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Game Over For First Sale

Stephen J McIntyre
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STEPHEN McINTYRE

ABSTRACT

Video game companies have long considered secondhand game retailers a threat to their bottom lines. With the next generation of gaming consoles on the horizon, some companies are experimenting with technological tools to discourage and even prevent gamers from buying and selling used games. Most significantly, a recent patent application describes a system for suppressing secondhand sales by permanently identifying game discs with a single video game console. This technology flies in the face of copyright law’s “first sale” doctrine, which gives lawful purchasers the right to sell, lease, and lend DVDs, CDs, and other media.

This Article answers a question posed by many industry analysts: whether it is legal to employ technology that restricts first sale rights. The answer hinges on two statutes: the Digital Millennium Copyright Act (DMCA) and the Sherman Antitrust Act. The DMCA broadly protects technological measures that restrict access to copyrighted material, which would likely include technologies aimed at suppressing secondhand video game sales. If gamers came up with a method for getting around these devices, they could potentially incur liability under the DMCA. However, some courts have interpreted the DMCA narrowly so as to allow circumvention that does not clearly lead to copyright infringement. Since accessing the content on a video game disc does not constitute infringement, this construction of the statute would most likely permit gamers to lawfully circumvent restrictive technology.

Moreover, technology that abridges first sale rights may violate the Sherman Act, which prohibits monopolists from acquiring, maintaining, or extending their market power through predatory or anticompetitive means. Courts recognize the importance of secondhand markets, and have held that monopolists may not use technology to suppress competition. A Sherman Act challenge to anti-used game technologies would therefore be plausible. However, the difficulty of demonstrating that any video game company possesses monopoly power could be fatal to the claim.

Given these doctrinal complexities, it may ultimately devolve upon consumers to vote with their wallets and choose not to patronize video game companies that engage in anticompetitive business practices. Otherwise, it really could be “Game Over” for first sale.
I. INTRODUCTION

In the early days of 2013, just as the holiday shopping season was coming to a close, an obscure legal filing took the video game world by storm. An Internet user known only as “gofreak” posted a brief message to an online discussion describing a patent application that Sony Computer Entertainment, maker of the popular line of PlayStation gaming consoles, had filed with the U.S. Patent & Trademark Office a few months earlier.\(^1\) The application describes a technology that would permanently affiliate video game discs with a particular video game console, such that a game would not run if the disc were inserted into another gamer’s device.\(^2\) This “Disc ID” system would effectively preclude gamers from lending, trading, or selling video games, since each disc could only function on a single console. This, according to the patent application, is Disc ID’s main purpose. The filing states that Disc ID would “suppress” secondhand video game sales by forcing all interested gamers to purchase new discs.\(^3\) The intended outcome is enhanced “redistribution” of profits to game makers and developers.\(^4\)

As the news spread, bloggers and tech publications registered their outrage. The website ITworld called the Disc ID plans “nefarious” and predicted that gamers would “grab their pitchforks and torches” to protest the technology.\(^5\) Techdirt sardonically described the news as coming from the “Sony-obviously-feels-it’s-not-hated-enough-already” department.\(^6\) Some commentators were more restrained; Ars Technica, for example, correctly pointed out that “the fact that Sony has applied to patent this idea is a far cry from confirmation that this kind of

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\(^3\) Id. at 2.

\(^4\) Id.


protection system is in the works for [Sony’s next game console,] the PlayStation 4.”⁷ (Since the technology became public, Sony executives have sent mixed signals regarding whether PlayStation 4 will utilize Disc ID.⁸) Though Sony’s plans remain unclear, the Disc ID controversy has attracted mainstream media attention.⁹

Video game companies have been cool to secondhand game sales for some time now. The chain retailer GameStop makes billions each year in used game sales (it also sells new games),¹⁰ and has attracted harsh criticism from the industry.¹¹ Because GameStop offers pre-owned copies of popular games at a discounted price, within months or even weeks of the games’ release, game companies charge that secondhand sales “deprive publishers of revenue, with the proceeds of the sale lining only the retailers’ pockets.”¹² Others in the industry have directed their ire at the gamers themselves. When game maker THQ introduced a system that would allow only original purchasers to access certain content in popular games, an executive told the press that he did not “really have much sympathy for” used game buyers, because “when the game’s bought used we get cheated.”¹³ Several other developers have pursued similar

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¹⁰ Yukari Iwatani Kane & Miguel Bustillo, Used Games Score Big for GameStop, WALL ST. J., Jan. 21, 2009, http://online.wsj.com/article/SB123249378212700025.html (.)
strategies to discourage secondhand game purchases.\textsuperscript{14} GameStop insists that its used games business is in fact good for the video game makers’ bottom lines\textsuperscript{15}—a claim that enjoys empirical support\textsuperscript{16}—but they are not buying it. Predictably, GameStop’s stock took a hit when Sony’s patent application was made public,\textsuperscript{17} and dropped again when rumors surfaced that Microsoft would also employ anti-used game technology in its upcoming Xbox 720 console.\textsuperscript{18}

Sony’s patent application is just the latest attack in a decades-long assault on the copyright “first sale” doctrine. The first sale doctrine provides that the lawful owner of a copy of a copyrighted work has the right to sell, lease, lend, or otherwise transfer that particular copy.\textsuperscript{19} With the rise of digital technology and personal computing in the 1980s, copyright-dependent industries grew increasingly anxious over the security of their products. New technology made it dramatically easier and cheaper to copy and distribute movies, computer programs, and other media. The first sale doctrine was especially troublesome, since it propped up secondhand markets and a rental industry that companies in Hollywood, Silicon Valley, and elsewhere considered threatening. Software makers were especially concerned that consumers would rent computer programs for a matter of dollars, only to create their own illicit copies at home before returning the disks to the rental store. Not only did these industries successfully lobby Congress for statutory “first sale” exceptions, but software companies also adopted widespread licensing practices that precluded “first sales” from taking place to begin with.

\textsuperscript{14} Id.
\textsuperscript{16} See, e.g., Nicole F. Velasquez et al., \textit{The Impact of a Secondary Market on Video Game Purchase Intentions}, 16 REV. BUS. INFO. SYS. 103, 109 (2012) (finding that “the accessibility . . . of a secondary market is important to consumers’ purchase behaviors in the primary market,” suggesting that “game developers and publishers would be wise to reassess their push to criminalize the resale of video games”).
\textsuperscript{17} \textit{GameStop Shares Fall on Sony Patent Application}, YAHOO! NEWS, Jan. 3, 2013, \url{http://news.yahoo.com/gamestop-shares-fall-sony-patent-201046439.html}.
\textsuperscript{18} Ben Lamoreux, \textit{GameStop Stock Plunges 10% Following Recent Xbox Rumors}, GENGAME, Feb. 6, 2013, \url{http://gengame.net/2013/02/gamestop-stock-plunges-10-following-recent-xbox-rumors/}.
\textsuperscript{19} 17 U.S.C. § 109(a) (2012).
Disc ID is simply a new tool for accomplishing an old goal: abrogating consumers’ first sale rights. The question already posed by many industry analysts is whether this technology, if adopted, would be legal. This Article seeks to answer that question. The legality of Disc ID and similar technologies hinges on two statutes: the Digital Millennium Copyright Act (“DMCA”) and the Sherman Antitrust Act (“Sherman Act”). The DMCA protects “technological protection measures,” including devices like Disc ID, that restrict consumers’ access to copyrighted material. Circumventing these protection measures so as to gain access to music, video, or other media is ordinarily prohibited. While many courts would likely uphold Disc ID against circumvention, some have interpreted the DMCA narrowly so as to allow circumvention where it would not clearly lead to copyright infringement. Since accessing the game content stored on a video game disc would not, in itself, constitute infringement, consumers might be able to circumvent anti-used game technology without violating the DMCA. Given the split in legal authority, however, it is impossible to say with any certainty how a court might rule on this issue.

Moreover, technology that restricts first sale rights may run afoul of the Sherman Act, which prohibits monopolization through predatory or anticompetitive means. Courts have long recognized the importance of secondhand markets. While judges are rightfully cautious about standing in the way of technological innovation, it is well-established that monopolists may not use technology to suppress competition. An antitrust challenge to Disc ID or a similar technology would therefore be plausible. As a prerequisite to monopolization liability, however, an antitrust defendant must possess monopoly power in the relevant market. Under current industry conditions, it would be difficult if not impossible to show that any major video game

20 See, e.g., Cushing, supra note 6 (“creating discs that are ‘locked’ to a certain system would seem to violate the right of first sale”); Orland, supra note 7 (“While this kind of resale-blocking technology would seemingly run afoul of the first sale doctrine codified into US law, legal experts seem unsure about whether that doctrine would be enough to overcome the end-user license agreements common to video game sales”).
company enjoys a monopoly. This means that, if first sale rights are to be preserved, consumers themselves may have to vote with their wallets and choose not to patronize companies that engage in user-unfriendly business practices.

This Article proceeds as follows. Part II introduces the first sale doctrine and explains its application to software and video games. Part III then describes the content industries’ past and ongoing efforts to fight first sale through lobbying, licensing, and litigation. Part IV analyzes anti-used game technology under the DMCA’s anticircumvention provisions, and concludes that, at least in some jurisdictions, the law might permit gamers to circumvent systems like Disc ID without incurring liability. Part V then discusses whether technologically restricting first sale rights in the video game industry would support a monopolization claim under the Sherman Act. While a claim would be plausible, the difficulty of defining the relevant market so as to establish that any video game maker currently possesses monopoly power could be prohibitive. Part VI then offers concluding remarks.

II. A LINK TO THE PAST: OLD DOCTRINE, NEW TECHNOLOGY

A. The Copyright First Sale Doctrine.

The “first sale” doctrine permits the lawful owner of a copy of a copyrighted work to freely resell that copy without restriction.21 The Supreme Court first recognized the doctrine over a century ago in Bobbs-Merrill Co. v. Straus.22 The plaintiffs in Bobbs-Merrill sued to enforce a notice printed in each copy of a novel called The Castaway: “The price of this book at retail is $1 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.”23 The defendant booksellers had full knowledge of this

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23 Id. at 341.
restriction, but nonetheless elected to retail copies of *The Castaway* for 89 cents.\textsuperscript{24} The Court held that, although the Copyright Act reserved to the copyright holder “the sole right to vend” copies of his or her work, the Act did not “create the right to impose, by notice, . . . a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract.”\textsuperscript{25} By producing and selling copies of *The Castaway* “in quantities and at a price satisfactory to [them],” the plaintiffs had “exercised the right to vend.”\textsuperscript{26} The Court refused to read into the statute a right to control all *future* retail sales.\textsuperscript{27}

Congress has codified the first sale doctrine in Section 109(a) of the Copyright Act, which provides that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”\textsuperscript{28} Because this section is only triggered by an “actual sale” or other transfer of title,\textsuperscript{29} only bona fide owners may avail themselves of its protection.\textsuperscript{30}

The first sale doctrine occupies the intersection between intellectual property and tangible property.\textsuperscript{31} According to Professor Melville Nimmer, once a copyright owner has consented to the sale or distribution of copies of a work, “continued control over the distribution of copies” would only serve as “a device for controlling the disposition of the tangible personal property

\textsuperscript{24} *Id.* at 342.
\textsuperscript{25} *Id.* at 350.
\textsuperscript{26} *Id.* at 351.
\textsuperscript{27} *Id.*
\textsuperscript{28} 17 U.S.C. § 109(a).
\textsuperscript{31} See Brilliance Audio, Inc. v. Cross Commc’ns, Inc., 474 F.3d 365, 373 (6th Cir. 2007) (“This bargain, first developed in the common law, and later codified in the first sale doctrine, provides that once a copyright owner consents to release a copy of a work to an individual (by sale, gift, or otherwise), the copyright owner relinquishes all rights to that particular copy. . . . The first sale doctrine ensures that the copyright monopoly does not intrude on the personal property rights of the individual owner, given that the law generally disfavors restraints of trade and restraints on alienation.”).
that embodies the work.”

At this point, “the policy favoring a copyright monopoly . . . gives way to the policy opposing restraints of trade and restraints on alienation.” Without the first sale rule, copyright holders could extend the copyright monopoly “so far as to . . . control . . . the disposition of lawfully obtained tangible personal property.” In this sense, the first sale doctrine’s origins can be traced to the ancient common law rule disfavoring limitations on the transfer of private property.

There is also a sound economic rationale for the first sale doctrine. For one, the doctrine avoids the “prohibitive transaction costs” of affording copyright holders unfettered control over successive sales of copies of their works. In the doctrine’s absence, successive purchasers or possessors of a copy would have to “negotiate with the [copyright] owner each time they contemplate a further sale or other transfer of the copy.” Moreover, where a “first sale” has taken place, “it may fairly be said that the copyright proprietor has received his reward” for the use of his or her work, and no further control over the copy’s distribution is warranted. Copyright exists not for the enrichment of authors and artists, but rather for the public’s benefit. With the consummation of a sale, the copyright monopoly has served its constitutionally mandated purpose—an author or artist holder has conveyed a creative work to the public—and any justification for continued control over distribution evaporates. First sale
therefore balances copyright holders’ economic incentives to create and publish new works against the public’s interest in having access to those works.\textsuperscript{41}

A number of public institutions and industries owe their existence to the first sale doctrine. For instance, according to the American Library Association, “first sale is what allows libraries to do what we do—lend books and materials to our patrons, the public.”\textsuperscript{42} American public libraries collectively house nearly a billion media items (the vast majority of which are printed books); academic library collections account for over 1.3 billion items in total; and public school media centers contain a billion more.\textsuperscript{43} Americans borrow these materials at a rate of 4.4 billion times per year.\textsuperscript{44} Not only do libraries make for a more literate, cultured, and informed citizenry, but they also promote local economic development.\textsuperscript{45} Post-sale restrictions on the disposition of copyrighted materials would prevent libraries from providing this crucial public service.

Likewise, businesses that profit from the buying, selling, or renting of secondhand media could not exist without the first sale doctrine. Movie and video game rental businesses, such as Blockbuster, Redbox, GameFly, and Netflix, purchase inventory and then rent items to

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\textsuperscript{41} See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“The limited scope of the copyright holder’s statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts”).

\textsuperscript{42} Am. Library Ass’n, First Sale Doctrine, \url{http://www.ala.org/advocacy/copyright/firstsale} (accessed Jan. 15, 2013).


\textsuperscript{44} Id.

customers for a fee. Although technological innovations, such as on-demand streaming video, have challenged the traditional rental business model, the movie and video game rental industries still generate billions of dollars per year. Markets for used goods can also be substantial. GameStop, for example, reaped $2.6 billion in revenues from used game sales in 2011 alone. These secondary markets represent a boon for consumers, who benefit from increased price competition. Contrary to conventional wisdom, secondhand markets may often benefit suppliers of new goods as well. These markets all depend upon the first sale doctrine.

The significance of the first sale doctrine can hardly be overstated. This “longstanding and fundamental . . . limitation on the public distribution right” promotes commerce, safeguards competition, and props up entire industries. Although first enunciated over a century ago, the doctrine remains central to our understanding of copyright and property.

46 Julie H. Mortimer, Vertical Contracts in the Video Rental Industry, 75 REV. ECON. STUD. 165, 165–69 (2008). The rental market represents a significant revenue stream for content producers (i.e., copyright owners), especially under profit-sharing schemes that have become widespread in the industry. See id. at 165–69.
47 See Ben Fritz, Blockbuster Tells Hollywood Studio’s It’s Preparing for Mid-September Bankruptcy, L.A. TIMES, Aug. 26, 2010, http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/08/blockbuster-tells-hollywood-studios-its-preparing-for-mid-september-bankruptcy.html (“After dominating the home video rental business for more than a decade and struggling to survive in recent years against upstarts Netflix and Redbox, Blockbuster Inc. is preparing to file for bankruptcy next month, according to people who have been briefed on the matter”).
50 See Anindya Ghose et al., Durable Goods Competition in Secondary Electronic Markets, in PROCEEDINGS OF THE TWENTY-FOURTH INTERNATIONAL CONFERENCE ON INFORMATION SYSTEMS 341, 346 (2003), available at http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.231.3720 (“The presence of an active used-goods market creates competition for new goods because the option of buying used goods is now incentive compatible for some consumers who would have bought new goods before. This enhanced competition forces suppliers to decrease the new-good prices in order to remain competitive with used goods.”).
51 See id. at 350 (“Thus, we show that, contrary to popular perceptions, the presence of a used-goods market is beneficial for suppliers too, under a relatively wide range of conditions”); Hal R. Varian, Reading Between the Lines of Used Book Sales, N.Y. TIMES, July 28, 2005, http://www.nytimes.com/2005/07/28/technology/28scene.html (in book industry, “the used market does not have a big impact in terms of lost sales in the new market”).
53 See Andrew Degner, Wise-ing Up About the First Sale Doctrine: A Look at the Ninth Circuit’s Approach in Vernor v. Autodesk, 35 COLUM. J.L. & ARTS 581, 602 (2012) (“it is important to recall that the first sale doctrine was designed to protect the rights of individuals to their property against unreasonable restraints upon alienation under the guise of the copyright law”).
B. Licensing Arrangements.

The first sale doctrine notwithstanding, copyright owners do have an effective means for controlling copies of their work no longer in their possession. While “the first sale inquiry examines ownership of the tangible property in which the copyrighted work has been embodied,”54 a copyright owner may lawfully transfer possession of a particular copy without forfeiting title to it.55 The law permits “copyright owners [to] create licensing arrangements so that users acquire only a license to use the particular copy . . . and do not acquire title that permits further transfer or sale of that copy without the permission of the copyright owner.”56 A license functions as a contract,57 dictating the terms by which the licensee may possess and use the copy of the work in question. If the licensee violates the terms of the license in a manner that implicates copyright, the copyright owner may sue for both breach of contract and infringement— the latter of which carries significant statutory damages.58 This notion that copyright owners may contract around the first sale doctrine by way of licensing is as old as the doctrine itself. In Bobbs-Merrill, the Supreme Court acknowledged that its first sale holding did not reach license agreements controlling subsequent sales of a book.60

C. Application to Computer Software and Video Games.

54 2-8 Nimmer & Nimmer, supra note 32, at ¶ 8.12[B][1][d][i] (emphasis added).
55 See United States v. Drebin, 557 F.2d 1316, 1330 (9th Cir. 1977) (“transfer of title [is] the sine qua non of the first sale doctrine”); UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1180 (9th Cir. 2011) (“We have recognized . . . that not every transfer of possession of a copy transfers title”).
56 UMG Recordings, 628 F.3d at 1180.
57 See Flava Works, Inc. v. Gunter, 689 F.3d 754, 755 (7th Cir. 2012) (Posner, J.) (“a copyright license is just a type of contract”).
58 See MDY Indus., LLC v. Blizzard Entmt., Inc., 629 F.3d 928, 940 (9th Cir. 2010) (“To recover for copyright infringement based on breach of a license agreement, (1) the copying must exceed the scope of the defendant’s license and (2) the copyright owner’s complaint must be grounded in an exclusive right of copyright”).
59 17 U.S.C. §§ 504(c), (d).
60 Bobbs-Merrill Co. v. Strauss, 210 U.S. 339, 350 (1908). By its own terms, Section 109(a) of the Copyright Act only applies to “the owner of a particular copy or phonorecord made under this title, or any person authorized by such owner.” 17 U.S.C. § 109(a) (emphasis added).
Computer programs raise special challenges for copyright law. Under the 1980 amendments to the Copyright Act, computer programs became eligible for federal copyright protection. With the advent of personal computing in the early 1980s, software producers became increasingly concerned with unauthorized copying. They were especially worried about software rental, which the Copyright Act expressly permitted (and which, in fact, came to pass in the rental industry). Due to the ease of copying software, consumers could, in lieu of purchasing a program, “simply rent a copy of the program, and duplicate it.” While unauthorized duplication ordinarily constitutes infringement, it would have been impractical and uneconomical for copyright owners to track down and sue individual consumers. Going after the rental stores made more sense, but the first sale doctrine apparently immunized software rental stores from liability. Software producers opted to begin licensing, rather than selling, their computer programs. This allowed software owners to “retain ownership and . . . limit the user’s rights to copy, transfer or modify the software, thereby making the first sale doctrine inapplicable.” Licensing continues to be the norm in software marketing.

At the same time, the computer industry lobbied Congress for an exception to the first sale doctrine. Recognizing that first sale permitted “rental firms [to] legally dispose of legitimately purchased copies of computer programs,” and that rented software could be copied

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62 Id.; see 17 U.S.C. § 101 (defining “computer program”).
63 Smith, supra note 61, at 1626–28.
64 See id. at 1626, 1628.
66 See id. (“This copying by the individual consumers would presumably infringe the copyright, but usually it would be far too expensive for the copyright holder to identify and sue each individual copier”).
67 Id.; Smith, supra note 61, at 1624–25.
68 Smith, supra note 61, at 1630–31.
69 Id.
70 Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1155 (9th Cir. 2011).
with little more than the push of a button, Congress enacted the Computer Software Rental Amendments Act of 1990. While not disturbing “the ability of copyright owners and users to enter into license agreements regarding the use of computer programs,” the Act amended Section 109 to prohibit “any person in possession of a particular copy of a computer program” from renting, leasing, or lending the copy for commercial purposes. Between licensing and legislation, the software industry had by the early 1990s successfully made an end-run around the first sale doctrine.

Video games are of course computer programs, but they have charted a different course from other types of software covered by the Copyright Act. Unlike personal computing software, video games designed for home consoles are ordinarily difficult to copy. In fact, Nintendo designed its groundbreaking NES console to play game cartridges rather than floppy disks precisely because cartridges were harder to copy. Video games are, in this respect, more akin to videocassettes and DVDs than to conventional software: popping a video game cartridge or disc into the console allows the gamer to access its contents, but no permanent copy is created and stored on the console (i.e., the game need not be “installed” on a local hard drive prior to use).

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76 See S. REP. NO. 101-265, at 5 (1990). In 1990, video games manufactured for home consoles were stored on difficult-to-copy microchips encased in cartridges. Id. Subsequent generations of consoles, such as the Sony PlayStation, utilized easier-to-copy compact discs rather than cartridges. However, the consoles themselves were incapable of running pirated discs without modifications to their hardware. See Miodrag Kovačević, A Brief Overview of Console Piracy, DELTA GAMER, Nov. 27, 2011, http://deltagamer.com/20973/a-brief-overview-of-console-piracy.
77 See DAVID SHEFF, HOW NINTENDO ZAPPED AN AMERICAN INDUSTRY, CAPTURED YOUR DOLLARS, AND ENSLAVED YOUR CHILDREN 33 (1993) (“The system would play games on cartridges, not disks. Floppy disks were threatening to computerphobes and, more important, they were copiable”).
For these reasons, video game makers have been somewhat less guarded,\textsuperscript{78} and ordinarily sell rather than license their products.\textsuperscript{79} Congress determined that there was no need to extend the 1990 Amendments Act to video games,\textsuperscript{80} and accordingly excluded video games manufactured for home consoles from its coverage.\textsuperscript{81} The first sale doctrine therefore continues to apply with full force to video game sales.

For over a century, copyright law has relied upon the first sale doctrine to mediate the tension between intellectual property and personal property. The doctrine promotes efficiency and competition, and serves as the legal foundation for many public institutions and private enterprises. However, the doctrine is not absolute. Copyright owners may contract around it by way of licensing, which allows them to maintain title in distributed media and dictate terms of use. Computer programs enjoy additional statutory exemptions from first sale. Console-based video games remain fully subject to the first sale doctrine, and licensing has not yet become commonplace in the video games industry. But this is not to say that first sale is without threat in the gaming world.

\textbf{III. All Your Base Are Belong to Us: First Sale Under Fire}\textsuperscript{82}

\textsuperscript{78} This is not at all to say that video game makers have been unconcerned about piracy. Video game piracy has existed since the advent of home video game consoles. Kovačević, supra note 76. “Pong,” widely considered the first video game, was “copied with abandon.” SHEFF, supra note 77, at 140. Of the 100,000 “Pong” arcade games sold in 1974, only one-tenth were produced by Atari. \textit{Id.}

\textsuperscript{79} See Adobe Sys., Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086, 1091 (N.D. Cal. 2000) (Raymond Nimmer testified that “with the exception of video games, software is licensed rather than sold”).

\textsuperscript{80} See S. REP. NO. 101-265, at 5 (1990) (“At the present time, the rationale for prohibiting the rental of software available in other formats does not apply to video game cartridges”).

\textsuperscript{81} See 17 U.S.C. § 109(b)(1)(B)(ii) (“This subsection does not apply to . . . a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes”).

\textsuperscript{82} Explaining a cultural reference may defeat the purpose of making it to begin with, but this one is so obscure that it probably warrants comment. The phrase “All Your Base Are Belong to Us” is an awkward translation of “all your bases are under our control” that originally appeared in the European version of \textit{Zero Wing}, a video game released for Sega’s Mega Drive console in 1991. The catchphrase “swept across the internet at the dawn of the 21st century,” and was recently referenced in Disney’s video game-themed animated film \textit{Wreck-It Ralph}. See All Your Base Are Belong to Us, \textsc{Know Your Meme}, \url{http://knowyourmeme.com/memes/all-your-base-are-belong-to-us} (last accessed Feb. 27, 2013); Luke McKinney, \textit{Leeroy Jenkins Live! The 6 Best Video Game References in “Wreck-It Ralph,”}
First sale’s standing in copyright law has probably never been more precarious than it is today. While many have prematurely reported the doctrine’s demise—one law review article published almost thirty years ago pronounced it “the defense that never was”—the doctrine has indeed been under siege for decades. Since the advent of consumer copying technologies such as Xerox machines and VCRs, the content industry has incessantly fought first sale through litigation, lobbying, and licensing. Digital technology has now brought this fight to a head.

This section focuses on two practices the content industry has widely adopted to curtail first sale rights: first, the ubiquitous “shrink-wrap” or “click-through” license, which precludes transfer of ownership and affords copyright holders far-reaching control over media in their customers’ hands; and second, technologies that restrict consumers’ access to and usage of copyrighted media, even following a legitimate first sale.

A. Rise of the End User License Agreement.

As Professor Raymond Nimmer writes, contract law plays an “overriding role” in the law of first sale: “Contractual terms determine the applicability of first sale doctrine as a matter of copyright law. . . . The presence or absence of a first sale ownership privilege thus depends on the terms of a contract.” While freedom of contract has been esteemed as indispensable to a “free enterprise system based on an unheard of division of labor,” the “development of large scale enterprise with its mass production and mass distribution made a new type of contract


The “content industry” broadly encompasses companies that own and produce mass media, such as music and movies. Content Industry, WIKIPEDIA, http://en.wikipedia.org/wiki/Content_industry (last accessed Feb. 28, 2013).

For example: after the movie industry failed to kill home video players through litigation, see Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), it lobbied Congress to legislatively prohibit the rental, lease, and lending of videocassettes and other audiovisual works. See Ralph S. Brown, Jr., Eligibility for Copyright Protection: A Search for Principled Standards, 70 MINN. L. REV. 579, 584 & n.30 (1985–86).


inevitable—the standardized mass contract.”

The concept of standardized contracts, or contracts of adhesion, entered the American legal lexicon in the second decade of the twentieth century. Far removed from the romantic notion of two parties “meet[ing] each other on a footing of social and approximate economic equality” to achieve a unity of minds through self-interested bargaining, the terms of a contract of adhesion are entirely dictated by one party to another—take it or leave it.

Courts generally uphold contracts of adhesion, although the equitable doctrine of unconscionability may preclude enforcement of particularly egregious contracts. That these contracts are seldom read, and even less frequently understood, is of no instance; so long as the purchaser “assents” to the terms, the contract is valid. This is an extremely low bar. In ProCD, Inc. v. Zeidenberg, the defendant did not even see the contractual terms until after he had paid for the plaintiffs’ product and received it in the mail. Because the defendant used the product after having an opportunity to read the contract, however, Judge Easterbrook reasoned found that he had assented to the contractual terms and became bound by them. There are limits to the doctrine of assent—a contract may be unenforceable, for instance, in the absence of a reasonably

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90 Kessler, supra note 88, at 630.
91 See Victoria v. Sup. Ct., 710 P.2d 833, 837 (Cal. 1985) (“The term ‘adhesion contract’ refers to standardized contract forms offered to consumers of goods and services on essentially a ‘take it or leave it’ basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract” (quoting Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 783 (Cal. Ct. App. 1976))).
93 See Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 29 (2d Cir. 2002) (“Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract”).
94 ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996) (Easterbrook, J.).
95 Id. at 1452–53.
conspicuous notice that a party is binding itself. But the nomenclature now applied to contracts of adhesion ("shrink-wrap," “click-through,” etc.) suggests just how little courts require in the way of assent.

Copyright licenses are simply contracts, and copyright owners routinely use contracts of adhesion to avoid the first sale doctrine. The practice first arose in the 1980s with the mass marketization of computer software. Copies of computer programs literally had licensing agreements printed on their shrink-wrap packaging; the licenses were supposedly activated when a purchaser removed the wrapping. This creative practice was understandable given the state of copyright law at the time. The scope of copyright protection in computer programs was uncertain, and as previously discussed, the first sale doctrine prevented copyright owners from controlling the software rental business, which facilitated widespread unauthorized copying. Mass licensing permitted software producers to guard against gaps and uncertainty in copyright law.

Copyright protection in software is no longer a subject of serious debate, and the Copyright Act no longer permits software rental, but the proliferation of nonnegotiable licenses—commonly denominated “End User License Agreements,” or EULAs—has continued.

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96 See Specht, 306 F.3d at 35 (“Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility”).
98 See Richard H. Stern, Shrink-Wrap Licenses of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?, 11 Rutgers Computer & Tech. L.J. 51, 51 (1985) (“‘Shrink-wrap,’ ‘box-top,’ or ‘tear-open’ licenses are a new form a quasi-consensual agreement spawned by the needs of our computer society, or more precisely by the economic needs of mass marketers of software”).
99 David Bender, Software Protection: The 1985 Perspective, 77 W. New Eng. L. Rev. 405, 438–40 (1984–85). Software licensing began much earlier, in the 1960s, with the birth of the software industry. Glen O. Robinson, Personal Property Servitudes, 71 U. Chi. L. Rev. 1449, 1473 (2004). In those early days, “a typical mainframe computer cost hundreds of thousands (and perhaps over a million) dollars,” “application software was all custom developed, and a typical computer program might cost tens of thousands (or even more than a hundred thousand) dollars.” Bender, supra, at 438. Software transactions were therefore substantial, low in volume, and highly individualized to the parties involved. Id. License agreements were negotiated and drafted by lawyers. Id. In the 1980s, when consumers began purchasing software “over the counter like expensive jelly beans,” nonnegotiable, unindividuated licenses became the norm. Id. at 438–39.
100 Id. at 439.
unabated. As a federal appellate court puts it, “[s]oftware licensing agreements, rather than sales, have become ubiquitous in the software industry because they enable the licensor to control the use of the copyright material.”\(^{101}\) The capacity to make the first sale doctrine irrelevant (and, increasingly, obsolete) explains licensing’s popularity.\(^{102}\) The expanding list of names for EULAs reflects the myriad ways in which these contracts are created in today’s world; so-called “clickwrap” and “browsewrap” licenses are now common.\(^{103}\) While most commonly used in connection with software, standardized licenses can be slapped on virtually any type of copyrighted media.

The pervasiveness of EULAs means that copyright defendants asserting a first sale defense frequently have a difficult time proving that a true sale—a transfer of ownership—ever took place to begin with. The case law is not uniform,\(^{104}\) but the modern trend largely favors copyright owners over consumers, licenses over ownership.\(^{105}\) The Ninth Circuit has been especially prolific in articulating how copyright owners can avoid the pitfall of actually selling goods to their customers.\(^{106}\) Without sacrificing much in the way of nuance, one may describe the circuit’s recent precedents as establishing the following proposition: by observing certain

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101 Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1155 (9th Cir. 2011).
102 See id. at 1156 (“It is this distinction between sales and licenses that has caused the use of software licensing agreements to flourish and become the preferred form of software transactions”).
105 Jenny Lynn Sheridan, Does the Rise of Property Rights Theory Defeat Copyright’s First Sale Doctrine?, 52 SANTA CLARA L. REV. 297, 371 (2012); but see Krause v. Titleserv, Inc., 402 F.3d 119, 122–25 (2d Cir. 2005) (holding that purported “licensee” was in fact an owner, for purposes of 17 U.S.C. § 117(a) “essential step” doctrine, where it “paid substantial sums, to possess and use a copy indefinitely without material restriction, as well as to discard or destroy it at will”).
106 See, e.g., Apple Inc. v. Psystar Corp., 658 F.3d 1150 (9th Cir. 2011); F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958 (9th Cir. 2011); UMG Recordings, Inc. v. Augusto, 628 F.3d 1175 (9th Cir. 2011); MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F.3d 928 (9th Cir. 2010); Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010); Wall Data, Inc. v. L.A. Cnty. Sheriff’s Dep’t, 447 F.3d 769 (9th Cir. 2006); Triad Sys. Corp. v. Se. Express Co., 64 F.3d 1330 (9th Cir. 1995); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 551 (9th Cir. 1993); S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081 (9th Cir. 1989); United States v. Wise, 550 F.2d 1180 (9th Cir. 1977).
formalities, a copyright holder can retain ownership in virtually any copyrighted media it “sells,” thereby avoiding the first sale doctrine entirely.\textsuperscript{107} More specifically, the Ninth Circuit has held that the following factors determine whether a transfer constitutes a sale or a license: (1) whether the copyright owner specifies that a user is granted a license; (2) whether the copyright owner significantly restricts the user’s ability to transfer the software; and (3) whether the copyright owner imposes notable use restrictions.\textsuperscript{108} In other words, the copyright owner may avoid the first sale doctrine by “unilaterally plac[ing] reservations on title.”\textsuperscript{109} A transfer is a license and not a sale if the copyright owner says it is a license.\textsuperscript{110}

Widespread licensing may have begun with computer software, but court decisions upholding the standard-form licenses contain no such limiting language.\textsuperscript{111} There is nothing preventing copyright holders from applying EULAs to music, DVDs, or even books.\textsuperscript{112} Given “how easy it is for a vendor to put a ‘license’ label on a mass-marketed product with

\textsuperscript{107} See Electronic Frontier Foundation, “Magic Words” Trump User Rights: Ninth Circuit Ruling in \textit{Vernor v. Autodesk}, Sept. 13, 2010, \url{https://www.eff.org/deeplinks/2010/09/magic-words-trump-user-rights-ninth-circuit-ruling} (last accessed Jan. 26, 2013) (under Ninth Circuit precedent, “copyright’s first sale doctrine . . . doesn’t apply to software (and possibly DVDs, CDs and other ‘licensed’ content) as long as the vendor saddles the transfer with enough restrictions to transform what the buyer may think is sale into a mere license”).

\textsuperscript{108} \textit{Vernor}, 621 F.3d at 1110–11.

\textsuperscript{109} Sheridan, supra note 105, at 353.

\textsuperscript{110} The Ninth Circuit ostensibly recognizes that “the mere labeling of an arrangement as a license rather than a sale . . . [is] not dispositive of the issue.” \textit{UMG Recordings}, 628 F.3d at 1180. In \textit{UMG Recordings v. Augusto}, the Ninth Circuit held that a record company transferred ownership in unsolicited promotional CDs that it distributed freely by mail, despite having labeled the CDs with licensing language. \textit{See id.} at 1182. The court distinguished software licensees “who order and pay to acquire copies” from passive recipients of unrequested CDs. \textit{Id.} at 1183. Unlike software licensees, the CD recipients did not manifest assent to the contractual terms, and their assent could not be inferred from the mere failure to return the CDs (especially since the record company did not request the CDs’ return). \textit{Id.} at 1182–83. \textit{UMG Recordings} therefore stands as a reminder that there must be some manifestation of assent on the licensee’s part, however minimal. The copyright holder must also have a degree of knowledge or control over the disposition of media in order to be considered its owner. \textit{Id.}

\textsuperscript{111} See generally F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958 (9th Cir. 2011); Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (Easterbrook, J.); see also JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY 132–33 (2011).

\textsuperscript{112} See Electronic Frontier Foundation, 2012 in Review: First Sale Under Siege—If You Bought It, You Should Own It, Dec. 23, 2012, \url{https://www.eff.org/deeplinks/2012/12/first-sale-under-siege-if-you-bought-it-you-should-own-it} (last accessed Jan. 30, 2013) (“Not only does big content deny that first sale doctrine applies to digital goods, but they are also trying to undermine the first sale rights we do have by forcing users to license items they would rather buy. The copyright industry wants you to ‘licence’ all your music, your movies, your games — and lose your rights to sell them or modify them as you see fit.”).
copyrighted . . . components,” Pamela Samuelson worries what the Ninth Circuit’s precedents “mean for flea markets, bookstores, libraries, garage sales, and auction sites.” The prospect of having to trace “chain of title” before purchasing a book or record at a secondhand store may sound absurd, but it is no longer beyond the realm of legal possibility. Courts’ reverence for contracts of adhesion and deference to copyright owners threaten to eviscerate the first sale doctrine—upending copyright law’s balance between users and rights holders, ravaging secondary markets and the industries that depend on them, and opening the door to anticompetitive conduct.

B. DRM and the DMCA.

Copyright and contract afford only so much control over how consumers use the music, movies, video games, and other media in their possession. For one, the effectiveness of these legal strictures depends upon the degree to which they are followed and enforced. Piracy can be difficult (or at least expensive) to root out and consistently punish. Additionally, the law may not extend as far as content producers would like. Copyright protection is subject to limitations and exceptions, including fair use and first sale, that many rights holders see as threatening to their profit margins and reputations. Copyright holders commonly rely on technology to extend and solidify their control over content.

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114 See Microsoft Corp. v. Harmony Computers & Elec., Inc., 846 F. Supp. 2d 208, 212 (E.D.N.Y. 1994) (“Although a sale of a copyrighted work by a party authorized by the copyright holder may constitute a ‘first sale’ for purposes of the first sale doctrine, defendants have the burden of tracing the chain of title to show that their authority to sell Microsoft Products flows from the copyright holder” (citations omitted)). In *Vernor v. Autodesk*, the Ninth Circuit rebuffed *amicus curiae* eBay and the American Library Association’s argument that upholding the license at issue in that case “would force everyone purchasing copyrighted property to trace the chain of title to ensure that a first sale occurred.” Vernor v. Autodesk, Inc., 621 F.3d 1102, 1115 (9th Cir. 2010)
“Technological protection measures,” or TPMs, mediate users’ access to and usage of copyrighted media. 118 TPMs can be designed to perform any variety of functions; a simple example is requiring the entry of a password to access content. 119 James Boyle describes these systems as the technological equivalent of barbed wire—just like barbed wire surrounding a farmer’s fields, TPMs “fence off” copyrighted material from unwanted trespass, providing “an additional layer of ‘physical’ protection to the property owner’s existing legal protection.” 120 Of course, “unlike barbed wire, [TPMs] can also control what we do once we get access.” 121 In addition to regulating access to a music or video file, TPMs may also prevent users from copying it, modifying it, chopping it up, or shifting it from one storage medium to another. 122

Trepidation over technology-assisted copying is hardly new. Following a setback at the Supreme Court in 1908, 123 music publishers successfully lobbied Congress for protection from the threat of player pianos. 124 In 1982, Jack Valenti of the Motion Picture Association of America told Congress that “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.” 125 But the rise of digital technology, particularly the Internet, has elicited unprecedented and seemingly interminable panic in the content industry. 126 Recognizing that “technology could . . . safeguard the intellectual property

119 Id. at 547.
121 Id.
122 Id. at 85–86; Burk, supra note 118, at 538–39, 547–48.
123 See White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1 (1908).
rights threatened by the same technology,“¹²⁷ the industry widely embraced digital rights management, or DRM (essentially, TPMs in the digital sphere), as a means of achieving and maintaining far-reaching control over content.¹²⁸ With the coming of personal computing, for instance, software makers employed digital encryption and other technological tools to prevent piracy.¹²⁹ The makers of DVDs, e-books, and smartphones have likewise wrapped their products in DRM that restrict both access and usage.¹³⁰ Today, society is saturated in DRM;¹³¹ even garage door openers are controlled by DRM-protected computer programs.¹³²

Although rationalized as necessary for the protection of intellectual property rights,¹³³ DRM can, and frequently does, extend content owners’ control far beyond the “limited monopoly”¹³⁴ bestowed by copyright. By controlling users’ ability to copy or manipulate content, copyright holders can now make it impossible for users to exercise fair use rights spelled out in the Copyright Act.¹³⁵ Content owners can also employ DRM to tie up public domain material,¹³⁶ which is ordinarily “free as the air to common use.”¹³⁷ Finally, DRM and other protection measures are capable of making an end run around first sale, accomplishing with technology what the software industry has traditionally hoped to achieve via restrictive licensing.¹³⁸ For

¹²⁸ BOYLE, supra note 120, at 60, 119.
¹²⁹ See Bender, supra note 99, at 454–55 (describing “extralegal means” for protecting computer programs).
¹³³ E.g., Dusollier, supra note 127, at 285.
¹³⁴ 1-1 NIMMER & NIMMER, supra note 32, § 1.03[A].
¹³⁶ Id. at 88.
¹³⁸ Burk, supra note 118, at 543–45.
example, DRM technology prevents DVDs legally purchased in Japan from playing on most DVD players available in North America.\(^{139}\)

At first, TPMs were seen as practical “substitutes” for copyright protection.\(^{140}\) While purportedly bolstering the legal protections of copyright, TPMs “exist[ed] entirely outside of copyright,” and functioned independent of it.\(^{141}\) This was not enough for the content industry; rights holders insisted that TPMs be backed by law.\(^{142}\) This demand became a reality in 1996 with the passage of a series of World Intellectual Property Organization (“WIPO”) treaties,\(^{143}\) which required contracting nations to “provide adequate legal protection and effective remedies against the circumvention of effective technological measures.”\(^{144}\) Under these treaties, the mere act of *circumventing* a TPM—cutting the barbed wire surrounding a copyrighted work—is itself verboten, regardless of whether the user ever infringes a copyright.\(^{145}\)

The United States became the first nation to implement the WIPO treaties when President Bill Clinton signed the Digital Millennium Copyright Act (“DMCA”) into law in 1998.\(^{146}\) Even the bill’s proponents acknowledged that the DMCA far exceeds the United States’ treaty obligations.\(^{147}\) The statute broadly proscribes circumventing TPMs, as well as trafficking in

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\(^{139}\) See Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 Am. J. Comp. L. 323, 328 & n.19 (2004) (“The ‘regional code playback control’ used in the DVD standard, for instance, prevents European consumers from playing U.S. DVDs on their domestic DVD players”).

\(^{140}\) Paul Goldstein, *Copyright and Its Substitutes*, 1997 Wis. L. Rev. 865, 865 (1997).

\(^{141}\) Id.

\(^{142}\) See Dusollier, *supra* note 127, at 285 (“Building a technical fence around works was not considered as sufficient. Electrifying it by criminalizing its circumvention was needed. Therefore a due protection of the electronic copyright protection and management systems has always been a great concern of the rightholders and of the industry developing these systems.”).

\(^{143}\) Goldstein, *supra* note 140, at 869.


\(^{145}\) BOYLE, *supra* note 120, at 87.

\(^{146}\) 2 HANDBOOK OF INFORMATION SECURITY 298 (Hossein Bidgoli ed., 2006).

circumvention devices. Specifically, the DMCA protects TPMS that “effectively control[] access to a work” (“access controls”), and TPMs that “effectively protect[] a right of a copyright holder” (“copy controls”). The “effectively” qualifier is a very low bar: while the DMCA’s provisions do not extend to a TPM that “restricts one form of access but leaves another route wide open,” “the courts are unanimous [in holding] that ‘effective’ protection does not mean protection that is especially difficult to crack.” The mere act of circumventing an access control is illegal, subject only to narrow exceptions—which notably do not include fair use or first sale.

The DMCA forbids trafficking in devices that are designed or marketed for circumventing either access or copy controls. Universal City Studios v. Reimerdes was one of the first decisions to apply these provisions. The case revolved around the Content Scramble System, commonly known as CSS, an encryption technology developed by the movie industry to prevent unauthorized access to and copying of DVDs. CSS-protected DVDs can only be played on DVD players that are equipped with the digital “keys” required to decrypt and unscramble CSS encryption. The movie industry licenses CSS technology to manufacturers,

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149 Id.
151 Jane C. Ginsburg, Legal Protection for Technological Measures Protecting Works of Authorship: International Obligations and US Experience, 29 COLUM. J.L. & ARTS 11, 23 (2005). Courts have explained that requiring more in the way of effectiveness would “gut the statute” by limiting its application to TPMs that successfully thwart circumvention—in other words, precisely those TPMs that have no need for the legal protection. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 318 (S.D.N.Y. 2000); see also Realnetworks, Inc. v. DVD Copy Control Ass’n, 641 F. Supp. 2d 913, 938 (N.D. Cal. 2009) (“This argument is audacious in its assertion and to countenance it would virtually jettison the law of section 1201(b). If this were the law, a copy protection measure would have to protect against every possible current and future means of copying copyrighted content. There could be no liability under this section, for once the copy protection measure had been circumvented, it would purportedly be rendered ineffective. This is circular nonsense.”).
153 Id. §§ 1201(a)(2), (b)(1).
155 Reimerdes, 111 F. Supp. 2d at 308.
156 Id. at 308, 310.
who are under strict contractual obligations to maintain the system’s security.\textsuperscript{157} Among other things, licensed manufacturers may not produce devices that are capable of copying the contents of a DVD.\textsuperscript{158}

In September 1999, a Norwegian teenager named Jon Johansen became acquainted with two individuals, known only by their pseudonyms, over the Internet.\textsuperscript{159} Together, the three hackers reverse-engineered a licensed DVD player and discovered the CSS encryption algorithm and keys.\textsuperscript{160} With this information in hand, they devised a program called “DeCSS,” which was capable of decrypting CSS-protected DVDs.\textsuperscript{161} Johansen and his colleagues were purportedly motivated, at least in part, by a desire to create a DVD player that was compatible with the Linux operating system.\textsuperscript{162} However, in addition to unlocking access to movies stored on DVDs, DeCSS allowed users to create copies of the digital movie files.\textsuperscript{163}

Defendant Eric Corley belonged to a hacker organization named for Emmanuel Goldstein, leader of the underground Brotherhood in George Orwell’s \textit{Nineteen Eighty-Four}.\textsuperscript{164} Corley published a magazine called \textit{2600: The Hacker Quarterly}, which he appropriately enough founded in 1984.\textsuperscript{165} In late 1999, Corley posted the source and object code for DeCSS to his website, 2600.com.\textsuperscript{166} Corley’s website was only one of hundreds from which DeCSS could be downloaded, but for one reason or another, he was one of the few singled out by the movie studios for litigation under the DMCA.\textsuperscript{167} The movie studios contended that CSS was an

\textsuperscript{157} \textit{Id.} at 310.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.} at 311.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.} at 308; \textit{see} GEORGE ORWELL, \textit{NINETEEN EIGHTY-FOUR} 11–12 (1950).
\textsuperscript{165} Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000).
\textsuperscript{166} \textit{Id.} at 309.
\textsuperscript{167} \textit{Id.} at 311–12.
effective protection measure, and that Corley had illegally trafficked in a program designed to circumvent CSS.\textsuperscript{168} After the district court issued a preliminary injunction, Corley removed DeCSS from 2600.com—but in an act of “electronic civil disobedience,” continued to direct Internet users to as many as 500 other websites offering DeCSS for download.\textsuperscript{169} Predictably, this did not help Corley’s case.

Judge Lewis A. Kaplan’s permanent injunction order reads like a technophobe’s diary. The decision begins with a lengthy “vocabulary of the case,” in which Judge Kaplan methodically defines such terms as computer, Internet, CD-ROM, and web site.\textsuperscript{170} While venerating coders as “highly skilled human beings [who] can reduce data and instructions to strings of 1’s and 0’s,”\textsuperscript{171} he disdainfully characterizes hackers as degenerates with criminal inclinations.\textsuperscript{172} For Judge Kaplan, hackers like Eric Corley are indistinguishable from burglars, and programs like DeCSS are digital crowbars—except far more dangerous.\textsuperscript{173} The judge essentially embraces and codifies the content industry’s panic mentality: “from Judge Kaplan’s language it is evident that he sees [DeCSS] not as an act of expression but as a virus spreading

\begin{footnotesize}
\textsuperscript{168} Id. at 303, 316.
\textsuperscript{169} Id. at 312–13.
\textsuperscript{170} See id. at 305–7.
\textsuperscript{171} Id. at 306.
\textsuperscript{172} See id. at 308–9 (“The name ‘2600’ was derived from the fact that hackers in the 1960’s found that the transmission of a 2600 hertz tone over a long distance trunk connection gained access to ‘operator mode’ and allowed the user to explore aspects of the telephone system that were not otherwise accessible. Mr. Corley chose the name because he regarded it as a ‘mystical thing,’ commemorating something that he evidently admired. Not surprisingly, 2600: The Hacker Quarterly has included articles on such topics as how to steal an Internet domain name, access other people's e-mail, intercept cellular phone calls, and break into the computer systems at Costco stores and Federal Express. One issue contains a guide to the federal criminal justice system for readers charged with computer hacking.”).
\textsuperscript{173} See id. at 316 (circumventing DRM is “the electronic equivalent of breaking into a locked room”); id. at 329 (comparing laws “preventing people from circumventing technological access control measures” to “laws prohibiting the possession of burglar tools”).
\textsuperscript{174} See id. at 315 (publishing DeCSS “is analogous to the publication of a bank vault combination in a national newspaper. . . . Development and implementation of a new DVD copy protection system, however, is far more difficult and costly than reprogramming a combination lock and may carry with it the added problem of rendering the existing installed base of compliant DVD players obsolete.”).
\end{footnotesize}
like wildfire. . . . Just as in an epidemic, the harshest measures are called for.”175 The Reimerdes decision foresees—and attempts to avert—a “looming digital Black Death” heralded by DeCSS and other tools for circumventing DRM.176

While the specter of unmitigated digital piracy certainly animates Judge Kaplan’s opinion,177 he analyzes the movie studios’ DMCA claims within the framework of Section 1201(a)(2), which prohibits trafficking in technologies that circumvent access controls, rather than Section 1201(b), which deals with copy controls.178 The analysis is straightforward: CSS effectively controls access to copyrighted works (i.e., movies stored on DVDs), DeCSS is “clearly a means of circumventing a technological access control measure,” and Corley illegally trafficked in DeCSS.179 Judge Kaplan acknowledges that access controls may preclude lawful uses of copyrighted material, such as fair use180—and may even limit access to works that are not protected by copyright181—but concludes that the DMCA “fundamentally altered the landscape,” and traditional copyright norms may no longer apply.182 In our newly digital world, fair use and other user-friendly doctrines must give way in order to stamp out what Judge Kaplan describes as “the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”183

What the Reimerdes opinion fails to note is that, if the breaking-and-entering analogy is to be taken at face value, then the burglar implicitly owns the copy of the book in the locked

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175 BOYLE, supra note 120, at 101.
176 Id. at 102.
178 Id. at 316. The movie studios also brought claims under Section 1201(b). See id. at 316 n.133.
179 See id. at 317–19.
180 Id. at 322.
181 Id. at 322 n.159 (emphasis added).
182 Id. at 323.
183 Id. at 316 (quoting H.R. REP. NO. 105-551, at 17 (1998)).
room. This perfectly (if inadvertently) illustrates why DRM is problematic for the first sale doctrine. As many commenters have expressed, legally protected DRM “give copyright owners the ability to maintain a running control on access to . . . their works,” which “frustrates the goal of the first sale doctrine, by extending the rights of the copyright owner beyond the first sale of a particular copy.” The U.S. Copyright Office collected and summarized these comments in an August 2001 report that it prepared pursuant to Section 104 of the DMCA. The DMCA’s implications for first sale elicited a “dramatic range of opinions,” most of which argued that the anticircumvention provisions would restrict the doctrine’s operation. Many commenters specifically discussed CSS protection, as well as the related practice of DVD region coding. Although the Copyright Office was not terribly swayed by these arguments, it did acknowledge that “legitimate concerns have been raised about what may develop as the market and technology evolve,” and left the door open for recommending amendments to the first sale doctrine in the future. Now may be an opportune time to revisit the commenters’ concerns.

IV. PLAYING WITH POWER: CIRCUMVENTION TO PRESERVE FIRST SALE

Sony’s anti-used game technology is but the latest content industry assault on the first sale doctrine. Although video game technology is generally less susceptible to piracy than computer software, video game titans have long employed DRM and long despised the first sale doctrine. Sony’s new technology weds these two ideas, using DRM to “tether” video game discs

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184 In the context of Reimerdes, DeCSS permitted users to gain access to the content stored on legally purchased DVDs. See id. at 319 (DeCSS would allow users to view DVDs, i.e., gain access to the DVDs’ contents, on computers running the Linux operating system); see also BOYLE, supra note 120, at 100 (“In other words, even if Mr. Johansen made DeCSS so that he and his friends could watch DVDs they purchased legally on computers running Linux, they could still be liable for breaking the DMCA”).
186 See id. at v.
187 Id. at 34.
188 Id. at 35–37.
189 See id. at 73–76.
190 Id. at 96.
to particular consoles. Assuming that Sony, Microsoft, or another player adopts “tethering”
technology in the next generation of video game consoles, the question necessarily arises: would
circumventing this technology in a manner that permitted a single disc to be played on multiple
consoles (i.e., belonging to successive owners of the disc) violate the DMCA? (The predicate
question—whether the technology will be circumvented—need not be asked, for “DRM is
always circumvented.”) The answer is far from simple. Despite the Reimerdes court’s wooden
interpretation of the DMCA, subsequent appellate court decisions have given rise to competing
and contradictory views of the statute’s anticircumvention provisions. The resulting ambiguity
only makes it more likely that video game makers will shore up their position through restrictive
licensing.

A. Early Shots Across the Bow.

The video game industry’s vendetta against first sale is by no means of recent vintage.
Nintendo first declared war on the doctrine in the late 1980s and early 1990s, when the company
enjoyed a dominance that the video game industry had never been seen and that has not since
been replicated. It spent years fighting the bourgeoning video game rental industry, which
depended on the first sale doctrine for its survival. Rental businesses insisted that they were
good for Nintendo’s bottom line, but Nintendo disagreed. Nintendo executive and lawyer
Howard Lincoln characterized video game rental as “nothing less than commercial rape,”
pointing out that a single copy of a game could be rented out to potentially hundreds of
customers who might have otherwise bought a new copy for $40 or $50. Blockbuster raked in

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191 Cory Doctorow, DRM Gives Companies Security—From Competition, BOINGBOING, Feb. 17, 2012,
http://boingboing.net/2012/02/17/drm-gives-companies-security.html (emphasis added).
192 See SHEFF, supra note 77, at 402.
193 Id. at 276.
194 Id. at 283.
195 Id., at 273, 283.
$1.5 billion in revenues in 1990, as much as 10% of which was derived from Nintendo game rentals—and aside from profits made from sales of rental cartridges, Nintendo did not see any of that money.

Considering that demand for Nintendo game cartridges consistently outpaced supply during this period, it is rather difficult to believe that rental stores displaced new cartridge sales in any significant degree. At the time, Nintendo controlled 85 to 90 percent of the Japanese and American home video game markets and was generating several billion dollars per year in net sales. The company nonetheless went on the attack. Nintendo considered suing rental businesses, but the first sale doctrine stood squarely in its way. Naturally, the company then sought to change first sale law, lobbying Congress for a prohibition on video game rentals. Nintendo joined the coalition of software companies pushing for a ban on computer software rental, but when the Video Software Dealers Association (a trade association of video-rental dealers) threatened to crush the bill if it included video games, the software companies succumbed. The bill was rewritten so as to exclude “computer program[s] embodied in or used in conjunction with a limited purpose computer that is designed for playing video games.”

Political infighting may have killed the video game rental prohibition, but the official rationale for excluding it from the Computer Software Rental Amendments Act of 1990 was sound: “It was easy to rent computer software and make a permanent copy at home, but it was nearly impossible to make a copy of ‘Super Mario Bros.’” Unlike traditional software makers, video game companies simply did not have as much to lose from the rental industry. Including

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196 Id. at 283.
197 Id. at 203, 244–45.
198 Id. at 196, 349, 402.
199 Id. at 284.
200 Id. at 283.
201 Id. at 283–84.
203 SHEFF, supra note 77, at 284; see supra notes 76–81 and accompanying text.
video games in the 1990 Amendments Act would have served but one purpose: shoring up
Nintendo’s monopoly profits. Even after losing in Congress, the video game giant did not back
down. Nintendo refused to sell cartridges directly to rental chains and forbade retailers from
selling multiple copies of any game to a single customer. In at least one instance, Nintendo
threatened retaliation against a retailer who sold to renters.

In short, video games and the first sale doctrine got off to a rocky start. Although
revenue-sharing agreements (which have overtaken the rental industry) may have softened game
makers’ feelings toward chains like Blockbuster, the existence of a robust secondhand market
for video games means that the first sale doctrine remains controversial within the industry.

B. DRM: The Latest Attack on First Sale.

Sony’s Disc ID patent application represents a significant step for video game producers
fed up with competition from the secondhand market. DRM is certainly not new to video
games, but as Sony acknowledges in the patent application, “[t]ypically, DRM is a technology
for the prevention of the unlimited copy [sic] of electronic content.” By contrast, Sony’s new
invention seeks to “prevent . . . electronic content from being used unlimitedly” by successive
owners. More to the point, the technology “reliably restricts the use of electronic content [i.e.,

204 SHEFF, supra note 77, at 276, 283.
205 Id. at 276–77. Nintendo also sued Blockbuster for including photocopied instruction manuals with rented games.
See Nadia Oxford, Trials and Tribulations: Video Games’ Many Visits to Court, 1UP.COM, Dec. 14, 2005,
206 See Julie H. Mortimer, Vertical Contracts in the Rental Industry, 75 REV. ECON. STUD. 165 (2008); James D.
Dana et al., Revenue Sharing and Vertical Control in the Video Rental Industry, 49 J. INDUS. ECON. 223 (2001).
207 Nintendo’s NES console included a “lock-out” security system that prevented counterfeit and unlicensed games
from playing. See Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 844 (Fed. Cir. 1992) (describing NES
security system); Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1574–75 (Fed. Cir. 1990) (same).
209 Id.
video game discs] dealt in the second-hand markets.” Buying and selling used games would become a thing of the past.

The plan, as set forth in Sony’s patent application, would be to package each video game disc with a “use permission tag,” which would be capable of wirelessly communicating with a sensor on the game console. Boiled down to essentials, when a game disc is first played, the use permission tag would associate that specific disc with the specific game console in which it is used. From that point on, every time the disc is played, the user would have to swipe the tag across a scanner located on the console, allowing the tag to check the disc ID and console ID. If the disc ID and console ID match the information stored on the tag, the disc will run; if either the disc ID or the console ID does not match up, the disc will not operate. Since each game disc can only be associated with one console, then as a practical matter, lending or selling the disc to another gamer would be pointless—the disc would be incapable of playing on another person’s console. The first sale doctrine would be rendered obsolete.

C. Lawful Circumvention?

Video game players, proprietors of used games, digital activists, and others would have an obvious interest in coming up with a way to circumvent Disc ID or any other tethering technology. The question is whether doing so would run afoul of the DMCA’s anticircumvention provisions. As a threshold matter, it appears that tethering technology such as Disc ID would readily qualify for DMCA protection as a technological measure that “effectively controls access

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210 Id.
211 See id. at 2 (“In other words, the game disk 210 and the use permission tag 220 are commercially released and transacted as a set and are also distributed integrally as an inseparable set, that is, are distributed as a bundle”).
213 Id.
214 Id. The patent application also describes a “temporary use device,” which would allow a disc to be played on a console for a limited number of times without permanently associating that disc with that console. See Sony Patent App. at 4–5. This would presumably facilitate rental.
215 For example, intermediaries such as eBay.
to a work.” If the Disc ID patent application is to be believed, the technology “in the ordinary course of operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” That is, in order to obtain access to game content stored on a disc, the user would have to swipe the use permission tag across the game console’s reader, and if the information supplied by the tag matches both the disc ID and the console ID, only then will the game run. The tag ensures that users access game content solely on the copyright owners’ terms. This “authentication sequence” readily satisfies the “effectiveness” bar to DMCA protection.

With that prima facie showing in place, circumventing the Disc ID system may seem like an uncontroversial DMCA violation. The DMCA prohibits users from circumventing TPMs that effectively control access to a work, and breaking the Disc ID system would do just that. Reimerdes left very little wiggle room. Just as CSS encryption prevents DVDs from playing on unlicensed DVD players, tethering technology would prevent game discs from playing on unauthorized game consoles (i.e., any console other than the one on which the disc was first played). On Judge Kaplan’s reasoning, circumventing Disc ID technology would violate the DMCA just as “clearly” as DeCSS did.

The DMCA has already been applied in the video games context—to an earlier generation of Sony DRM, no less. In Sony Computer Entertainment America v. GameMasters, Sony asked a California district court to issue a preliminary injunction blocking defendants from selling the “Game Enhancer,” a device that allowed American gamers “to play games sold in

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217 Id. § 1201(a)(3)(B).
221 Sony Comp. Entm’t Am. Inc. v. GameMasters, 87 F. Supp. 2d 976 (N.D. Cal. 1999)
Japan or Europe and intended by [Sony] for use exclusively on Japanese or European PlayStation console.” Sony’s PlayStation consoles featured classic lock-and-key DRM: “The PlayStation console is designed to operate only when encrypted data is read from a CD-ROM that verifies that the CD is an authorized, legitimate [Sony] product licensed for distribution in the same geographical territory of the console’s sale.” Each console could only access those games with “data codes” matching the region in which the console itself was sold. In practical terms, the DRM system prevented games sold abroad from playing on American PlayStation consoles. The Game Enhancer circumvented this system, allowing gamers to play legally purchased Japanese and European games on their American consoles. Sony alleged that its lock-in-key system qualified for DMCA protection as an access control measure, and that defendants violated the DMCA by trafficking in the Game Enhancer device. The court agreed that the Game Enhancer “appear[ed] to be a device whose primary function is to circumvent ‘a technological measure . . . that effectively controls access to a system protected by a registered copyright.’” Finding that Sony was likely to prevail on its DMCA claim, the court issued the preliminary injunction.

Perhaps to a greater extent than Reimerdes, Sony v. GameMasters appears to foreclose any reasonable argument that circumventing Disc ID technology would not run afoul of the DMCA. The Disc ID system is essentially a more sophisticated version of the DRM at issue in GameMasters, except that rather than limiting a game’s operability to consoles sold within the same geographic region, Disc ID limits a game’s operability to a single console. That the gamer

\[\text{Footnotes:}\]
222 Id. at 977, 981.
223 Id. at 981.
224 Id. at 987.
225 Id. at 981.
226 Id.
227 Id. at 987.
228 Id. (quoting 17 U.S.C. § 1201(a)(2)(A)).
229 Id. at 988.
may have legally purchased the game is of no matter; in *GameMasters*, the court acknowledged that the games at issue may have been “legally, validly manufactured and sold in Japan,” and that they “do not become transformed into illegal, bootleg infringing games merely because they are transported across the ocean.”\(^{230}\) That did not preclude DMCA liability.\(^{231}\) As Judge Kaplan reminds us, the DMCA forbids the “electronic equivalent of breaking into a locked room”—even, apparently, when the only purpose is to gain access to a video game that the alleged “burglar” lawfully purchased.\(^{232}\)

But the story does not end with *Game Masters* and *Reimerdes*. In 2004, the Federal Circuit issued a major decision interpreting the DMCA anticircumvention rules within the broader context of copyright protection.\(^{233}\) In *Chamberlain Group v. Skylink*, the circuit court reviewed a summary judgment order finding that defendant Skylink’s “universal” garage door opener did not violate Chamberlain’s rights in its “Security+” garage door technology.\(^{234}\) Unlike ordinary garage door systems, which typically rely on a single fixed transmitter signal, Security+ garage door openers incorporated a “rolling code” computer program, which constantly changed the transmitter signal required to open the garage door.\(^{235}\) When the Security+ garage door receptor detected a signal, it would check it against the previous 1,024 signals received.\(^{236}\) If the signal was identical to any of the most recent 1,024 signals, the garage door would not open.\(^{237}\) If, however, the signal was among the next 4,096 binary signals incorporated in the Security+

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\(^{230}\) *Id.* at 986.

\(^{231}\) *See id.* at 986–88.


\(^{233}\) The Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178 (Fed. Cir. 2004).

\(^{234}\) *Id.* at 1181, 1183.

\(^{235}\) *Id.* at 1183.

\(^{236}\) *Id.* at 1184.

\(^{237}\) *Id.*
system, the garage door would open. 238 The idea behind Security+ was to prevent “code grabbing,” a practice whereby burglars might theoretically detect a garage door system’s fixed transmitter signal and use it to surreptitiously enter the garage. 239

Skylink’s “Model 39” universal transmitter was designed to interoperate with many common garage door systems, including rolling code and fixed code systems. 240 The Model 39 did not use rolling code technology, but rather simulated the effects of it. 241 When the button on a Model 39 opener was pressed, the transmitter would emit three codes in rapid succession, as determined by a complex algorithm. 242 This programming allowed the Model 39 to interoperate with Chamberlain’s Security+ system, meaning that homeowners who purchased a Model 39 “universal” opener could use the device to open their Security+ automatic garage door. 243 Chamberlain characterized its Security+ system as a technological measure controlling access to a copyrighted work— i.e., the “rolling code” computer programs that governed the garage door. 244 Because “[t]he only way for the Model 39 to interoperate with a Security+ [garage door opener] is by ‘accessing’ copyrighted software,” Chamberlain argued, Skylink had “therefore committed a per se violation of the DMCA.” 245 The district court disagreed and granted Skylink’s summary judgment motion. 246 The court held that Chamberlain had not demonstrated

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238 Id.
239 Id. at 1183–84. As the court noted, and as Chamberlain conceded, “code grabbers are more theoretical than practical burgling devices; none of [Chamberlain’s] witnesses had either firsthand knowledge of a single code grabbing problem or familiarity with data demonstrating the existence of a problem.” Id.
240 Id. at 1184.
241 Id. at 1184–85.
242 Id. at 1185.
243 Id.
244 Id. at 1185, 1197.
245 Id.
that circumventing the Security+ system afforded customers *unauthorized* access to
Chamberlain’s software.\textsuperscript{247}

The Federal Circuit affirmed the district court, but for different reasons. The Federal Circuit premised its decision on the proposition that the DMCA anticircumvention provisions “do not establish a new property right.”\textsuperscript{248} Unlike copyrights and patents, which are considered property, “liability protection from unauthorized circumvention merely creates a new cause of action under which a defendant may be liable.”\textsuperscript{249} To the circuit court panel, this distinction between property and liability was “critical” to its interpretation of the DMCA.\textsuperscript{250} The court rejected Chamberlain’s argument that “Congress empowered manufacturers to prohibit consumers from using embedded software products in conjunction with competing products,” reasoning that such a broad reading of the DMCA would only be plausible “if the anticircumvention provisions established a new property right capable of conflicting with the copyright owner’s other legal responsibilities,” rather than merely a “new way” to secure preexisting intellectual property rights.\textsuperscript{251} Contrary to Judge Kaplan’s assertion in *Reimerdes*, the Federal Circuit held that “the DMCA emphatically did not ‘fundamentally alter’ the legal landscape governing the reasonable expectations of consumers or competitors.”\textsuperscript{252}

Since the DMCA merely “introduce[d] new grounds for liability *in the context* of the unauthorized access of copyrighted material,”\textsuperscript{253} the court reasoned that the circumvention prohibitions “applie[d] only to circumventions reasonably related to protected rights.”\textsuperscript{254}

\textsuperscript{247} See id. at 1045–46.
\textsuperscript{248} The Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1192 (Fed. Cir. 2004).
\textsuperscript{249} Id. at 1192–93.
\textsuperscript{250} Id. at 1192.
\textsuperscript{251} Id. at 1193–94.
\textsuperscript{252} Id. at 1194; see also Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000) (“By prohibiting the provision of circumvention technology, the DMCA fundamentally altered the landscape”).
\textsuperscript{253} *Chamberlain*, 381 F.3d at 1194 (emphasis added).
\textsuperscript{254} Id. at 1195.
court found support for this construction in legislative history as well as the statute itself, which consistently links “access” to copyright “protection.” Chamberlain’s arguments predictably relied heavily on Reimerdes, but the Federal Circuit found that decision inapposite. Whereas DeCSS permitted not only unauthorized access but also unauthorized copying (i.e., infringement), the Model 39 “enable[d] only legitimate uses of copyrighted software.” In the decision’s key passage, the circuit court concluded that Chamberlain’s broad reading of the DMCA would afford the owners of copyrighted works “unlimited rights to hold circumventors liable . . . merely for accessing that work, even if that access enabled only rights that the Copyright Act grants the public.” The court suggested that, even allowing for the substantial deference given Congress in its exercise of the authority bestowed by the Copyright Clause, such a redefinition of copyright owners’ rights could potentially violate the Constitution. In affirming the district court, the Federal Circuit articulated the following rule: the DMCA antircircumvention provisions only prohibit forms of access that bear a “reasonable relationship” to copyright protection. Because Chamberlain failed to establish this “critical nexus,” the circuit court affirmed the district court’s summary judgment in favor of Skylink.

Although the Federal Circuit did not mention the first sale doctrine in its Chamberlain opinion, it relied heavily upon the classical understanding of personal property rights that first sale embodies. The court began by noting that, in the absence of “explicit restrictions” on their

255 See id. at 1197 (“it is significant that virtually every clause of § 1201 that mentions ‘access’ links ‘access’ to ‘protection’”).
256 See id. at 1197–98 (“Chamberlain derives its strongest claimed support for its proposed construction from the trial court’s opinion in Reimerdes, a case involving the same statutory provision”).
257 Id. at 1198.
258 Id. at 1200.
259 See id. (“First, as the Supreme Court recently explained, ‘Congress’ exercise of its Copyright Clause authority must be rational’ . . . . Chamberlain’s proposed construction of § 1201(a) implies that in enacting the DMCA, Congress attempted to ‘give the public appropriate access’ to copyrighted works by allowing copyright owners to deny all access to the public. Even under the substantial deference due Congress, such a redefinition borders on the irrational” (quoting Eldred v. Ashcroft, 537 U.S. 186, 205 n.10 (2003))).
260 Id. at 1202.
261 Id. at 1204.
use of the Security+ system, Chamberlain’s customers may justifiably assume that they “enjoy all of the rights associated with the use of their [garage door openers] and any software embedded therein” that the laws provide.\textsuperscript{262} Neither party disputed that “a homeowner who purchases a Chamberlain [garage door opener] owns it and has a right to use it to access his or her own garage.”\textsuperscript{263} The court rejected the notion that Chamberlain was “entitled to prohibit legitimate purchasers of its embedded software from ‘accessing’ the software by using it,” since such a construction would “allow copyright owners to prohibit exclusively fair uses even in the absence of any feared foul use.”\textsuperscript{264} The court declared unequivocally that “[c]onsumers who purchase a product containing a copy of embedded software have the inherent legal right to use that software.”\textsuperscript{265} While the court described this legal right as “inherent,” it is also explicit: the first sale doctrine grants lawful owners of copyrighted material the right to use the particular copy that they purchased.\textsuperscript{266} “What the law authorizes, Chamberlain cannot revoke.”\textsuperscript{267}

Under \textit{Chamberlain}, the case against circumventing tethering technology is considerably less certain. Assuming that hackers came up with a method for circumventing the technology that did not also facilitate illicit copying—a method that broke through the game console’s access controls but not its copy controls—the question would be whether the circumvention bears “a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.”\textsuperscript{268} That is, would circumventing a tethering system like Disc ID permit access to copyrighted video game content “in a manner that . . . infringes or facilitates infringing

\textsuperscript{262} \textit{Id.} at 1183.
\textsuperscript{263} \textit{Id.} at 1187.
\textsuperscript{264} \textit{Id.} at 1202.
\textsuperscript{265} \textit{Id.}
\textsuperscript{266} \textit{See} Bell Atl. Bus. Sys. Servs., Inc. v. Hitachi Data Sys. Corp., No. C93-20079 JW, 1995 WL 798935, at *3 (N.D. Cal. Mar. 10, 1995) (“As BABSS correctly points out, ‘a “first sale” by Comparex terminates Hitachi Data’s right to control the distribution of the service items, and BABSS would have every legal right to use the service items to maintain its customers’ equipment’ ”).
\textsuperscript{267} The Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004).
\textsuperscript{268} \textit{Id.} at 1202.
a right protected by the Copyright Act”? The rights bestowed by the Copyright Act are enumerated in Section 106. That section provides that, subject to the limitations and exceptions prescribed in Sections 107 through 122—such as first sale and fair use—copyright owners in video games and other audiovisual works enjoy exclusive rights of reproduction, preparation of derivative works, distribution, public performance, and public display. Merely accessing video game content stored on a disc does not implicate any of those rights. One might argue that, by facilitating the resale of video games, circumventing tethering technology “reasonably relates” to the distribution right. But so long as new game discs are actually sold to customers, the first sale doctrine exhausts the copyright owner’s distribution right at the moment of transfer. As the Chamberlain court pointed out, sanctioning the technological repeal of copyright limitations would contradict DMCA Section 1201(c)(1), which states that the provisions against circumvention shall not affect copyright limitations or defenses to infringement, including fair use (and implicitly, first sale). If purchasers of Chamberlain’s Security+ system possess an “inherent right” to use the software embedded in their garage door

269 Id. at 1203.
271 Id. § 109(a).
272 Id. § 107.
273 See Storage Tech. Corp. v. Custom Hardware Engineering & Consulting, Inc., 421 F.3d 1307, 1318 (Fed. Cir. 2005) (“courts generally have found a violation of the DMCA only when the alleged access was intertwined with a right protected by the Copyright Act”).
274 Cf. id. (“A copyright owner alleging a violation of section 1201(a) consequently must prove that the circumvention of the technological measure either ‘infringes or facilitates infringing a right protected by the Copyright Act’” (quoting Chamberlain, 381 F.3d at 1203).
275 See Sebastian Int’l, Inc. v. Consumer Contacts (PTY) Ltd., 847 F.2d 1093, 1099 (3d Cir. 1988) (“Because that exclusive [distribution] right is specifically limited by the first sale provisions of § 109(a), it necessarily follows that once transfer of ownership has cancelled the distribution right to a copy, the right does not survive . . .”).
276 The Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1200 (Fed. Cir. 2004); 17 U.S.C. § 1201(c)(1); see Vernor v. Autodesk, Inc., 621 F.3d 1102, 1107 (9th Cir. 2010) (“The exclusive distribution right is limited by the first sale doctrine, an affirmative defense to copyright infringement that allows owners of copies of copyrighted works to resell those copies”); Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1444 (11th Cir. 1998) (first sale doctrine is a “well-established limitation on intellectual property rights”); Pearson Educ., Inc. v. Liu, 656 F. Supp. 2d 407, 409 (S.D.N.Y. 2009) (“This limitation on scope of the distribution right, known as the first sale doctrine, is codified in § 109(a) of the Act”).
opener, it seems inescapable that purchasers of video games must have the same right to use the software embedded in their game discs.\textsuperscript{278}

Not all courts have followed the Federal Circuit’s lead. Most notably, the Ninth Circuit took issue with \textit{Chamberlain}’s “nexus” requirement in \textit{MDY Industries, LLC v. Blizzard Entertainment, Inc.}\textsuperscript{279} That case concerned a “bot” program that a computer programmer had developed for use in Blizzard’s popular online computer game, \textit{World of Warcraft}.\textsuperscript{280} The bot, called “Glider,” essentially put the game on auto-pilot—as Glider’s website explained, “You tell [Glider] about your character, where you want to kill things, and when you want to kill. Then it kills for you automatically. You can do something else, like eat dinner or go to a movie, and when you return, you’ll have a lot more experience and loot.”\textsuperscript{281} Glider allowed players to amass experience points and in-game currency quickly, which made their \textit{World of Warcraft} avatars more powerful and allowed them to purchase more expensive items for in-game use.\textsuperscript{282} Glider’s creator, Michael Donnelly, began selling copies of Glider through his company, MDY Industries, in summer 2005.\textsuperscript{283} Shortly after Glider hit the market, Blizzard launched a program called “Warden” to detect and prevent players using bots from connecting to its servers—which only prompted Donnelly to modify Glider to effectively avoid detection by Blizzard.\textsuperscript{284} Donnelly

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\textsuperscript{278} See \textit{Chamberlain}, 381 F.3d at 1202.
\textsuperscript{279} MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F.3d 928 (9th Cir. 2010).
\textsuperscript{280} Id. at 934–35.
\textsuperscript{281} Id. at 935. Appropriately, the term “bot” is short for “robot.” Id.
\textsuperscript{282} See id. at 935–36. The appeal of a “bot” is that it allows players to gain experience points and in-game currency without the monotony of “grinding”—“the action of repeatedly killing mobs inside of a video game in order to mass experience or currency,” which may be required in order to progress to higher stages in a role-playing video game. See Justin Eldridge, \textit{What is Grinding? Grinding in Video Games}, \texttt{EXAMINER.COM}, Mar. 5, 2012, \url{http://www.examiner.com/article/what-is-grinding-grinding-video-games}. The necessity of “grinding” in role-playing video games—particularly subscription-based games like \textit{World of Warcraft}—has sparked a cottage industry in China, where low-paid workers spend hours upon hours grinding for in-game currency—which is then sold to Western gamers online, in exchange for \textit{real} money. See Julian Dibbell, \textit{The Life of a Chinese Gold Farmer}, N.Y. TIMES, \url{http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html}.
\textsuperscript{283} MDY Indus., 629 F.3d at 936. By September 2008, the company had reaped gross revenues of $3.5 million from Glider sales. Id.
\textsuperscript{284} Id.
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acknowledged in online statements that Glider violated Blizzard’s Terms of Use, remarking that “[a]voiding detection is rather exciting, to be sure.” After Blizzard sent a cease-and-desist letter to MDY in August 2006 and dispatched an attorney to Donnelly’s home in October 2006, MDY brought suit in the District of Arizona seeking a declaration that Glider did not infringe Blizzard’s copyrights or any other rights. Blizzard filed counterclaims alleging vicarious and contributory copyright infringement and violations of the DMCA. After a bench trial, the district court held MDY liable for violating the DMCA and Donnelly personally liable for copyright infringement, and entered a judgment for $6.5 million.

Blizzard presented several theories of liability for its DMCA claims, but the core issue related to World of Warcraft’s “dynamic non-literal elements”—that is, the “real-time experience traveling through different worlds, hearing their sounds, viewing their structures, encountering their inhabitants and monsters, and encountering other players.” Blizzard argued, and the district court agreed, that Warden effectively controlled access to World of Warcraft’s dynamic non-literal elements, and that MDY unlawfully marketed Glider as a tool for circumventing warden. Since Glider did not infringe or facilitate infringement of Blizzard’s copyrights in the game’s dynamic non-literal elements, MDY’s appeal required the Ninth Circuit to address whether the DMCA prohibits circumvention where infringement is not an issue.

The Ninth Circuit considered but ultimately rejected the Federal Circuit’s reasoning in Chamberlain. The court observed that although Section 1201(a) uses the term “work protected under this title,” neither of its subsections “explicitly refers to traditional copyright

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285 *Id.*
286 *Id.* at 936–37.
287 *Id.* at 937.
288 *Id.*
289 *Id.* at 942–43.
290 *Id.* at 943.
291 *Id.*
infringement.” Further, the DMCA’s definition of circumvention describes acts that do not necessarily infringe or facilitate infringement. The court therefore interpreted the DMCA as “granting copyright owners a new anti-circumvention right.” The court found support for this construction in the DMCA’s legislative history. For example, the Senate Judiciary Committee’s report explains that the two subsections prohibiting trafficking in circumvention devices—one for access controls, the other copy controls—are “not interchangeable,” for the former “protect[s] access to a copyrighted work” while the latter “protect[s] the traditional copyright rights of a copyright owner.” The court then cited an example of DMCA liability given in the Committee’s report: crafting a tool to bypass a password in order to gain access to a copyrighted work. Notably, in this example, liability would attach even though the circumvention bears no nexus to infringement. Channeling Judge Kaplan, the court underscored the moral turpitude of infringement-free circumvention by emphasizing that the DMCA’s proscriptions are “roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.” While acknowledging the policy considerations that drove the Federal Circuit’s reasoning, the Ninth Circuit concluded that “to follow Chamberlain in imposing an infringement nexus requirement” would mean “disregard[ing] the plain language of the statute.” The court held that MDY had violated the DMCA with respect to World of Warcraft’s dynamic non-literal elements.

292 Id. at 945.
293 See id. (quoting 17 U.S.C. § 1201(a)(3)(A)).
294 Id.
295 See id. at 946–47.
296 Id. at 947 (quoting S. REP. NO. 105-109, at 12 (1998)).
297 Id.
298 Id.
299 Id. (quoting S. REP. NO. 105-109, at 12 (1998)).
300 Id. at 950.
301 Id. at 958.
With Chamberlain and MDY both on the books, there is now a circuit split as to whether circumventing an access control gives rise to liability where there is no threat of infringement. So far, other circuits have done little to resolve the disagreement. The Fifth Circuit initially embraced the Federal Circuit’s rule, but then issued a revised opinion omitting any mention of Chamberlain. In affirming Judge Kaplan’s decision in Reimerdes, the Second Circuit implicitly adopted the stricter rule later embraced by the Ninth Circuit in MDY. District courts have gone both ways, as have academics and commentators. Since circumventing tethering technology would likely be lawful under Chamberlain but unlawful under MDY and Reimerdes, it is impossible to render a prediction as to how the controversy would fare in court. As the leading treatise on copyright law acknowledges, “the airy drafting of the Digital Millennium Copyright Act . . . has led to a situation in which no perfect judicial construction presents itself.” The outcome of any litigation would therefore largely be dependent upon the forum in

302 See Murphy v. Millennium Radio Group LLC, 650 F.3d 295, 300 n.4 (5th Cir. 2011) (noting circuit split); Ground Zero Museum Workshop v. Wilson, 813 F. Supp. 2d 678, 691 n.6 (D. Md. 2011) (“There is disagreement as to whether liability under § 1201(a) can only exist if the circumvention device facilitated infringement. Neither the Fourth Circuit nor any district court within this circuit has addressed the issue. The Federal Circuit has limited liability under § 1201(a) to devices that facilitate infringement. In contrast, the Ninth Circuit has interpreted the statute to create ‘a distinct anti-circumvention right under § 1201(a) without an infringement nexus requirement.’” (Citations omitted)).

303 See MGE UPS Sys., Inc. v. GE Consumer & Indus. Inc., 612 F.3d 760, 765 (5th Cir. 2010) (original opinion); MGE UPS Sys., Inc. v. GE Consumer & Indus. Inc., 622 F.3d 631 (5th Cir. 2010) (substituted opinion).

304 See Universal City Studios v. Corley, 273 F.3d 429, 443 (2d Cir. 2001) (“the DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred”).


307 3-12A NIMMER & NIMMER, supra note 32, §12A.06[B][7][c][ii].
which it is brought and whether the parties’ claims and defenses are such that the Federal Circuit would have jurisdiction over any appeals.\textsuperscript{308}

The profound uncertainty surrounding the DMCA only makes it more likely that video game companies will resort to restrictive licensing as a legal backstop to DRM. Using technological protection in conjunction with restrictive licensing is not uncommon.\textsuperscript{309} The two are mutually reinforcing: the DRM technologically enforces the license terms,\textsuperscript{310} and if the legal protection afforded the DRM fails, the copyright owner may fall back on the license in order to punish and prevent circumvention. This “combination of contractual terms and technological measures” can effectively repeal fair use, first sale, and other rights and protections the end user would normally enjoy.\textsuperscript{311} This double-layered protection carries an additional advantage: even if circumventing the DRM is deemed lawful,\textsuperscript{312} using the product in violation of the license terms may give rise to infringement liability.\textsuperscript{313} The benefits of licensing are not lost on video game companies. In fact, Sony has already begun licensing rather than selling PlayStation 3 games.\textsuperscript{314} The EULA for a popular line of PlayStation games provides: “THIS SOFTWARE IS LICENSED, NOT SOLD. . . . Your license terminates immediately if you attempt to circumvent any technical protection measures used in connection with the Software. . . . You agree not to . . .

\textsuperscript{309} Burk, supra note 38, at 547.
\textsuperscript{310} See id. at 547–48.
\textsuperscript{311} The Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004).
\textsuperscript{312} It is unclear whether even the Federal Circuit would apply Chamberlain’s review to a licensee. See id. at 1202 n.17 (“It is not clear whether a consumer who circumvents a technological measure controlling access to a copyrighted work in a manner that enables uses permitted under the Copyright Act but prohibited by contract can be subject to liability under the DMCA. Because Chamberlain did not attempt to limit its customers use of its product by contract, however, we do not reach this issue.”).
\textsuperscript{313} MDY Indus., LLC v. Blizzard Entmt., Inc., 629 F.3d 928, 940 (9th Cir. 2010). In the case of video games and computer software, end users operating under a license do not enjoy the protections of Section 117(a)(1) of the Copyright Act, which provides that there is no infringement when “the owner of a copy of a computer program” runs the software, resulting in the creation of a temporary copy in the computer’s random access memory (RAM). 17 U.S.C. § 117(a)(1); see Vernor v. Autodesk, Inc., 621 F.3d 1102, 1109–11 (9th Cir. 2010). Licensees may only create RAM copies to the extent provided in their license. Vernor, 621 F.3d at 1110–11.
sell, rent or otherwise transfer or assign the Software.”

It appears that the age of video game ownership is already drawing to a close.

V. ONE-UP: THE COMING COLLISION—AND POSSIBLE SOLUTION

As the Federal Circuit and Ninth Circuit foreshadowed in Chamberlain and MDY, a conflict between the antitrust laws and copyright owners’ technological and contractual abrogations of the first sale doctrine may be on the horizon. Video game DRM has already attracted antitrust scrutiny from private litigants and government enforcers. As protective technology becomes more sophisticated and more aggressive, we can expect to see a flurry of antitrust enforcement activity in the years ahead. In fact, the first sale doctrine may find its salvation in the antitrust laws. The doctrine first arose in the context of an elaborate vertical price-fixing scheme. The courts have long recognized the value of competition from secondhand markets and protected against aftermarket monopolization. Because tethering technology would allow a console maker to monopolize the aftermarket for video game discs, employing this or a related technology could give rise to antitrust liability. However, given the difficulty of defining the relevant market, it is by no means clear that this argument could succeed in the courts.

A. The First Sale Doctrine’s Antitrust Origins.

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315 Rockstar Games End User License Agreement, [http://www.rockstargames.com/eula](http://www.rockstargames.com/eula) (last accessed Feb. 24, 2013). Rockstar Games is responsible for the popular Grand Theft Auto franchise. The fine print on packages for such games as Grand Theft Auto IV directs users to read the EULA online.

316 The Federal Circuit construed the DMCA narrowly so as to avoid a conflict with the antitrust laws. See [The Chamberlain Group, Inc. v. Skylink Techs., Inc.](https://caselaw.findlaw.com/fed-cir/381/1178.html) (Fed. Cir. 2004). The Ninth Circuit broadly interpreted the DMCA but left open the possibility that a copyright owner might exercise his or her rights under the DMCA in a manner that violates the antitrust laws. See MDY Indus., 629 F.3d at 951 (“If a § 1201(a)(2) defendant in a future case claims that a plaintiff is attempting to enforce its DMCA anti-circumvention right in a manner that violates antitrust law, we will then consider the interplay between this new anti-circumvention right and antitrust law”).

From its birth, the copyright first sale doctrine has been intertwined with antitrust law. *Bobbs-Merrill Co. v. Straus*,[^318] the case in which the U.S. Supreme Court first recognized the first sale doctrine, involved a publisher’s resale price management—“[t]hat is, the publisher wanted to control the price of a book after ownership was passed from the publisher to the wholesaler and from the wholesaler to the retailer.”[^319] The wholesaler in *Bobbs-Merrill* was aware of the price restriction printed in copies of the book, but did not agree to enforce it, and in fact sold the book for less than the specified price of one dollar.[^320] The Supreme Court’s opinion fails to mention that this particular vertical price restraint was “part of a larger scheme by publishers and retailers to engage in horizontal price fixing, which was the subject of [an] earlier New York Court of Appeals case.”[^321] But as the district court recognized, Bobbs-Merrill placed the restrictive notice in its books “as an attempt . . ., as a member of said American Publishers’ Association, to enforce as against this defendant the rules of such associations and combination fixing prices, in an effort to maintain them.”[^322]

Just three years after deciding *Bobbs-Merrill*, the Supreme Court held in *Dr. Miles Medical Co. v. John D. Parks & Sons Co.* that resale price maintenance constitutes a *per se* violation of the Sherman Act.[^323] The Court relied on *Bobbs-Merrill*, reasoning that if “no such privilege [to fix prices for downstream sales] exists under the copyright statutes . . . [i]t will hardly be contended, with respect to such a matter, that the manufacturer of an article of

[^320]: Id.
[^321]: Id. at 519–20 (citing Straus v. Am. Publishers’ Ass’n, 69 N.E. 1107 (N.Y. 1904)).
commerce, not protected by any statutory grant, is in any better case.” \(^{324}\) As in \textit{Bobbs-Merrill}, the Court found it legally significant that the complainant had transferred ownership over the goods in question: “The agreements are designed to maintain prices, \textit{after the complainant has parted with the title to the articles}, and to prevent competition among those who trade in them.” \(^{325}\) Borrowing in part language that it had used just three years earlier, the Court held that “[t]he complainant having sold its products at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.” \(^{326}\) As subsequent courts recognized, \textit{Bobbs-Merrill} and \textit{Dr. Miles} go hand in hand—not only because they both concerned resale price maintenance, but because the first sale doctrine and competition are intrinsically linked. \(^{327}\)

B. \textit{Antitrust, Aftermarkets, and the DMCA.}

In \textit{Chamberlain}, the Federal Circuit’s construction of the DMCA was largely driven by a concern about conflict with antitrust law. \(^{328}\) The court was especially troubled by the likelihood that Chamberlain’s construction, if adopted, “would allow any manufacturer of any product to

\(^{324}\) \textit{Dr. Miles}, 220 U.S. at 405 (quoting \textit{Bobbs-Merrill}, 210 U.S. at 339).
\(^{325}\) \textit{Id.} at 407 (emphasis added).
\(^{326}\) \textit{Id.} at 409; see \textit{Bobbs-Merrill}, 210 U.S. at 351 (“The owner of the copyright in this case \textit{did sell copies of the book in quantities and at a price satisfactory to it}. It has exercised the right to vend. . . . To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment” (emphasis added)).
\(^{327}\) See, e.g., \textit{Ethyl Gasoline Corp. v. United States}, 309 U.S. 436, 456–58 (1940) (citing both \textit{Bobbs-Merrill} and \textit{Dr. Miles} in holding that “by the authorized sale of the fuel by refiners to jobbers the patent monopoly over it is exhausted,” and that “[a]greements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints of trade within the meaning of the Sherman Act because they eliminate competition”); \textit{Waltham Watch Co. v. Keene}, 202 F. 225, 233–34 (S.D.N.Y. 1913) (relying on both \textit{Bobbs-Merrill} and \textit{Dr. Miles} in declaring unlawful “an attempt to monopolize and control prices to destroy competition”); see also Herbert Hovenkamp, \textit{The Law of Vertical Integration and the Business Firm: 1880–1960}, 95 IOWA L. REV. 863, 889 (“However, in its \textit{Dr. Miles} decision three years later the Supreme Court cited both the first-sale doctrine and the Sherman Act for the proposition that even an explicit resale-price-fixing agreement between a manufacturer of a patent medicine and a retailer was contrary to legal policy”).
\(^{328}\) See \textit{The Chamberlain Group, Inc. v. Skylink Techs., Inc.}, 381 F.3d 1178, 1193 (Fed. Cir. 2004) (“Chamberlain’s interpretation of the DMCA would . . . grant manufacturers broad exemptions from both the antitrust laws and the doctrine of misuse”).
add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial ‘encryption’ scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products.”  

Such a broad interpretation of the DMCA would “allow virtually any company to attempt to leverage its sales into aftermarket monopolies”—that is, monopolies in markets for parts and accessories to the original product. As the Federal Circuit noted, monopolization of aftermarkets violates the Sherman Act. The Ninth Circuit skirted the aftermarket issue in *MDY*, but nonetheless left the door open to antitrust liability, stating that it would “consider the interplay between this new anti-circumvention right and antitrust law” if a future defendant “claims that a plaintiff is attempting to enforce its DMCA anti-circumvention right in a manner that violates antitrust law.”

Manufacturers of “durable goods”—products that are intended to be used over a period of time after they are purchased, such as washing machines, cars, and computer printers—are “highly protective of the aftermarkets of their goods because these are the most profitable—a manufacturer may sell the initial product at a low cost but mark up the price of the aftermarket goods or services to make a profit.” In fact, “[f]irms may even price equipment below cost in order to ‘buy’ market share that will yield profits from high aftermarket prices.” This is precisely what happens in the video game market. Like washing machines, video game consoles

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329 Id. at 1201.
330 Id. (citing Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 455 (1992)).
333 See MDY Indus., LLC v. Blizzard Entmt., Inc., 629 F.3d 928, 951 (9th Cir. 2010) (“there is no clear issue of anti-competitive behavior” in the case at bar).
334 Id.
are durable goods that are intended for extended use after purchase.\textsuperscript{337} Console manufacturers regularly sell video game consoles at or below cost in order to maximize market share, with the expectation that they will realize profits in aftermarkets—most importantly in video game sales (including licensing royalties from third-party game publishers).\textsuperscript{338} Incredibly, when the Xbox 360 and PlayStation 3 consoles were first released, Microsoft and Sony each lost about $300 per console sold.\textsuperscript{339} Because console makers depend on aftermarkets to recoup these initial losses and generate their profits, they have a significant incentive to erect barriers to entry in aftermarket goods. DRM can be, and in fact has been, utilized for the purpose of excluding aftermarket competitors in the video game industry.\textsuperscript{340} And because competition in primary markets does not necessarily translate to competition in aftermarkets,\textsuperscript{341} DRM can be an effective tool for reducing aftermarket competition and increasing profits.\textsuperscript{342} The DMCA’s protections for DRM only increase the likelihood of competitive harm in the video game market.\textsuperscript{343}

\textbf{C. Monopolization in the Video Game Aftermarket.}

Although \textit{Bobbs-Merrill} and \textit{Dr. Miles} concerned vertical price restraints that implicated Section 1 of the Sherman Act, technological restraints on the exercise of first sale rights would

\textsuperscript{337} This author, for example, still owns a functioning Sega Genesis console that he purchased over two decades ago.
\textsuperscript{338} Why Nintendo Has Dominant Market Share, \url{http://sites.duke.edu/soc142-videogames/global-value-chain/market-power/why-nintendo-has-dominant-market-share-2/} (last accessed Feb. 25, 2013); see Dmitri Williams, \textit{Structure and Competition in the U.S. Home Video Game Industry}, 4 \textit{INT’LJ. ON MEDIA MGMT.} 41, 44 (2002) (“The incentive to sell units below cost is created by the need for a large installed user base; since the systems are proprietary, competition for the hearts and minds of consumers is fierce”). There is also a lucrative aftermarket for accessories and add-ons. See Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 979 (N.D. Cal. 2010).
\textsuperscript{339} Why Nintendo Has Dominant Market Share, supra note 338
\textsuperscript{340} See, e.g., Datel Holdings, 712 F. Supp. 2d at 985–86 (technological barriers preventing competition in aftermarket for Xbox 360 add-ons and accessories); SHEFF, supra note 77, at 247–50 (NES lock-out chip prevented unlicensed games cartridges from playing).
\textsuperscript{341} Borenstein et al., supra note 336.
\textsuperscript{343} See id. at 206–10.
more appropriately be analyzed under Section 2, which governs monopolization. Although the federal courts have at times condemned the accumulation of monopoly power as an evil in itself, in general, the “mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.” Section 2 liability does not attach unless the possession of monopoly power is accompanied by anticompetitive or exclusionary conduct.

By limiting consumers’ ability to sell durable goods (e.g., video game discs), tethering technologies like Disc ID prevent or inhibit the development of a market for used goods. As the Copyright Office recognized in its DMCA Section 104 report, “[t]he practice of using technological measures to tether a copy of a work to a particular hardware device” makes reselling the copy “a useless exercise, since the recipient will always receive nothing more than a useless piece of plastic.” This allows the original producer to acquire or maintain a monopoly in the relevant market, potentially in violation of Section 2.

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345 Sandeep Vaheesan, The Evolving Populisms of Antitrust 21–22, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222368; see Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979) (“Because, like all power, it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our economy and our society, monopoly power is ‘inherently evil’” (quoting United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 345 (D. Mass. 1953), aff’d per curiam, 347 U.S. 521 (1954))).


347 U.S. COPYRIGHT OFFICE, supra note 185, at 75–76.

348 See Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1198 (10th Cir. 2009) (unilateral conduct unlawful under Section 2 if it threatens a monopoly); Aspen Skiing Co., 472 U.S. at 595–96 (“the offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes”). The “willful acquisition or maintenance” of monopoly power that Section 2 prohibits is “distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” Aspen Skiing Co., 472 U.S. at 596 n.19 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).
Courts and commentators have long recognized the value of secondhand competition.\textsuperscript{350} As the leading treatise on antitrust law explains, “[d]urability bears on market power when the second use ‘competes’ in some significant sense with the first. . . . To this extent, the durable item competes with the new item and limits the power of its producer.”\textsuperscript{351} In the well-known \textit{Alcoa} decision, Judge Learned Hand gave the following illustration: even though the owner of a copyright enjoys a “lawful monopoly,” he “cannot prevent those to whom he sells from reselling at whatever prices they please.”\textsuperscript{352} Consequently, “[a]t any moment his control over the market will therefore be limited by that part of what he has formerly sold, which the price he now charges may bring upon the market, as second hand or reclaimed articles.”\textsuperscript{353} The presence of a secondhand market therefore limits a monopolist’s ability to charge monopoly prices.\textsuperscript{354} Attempting to suppress a secondhand market may raise antitrust concerns.\textsuperscript{355} In \textit{United States v. United Shoe Machinery Corp.},\textsuperscript{356} defendant United Shoe manufactured a variety of machines used for shoemaking, enjoying an approximately 85 percent share of the relevant market.\textsuperscript{357} The company engaged in a number of business practices to maintain and extend its

\textsuperscript{350} \textit{See}, \textit{e.g.}, United States v. Aluminum Co. of Am., 148 F.2d 416, 424–25 (2d Cir. 1945) (“At any given moment therefore ‘secondary’ competes with ‘virgin’ in the ingot market; further, it can, and probably does, set a limit or ‘ceiling’ beyond which the price of ‘virgin’ cannot go, for the cost of its production will in the end depend only upon the expense of scavenging and reconditioning. . . . At any moment his control over the market will therefore be limited by that part of what he has formerly sold, which the price he now charges may bring upon the market, as second hand or reclaimed articles.”).

\textsuperscript{351} PHILLIP E. AREEDA & HERBERT HOVENKAMP, \textit{ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION} § 573a (2012).

\textsuperscript{352} \textit{Aluminum Co. of Am.}, 148 F.2d at 425 (citing United States v. Gen. Elec. Co., 272 U.S. 476, 484 (1926)).

\textsuperscript{353} \textit{Id.}

\textsuperscript{354} AREEDA & HOVENKAMP, \textit{supra} note 351, § 573b.

\textsuperscript{355} \textit{See} Michael Waldman, \textit{Antitrust Perspectives for Durable-Goods Markets} 16 (CESifo Working Paper No. 1306) (“The antitrust issue here is whether the antitrust authorities should intervene to eliminate practices that serve to make used units unavailable for consumption. The perspective put forth here is that the answer is frequently yes.”); Barak Y. Orbach, \textit{The Durapolist Puzzle: Monopoly Power in Durable-Goods Markets}, 21 YALE J. ON REG. 67, 108 (2004) (“Courts therefore usually condemn practices that tend to cripple secondhand markets, such as limiting access to necessary replacement parts and lease-only policies”).


\textsuperscript{357} \textit{Id.} at 297, 307.
monopoly, chief among them being a complex leasing system. This “lease-only system” was exclusionary in the extreme—among other things, the leases imposed a lengthy 10-year term—and allowed United to maintain its market power and engage in price discrimination. By not selling its machines outright, United erected barriers to entry and prevented the development of a secondhand market for shoe machinery. To the extent that used machines did make it to market, United bought them back. “It is a fair inference,” the court observed, “that United’s purpose in acquiring them was to curtail competition from second-hand shoe machinery.” Finding that United had violated Section 2, the court fashioned a remedy that, among other things, required United to begin offering its machines for sale as well as lease. This remedy ensured that United machines would eventually reach secondhand markets, from which “United will face a type of substitute competition which will gradually weaken the prohibited market power which it now exercises.” The Supreme Court ultimately affirmed the district court.

United Shoe suppressed competition through its leasing practices, but a monopolist might accomplish the same end through technological means. Of course, “courts are properly very skeptical about claims that competition has been harmed by a dominant firm’s product design

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358 See id. at 314 et seq. (describing lease system).
359 Id. at 344.
360 Id.
361 See id. at 340 (“United’s leases, in the context of the present shoe machinery market, have created barriers to the entry by competitors into the shoe machinery field.”).
362 See id. at 325 (“United’s lease system makes impossible a second-hand market in its own machines. This has two effects. It prevents United from suffering that kind of competition which a second-hand market offers. Also it prevents competitors from acquiring United machines with a view to copying such parts of the machines as are not patented, and with a view to experimenting with improvements without disclosing them to United.”).
363 Id. at 333-34.
364 Id. at 334.
365 Id. at 343.
366 Id. at 349, 352.
367 Id. at 350.
369 Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 545 (9th Cir. 1983).
Antitrust law not only permits but encourages monopolists to “compete aggressively on the merits” and to strive to succeed through “the process of invention and innovation.” But a monopolist may be on the hook under the Sherman Act if the plaintiff can prove that a technological “innovation” was in fact implemented for anticompetitive reasons, “rather than for improving the operation of the [product].” In *C.R. Bard v. M3 Systems*, for example, the Federal Circuit upheld an antitrust verdict finding that C.R. Bard had modified a patented medical device, its biopsy “gun,” not to improve functionality but to “prevent its competitors’ non-infringing, flangeless needles from being used in Bard’s guns.” Similarly, in *United States v. Microsoft*, the D.C. Circuit held that Microsoft’s technological integration of its Windows operating system and Internet Explorer web browser was subject to antitrust scrutiny. The government put forth evidence establishing that the integration did not make Internet Explorer more attractive to consumers, but rather discouraged competitors from distributing rival products.

Under these standards, one can easily envision how a monopolization claim against tethering technology might look. The sole purpose of tethering technology like Disc ID is to reduce competition in the aftermarket for video games. In fact, according to Sony’s patent application, the Disc ID system effectively “suppresses” the secondhand market for video games by preventing game discs from being played on multiple consoles. Eliminating competition from secondhand sellers “supports the redistribution of part of proceeds from sales of the

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371 *Id.* at 544–45 (9th Cir. 1983) (quoting Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979)).
372 *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1382 (Fed. Cir. 1998).
373 *Id.*
374 *Microsoft Corp.*, 253 F.3d at 64–66.
375 *Id.* at 65.
In other words, like the lease-only system in *United Shoe*, tethering technology shields the console maker from secondhand “substitute competition”—thereby enhancing corporate profits and cementing the console maker’s monopoly status in the aftermarket for games. The patent application does not suggest that this technological “improvement” would enhance the console’s functionality or make video game products more attractive to consumers. Its sole purpose and effect would instead be to prevent competitors from selling substitute goods in the form of used games. Because the acquisition of monopoly power through tethering technology does not represent legitimate success “as a consequence of a superior product, business acumen, or historic accident,” but rather amounts to aftermarket control through “anticompetitive or exclusionary means,” it provides a plausible basis for antitrust liability under Section 2 of the Sherman Act.

**D. The Relevant Market Problem.**

A competitor cannot monopolize in violation of Section 2 if it does not possess monopoly power in the relevant market. Defining the relevant market is therefore a crucial, and predictably thorny, issue in Section 2 cases. The Supreme Court has explained that the relevant market consists of those “commodities reasonably interchangeable by consumers for the same purposes.” Interchangeability requires only rough equivalence—“while there may be some

377 *Id.*
379 *Cf. C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1382 (Fed. Cir. 1998) (“Although Bard contended at trial that it modified its Biopty [sic] gun to make it easier to load and unload, there was substantial evidence that Bard’s real reasons for modifying the gun were to raise the cost of entry to potential makers of replacement needles, to make doctors apprehensive about using non-Bard needles, and to preclude the use of ‘copycat’ needles.”). 380 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 & n.19 (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).
degree of preference for one [product] over the other, either would work effectively.” \[^{383}\] Thus, under certain circumstances, a market for transportation might include not only cars of varying makes and models, but also bicycles. \[^{384}\] One of the major indicators of interchangeability is “cross-elasticity of demand,” \[^{385}\] i.e., the degree to which the rise in price of one product precipitates greater demand for another. Products belonging to the same market are typically characterized by a cross-elasticity of demand. \[^{386}\]

In the case of tethering technologies like Disc ID, defining the relevant market so as to support a monopolization claim would be a considerable (and perhaps insurmountable) challenge. Perhaps the most logical measure of a video game company’s monopoly power is the console market, which “represent[s] the mainstream of the video game industry.” \[^{387}\] Although the oligopolistic console market has historically accommodated no more than two or three major players at any given time, it is marked by fierce competition. \[^{388}\] With the exception of Nintendo, whose NES console dominated the industry in the late 1980s and early 1990s, \[^{389}\] the market has not seen a true monopolist in the past few decades. \[^{389}\] The market for the current generation of consoles \[^{390}\] is split more or less evenly: Nintendo accounts for about 40 percent of the market, while Sony and Microsoft hold about 30 percent each. \[^{391}\] Even if Nintendo is taken out of the equation—compared to Sony’s PlayStation 3 and Microsoft’s Xbox 360, Nintendo’s Wii utilizes

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\[^{384}\] Id.


\[^{386}\] Id. (quoting Tunish Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)).

\[^{387}\] Williams, supra note 338, at 44.

\[^{388}\] Id. at 43.

\[^{389}\] SHEFF, supra note 77, at 196, 349, 402.

\[^{390}\] Williams, supra note 338, at 43–44.

\[^{391}\] That is, Nintendo’s Wii, Sony’s PlayStation 3, and Microsoft’s Xbox 360.

inferior hardware, costs less, and targets different classes of consumers—\textsuperscript{393} the console market would still be split evenly.\textsuperscript{394} No competitor could be considered a monopolist in these conditions,\textsuperscript{395} as evidenced by the robust competition between the major console makers.

As discussed above, however, the real market of interest is the aftermarket for video game discs. Since this is where the profits lie, console makers try to “lock in” a critical mass of users at the console level and then extract as much from them as possible in the aftermarket.\textsuperscript{396} Disc ID specifically seeks to reduce competition and promote console makers’ monopoly power, in this lucrative aftermarket. It therefore makes sense, at least in theory, to define the “relevant market” as the aftermarket for video games, rather than the primary market for gaming consoles. In fact, interchangeability principles support an even more precise market definition: the market for video game discs that are compatible with a particular console (\textit{e.g.}, the market for PlayStation 3 games). Games produced for the Wii or Xbox 360 are not generally interchangeable with those produced for the PlayStation 3. This owes, in part, to the fact that many games are only developed for a single gaming console—the popular \textit{Final Fantasy} franchise, for example, is exclusive to Sony’s consoles, while games featuring Nintendo’s mascot Mario are only available for Wii. More fundamentally, however, games manufactured for different consoles are not interchangeable because different consoles are not interoperable.\textsuperscript{397} If the price of Xbox games increases, consumers who are “locked in” to the Xbox console cannot

\textsuperscript{393} See Why Nintendo Has Dominant Market Share, \textit{supra} note 338 (“Creating a system with lower development cost and one that has a function to create a gaming experience focused on both console and video game, Nintendo has created a product (the Wii) with good value, great accessibility, and broad based appeal. The Wii does not effectively capture the market for ‘hard-core’ gamers (it is undoubtedly graphically inferior), but has focused its efforts and resources on expanding and then penetrating new markets.”).

\textsuperscript{394} See D’Angelo, \textit{supra} note 392.

\textsuperscript{395} \textsc{Areeda} \& \textsc{Hovenkamp}, \textit{supra} note 351, § 532c (generally market shares below 50 or 60 percent do not constitute monopoly power).

\textsuperscript{396} See Williams, \textit{supra} note 338, at 43 (“In seeking to create dominant positions for themselves, each firm release[s] a system incompatible with the others. . . . Meanwhile, the consumer [is] forced into an all-or-nothing decision when purchasing a home machine. . . .”).

\textsuperscript{397} \textit{Id.}
opt for less-expensive Wii or PlayStation games without buying a new console. The absence of cross-elasticity of demand favors a market definition that is specific to a single console’s games.  

A console-specific definition of the video game market would be plausible under current law. The Supreme Court has held that the relevant market may be an aftermarket for products belonging to a single brand, at least where consumers are “locked in” to equipment purchased in the primary market. Eastman Kodak v. Image Technical Services centered on Kodak’s policy of selling photocopier replacement parts only to purchasers of Kodak photocopiers who used Kodak repair services. The Court held that the relevant market could be defined as the aftermarket for Kodak-provided parts and services, even though Kodak did not have market power in the photocopier market. This holding was premised on a theory of “locking in”: because most consumers were incapable of or simply chose not to undertake the “sophisticated analysis” required to evaluate the total lifetime cost of Kodak equipment, parts, and services, they could not make informed purchasing decisions in the primary equipment market. (The Court referred to this market imperfection as “information costs.”) Once consumers had purchased a Kodak photocopier, they were essentially “locked in” to Kodak’s parts and services aftermarket. “If the cost of switching is high,” the Court reasoned, “consumers who already have purchased the equipment, and are thus ‘locked in,’ will tolerate some level of service-price

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398 See Michael L. Katz & Carl Shapiro, Antitrust in Software Markets, in COMPETITION, INNOVATION AND THE MICROSOFT MONOPOLY: ANTITRUST IN THE DIGITAL MARKETPLACE 30, 39 (Jeffrey A. Eisenach & Thomas M. Lenard eds., 1999) (“Thus, application software markets tend to be defined for a given hardware and operating system configuration, or ‘platform’”).


400 Id. at 458.

401 Id. at 477–78, 481–82.

402 Id. at 473–76.

403 Id. at 477.

404 Id. at 476.
increases before changing equipment brands.”  

The combination of high information costs and high switching costs meant that, from the consumer’s perspective, “service and parts for Kodak equipment are not interchangeable with other manufacturers’ service and parts.” The Court concluded that it was appropriate to define the relevant market as “only those companies that service Kodak machines”—i.e., Kodak alone.

The video game market presents some of the same characteristics as the photocopier market described above. As in Kodak, video games consumers are apt to being “locked in.” Consumers are “forced into an all-or-nothing decision” when purchasing a console: they can only play games manufactured for the console they purchase, and are excluded from paying games developed for other consoles. This means that switching costs are high. Consumers who have committed to a particular console will tolerate some level of price increase in the aftermarket for games before investing in a brand new console. Given the gap between the cost of switching consoles and any marginal increase in the price of games—new consoles typically retail for anywhere from two hundred to six hundred dollars, while games go for $50 or $60—video game companies arguably have considerable latitude to increase game prices before customers start jumping consoles.

There is precedent for defining the relevant market to include only software compatible with a particular hardware configuration. In the Microsoft litigation, for example, one of the

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405 Id.
406 Id. at 481–82.
407 Id. at 482.
408 Williams, supra note 338, at 43.
409 See Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 476 (1992) (“Under this scenario, a seller profitably could maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers” (emphasis added)); see also Katz & Shapiro, supra note 398, at 39 (“[C]onsumers use applications software in conjunction with specific configurations of hardware and/or operating systems, and often will not purchase new hardware or a new operating system in response to modest shifts in application software prices. In part, this results from the fact that consumers have already purchased the hardware and operating system prior to buying specific pieces of software.”).
relevant markets identified by the district court was the market for the “licensing of all Intel-compatible PC operating systems.” Microsoft argued that non-Intel-compatible operating systems, chiefly Apple’s Mac OS, should be included in the relevant market. The district court found, and the appellate court agreed, that high switching costs militated against including non-Intel-compatible systems in the definition. In the district court’s words, there were, at the time, “no products . . . that a significant percentage of computer users worldwide could substitute for [Intel-compatible operating systems] without incurring substantial costs.” Mac OS was not interchangeable with Microsoft’s Intel-compatible Windows program because most “consumers would not switch from Windows to Mac OS in response to a substantial price increase because of the costs of acquiring the new hardware needed to run Mac OS (an Apple computer and peripherals) and compatible software applications.” Under this reasoning, the relevant market in a Section 2 challenge to tethering technology might also be defined in hardware-specific terms. Just as Microsoft unquestionably possessed monopoly power in the market for Intel-compatible operating systems (Windows had a 95 percent market share), so too does Sony enjoy monopoly status in the market for PlayStation-compatible video games.

Most courts, however, maintain that high switching costs are insufficient to justify a narrow market definition like that in Kodak and Microsoft. As one district court explains, aftermarket monopolization is only possible “when there are ‘significant information and switching costs,’” which sever the link between the primary market and the aftermarket. This

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410 United States v. Microsoft, 253 F.3d 34, 52 (D.C. Cir. 2001).
411 Id.
412 Id.
413 Id.
414 Id. at 54–56.
415 All PlayStation games must be produced by Sony or a third-party licensed by Sony. See Williams, supra note 338, at 44.
is intuitive. In *Kodak*, it was consumers’ inability to accurately assess lifetime photocopier costs (inclusive of equipment, parts, and service) that induced them to being “locked in.”417 Had information costs been lower, consumers could have accounted for Kodak’s aftermarket costs in deciding whether to purchase a Kodak photocopier in the first place.418 By the same token, had information costs been high but switching costs low, then Kodak’s customers could have painlessly switched to a competitor’s equipment once they encountered high prices for parts and service. It is the combination of product uniqueness, switching costs, and information costs that “generate[s] market power even as [it] delineate[s] the boundaries of the market in which such power is exercised.”419

Other courts have expressed this same relationship in terms of the primary market’s interplay with the aftermarket. The First Circuit instructs that “a court may conclude that the aftermarket is the relevant market for antitrust analysis only if evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check.”420 Where information costs or switching costs (or both) are low, “aftermarket behavior is generally disciplined by competition in the primary product market.”421 As the Court lucidly explained in *Kodak*, aftermarket monopolization is necessarily tempered by the degree to which consumers can make informed decisions in the primary market or easily switch brands to avoid aftermarket gouging.422

This is why an aftermarket monopolization claim against a video game console maker may be doomed to fail. Even though tethering technology is plainly anticompetitive, and even

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417 *Eastman Kodak Co.*, 504 U.S. at 473–76.
418 See id.
422 *Eastman Kodak Co.*, 504 U.S. at 473–77; see ID Sec. Sys., 249 F. Supp. 2d at 641–43, 647–48 (interpreting *Kodak*).
though secondhand dealers probably would be excluded from market, and even though switching costs are high, available evidence suggests that information costs are comparatively low. In contrast to Kodak, prospective game console purchasers have ready access to information about aftermarket costs. Video game pricing is highly visible, easy to comprehend, and not usually subject to wide fluctuation. Moreover, gamers readily understand the implications of technology that precludes the use of secondhand video games. As GameStop CFO Rob Lloyd recently announced, internal market research found that approximately 60 percent of consumers would not buy a new console if it were incapable of playing pre-owned games. In other words, simple information about a console maker’s aftermarket behavior directly impacts consumers’ decisions in the primary market. GameStop’s research bears out the conclusion that “the high switching costs associated with [video game consoles] are significantly counterbalanced by information costs so low as to be almost nonexistent, a fact that increases a consumer’s ability to make an intelligent choice when choosing the company with which it will have a long relationship.” A court might therefore be hesitant to conclude that a console-specific aftermarket for video games would be an appropriate market definition.

The difficulty of defining the relevant market in such a manner that a video game company could be shown to possess market power could be fatal to any theory of Section 2 liability. Although antitrust law offers a potential solution to the dilemma posed by Disc ID and other types of tethering technology, the course is far from clear. The Sherman Act prizes

423 See Eastman Kodak Co., 405 U.S. at 473 (“Much of this information is difficult—some of it impossible—to acquire at the time of purchase”).
425 ID Sec. Sys., 249 F. Supp. 2d at 643.
426 See SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 17 (1st Cir. 1999) (“Put another way, a court may conclude that the aftermarket is the relevant market for antitrust analysis only if the evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check”).
consumer welfare above all else, but it will not intervene where consumer preference is sufficient to remedy market abuses. One can only hope, for the sake of first sale, that consumers will have the good sense to veto such draconian technologies.

VI. CONCLUSION: GAME OVER?

Revisions to the first sale doctrine are not to be taken lightly. Narrowing the doctrine, even modestly, amounts to “a fundamental change in one of the main tenets of copyright law,” and upsets the “traditional copyright bargain” between copyright holders and personal property owners. First sale benefits consumers both directly and indirectly: not only does the doctrine facilitate the free alienability of personal property, minimizing transaction costs and obviating the need to negotiate with copyright owners for resale or transfer rights, but it also promotes competitive pricing in the marketplace. The Supreme Court has recognized the first sale doctrine’s importance to consumers and competition for over a century.

This is precisely why the content industry’s assault on first sale is so troubling. For the past three decades, copyright-heavy corporations have chipped away at the doctrine through lobbying, litigation, and licensing. Tethering technology, such as Disc ID, threatens to further undermine first sale by physically preventing users from exercising their first sale rights. More broadly, industry’s embrace of tethering technology threatens to stymie competition and enhance copyright owners’ monopolies. What is worse, these technological barriers are themselves

427 Vaheesan, supra note 345, at 33–39.
428 See Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 421 (D. Del. 2006) (“If consumers are free to choose among products, then the success of a new product in the marketplace reflects consumer choice, and antitrust should not intervene when an invention pleases customers” (quoting AREEDA & HOVENKAMP, supra note 351, § 776d)).
430 Brilliance Audio, Inc. v. Haight’s Cross Commc’ns, Inc., 474 F.3d 365, 374 (6th Cir. 2007) (construing statutory exception to first sale doctrine narrowly so as to protect the copyright “bargain”).
432 Ghose et al., supra note 50, at 346.
backed by the force of law. The marriage of digital technology and strict anticircumvention rules could effect a *de facto* repeal of the first sale doctrine.

The irony is that even though “the Copyright Act and the Sherman Act [are] both designed ultimately to improve the welfare of consumers in our free market system,”[^434] neither body of law provides a clear solution to the problems posed by tethering technology. Video gamers could be held liable under the DMCA for circumventing a system like Disc ID, and the Sherman Act might not prevent content producers from technologically decimating an entire industry of secondhand video game merchants. This Article demonstrates that there is a way through the copyright and antitrust thicket, but it also acknowledges doctrinal complexities and litigation realities that could frustrate a consumer-friendly resolution to this quagmire. Ultimately, it may devolve upon consumers to inform themselves and vote with their wallets. Otherwise, it really could be “Game Over” for first sale.