham Act §43(a).

19. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

20. In one recent example, the court dismissed a false advertising claim brought on behalf of consumers, who alleged that they purchased crab cakes labeled as "Made in the USA" that were actually manufactured with nondomestic crabmeat. See *Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278 (4th Cir. 2004).

21. See *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 693 (2d Cir. 1971); *Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987) ("Competitors have the greatest interest in stopping misleading advertising, and ... section 43(a) allows those parties with the greatest interest in enforcement, and in many situations with the greatest resources to devote to a lawsuit, to enforce the statute rigorously"); *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 212 (D.D.C. 1989), *aff'd in part, rev'd in part*, 913 F.2d 958 (D.C. Cir. 1990) ("While the Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving the cause of action to competitors who are prepared to vindicate the injury caused to consumers.").

22. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

23. See Federal Trade Commission Act § 5(b).

24. *Ibid.*

25. *Johnson & Johnson v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992) (plaintiff must show that "a statistically significant part of the commercial

audience holds the false belief allegedly communicated by the challenged advertisement”).

26. *McNeilab, Inc. v. Am. Home Prods. Corp.*, 675 F. Supp. 819, 825 (S.D.N.Y. 1987).

27. *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015) (“The Commission ... considers whether ‘at least a significant minority of reasonable consumers’ would ‘likely’ interpret the ad to assert the claim”) (quoting *In re Telebrands Corp.*, 140 F.T.C. 278, 291 [2005]).

28. *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (3 percent is not proof that a “significant portion” were deceived); *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms.*, 19 F.3d 125 (3d Cir. 1994) (survey showing 7.5 percent were deceived or misled was not sufficient).

29. *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973) (finding “it hard to overturn the deception findings of the Commission if the ad thus misled 15 percent (or 10 percent) of the buying public”); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 594 (3d Cir. 2002) (survey showing 15 percent of respondents were misled is sufficient to prove a likelihood of deception among a “substantial portion” of the intended audience); *Telebrands Corp. v. Media Grp., Inc.*, 45 U.S.P.Q.2d (BNA) 1342, 1348, 1997 WL 790576, \*21–22 (S.D.N.Y. Dec. 23, 1997) (survey showing that 20 percent of the viewers took away the false message is sufficient).

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31. *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944) (quoting *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 F. 73, 75 [2d Cir. 1910]).

32. James C. Miller to John D. Dingell, October 14, 1983: “A ‘material’ misrepresentation or practice is one which is likely to affect a consumer’s choice of or conduct regarding a product.”

33. See James B. Astrachan et al., “An Overview of the Tools Available to the Federal Trade Commission,” in *The Law of Advertising*, vol. 5, § 18.01 (Newark, NJ: Matthew Bender, 2015).

34. Aaron Perzanowski and Chris Hoofnagle, “What We Buy When We Buy Now,” forthcoming *University of Pennsylvania Law Review*, on file with authors.

35. The sample was also roughly in line with the U.S. population in terms of race and geographic distribution.

36. Those terms provided in relevant part:

Upon your download of MediaShop Content and payment of any applicable fees (including applicable taxes), the Content Provider grants you a non-exclusive right to view, use, and display such MediaShop Content an unlimited number of times, solely on the MediaShop or a Reading Application or as otherwise permitted as part of the Service, solely on the number of Supported Devices specified in the MediaShop Store, and solely for your personal, non-commercial use. MediaShop Content is licensed, not sold, to you by the Content Provider. The Content Provider may include additional terms for use within its MediaShop Content. ...

Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the MediaShop Content or any portion of it to any third party, and you may not remove or modify any proprietary notices or labels on the MediaShop Content. In addition, you may not bypass, modify, defeat, or circumvent security features that protect the MediaShop Content. ...

Termination. Your rights under this Agreement will automatically terminate if you fail to comply with any term of this Agreement. In case of such termination, you must cease all use of the MediaShop Store and the MediaShop Content, and MediaShop may immediately revoke your access to the MediaShop Store and the MediaShop Content without refund of any fees. MediaShop's failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of its rights.

37. Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, "Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts," New York University Law and Economics Working Papers, Paper 195, New York University School of Law, New York, 2014, 22, [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1199&context=nyu\\_lewp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1199&context=nyu_lewp), accessed July 7, 2015 (finding that only one or two out of every thousand retail software shoppers access license agreements).

38. Ben Sheffner of the Motion Picture Association of America has claimed, "If you ask people when you go to a site to buy a movie or a book or a song, I think they pretty much understand that you're not actually buying the copyright. What you are doing is you're purchasing or buying a license which permits you to do certain things." And Catherine Bridge of Disney has stated, "I'm not sure that the consumers have the expectation that when they hit the buy button for some music that they're thinking about how they're going to resell it." See Department of Commerce Internet Policy Task Force, White Paper on Remixes, First Sale, and Statutory Damages, 56–57n35, January 2016, <http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>, accessed April 10, 2016.

39. Tim Cushing, "Barnes & Noble Decides That Purchased Ebooks Are Only Yours Until Your Credit Card Expires," *Techdirt*, November 27, 2012, <https://www.techdirt.com/articles/20121126/18084721154/barnes-noble-decides-that-purchased-ebooks-are-only-yours-until-your-credit-card-expires.shtml>, accessed August 21, 2015.

40. Consider the following language from the Kindle Store's Terms of Use:

Risk of Loss. Risk of loss for Kindle Content transfers when you download or access the Kindle Content.

Termination. Your rights under this Agreement will automatically terminate if you fail to comply with any term of this Agreement. In case of such termination, you must cease all use of

the Kindle Store and the Kindle Content, and Amazon may immediately revoke your access to the Kindle Store and the Kindle Content without refund of any fees. Amazon's failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of its rights. ("Kindle Store Terms of Use," Amazon Digital Services, Inc.)

41. Not some older devices. And terms are still limited to "Supported Devices." "Supported Device" means a mobile, computer, or other supported electronic device other than a Kindle on which you are authorized to operate a "Reading Application."

42. Kelly Clay, "Amazon Confirms It Makes No Profit on Kindles," *Forbes*, October 12, 2012, <http://www.forbes.com/sites/kellyclay/2012/10/12/amazon-confirms-it-makes-no-profit-on-kindles/>, accessed August 21, 2015; Steve Kovach, "Amazon Will Lose Millions Selling the Kindle Fire, But That's the Point," *Business Insider*, September 30, 2011, <http://www.businessinsider.com/kindle-fire-profit-margins-2011-9>, accessed August 21, 2015.

43. Oscar Williams-Grut, "Apple's iPhone: The Most Profitable Product in History," *Independent* (UK), January 29, 2015, <http://www.independent.co.uk/news/business/analysis-and-features/apples-iphone-the-most-profitable-product-in-history-10009741.html>, accessed August 21, 2015; Daisuke Wakabayashi, "Apple's Market Cap Loses \$60 Billion After iPhone Sales Disappoint," *Wall Street Journal*, July 22, 2015, <http://www.wsj.com/articles/apple-earnings-boosted-by-iphone-sales-1437510647>, accessed August 21, 2015.

44. "iCloud: Family Sharing," Apple, Inc., <http://www.apple.com/icloud/family-sharing/>, accessed August 25, 2015; see also "Steam Family Sharing," Valve Corporation, <http://store.steampowered.com/promotion/familysharing>, accessed August 25, 2015.

45. Geoffrey A. Fowler, "Facebook Heir? Time to Choose Who Manages Your Account When You Die," *Wall Street Journal*, February 12, 2015, <http://www.wsj.com/articles/facebook-heir-time-to-choose-who-manages-your-account-when-you-die-1423738802>, accessed August 25, 2015.

46. See Fiduciary Access to Digital Assets and Digital Accounts Act, 79 Del. Laws 416 (2014), [http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB%20345/\\$file/legis.html](http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/HB%20345/$file/legis.html), accessed August 25, 2015; Uniform Fiduciary Access to Digital Assets Act (Nat'l Conf. of Comm'rs on Unif. State Laws 2014), [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf), accessed August 25, 2015.

47. Fiduciary Access to Digital Assets and Digital Accounts Act §§ 5004–5005.

48. *Ibid.*, § 5004.

49. That case is even stronger when gender is taken into account. As is often the case with online surveys, women were overrepresented. And since men were

significantly more confused about their resale rights—the same 10 percent for books, but 13.5 percent for music and 25 percent for movies—a more representative gender distribution would have likely shown greater overall deception.

50. Since most readers don't rely on any device other than their eyes or a pair of glasses when reading a hardcover book, the survey asked respondents whether they would prefer a book they can read at the location of their choice. This is an imperfect substitute for the device-of-choice inquiry, but it yielded nearly indistinguishable results.

51. The study reduced the impact of outliers by capping the maximum response for each right at \$20.

52. Steven Tweedie, "Apple Made a Small but Significant Change to 'Free' Apps in the App Store," *Business Insider*, November 20, 2014, <http://www.businessinsider.com/apple-changes-free-apps-to-get-in-app-store-2014-11>, accessed August 25, 2015.

53. See Nathaniel Good, Jens Grossklags, David Thaw, Aaron Perzanowski, Deirdre Mulligan, and Joseph Konstan, "User Choices and Regret: Understanding Users' Decision Process about Consensually Acquired Spyware," *I/S: A Journal of Law and Policy* 2, no. 2 (2006): 283–344; Joel R. Reidenberg, Travis Breaux, Lorrie Faith Cranor, Brian French, Amanda Grannis et. al., "Disagreeable Privacy Policies: Mismatches Between Meaning and Users' Understanding," *Berkeley Technology Law Journal* 30 (2015): 39–87, at 48; Lorrie Faith Cranor, "Necessary but Not Sufficient: Standardized Mechanisms for Privacy Notice and Choice," *Journal of Telecommunications & High Technology Law* 10, (2012): 273–307, at 293; Marie C. Pollio, "The Inadequacy of HIPAA's Privacy Rule: The Plain Language Notice of Privacy Practices and Patient Understanding," *N.Y.U. Annual Survey of American Law* 60, (2004): 579–620, at 615; Katy K. Liu, "Fair and Accurate Credit Transactions Act Regulations: Disclosure, Opt-Out Rights, Medical Information Usage, and Consumer Information Disposal," *I/S: A Journal of Law and Policy* 2, (2006): 715–735, at 720.

## 6 The Promise and Perils of Digital Libraries

1. Others contend the first major public library was the Boston Public Library, founded in 1852 through a large donation from Joshua Bates, because it was the first to make all of its books "free to all" Boston citizens. See John Palfrey, *BiblioTech: Why Libraries Matter More Than Ever in the Age of Google* (New York: Basic Books, 2015), 1.

2. See, e.g., N.Y. C.P.L.R. § 4509 (Consol. 2015) ("Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries,

requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute.”); “Code of Ethics of the American Library Association,” last amended January 22, 2008, <http://www.ala.org/advocacy/proethics/codeofethics/codeethics>, accessed August 6, 2015; “Privacy: An Interpretation of the Library Bill of Rights,” American Library Association, adopted June 19, 2002, <http://www.ala.org/Template.cfm?Section=interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=132904>, accessed August 6, 2015. See also Adam L. Penenberg, “Don’t Mess with Librarians,” *Wired*, September 15, 2004, <http://www.wired.com/2004/09/dont-mess-with-librarians/>, accessed August 6, 2015.

3. Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (New York: Oxford University Press, 2015). See also “DRAFT—Library Privacy Guidelines for E-book Lending and Digital Content Vendors,” American Library Association, last modified June 16, 2015, <http://connect.ala.org/node/241070#sthash.OUjmCDa7.dpuf>, accessed August 6, 2015; “Protecting user privacy and confidentiality has long been an integral part of the intellectual freedom mission of libraries.”

4. Boston Public Library’s McKim Building bears the inscription “FREE-TO-ALL” above its main entrance—an expression of one of the longstanding values of the BPL system. For a photograph of the inscription, see [http://maps.bpl.org/sites/default/files/images/about\\_ph\\_6.jpg?1361904290](http://maps.bpl.org/sites/default/files/images/about_ph_6.jpg?1361904290), accessed August 6, 2015.

5. David O’Brien, Urs Gasser, and John G. Palfrey Jr., “E-Books in Libraries: A Briefing Document Developed in Preparation for a Workshop on E-Lending in Libraries,” Berkman Center Research Publication No. 2012-15, Berkman Center for Internet & Society, Harvard University, Cambridge, MA, 2012, [https://cyber.law.harvard.edu/publications/2012/ebooks\\_in\\_libraries](https://cyber.law.harvard.edu/publications/2012/ebooks_in_libraries), accessed August 6, 2015.

6. Ted Striphas, *The Late Age of Print: Everyday Book Culture from Consumerism to Control* (New York: Columbia University Press, 2009), 35.

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accessed August 6, 2015; Ken Chad, “‘Frictionless’ Ebook Lending from Public Libraries,” *Shelf Free* (blog), July 26, 2013, <http://shelffree.org.uk/2013/07/26/frictionless-ebook-lending-from-public-libraries/>, accessed August 6, 2015; David R. O’Brien, Urs Gasser, and John Palfrey, *E-Books in Libraries* (Cambridge, MA: The Berkman Center for Internet & Society at Harvard University, 2012), PDF briefing document, 22, [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/E-Books%20in%20Libraries%20\(O'Brien,%20Gasser,%20Palfrey\)-1.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/E-Books%20in%20Libraries%20(O'Brien,%20Gasser,%20Palfrey)-1.pdf), accessed August 6, 2015.

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13. Alexandra Alter, “The Plot Twist: E-Book Sales Slip, and Print Is Far from Dead,” *New York Times*, September 22, 2015, <http://www.nytimes.com/2015/09/23/business/media/the-plot-twist-e-book-sales-slip-and-print-is-far-from-dead.html>, accessed November 20, 2015.

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31. See Katz, “The First Sale Doctrine,” 81 (citing F. M. Scherer and Jayashree Watal, “Post-TRIPS Options for Access to Patented Medicines in Developing Nations,” *Journal of International Economic Law* 5 [2002]: 913).

32. See <http://doggett.house.gov/images/DoggettLetter1.11.pdf>, accessed April 10, 2016.

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## 10 Ownership’s Uncertain Future

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7. "Random House Launches New Digital-Only Imprints," *Publisher's Weekly*, November 29, 2012, <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/54930-random-house-launches-new-digital-only-imprints.html>, accessed September 4, 2015.

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9. Ted Sarandos, "Why You'll See Some High Profile Movies Leave Netflix US Next Month," *Netflix US & Canada Blog*, August 30, 2015, <https://web.archive.org/web/20151126144555/http://blog.netflix.com/2015/08/why-youll-see-some-high-profile-movies.html> (site discontinued), accessed November 20, 2015.

10. If this seems farfetched, consider the statement of Ford's VP of marketing and sales: "We know everyone who breaks the law, we know when you're doing it. We have GPS in your car, so we know what you're doing." Jim Edwards, "Ford Exec Retracts Statements about Tracking Drivers with the GPS in Their Cars," *Business Insider*, January 9, 2014, <http://www.businessinsider.com/ford-jim-farley-retracts-statements-tracking-drivers-gps-2014-1>, accessed September 4, 2015.

11. See Jessica Litman, "Revising Copyright Law for the Information Age," *Oregon Law Review* 75 (1996): 19–48 (describing a legislative process dominated by industry insiders).

12. Maria A. Pallente, "The Next Great Copyright Act" (lecture, Columbia University, New York, March 4, 2013), <https://web.law.columbia.edu/sites/default/files/microsites/kernochan/files/Pallante-The%20Next%20Great%20Copyright%20Act.pdf>, accessed September 4, 2015.

13. Lesley Fair, "Full Disclosure," *FTC Business Blog*, September 23, 2014, <https://www.ftc.gov/news-events/blogs/business-blog/2014/09/full-disclosure>, accessed September 4, 2015.

14. *Ibid.*; Nancy S. Kim, *Wrap Contracts* (New York: Oxford University Press, 2013), 89–90.

15. Council Directive 93/13 1993 O.J. (L 95); Jane K. Winn and Mark Webber, "The Impact of EU Unfair Contract Terms Law on US Business-to-Consumer Internet Merchants," *Business Lawyer* 62 (November 2006): 209–228.

16. Rice University, "Removal of Restrictions Can Decrease Music Piracy, Study Suggest," *ScienceDaily*, October 10, 2011, <http://www.sciencedaily.com/releases/2011/10/111007113944.htm>, accessed September 4, 2015.

17. One practical problem is that the United States is a signatory to the WIPO Copyright Treaty. That treaty requires parties to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures." WIPO Copyright Treaty art. 11, April 12, 1997, S. Treaty Doc. No. 105-17 (1997). Conceivably, the United States could limit anti-circumvention law in a manner consistent with exhaustion since the uses owners would make would be "permitted by law." *Ibid.*

18. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004).

19. See *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1319 (Fed. Cir. 2005). The Fifth Circuit rejected an "interpretation [that] would permit liability under section 1201(a) for accessing a work simply to view it or to use it within the purview of 'fair use' permitted under the Copyright Act." *MGE UPS Sys. Inc. v. GE Consumer & Indus.*, 612 F.3d 760, 765 (5th Cir. 2005).

20. Although outside the scope of this book, in some instances breaking DRM could violate the Computer Fraud and Abuse Act. See 18 U.S.C. § 1030 (creating civil and criminal liability for "knowingly access[ing] a computer without authorization or exceeding authorized access").

21. H.R. 3048, 105th Cong. (1997).

22. Christopher Wolf, *The Digital Millennium Copyright Act: Text, History, and Case-law* (Silver Spring, MD: Pike & Fischer, 2003), 460.

23. H.R. 862, 114th Cong. (2015).

24. "Grassley & Leahy Call for Copyright Study," Sen. Chuck Grassley's webpage, October 22, 2015, <http://www.grassley.senate.gov/news/news-releases/grassley-leahy-call-copyright-study>, accessed November 20, 2015.

25. See 17 U.S.C. § 107.

26. Pamela Samuelson, "Unbundling Fair Uses," *Fordham Law Review* 77 (April 2009): 2537–2621, at 2602–2615; Michael J. Madison, "A Pattern-Oriented Approach to Fair Use," *William & Mary Law Review* 45, no. 4 (2004): 1525–1687, at 1687.

27. See 17 U.S.C. §§ 109 & 117.

28. *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 854 (2d Cir. 1963) (noting that "the ultimate question embodied in the 'first sale' doctrine is 'whether or not there has been such a disposition of the article that it may fairly be said that

the patentee [or copyright proprietor] has received his reward for the use of the article” (alteration in original) (quoting *United States v. Masonite Corp.*, 316 U.S. 265, 278 [1942]); *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1389 (C.D. Cal. 1993) (“The distribution right and the first sale doctrine rest on the principle that the copyright owner is entitled to realize no more and no less than the full value of each copy or phonorecord upon its disposition”); *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881, 884 (E.D. Pa. 1964) (“The ultimate question under the ‘first sale’ doctrine is whether or not there has been such a disposition of the copyrighted article that it may fairly be said that the copyright proprietor has received his reward for its use.”).

29. Christina Mulligan, “A Numerus Clausus Principle for Intellectual Property,” *Tennessee Law Review* 80 (2013), 280: “Digital works have greater hurdles to preservation than analog or physical copies of works; in addition to preserving a copy and translating the language, ‘digital translation’ presents an additional problem”; Reese, “The First Sale Doctrine in the Era of Digital Networks,” *Boston College Law Review* 44 (2003): 577–652, at 633–639 (noting the difficulties of preserving readable digital content in an environment in which languages, software, hardware, and file formats undergo rapid change).

30. 17 U.S.C. § 107.

31. 17 U.S.C. § 109(b).

32. *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010), *aff’g* 576 F. Supp. 2d 463 (S.D.N.Y. 2008).

33. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012), *aff’g in part, rev’g and rem’g in part*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

34. Case C-128/11, *UsedSoft GmbH v. Oracle Int’l Corp.*, 2012 E.C.R. I-0000.

35. Rb. Den Haag, 3 september 2014, ECLI:NL:RBDHA:2014:10962, *IEF 14164 (VOB/ Stichting Leenrecht e.a.)* (Neth.), <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:10962>, accessed September 4, 2015.

36. Hof Amsterdam, 20 januari 2015, ECLI:NL:GHAMS:2015:66, *NUV/Tom Kabinet* (Neth.), <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2015:66>, accessed September 4, 2015.

37. *Ibid.*

38. Christina Mulligan, “Killing Copyright,” on file with authors.

39. *Public Hearing Filed in Response to 65 FR 63626*, November 29, 2000 (testimony of Susan Mann, National Music Publishers Association).

40. National Telecommunications & Information Administration, *Report to Congress: Study Examining 17 U.S.C. Sections 109 and 117 Pursuant to Section 104 of the Digital Millennium Copyright Act* (2001), <https://www.ntia.doc.gov/report/2001/report-congress-study-examining-17-usc-sections-109-and-117-pursuant-section-104-digital>, accessed September 4, 2015.
41. U.S. Copyright Office, *DMCA Section 104 Report* (2001), <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>, accessed September 4, 2015.
42. The proposed DPP standard would allow consumers to share digital files with anyone they chose using a “give” button. But when a recipient clicked a “take” button, access to all other copies originating with the initial purchaser would be disabled. Paul Sweazey, “Introduction to Digital Personal Property,” in *Consumers in the Information Society: Access, Fairness and Representation*, ed. Jeremy Malcolm (Kuala Lumpur: Consumers International, 2012), 53–71.
43. Erich Ringewald, Secondary market for digital objects, US Patent 8,364,595, filed May 5, 2009, issued January 29, 2013.
44. Eliza C. Block and Marcel van Os, Managing access to digital content items, US Patent Application 20130060616, filed June 22, 2012.
45. Jack Bertram Coronel and Joseph R. Coronel, Method, system, and device for providing a market for digital goods, US Patent 8,631,505, filed March 16, 2013, issued January 14, 2014; Brian K. Buchheit, Secondary marketplace for digital media content, US Patent 8,359,246, filed March 19, 2010, issued January 22, 2013.
46. Block and van Os, Managing access to digital content items: “A portion of the proceeds of the ‘resale’ may be paid to the creator of the digital content item.”
47. S. 2045, 113th Cong. (2014); H.R. 4103, 113th Cong. (2014).
48. See *Sam Francis Foundation v. Christies*, 78 F.3d 1320 (9th Cir. 2015).
49. Guy A. Rub, “The Unconvincing Case for Resale Royalties,” *Yale Law Journal Forum* 124 (2014): 1, <http://www.yalelawjournal.org/forum/the-unconvincing-case-for-resale-royalties>, accessed September 4, 2015.
50. For a thorough discussion of the insights bitcoin offers for property in general and digital assets in particular, see Joshua A. T. Fairfield, “Bitproperty,” *Southern California Law Review* 88 (May 2015): 805–874.
51. James Grimmelmann and Arvind Narayanan, “The Blockchain Gang,” *Slate*, February 16, 2016, [http://www.slate.com/articles/technology/future\\_tense/2016/02/bitcoin\\_s\\_blockchain\\_technology\\_won\\_t\\_change\\_everything.html](http://www.slate.com/articles/technology/future_tense/2016/02/bitcoin_s_blockchain_technology_won_t_change_everything.html), accessed April 10, 2015.

52. Marc Andreessen, "Why Bitcoin Matters," *Dealbook* (blog), *New York Times*, January 21, 2014, <http://dealbook.nytimes.com/2014/01/21/why-bitcoin-matters/>, accessed September 4, 2015.

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54. As with any property, the value of a digital asset can fluctuate. Dedicated Destiny players will tell you that the once-mighty Gjallarhorn was "nerfed" by game maker Bungie, rendering it far less coveted.

55. Fairfield, "Bitproperty."

56. See Arnold S. Weinrib, "Information and Property," *University of Toronto Law Journal* 38 (1988): 117–150, at 120: "It also makes plain the conclusory nature of the term 'property': it is a legal characterization, a statement that the court has chosen to assign a particular form of protection to the interest in question" (footnote omitted); see also *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823) (stating that property claims "must be admitted to depend entirely on the law of the nation in which they lie"); Jeremy Bentham, *The Theory of Legislation*, ed. C. K. Ogden (London: Oxford University Press, 1950), 113: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."

