

NOTE

Owning a Piece of the Cloud: Intellectual Property and Consumer Protection

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ABSTRACT

The goods purchased by consumers today are increasingly digital or electronic in nature, with copyrighted components becoming commonplace in many industries. This situation has created a conflict between intellectual property rights and consumer property rights. The enforcement of intellectual property rights, and the introduction of measures designed to prevent the violation of those rights, have had the effect of eroding consumers' personal property rights in the products they purchase.

Most software purchased by consumers, and many electronic devices as well, are sold under license agreements that restrict consumers' rights in their products. Many products are also sold with digital rights management software, which prevents consumers from using their property in various ways as a practical matter. These digital rights management schemes are also equivalent to legal restrictions, due to statutory provisions that criminalize their circumvention. Most consumers, however, do not read these license agreements or understand the legal implication of circumventing digital rights management schemes, even in furtherance of a legal purpose. This situation creates both consumer disappointment and traps for the unwary, as consumers "buy" a product only to discover that they cannot use it as they expected, or that they are legally liable for doing so.

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This Note proposes a legislative solution that would require notification on any product sold with either legal or practical restrictions on any of a proposed suite of fundamental rights of ownership. This solution would allow consumers to choose the bundles of rights and features that most appeal to them, and would end the consumer disappointment at unexpected and unwelcome restrictions. This solution would also allow the existing market pressure in this direction to incentivize less restrictive options, rather than using more intrusive or burdensome government regulation to achieve this goal.

TABLE OF CONTENTS

INTRODUCTION	241
I. THE SCALES ARE TIPPED: CURRENT RIGHTS OF CONSUMERS OF COPYRIGHTED GOODS	244
A. <i>Paving with Good Intentions: Consumer Rights in the Copyright Act</i>	245
1. The Right to Resell and the First Sale Doctrine	246
2. The Right to Use and the Essential Step Defense	250
B. <i>The Detour: How Private Contracts Restrict Consumer Property Rights</i>	253
C. <i>The Blockade: Digital Rights Management Schemes</i> ..	255
II. BANS, OWNERS, AND MARKETS, OH MY: CURRENT OPTIONS FOR A SOLUTION	259
A. <i>Bans: Throwing the Baby out with the Bath Water</i> ..	259
B. <i>Owners: Returning the Copyright Act Consumer Protections to Everyone</i>	261
C. <i>Markets: Let the Invisible Hand Fix It</i>	262
III. ENABLING CONSUMER CHOICE THROUGH A LEGISLATIVE NOTIFICATION MANDATE	263
CONCLUSION	269
APPENDIX	270

INTRODUCTION

In 2007, Amazon debuted the Kindle, an electronic book (“eBook”) reader designed to preserve as much of the look and feel of paper book reading as possible.¹ The Kindle had the ability to connect to the Kindle Store, Amazon’s online eBook store, allowing Kindle owners to purchase eBooks directly from their devices and then

¹ Press Release, Amazon.com, Introducing Amazon Kindle (Nov. 19, 2007), <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1079388>.

download and begin reading them immediately.² In part because of this connectivity and ease of use, the Kindle was an instant commercial success. It sold out within hours.³

In 2009, Kindle owners reacted less positively to the company when Amazon remotely removed some already-purchased eBooks from customers' Kindle libraries.⁴ Although multiple titles were affected, a highly prominent deletion was George Orwell's novel *1984*.⁵ The company issued refunds,⁶ but the public relations impact was significant. Many customers were outraged, in large part because they had no idea that Amazon had the technological ability to remove content from their devices, let alone would actually allow remote deletions to occur.⁷

The Kindle illustrates an increasingly prominent issue in the age of the internet: consumers are buying digital goods but not acquiring the ownership rights that normally accompany a purchase. If a consumer buys a physical book, she can resell it or give it away, loan or lease it to a third party, and read it without ever needing to contact the seller or the publisher for permission. For digital products, each of these rights, as well as others more applicable to products other than to books,⁸ is currently restricted by the license agreements of many popular products.⁹

² *Id.*

³ *Amazon Kindle Sells Out on Debut*, BBC NEWS (Nov. 22, 2007, 11:58 AM), <http://news.bbc.co.uk/2/hi/technology/7107118.stm>.

⁴ Brad Stone, *Amazon Erases Two Classics from Kindle. (One Is '1984.')*, N.Y. TIMES, July 18, 2009, at B1. The deletion was prompted by a dispute over whether the company selling that version of the novel in the Kindle store in fact had the rights to do so. *Id.*

⁵ *Id.* As the article notes, the irony of remotely deleting a novel about an overly intrusive "Big Brother" was not lost on anyone. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ For example, if you buy an oven from Sears, you can use it to bake cookies for your start-up bakery. Sears places no legal restrictions on your use of the appliances you purchase. *Cf. Terms of Use*, SEARS, <http://www.sears.com/cstermsofsevice/nb-10000000022530> (last updated Sept. 25, 2013) [hereinafter *Sears.com Terms of Use*] (listing terms that limit use of the website without providing a legal document that specifically limits customers' use of the products themselves). If you buy an iPhone or iPad from Apple, however, you cannot use it to shoot video or take pictures to advertise that bakery. *See* APPLE, iOS 7.0 SOFTWARE LICENSE AGREEMENT ¶ 15 (July 24, 2013) [hereinafter *iOS7 LICENSE AGREEMENT*], available at <http://images.apple.com/legal/sla/docs/iOS7.pdf> (prohibiting commercial use of the video and image encoding software in iPhone, iPad, and iPod Touch devices).

⁹ Kindle eBooks cannot be sold, according to the Kindle Store Terms of Use. *Kindle Store Terms of Use*, AMAZON, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201014950> (last updated Sept. 6, 2012) [hereinafter *Kindle Store Terms of Use*]. Although Kindle eBooks can be loaned to a third party for up to fourteen days, they can only be loaned once per title. *Lend or Borrow Kindle Books*, AMAZON, <http://www.amazon.com/gp/help/customer/dis>

Several trends of modern technology exacerbate this problem. First, software (and other copyrighted material) is embedded in many goods purchased in America today,¹⁰ and those goods frequently come with the same kind of contracts attached to them that software has.¹¹ Second, in addition to the legal restrictions imposed by a license agreement, many copyrighted goods are sold with software “locks,” called “digital rights management” (“DRM”), that prevent certain uses of the software.¹² Finally, the situation is complicated by the increasing use of the internet to purchase goods;¹³ a consumer who would never sign a fifty page paper contract before purchasing a product at a brick-and-mortar store can easily click through and agree to the terms of an End User License Agreement of similar length on the internet without much thought. The fact that most consumers pay little attention to online contracts allows companies to include clauses

play.html/ref=HP_rel_topic?ie=UTF8&nodeId=200549320 (last visited Dec. 28, 2014). Further, not all eBook platforms have this option. See *User Policies for Google Play Books*, GOOGLE, <https://support.google.com/googleplay/answer/1062968?hl=en> (last visited Dec. 28, 2014) [hereinafter *Google Play Books User Policies*]. Finally, many software titles, especially big-budget video game titles, require a constant connection to the game publisher’s servers in order to verify that the game is an authorized copy and to prevent piracy. See Paul Tassi, *The Real Reason There Will Never Be Offline Single Player in Diablo 3*, FORBES (May 16, 2012, 9:46 AM), <http://www.forbes.com/sites/insertcoin/2012/05/16/the-real-reason-there-will-never-be-offline-single-player-in-diablo-3/> (noting that the requirement of a constant internet connection to play certain games exists to prevent piracy). In some cases, this requirement exists even in cases where online elements of the game, such as a multiplayer feature that allows players on different computers to interact with each other, are not being used. Andrew Yoon, *Destiny Requires Online Connection, Even in Single-Player*, SHACKNEWS (Feb. 17, 2013, 1:00 PM), <http://www.shacknews.com/article/77873/destiny-is-online-only-even-for-single-player> (noting that even single players of the game *Destiny* will need an online connection).

¹⁰ See Joanna Stern, *More than Half of Americans Own Smartphones*, ABCNEWS.COM TECH. REV. BLOG (June 6, 2013, 2:03 PM), <http://abcnews.go.com/blogs/technology/2013/06/more-than-half-of-americans-own-smartphones/> (noting that smartphones, phones embedded with software, are ubiquitous).

¹¹ See, e.g., iOS7 LICENSE AGREEMENT, *supra* note 8. For example, using any Apple device running iOS7 software constitutes consent to the iOS7 software license agreement. Previous and subsequent versions of iOS have similar licenses, which can be viewed at <https://www.apple.com/legal/sla/> by clicking on the button labeled “iPad, iPhone and iPod touch Terms and Conditions,” which then reveals buttons for the various software models. Clicking on these buttons brings the viewer to the license agreement for the designated version of the software.

¹² Q&A: *What Is DRM?*, BBC NEWS (Apr. 2, 2007, 2:13 PM), <http://news.bbc.co.uk/2/hi/technology/6337781.stm> (“Digital Rights Management, or DRM, is a class of technologies that allow rights owners to set and enforce terms by which people use their intellectual property.”).

¹³ Ruth Mantell, *E-commerce Speeds Up, Hits Record High Share of Retail Sales*, MARKETWATCH CAPITOL REP. BLOG (Aug. 15, 2014, 1:45 PM), <http://blogs.marketwatch.com/capitolreport/2014/08/15/e-commerce-speeds-up-hits-record-high-share-of-retail-sales/> (showing that quarterly e-commerce sales, as a percent of total quarterly retail sales in the United States, and adjusted for season variation, increased to 6.4% in the second quarter of 2014 from less than 3.0% in the second quarter of 2005).

that may be off-putting or surprising to consumers, with little fear that such clauses will have any effect on sales.¹⁴

When consumer products contain so many copyrighted elements, the law of intellectual property begins a tug of war with the law of personal property to decide who has what rights. As consumers are mostly individuals, and intellectual property holders are mostly large corporations, the contest between these two parties has favored the intellectual property holders at the expense of consumer rights. This Note sets forth the type and extent of this loss of consumer property rights and proposes a novel legislative solution that would provide a measure of protection for consumers without putting overly burdensome restrictions on contract terms.

Part I describes the rights that purchasers of copyrighted goods currently do and do not have, under both statutory law and common clauses in private contracts, as well as practical restrictions imposed by digital rights management schemes. Part II summarizes potential options to address this situation, and evaluates the relative strengths and weaknesses of these alternatives. Part III suggests that Congress address the current deterioration of consumer property rights by passing legislation that (1) identifies the fundamental rights of an owner of a piece of personal property, including a product that is or includes a copy of copyrighted material, and (2) requires clear notification, prior to the finalization of the transaction, of any restriction of those rights in any contract or license agreement accompanying the product.

I. THE SCALES ARE TIPPED: CURRENT RIGHTS OF CONSUMERS OF COPYRIGHTED GOODS

There are two main sources of law that describe the rights of an owner of a copyrighted good.¹⁵ The first is statutory law and accom-

¹⁴ See, e.g., *7,500 Online Shoppers Unknowingly Sold Their Souls*, FOXNEWS.COM, Apr. 15, 2010, <http://www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls/>. An online retailer of computer games changed its Terms and Conditions to include a clause reading, "By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul." *Id.* (internal quotation marks omitted). Based on the fact that few customers selected a tick box option to nullify this clause, the retailer believed that as many as eighty-eight percent of its customers failed to review its terms and conditions before completing a purchase. *Id.*

¹⁵ For the purposes of this Note, the phrase "copyrighted good" is used to mean any consumer product, virtual or physical, that is itself a copyrighted work, or includes a copyrighted component. This Note also uses the phrase "owner of a copyrighted good" to mean an individual consumer who paid for the product under circumstances other than as a rental or a subscription. Many of the issues discussed in this Note can also apply to any product whose purchase

panying judicial interpretation; the second is contract law, due to the license agreement to which the consumer almost certainly agreed when she bought or used the device. In addition, software manufacturers frequently include technological measures that restrict consumer use of their products as a practical matter. Although copyright law itself grants consumers a number of rights and safe harbors, the ubiquitous contract license terms and software restrictions often combine to strip away those consumer protections.

A. Paving with Good Intentions: Consumer Rights in the Copyright Act

The purpose of copyright law, as set forth in the Constitution, is “[t]o promote the Progress of Science and useful Arts” by giving writers the “exclusive Right” to their creations.¹⁶ The copyright statutes are thus intended to strike a balance between granting that right to authors and preserving other rights of the general public.¹⁷ In some areas the correct balance is not obvious. For example, there is tension between the exclusivity of the author’s right to reproduce her work and the public interest in the dissemination of certain information.¹⁸ This prompted judicial creation of the fair use doctrine, which carves out exceptions to an author’s exclusive right to reproduce her work “where the public interest compels free access.”¹⁹

When copyrighted works are embedded in physical goods, or themselves constitute functional items, the concern for balancing authors’ and consumers’ rights becomes more acute. Ordinarily, a seller’s rights in a piece of personal property end at the sale. There is no balance to be struck between his interests and those of the buyer once the buyer has paid and taken possession of the property: the buyer assumes full ownership rights. In contrast, with a copyrighted good, an author retains rights in the intellectual property embedded in a physical good, even where he transfers ownership of the item to a

requires signing a contract, which could in theory be any product. This Note, however, will focus on copyrighted goods. Many of the contracts actually in use today arose out of the intellectual property aspect, and companies generally style such contracts as licenses to use the embedded intellectual property.

¹⁶ U.S. CONST. art I, § 8, cl. 8.

¹⁷ See John D. Shuff & Geoffrey T. Holtz, *Copyright Tensions in a Digital Age*, 34 AKRON L. REV. 555, 556 (2001).

¹⁸ *Id.*

¹⁹ See Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1011 (1970).

consumer.²⁰ Under these circumstances, it becomes necessary to clarify who has what rights.

The federal copyright statutes include several provisions related to this problem. After describing the exclusive rights of authors,²¹ the Copyright Act goes on to list a number of exceptions to those rights.²² The provisions most relevant to copyrighted goods are those granting consumers the right to resell their property²³ and the right to use their property even when doing so creates a copy.²⁴

1. *The Right to Resell and the First Sale Doctrine*

The right to resell a copy of a copyrighted good is codified in the Copyright Act at 17 U.S.C. § 109.²⁵ The body of judicial interpretation surrounding this provision is collectively known as the “first sale doctrine.”²⁶ Essentially, the first sale doctrine holds that an author’s exclusive right to distribute her copyrighted work with respect to any individual copy is exhausted by the first sale of that copy of the work, and the purchaser may subsequently resell or otherwise distribute her legally purchased copy without infringing on the author’s rights.²⁷

Though its basic premise is straightforward, the first sale doctrine has a number of exceptions and restrictions that complicate the picture. First, the article sold must have been “lawfully made under [the Copyright Act].”²⁸ Some circuits initially interpreted this provision to require that either the sale or the manufacture of the product must take place in the United States.²⁹ This view prevented an interna-

²⁰ 17 U.S.C. § 202 (2012).

²¹ These rights include the right to reproduce the copyrighted work, to prepare derivative works based on the work, to distribute copies of the work to the public, and, if applicable, to perform or display the copyrighted work publicly. *Id.* § 106.

²² These exceptions include fair use, reproduction by libraries or archives, performance or display for various educational purposes, and the lawful transmission of a work. *Id.* §§ 107–122.

²³ *Id.* § 109.

²⁴ *Id.* § 117.

²⁵ *Id.* § 109.

²⁶ The first case to expound this right was *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), in which a department store purchased books at wholesale prices and resold them at a price below the publisher’s mandated level as stated in a notice in the book. The Court held that the store’s conduct was not an infringement of the copyright, which gave rise to the first sale doctrine. *Id.* at 350–51.

²⁷ *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010).

²⁸ 17 U.S.C. § 109(a). The statute specifically notes that the copy must be made under “this title,” which includes two chapters not in the Copyright Act, but the provisions relevant to this discussion are only in the Copyright Act.

²⁹ *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 222 (2d Cir. 2011), *rev’d*, 133 S. Ct. 1351 (2013); *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 990 (9th Cir. 2008), *abrogated by Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

tional secondary market for copyrighted goods; if a publisher wished to sell books for half the price in Asia, an American consumer could buy those books for his own use but not resell them later in America. In 2013, however, the Supreme Court overturned these cases in *Kirtsaeng v. John Wiley & Sons, Inc.*,³⁰ in which the Court held that the phrase simply meant “in accordance with” or “in compliance with” the Copyright Act, with no geographical limitation.³¹ This holding significantly diminished the restrictive power of the phrase. Today, this criterion serves only to clarify that if a copy of a copyrighted good or work is made illegally, the sale of that copy is also illegal.³²

Second, and more importantly for the purposes of this Note, the first sale doctrine applies only to *owners* of copies of a copyrighted work.³³ Exactly what this means is unclear, and the interpretation varies by circuit,³⁴ and even within circuits.³⁵ The Ninth Circuit in general takes the most restrictive view, holding that licensees and owners are mutually exclusive categories, and that therefore no licensee can be considered an owner of a copy for the purposes of the Copyright Act.³⁶ The Second Circuit takes a broader view, evaluating any pertinent factors to determine whether a rightful possessor of a copy of a copyrighted work is an owner of that copy, whether or not that rightful possessor had formal title to the copy.³⁷ Each of these approaches has very different consequences for consumer rights.

In 2010, the Ninth Circuit affirmed its approach to determining whether a person is an owner of a copy of a copyrighted work in *Vernor v. Autodesk, Inc.*³⁸ Analyzing Ninth Circuit precedent, the court

³⁰ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

³¹ *Id.* at 1358 (internal quotation marks omitted).

³² *See id.* at 1361 (noting that § 109(a) only provides first sale protection to an owner of a lawfully created copy of a copyrighted material, without regard to geography).

³³ 17 U.S.C. § 109.

³⁴ *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1116 (9th Cir. 2010) (distinguishing between owners and licensees for purposes of first sale protection); *Krause v. Titleserv, Inc.*, 402 F.3d 119, 124–25 (2d Cir. 2005) (applying a multifactor test to determine if a person is an owner).

³⁵ Jim Graves, *Who Owns a Copy?: The Ninth Circuit Misses an Opportunity to Reaffirm the Right to Use and Resell Digital Works*, 2 CYBARIS AN INTELL. PROP. L. REV. 45, 48–53 (2011) (describing the various and sometimes contradictory tests that have been used to determine whether someone is an owner of a copy within the Ninth Circuit).

³⁶ *See Vernor*, 621 F.3d at 1107, 1116; *see also MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 938 (9th Cir. 2010) (interpreting the definition of “owner” in the context of the essential step defense), *opinion amended and superseded on denial of reh'g*, Nos. 09-15932, 09-16044, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (noting that the amendments to the opinion have been incorporated into the cited reporter).

³⁷ *Krause*, 402 F.3d at 124.

³⁸ *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

formulated a three-factor test to determine whether a possessor of a copyrighted good is an owner or a licensee of the copy.³⁹ The factors are “whether the copyright owner specifies that a user is granted a license,” “whether the copyright owner significantly restricts the user’s ability to transfer the software,” and “whether the copyright owner imposes notable use restrictions.”⁴⁰ If all three factors are present, the user is a licensee rather than an owner and is not entitled to assert the first sale doctrine as a defense.⁴¹

Under this approach, purchasers of Kindle eBooks would certainly be deemed licensees rather than owners. All eBooks sold in the Kindle Store are subject to an agreement stating that “Kindle Content is licensed, not sold, to you by the Content Provider.”⁴² The same agreement also forbids customers from renting, leasing, distributing, or selling the Kindle Content,⁴³ which would undoubtedly qualify as “significantly restrict[ing] the user’s ability to transfer.”⁴⁴ Similarly, the terms in the Kindle agreement restricting the display of Kindle Content to specific approved devices and programs and forbidding commercial use would likely constitute “notable use restrictions.”⁴⁵ Therefore, Kindle eBook “owners” in the Ninth Circuit likely do not have a legal right to sell their eBooks, even under the first sale doctrine.

By contrast, the Second Circuit takes a broader and more fluid view of the issue of ownership.⁴⁶ In *Krause v. Titleserv, Inc.*,⁴⁷ an employee of Titleserv wrote a computer program for the company and then, after leaving the company, attempted to block Titleserv’s modification of that program.⁴⁸ After Titleserv was able to get around the block imposed by Krause and made modifications to the program, Krause sued the company on copyright grounds.⁴⁹ After analyzing the

³⁹ *Id.* at 1110–11.

⁴⁰ *Id.*

⁴¹ *See id.* at 1111.

⁴² *Kindle Store Terms of Use*, *supra* note 9. The Terms of Use define “Content Provider” as “the party offering Kindle Content in the Kindle Store, which may be [Amazon] or a third party.” *Id.* For “Kindle Content designated as active content in the Kindle Store, ‘Content Provider’ means the publisher of the Kindle Content.” *Id.*

⁴³ *See id.*

⁴⁴ *Vernor*, 621 F.3d at 1111.

⁴⁵ *See Kindle Store Terms of Use*, *supra* note 9; *Vernor*, 621 F.3d at 1111.

⁴⁶ *See Krause v. Titleserv, Inc.*, 402 F.3d 119, 124–25 (2d Cir. 2005).

⁴⁷ *Krause v. Titleserv, Inc.*, 402 F.3d 119 (2d Cir. 2005).

⁴⁸ *Id.* at 120–21.

⁴⁹ *Id.*

text of the section of the copyright statute in question⁵⁰ and its legislative history⁵¹ to determine whether Titleserv was an “owner” of the copy, the court concluded that “formal title in a program copy is not an absolute prerequisite” to qualifying as an owner of the copy.⁵² Instead of an absolute title requirement, the court asked “whether the party exercises sufficient incidents of ownership over a copy of the program to be sensibly considered the owner of the copy.”⁵³ In this case, the court found that Titleserv owned the copies in question because Titleserv had paid to develop the program; the copies were stored on Titleserv’s servers; Krause customized the program for Titleserv’s usage; Krause did not reserve the ability to repossess Titleserv’s copies; and Titleserv had both the right to possess and use the program forever and the right to destroy or discard the program.⁵⁴ Unlike the court in *Vernor*, the court never explicitly reached the question of whether the result would be the same if Titleserv were deemed a licensee.⁵⁵

Under the Second Circuit’s test, Kindle eBook purchasers might be considered owners of their eBooks. On the surface of the transaction, users appear to be acquiring “incidents of ownership”;⁵⁶ they are clicking a “buy” button, after which the user can download the file at will, and the user has unlimited access to the downloaded file.⁵⁷ The actual text of the Kindle Store Terms of Use, however, places various restrictions on the use of Kindle eBooks⁵⁸ beyond the facts considered in the *Krause* case.⁵⁹ It is possible that if the Second Circuit were confronted with a set of facts closer to those of a Kindle owner, or the situation in *Vernor*, the court might distinguish *Krause* and hold that such license terms preclude a finding of “incidents of ownership.” The other factors that weigh in favor of Kindle users being owners—stor-

⁵⁰ 17 U.S.C. § 117 (2012); *Krause*, 402 F.3d at 122 (“It is not clear from the text of [the statute] how many and what kind of sticks may be removed from the bundle [of property rights] before the possessor of a copy of a computer program is no longer considered its owner for purposes of [the statute].”).

⁵¹ *Krause*, 402 F.3d at 123 (“In our view, Congress’s decision to reject ‘rightful possessor’ in favor of ‘owner’ does not indicate an intention to limit the protection of the statute to those possessing formal title.”).

⁵² *Id.* at 124.

⁵³ *Id.*

⁵⁴ *Id.* at 124–25.

⁵⁵ *See id.* at 124.

⁵⁶ *Id.*

⁵⁷ *See Kindle Store Terms of Use*, *supra* note 9.

⁵⁸ *Id.* These restrictions include preventing users from selling, renting, leasing, distributing, broadcasting, sublicensing, or assigning any rights to the Kindle content to another.

⁵⁹ *See Krause*, 402 F.3d at 124–25.

age on users' devices, right to use and possess indefinitely, right to discard or destroy—indicate, however, that it would at least be possible to come to that conclusion.⁶⁰

2. *The Right to Use and the Essential Step Defense*

The right to use a product must necessarily include the right to perform all the steps required to effect that use. For example, using an oven requires installing the oven, and then turning it on. Installing the oven is not “using” it in the technical sense, but, without the ability to do so, the use of the oven for its intended purpose is impossible. As this example demonstrates, there is rarely any disconnect between rights granted on the purchase of a product and rights required to use it. This issue does arise with computer programs, however, because of the way in which computers work. In short, any time a modern computer runs a program, the copyrighted code at the base of that program is copied from one part of the computer to another.⁶¹ Under current law, running or loading a program onto a computer thus creates a copy of the work for copyright purposes, meaning that it potentially infringes on the copyright.⁶²

The Copyright Act recognizes this problem, and therefore grants users the right to make copies of a computer program when such copies are an “essential step” in using that program.⁶³ Like the first sale section of the Copyright Act, however, the rights conferred in this section are also restricted to an “owner of a copy.”⁶⁴ Purchasers not con-

⁶⁰ See *id.*

⁶¹ Programs can be run from an external storage device, such as a game cartridge or CD, or they can be copied to the hard drive of the computer (“installed”) and run from there. In either case, “running” the program involves copying it from those storage devices to the memory of the computer, where the bits that make up the program can be manipulated. This happens every time a program is opened. It is not possible to run a program on any computer currently in existence without creating this copy. The same is true for opening any document, such as an Adobe PDF file or a Kindle eBook; opening a document on a computer creates a copy of that document. See Zbigniew J. Bednarz, Note, *Unreal Property: Vernor v. Autodesk, Inc. and the Rapid Expansion of Copyright Owners' Rights by Granting Broad Deference to Software License Agreements*, 61 DEPAUL L. REV. 939, 944 (2012).

⁶² See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (“[I]t is generally accepted that the loading of software into a computer constitutes the creation of a copy under the Copyright Act.”).

⁶³ 17 U.S.C. § 117(a) (2012). In fact, the *Krause* case discussed above was about this section of the statute, rather than Section 109. *Krause*, 402 F.3d at 121. The phrase “owner of a copy” appears in both sections of the statute, however, and courts have treated it as having the same meaning in both sections. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1109–10 (9th Cir. 2010).

⁶⁴ 17 U.S.C. § 117(a).

sidered owners, which in most cases will include the overwhelming majority of software users who accepted a license agreement,⁶⁵ are not covered by the protection of the essential step provision, and must receive express permission from the copyright holder to run their programs after purchasing them to avoid copyright infringement.⁶⁶

This permission usually exists in the form of a license agreement that accompanies the software.⁶⁷ License agreements, however, are sometimes very specific in listing what uses are allowed and frequently have clauses stating that the license can be revoked at any time or automatically end upon the violation of any other term of the agreement.⁶⁸ Under these circumstances, without the defense provided in § 117 of the Copyright Act,⁶⁹ any consumer action deemed to be in violation of any of the terms of the agreement may render each subsequent use of the program an act of copyright infringement.⁷⁰

A 2010 case illustrates the consequences and dangers of this state of the law. *MDY Industries, LLC v. Blizzard Entertainment, Inc.*⁷¹ involved a user who ran a program of his own creation in conjunction with Blizzard's popular online computer game *World of Warcraft* ("WoW").⁷² Michael Donnelly created a program called Glider, which automated certain game play activities within *WoW*.⁷³ Blizzard asserted that its Terms of Use prohibited programs of this type, and

⁶⁵ See *supra* Part I.A.1. The Second Circuit's test might yield a different result, but the Second Circuit has not yet ruled on the issue in a case involving this kind of license agreement. The Ninth Circuit, which is home to the many software companies of Silicon Valley and therefore likely to be the venue for many such cases, would clearly consider such a purchaser a licensee rather than an owner, based on the court's decision in *Vernor*.

⁶⁶ *MAI Sys. Corp.*, 991 F.2d at 518 ("In the absence of ownership of the copyright or express permission by license, such acts constitute copyright infringement." (internal quotation marks omitted)).

⁶⁷ See *Bednarz*, *supra* note 61, at 945 (noting that license agreements are attached to "almost all modern software" bought in the United States).

⁶⁸ See, e.g., *Kindle Store Terms of Use*, *supra* note 9 (noting that Amazon may immediately revoke users' access to the Kindle Store and content upon failure to comply with the Kindle Store Terms of Use).

⁶⁹ 17 U.S.C. § 117 (2012).

⁷⁰ Whether subsequent use is copyright infringement or merely breach of contract depends on a state-law analysis of that particular term in its contractual context. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 939 (9th Cir. 2010), *opinion amended and superseded on denial of reh'g*, Nos. 09-15932, 09-16044, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (amendments incorporated into the cited version).

⁷¹ *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010), *opinion amended and superseded on denial of reh'g*, Nos. 09-15932, 09-16044, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (amendments incorporated into the cited version).

⁷² *Id.* at 935.

⁷³ *Id.*

the court concluded that Donnelly was aware of this prohibition.⁷⁴ Donnelly continued using and distributing his program and brought an action to determine that the sales of his program did not constitute a copyright infringement.⁷⁵ The court ultimately ruled that Donnelly's actions were not infringing, but only because the specific term his program violated was deemed a contractual covenant, rather than a license condition.⁷⁶ Had the court held otherwise on that point, each time Donnelly (or anyone who had purchased his program) launched the *WoW* program, he would have been liable, civilly *and potentially criminally*, for copyright infringement.⁷⁷

Continuing the Kindle example, owners of Kindle eBooks are similarly vulnerable to this kind of liability. Each Kindle eBook is sold under a license that states that any violation of any of its terms will terminate the license.⁷⁸ One of the terms restricts the use or display of eBooks to supported devices and programs, which currently include Amazon's own Kindle devices, as well as certain reader programs for mobile devices, personal computers, or other supported electronic devices.⁷⁹ Competitor eBook readers are not included in this list.⁸⁰ Therefore, if a Kindle user loaded his eBook onto a competitor's eReader device, such as Barnes & Noble's Nook, he would be in violation of the agreement, which would result in the termination of the license.⁸¹ Every time the user subsequently opened that

⁷⁴ *Id.* at 936.

⁷⁵ *Id.* at 935.

⁷⁶ *See id.* at 939–41 (noting that the breach of “contractual terms that limit a license’s scope” constitute copyright infringement, whereas “all other license terms [are] ‘covenants,’ the breach of which is actionable only under contract law”). The court’s holding did not relieve Donnelly of *all* liability, but it did relieve him of *copyright* liability. Because the penalties for copyright infringement include injunctions, actual damages, statutory damages, and potential criminal prosecution, while the penalty for breach of contract is generally limited to actual damages shown by the plaintiff, this represented a significant victory for Donnelly. 17 U.S.C. §§ 502–506 (2012). Particularly in this case, proving actual damages likely would have been difficult; neither Donnelly nor his customers stopped paying their subscriptions to Blizzard, and it would be difficult to quantify how many other players, if any, stopped playing (and paying) *because of* Donnelly.

⁷⁷ *See supra* note 76 and accompanying text. The copies created internally by the computer when a program is loaded onto a computer are considered copies for the purposes of the Copyright Act. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993). Donnelly’s potential criminal liability stems from his commercial purpose; the hapless Kindle user discussed below would not be subject to prosecution unless his eBook library was worth over \$1,000. *See* 17 U.S.C. § 506.

⁷⁸ *Kindle Store Terms of Use*, *supra* note 9.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.*

eBook, he would be creating an unauthorized copy of the eBook, as the copy would be created outside the scope of the license. If the court decided that the “supported devices” term of the agreement was a license condition rather than a contractual covenant, he would then be liable for copyright infringement for opening the eBook he had purchased.⁸² This would subject the user, at the discretion of Amazon, either to Amazon’s actual damages (which would be nominal), or, more likely, to statutory damages of up to \$30,000, and potentially also Amazon’s attorney fees.⁸³ Given the opaque nature of the covenant-versus-condition distinction to most consumers, and the substantial penalties available in copyright infringement cases, this is a poor way to determine consumer rights and liabilities with respect to their personal property.

B. The Detour: How Private Contracts Restrict Consumer Property Rights

As with most rights, the right to sell and the right to use can be waived, and in the case of consumer license agreements, they usually are. Signing a license agreement with the seller of a software program replaces the bundle of rights granted to each party under the Copyright Act with the bundles specified in the contract.⁸⁴ At most, copyright law serves as a gap-filler by providing default provisions that come into force in the absence of anything on point in the license agreement.⁸⁵ As a result, the entire discussion of the previous section regarding the rights provided by the Copyright Act is moot if the contracts most consumers actually sign provide different rights.⁸⁶

Some rights or affirmative defenses described in the Copyright Act may be nullified by the mere presence of a license agreement, even if its terms do not explicitly reserve the right or revoke the de-

⁸² See *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 939–940 (9th Cir. 2010), *opinion amended and superseded on denial of reh’g*, Nos. 09-15932, 09-16044, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (amendments incorporated into the cited version).

⁸³ 17 U.S.C. § 504(c) (2012) (describing statutory damages). \$30,000 is the maximum the court can award without proof of willfulness, or conversely reasonable unawareness of infringement. The minimum penalty is \$200, unless the defendant successfully asserts a fair use defense. *Id.*; see also *id.* § 505 (stating that the prevailing party can seek attorney’s fees).

⁸⁴ Christina Bohannon, *Copyright Preemption of Contracts*, 67 MD. L. REV. 616, 616 (2008).

⁸⁵ See *id.* at 620 (“Where a statutory right is intended to benefit an individual, courts should treat it as a default right that parties may contract around.”).

⁸⁶ Paul Goldstein, *Copyright and Its Substitutes*, 1997 WIS. L. REV. 865, 865 (“Contracts and encryption today exist entirely outside of copyright; they are substitutes for, not supplements to, copyright.”).

fense. The first sale and essential step doctrines are affirmative defenses explicitly granted to *owners* of copies,⁸⁷ and some courts have held that a licensee, meaning anyone who signed a restrictive contract with the rights holder, is not an owner for purposes of those provisions.⁸⁸ This holding gives the rights holder the ability to use copy-right law to police any use or transfer of its products that it dislikes.⁸⁹

To examine how this works in practice, consider the license agreement for Apple's iOS7 software,⁹⁰ which, until the fall of 2014, was the most recent version of the operating system used by Apple's mobile devices, including the iPhone, iPad, and iPod touch.⁹¹ This license contains a clause that prohibits commercial use of the video encoding software included within the operating system.⁹² The encoding software is used by the iPhone or iPad's camera by default whenever the device records video. This means that the owner of an iPad cannot legally use it to, for example, shoot videos that she plans to sell.⁹³ If she does, she has violated her license agreement with Apple, and she may then be liable for either contractual damages, or actual damages or statutory copyright damages of up to \$30,000,⁹⁴ depending on whether the judge in her case decides that provision is a license condition or a contractual covenant.⁹⁵ The license agreement, therefore, limits the consumer's right to use her product in any lawful manner

⁸⁷ 17 U.S.C. § 109 (codifying the first sale doctrine); *id.* § 117 (establishing the essential step doctrine).

⁸⁸ See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1116 (9th Cir. 2010).

⁸⁹ See, e.g., *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 939–940 (9th Cir. 2010), *opinion amended and superseded on denial of reh'g*, Nos. 09-15932, 09-16044, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (amendments incorporated into the cited version). The plaintiff was not making or distributing copies of Blizzard's game, or enabling others to do so, except in a very narrow technical sense unrecognizable to most consumers. He was enabling others to *cheat* at Blizzard's game, which Blizzard naturally disliked. If the essential step defense were available to the players of Blizzard's game, copying the game from the hard drive to the RAM would not be infringement (as it would be an essential step), and Blizzard would therefore be unable to use *copyright* to attack uses of its program that it found objectionable. See *id.* at 938–939.

⁹⁰ iOS7 LICENSE AGREEMENT, *supra* note 8.

⁹¹ *Id.* The subsequent version is iOS 8. *iOS 8*, APPLE, <https://www.apple.com/ios/what-is/> (last visited Dec. 28, 2014).

⁹² iOS7 LICENSE AGREEMENT, *supra* note 8, ¶ 15.

⁹³ This probably was not Apple's idea. The program that formats the videos is patented, and Apple includes it with its iOS software under license from the patent holder. See *id.* According to the iOS7 license, the term that prevents use of the software for commercial purposes is included as part of Apple's license from the program's patent holder, MPEG LA. *Id.*

⁹⁴ 17 U.S.C. § 504(c) (2012).

⁹⁵ See *supra* Part I.A.2.

she chooses, in contrast to a stand-alone physical camera, which carries no such limitation.⁹⁶

C. *The Blockade: Digital Rights Management Schemes*

The terms of the license agreement are not the only restrictions on a consumer's use of his purchases. Many copyright holders or distributors encrypt their products so that consumers are unable to use them in particular ways, such as copying or sharing purchased files, unless they have permission to obtain decryption keys from the rights holder which, in turn, allow the consumers to use the products.⁹⁷ This practice, and the software that executes it, is known as digital rights management ("DRM").⁹⁸ Common DRM schemes include using proprietary formats for files so that they can only be opened by approved software programs or devices;⁹⁹ requiring that consumers register their copies of a software program with the rights holder before the program will function properly;¹⁰⁰ requiring that a software program make regular check-ins over the internet to a central server before

⁹⁶ Cf. *Nikon Software License Agreement*, NIKON, https://support.nikonusa.com/app/answers/detail/a_id/67/~nikon-software-license-agreement (last updated Apr. 4, 2013). This license only applies to software provided by Nikon, not to the cameras themselves. See *id.* Nikon's current software line includes image editors and camera control tools sold separately from the camera, none of which are required to use the cameras themselves. See *Software*, NIKON, <http://imaging.nikon.com/lineup/software/> (last visited Dec. 28, 2014). The Nikon software license agreement does not contain a non-commercial use prohibition, but even if it did, purchasers of the cameras could avoid it by using third-party software instead.

⁹⁷ Q&A: *What is DRM?*, *supra* note 12. This decryption process may require a user to manually input an activation code or register on a website, or it may occur automatically in the background of the program. See Brett Glass, *What Does DRM Really Mean?: How Does DRM Work?*, PCMag (Apr. 8, 2003), <http://www.pcmag.com/article2/0%2c2817%2c1164013%2c00.asp>.

⁹⁸ Q&A: *What is DRM?*, *supra* note 12.

⁹⁹ See, e.g., *DRM*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/drm> (last visited Dec. 28, 2014) (noting that DRM prevents a user from reading an eBook purchased on Amazon on any eBook reader of the user's choosing). Amazon's Kindle is a prominent example of this. An eBook purchased from the Kindle store is in the .mobi format, which can only be read on Kindle eReaders or on Amazon.com's Kindle cloud reader, which can be accessed through a browser. Other eReaders, such as Barnes & Noble's Nook, use the .epub format and cannot read Kindle eBooks. See Dan Howard, *How to Make Your Nook & Kindle Formats Compatible*, CHRON, <http://smallbusiness.chron.com/make-nook-kindle-formats-compatible-27494.html> (last visited Dec. 28, 2014) (noting that Kindle and Nook readers use different proprietary file formats which renders eBooks incompatible). On the other side of this scale, iTunes music files are usually in the .mp3 or .mp4/.acc formats, which are readable by almost any commercially available music player device or software program. *Audio Formats Explained*, BLUBBRY, <http://create.blubrry.com/manual/creating-podcast-media/audio/audio-formats/> (last visited Dec. 24, 2014).

¹⁰⁰ Glass, *supra* note 97.

launching or running;¹⁰¹ and using software to limit the number of times a particular program can be installed.¹⁰²

One DRM method, installation limits, can cause great inconvenience to users. This type of DRM seeks to prevent copying by limiting the number of times that any particular copy can be installed on a computer.¹⁰³ With this restriction, sharing copies of the program, through either digital file-sharing or physical lending of the discs, would be ineffective, as only the first few people to receive copies would be able to install and use them.

The most problematic aspect of installation limits is their potential to be exhausted through normal computer use.¹⁰⁴ The program detects whether it is a new installation based on a comparison of the current computer configuration to the one that was logged when the program was previously launched.¹⁰⁵ Because the computer configuration can change after the installation or replacement of computer parts, it is entirely possible for a single purchaser to exhaust all authorized installations without ever even attempting to install the program on multiple computers.¹⁰⁶ Today, DRM schemes of this type generally address this issue by allowing users to “deauthorize” an installation before upgrading or replacing computers,¹⁰⁷ but problems can still arise if the user forgets to do so at the proper time or is una-

¹⁰¹ Mike Masnick, *EA to Use Controversial Internet-Required DRM on New Games*, TECHDIRT (May 8, 2008, 3:34 AM), <https://www.techdirt.com/articles/20080507/1353061058.shtml>.

¹⁰² *Id.* A DRM program commonly used for this purpose is SecuROM, which has been the focus of numerous controversies. See Mark Milian, *Spore SecuROM Copy Protection System Draws Lawsuit*, L.A. TIMES TECH. BLOG (Sept. 25, 2008, 8:00 AM), <http://latimesblogs.la.times.com/technology/2008/09/spore-securom-d.html>. Sony BMG had previously utilized similar software that limited the number of devices on which users could play music among other restrictions not discussed in this Note. Sony eventually settled with the FTC over this practice. Press Release, FTC, Sony BMG Settles FTC Charges (Jan. 30, 2007), <http://www.ftc.gov/news-events/press-releases/2007/01/sony-bmg-settles-ftc-charges>.

¹⁰³ See Austin Modine, *Amazon Flash Mob Mauls Spore DRM*, THE REGISTER (Sept. 10, 2008, 12:21 AM), http://www.theregister.co.uk/2008/09/10/spore_drm_amazon_effect/ (noting that the online game *Spore* has a DRM restriction that limits its customers to only three activations after installation).

¹⁰⁴ See *id.* (noting the “plenty of legitimate reasons” why a customer may need to install a computer game multiple times, such as needing to reinstall a game after a computer malfunction that required the customer to wipe her hard drive).

¹⁰⁵ See *SecuROM™ Product Activation: License Information—Activation/Revocation*, SECuROM, https://support.securom.com/faq_pa.html#2.4 (last visited Dec. 28, 2014). This only applies to install limits managed through SecuROM, which *Spore*’s limits were.

¹⁰⁶ Modine, *supra* note 103.

¹⁰⁷ See, e.g., *EA Game Authorization Management*, EA, <http://activate.ea.com/deauthorize/> (last visited Dec. 28, 2014).

ware of the need to do so at all. Importantly, this restriction may apply to programs purchased on physical discs as well as digital download versions, leaving consumers with a copy of the program physically in their possession that nonetheless is incapable of being used as intended. In the case of one affected video game, outraged consumers noted that the DRM scheme of limited installations essentially amounted to renting the game, instead of purchasing it.¹⁰⁸

These DRM schemes are frequently an annoyance to consumers, but on their own they are insufficient to control use of the product as intended. Anyone with a computer and sufficient technical knowledge can produce and publicize workarounds or “cracks” to break such restrictions on products—and enable other consumers to do so as well.¹⁰⁹ For example, when the first iPhone was released without the capability to install third-party applications,¹¹⁰ a group of hackers found a way to add custom ringtones within eleven days.¹¹¹ Further, these DRM schemes do not simply inconvenience consumers, but also restrict their legal rights. The Digital Millennium Copyright Act (“DMCA”),¹¹² passed in 1998, includes a provision making it illegal to circumvent any copyright protection measure for any reason.¹¹³ Therefore, the inclusion of any such protection measure is equivalent

¹⁰⁸ Ben Kuchera, *Gamers Fight Back Against Lackluster Spore Gameplay, Bad DRM*, ARS TECHNICA (Sept. 8, 2008, 11:54 AM), <http://arstechnica.com/gaming/2008/09/gamers-fight-back-against-lackluster-spore-gameplay-bad-drm/>. The “rent” assertion is due to the fact that most users periodically upgrade or replace their computers over time, so that the three installations allowed for this video game would be used up in the normal course of a user’s actions, leaving the user with a copy of the game that would eventually be unusable simply because of the DRM.

¹⁰⁹ *How to Remove Adobe DRM from ePub and PDF eBooks*, THEEBOOKREADER.COM BLOG (Feb. 7, 2013), <http://blog.the-ebook-reader.com/2013/02/07/how-to-remove-adobe-drm-from-epub-and-pdf-ebooks/>.

¹¹⁰ Stuart Dredge, *Steve Jobs Resisted Third-Party Apps on iPhone, Biography Reveals*, GUARDIAN APPS BLOG (Oct. 24, 2011, 6:23 AM), <http://www.theguardian.com/technology/apps/blog/2011/oct/24/steve-jobs-apps-iphone>.

¹¹¹ The original iPhone was released on June 29, 2007. Ryan Block, *iPhone Release Date Confirmed: Yours on June 29th*, ENGADGET (June 3, 2007, 7:14 PM), <http://www.engadget.com/2007/06/03/iphone-release-date-confirmed-yours-on-june-29th/>. The first video of an iPhone playing custom ringtones, impossible with the preinstalled software, was posted on July 10, 2007. Thomas Ricker, *iPhone Hackers: “We Have Owned the Filesystem,”* ENGADGET (July 10, 2007, 7:05 AM), <http://www.engadget.com/2007/07/10/iphone-hackers-we-have-owned-the-filesystem/> (noting that hackers reported being able to enable custom ringtones and wallpaper on iPhones); see also Chris Hughes, *iPhone Ringtones*, YOUTUBE (July 10, 2007), <https://www.youtube.com/watch?v=yhng9NRqTIQ>.

¹¹² Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

¹¹³ 17 U.S.C. § 1201(a)(1)(A) (2012).

to a term in the license prohibiting whatever use the circumvention is designed to prevent.

Turning back to an earlier example, suppose Chris, a small business owner, wants to use an iPhone or an iPad, for which she paid several hundred dollars each, to shoot a commercial for her business.¹¹⁴ As previously discussed, the license agreement for the software on her devices forbids Chris from shooting the commercial, as she would be using the device for a commercial purpose.¹¹⁵ In theory, Chris could get rid of iOS and install a new operating system on her device; the license is for that operating system, not for the hardware itself, so the agreement would then cease to apply.

Even if Chris had the technical knowledge to do this, however, it would be just as illegal as violating her original license agreement. The DMCA forbids circumvention of any “technological measure” that “effectively controls access” to a copyrighted work.¹¹⁶ Because there is no Apple-approved way to uninstall iOS for most devices,¹¹⁷ doing so is a circumvention covered by the DMCA.¹¹⁸ The Copyright Office has the power to issue exemptions to the DMCA, but those exemptions must be renewed every three years and are at the discretion of the Copyright Office and Librarian of Congress.¹¹⁹ Currently, it is legal to circumvent measures that prevent you from installing programs (applications or “apps”) on your cellphone, but it is not legal to do so on a tablet computer.¹²⁰ This means that you can legally avoid the Apple iOS7 license on an iPhone, by uninstalling that software and using a different operating system, but not on an iPad. These technological restrictions, backed as they are by the force of law, fur-

¹¹⁴ See *supra* notes 92–96 and accompanying text.

¹¹⁵ See iOS7 LICENSE AGREEMENT, *supra* note 8.

¹¹⁶ § 1201(a)(1)(A).

¹¹⁷ See Simon Hill, *Can't Stand iOS 7 on Your iPhone 4? Here's How to Downgrade to iOS 6*, DIGITAL TRENDS (Oct. 19, 2013), <http://www.digitaltrends.com/mobile/how-to-downgrade-to-ios-6/> (noting that there is no Apple-approved way to “downgrade” to an earlier version of the iOS system on newer versions of the iPhone).

¹¹⁸ § 1201(a)(1)(A). A measure that “effectively controls access” is defined in the DMCA as a measure that “requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” *Id.* § 1201(a)(3)(B). This is a vague and broad definition, but because uninstalling iOS7 from an iPhone is not possible for ordinary consumers without technological expertise and usually requires that Apple “wipe” the phone itself, it likely qualifies as requiring the application of a process with the authority of the copyright owner.

¹¹⁹ *Id.* § 1201(a)(1)(C)–(D).

¹²⁰ 37 C.F.R. § 201.40(b)(2) (2013) (creating an exemption for circumventing measures that prevent a user from installing or removing programs on cellphones while not establishing the same exemption for tablets).

ther prevent consumers from exercising the full range of property rights they would normally enjoy.

II. BANS, OWNERS, AND MARKETS, OH MY: CURRENT OPTIONS FOR A SOLUTION

There are many proposed solutions to preventing the erosion of consumer property rights with regards to digital products. Broadly speaking, they can be sorted into two categories: proposals focused on the reform of the Copyright Act and proposals focused more generally on the imbalances inherent in boilerplate, take-it-or-leave-it contracts for consumer goods and services. Proposals from each category would, by their nature, solve some problems but not others.

A. *Bans: Throwing the Baby out with the BathWater*

One solution to the loss of consumer rights in digital ownership situations is to simply ban or invalidate license terms or software practices that restrict those rights, either through federal regulations and enforcement¹²¹ or an expansion of the fair use doctrine that would privilege end-use over IP rights in more circumstances.¹²² This approach would, if fully implemented and rigorously enforced, ensure that no consumer would be surprised by an inability to lend her eBooks or reinstall her computer programs. It would, however, also destroy a variety of business models that many consumers currently enjoy.

In some cases, restrictions may be attractive to consumers because of the benefits of other features. One example of this is video games. Consumer Jane can choose to buy a physical copy of *Extreme Game III*, or she can choose to buy a digital download copy from an online retailer such as Amazon or Steam.¹²³ If she chooses the physi-

¹²¹ Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36 CAMPBELL L. REV. 31, 70–72 (2013) (suggesting that the Copyright Office use its rulemaking authority to simply declare unwanted terms unenforceable). Garcia discusses online contracts in general, rather than software license agreements specifically, but her solution would be applicable to both. *Id.*

¹²² See JENNIFER M. URBAN, PUB. KNOWLEDGE, REPORT 1: UPDATING FAIR USE FOR INNOVATORS AND CREATORS IN THE DIGITAL AGE: TWO TARGETED REFORMS 1–2, 10 (2010), available at https://www.publicknowledge.org/assets/uploads/blog/1_Fair_Use.pdf.

¹²³ Steam is a digital distribution platform and game retailer. Users create an account with Steam and then purchase games and other programs through Steam, which are permanently associated with the user's account. A user can install the Steam application on any compatible computer, and download her games and programs to her account and access it on her computer an unlimited number of times. Steam Play allows a user to purchase a game on a PC and play it on a Mac, or vice versa. See *Information for New Users*, STEAM, <https://support.steampowered>

cal copy, she will get many of the same rights as the purchaser of a physical book¹²⁴; she can resell it, give it away, or loan it to a friend. If she loses or accidentally destroys the game disks, however, she loses her access to the game unless she buys another copy. If Jane instead buys a digital download, she will generally not be able to lend or resell the game, but she may be able to replace her downloaded copy for free if her hard drive fails or if she replaces her computer.¹²⁵ Retailers and online distribution platforms might choose not to offer this service if they could not verify that only one person was downloading replacement copies.

A milder form of this option would be to guarantee the proposed suite of ownership rights to all consumers of all products by making those rights nonwaivable. Under this solution, any provisions of license or sale agreements purporting to restrict those rights would simply be invalid. This solution would help consumers defend against lawsuits, but it is unlikely to stop companies from including restrictive terms in their license agreements. As a comparison, binding arbitration clauses in similar consumer contracts have sometimes been held to be unenforceable, but they are nevertheless part of almost every license agreement.¹²⁶ Such a solution would also put practical restrictions in limbo; it seems unavoidable that buying a product that cannot be lent to a third party is a de facto waiver of that right with respect to that product. A law that would require the removal of practical restrictions would be the most likely to drive companies and products out of the market, due to the greater costs involved in, for example, rewriting major parts of a computer program. This is not an optimal result for a change aimed at helping consumers.

.com/kb_article.php?ref=7141-OPGX-5121 (last visited Dec. 29, 2014); *Steam Play*, STEAM, https://support.steampowered.com/kb_article.php?ref=9439-QHKN-1308&snr=1_14_4_ (last visited Dec. 29, 2014); *Welcome to Steam*, STEAM, <http://store.steampowered.com/about/> (last visited Dec. 29, 2014).

¹²⁴ Unless the game includes a DRM system like those described in Part I.C.

¹²⁵ See, e.g., Cecil Ryan, *How Does Steam Work? A Basic Overview*, HUBPAGES, <http://queerlyobscure.hubpages.com/hub/How-Does-Steam-Work-A-Basic-Overview> (last updated June 19, 2013); *Amazon Games and Software Terms of Use*, AMAZON (July 29, 2013), <http://www.amazon.com/gp/help/customer/display.html?nodeId=200205280> (“We will usually continue making Applications you have purchased available to you in our Amazon Games & Software Library so that you can download additional copies of the Application and retrieve your license key (if applicable), but that is not always the case, and we may limit or disable further downloads of an Application due to licensing restrictions or for other reasons.”).

¹²⁶ See, e.g., *Kindle Store Terms of Use*, *supra* note 9.

B. Owners: Returning the Copyright Act Consumer Protections to Everyone

There is a less drastic option to improve the landscape of consumer restrictions and liability. A narrower legislative solution would be an amendment to the Copyright Act to define an “owner of a copy” in a way more similar to the Second Circuit’s definition, such that licensees would not be excluded.¹²⁷ Although such a solution would guarantee most consumers the right to resell and the right to essential use of a product, it would not guarantee the other rights mentioned in this Note’s proposal, such as the right to lend or lease a product, the right to use it without requiring further authorization, or the right to use the product for commercial purposes.¹²⁸ In addition, such a solution would still burden consumers who are sued by the industry with the cost of mounting those defenses, because the relevant statutes provide for affirmative defenses, rather than immunity.¹²⁹

More importantly, this option would provide an incentive for software companies to distribute their products on a subscription basis, rather than selling them outright. Although rental and subscription *options* can be a good thing for consumers, their benefits disappear when those models completely replace the option to own. Adobe, the maker of the popular publishing and image editing software Photoshop, recently moved that program and all of its similar products to a subscription-only model.¹³⁰ This subscription grants access to any and all future updates to the software over the one-year subscription,¹³¹ but it also removes consumers’ ability to edit their previous work if they stop paying the subscription.¹³² For heavy users, the

¹²⁷ See *supra* Part I.A.1; see also *Krause v. Titleserv, Inc.*, 402 F.3d 119, 124–25 (2d Cir. 2005). The judicial solution—leaving it to the Supreme Court to resolve the circuit split in favor of the Second Circuit—is both uncertain and unlikely. In 1998, the Court stated in dicta that “the first sale doctrine would not provide a defense to [an action based on the unlawful importation of copies] against any nonowner such as a bailee, a licensee, a consignee, or one whose possession of the copy was unlawful.” *Quality King Distribs., Inc. v. L’anza Research Int’l, Inc.*, 523 U.S. 135, 146–47 (1998).

¹²⁸ See *infra* Appendix.

¹²⁹ See 17 U.S.C. §§ 109, 117 (2012); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010).

¹³⁰ David Pogue, *Edit Your Photos? Feed the Meter*, SCIENTIFIC AMERICAN, October 2013, at 38.

¹³¹ *Id.*

¹³² See *Creative Cloud/Common Questions*, ADOBE, <http://helpx.adobe.com/creative-cloud/faq.html> (last visited Dec. 29, 2014). Consumers retain access to files they have saved to their computers but can no longer use Adobe’s editing programs. Files created by Photoshop may be viewed by many different programs, but the attributes that make them easy to edit such as layers and other tools are only accessible in Photoshop.

subscription is considered a better deal than the old pricing model, but for casual users the cost is much greater than previous pricing plans.¹³³ If redefining an “owner of a copy” prompts companies to offer even more restrictive license terms and access models, the solution will have been very counterproductive.

C. Markets: Let the Invisible Hand Fix It

The least interventionist approach would be to do nothing and allow consumers to vote with their wallets. If restrictive license terms are such an inconvenience, the argument goes, consumers will gravitate towards products that better meet their needs. However true that may be, this approach does not address the information asymmetry that presently exists. Most consumers are not on actual notice of the restrictions on their purchases, either because they do not read the license agreements¹³⁴ or do not understand them.¹³⁵ The purpose of the proposed legislation is to enable consumers to choose—or to demand, if no choices are available—options that preserve those rights they feel are important. This choice is not possible if the supporting information is not clearly available to consumers.

One counterargument to this Note’s proposal discussed below is that it does not go far enough to ensure that the important ownership rights discussed above will be respected. The purpose of the proposed statute is to provide consumers with frequently unavailable or buried information, in order to allow market pressures to steer companies toward less restrictive offerings. This purpose assumes, however, that consumers have a variety of different options from which to choose. If every option is equally restrictive, and providers of digital goods simply decline to offer other choices, consumers’ ability to express their preference for fewer restrictions would be severely limited, as they would be unable to vote with their wallets.

The textbook economics answer to this concern is that eventually some company would introduce a less restrictive option if there were truly consumer demand for that feature, and there are real-world examples of consumer pressure encouraging a change in rights models. Most prominently, Apple removed copy protection technologies from

¹³³ See Pogue, *supra* note 130.

¹³⁴ See *supra* note 14 and accompanying text.

¹³⁵ See *U.S. Credit Card Agreements Unreadable To 4 Out of 5 Adults*, FOX BUSINESS, July 22, 2010, <http://www.foxbusiness.com/personal-finance/2010/07/22/credit-card-agreements-unreadable-adults/> (noting that credit card agreements are, on average, written at a twelfth grade reading level, which leaves eighty percent of adults unable to understand them).

downloadable songs in its iTunes music store in 2009, following slower growth in paid downloads and emerging competition from Amazon.com, which did not use copy protection.¹³⁶ Users of iTunes had complained about the inconveniences imposed by the copy protection, including difficulty playing songs on devices made by Apple's competitors.¹³⁷ Similarly, in 2012, the publishing company Tor Books removed digital rights management protection from all of its eBooks in response to frustration from customers and concern by authors.¹³⁸

These examples show that a ban or other a priori restriction on contract terms is unnecessary where such terms create a serious inconvenience to consumers because consumers' frustration will often lead to a change in policy. The consumer pressure that gave rise to the changes made by Apple and Tor Books, however, was made possible only by the awareness of consumers that their rights were being restricted. The notification statute that this Note proposes addresses those situations where restrictions may not be obvious to consumers, either because the technological measures restricting their use of a product would not become apparent until after the purchase, or because the legal implications would not be obvious unless a consumer became the target of a lawsuit.

III. ENABLING CONSUMER CHOICE THROUGH A LEGISLATIVE NOTIFICATION MANDATE

The above description of the current state of affairs establishes that there is consumer demand for products and license terms with fewer restrictions and more regard for consumer convenience and consumer property rights.¹³⁹ It can be difficult, however, to identify which products have what restrictions, if any.¹⁴⁰ This opacity prevents informed consumer choice in this area.

¹³⁶ Ethan Smith & Yukari Iwatani Kane, *Apple Changes Tune on Music Pricing*, WALL ST. J., Jan. 7, 2009, at B1. Apple simultaneously implemented a new pricing scheme that raised prices on its most popular songs; however, as the copy protection was removed for all songs and the pricing scheme also lowered prices on the bulk of the iTunes catalog, this price hike appears to be unrelated to the removal of copy protection. See *id.*

¹³⁷ See Brad Stone, *Copy an iTunes Song? Go Ahead, Apple Says*, N.Y. TIMES, Jan. 7, 2009, at B1.

¹³⁸ See *DRM-Free—A Year On*, TOR BOOKS BLOG (Apr. 25, 2013), <http://torbooks.co.uk/2013/04/25/drm-free-a-year-on/>.

¹³⁹ See *supra* Part II.C.

¹⁴⁰ For example, individual eBooks in the Google Play store have no indication as to whether or not they carry DRM restrictions. *Google Play Books User Policies*, *supra* note 9 (“At this point, it is not possible to view the digital rights settings for individual books.”).

In order to remedy this problem, Congress should pass a law establishing a definitional suite of owner's rights, and requiring the seller of any product subject to more restrictive terms to clearly notify the consumer with a predefined label, including font size, placement, and wording.¹⁴¹ The proposed statute is modeled on the smokeless tobacco warning statute that requires warning labels on all smokeless tobacco products, and represents another area in which notifications have been required to ensure that consumers know the ramifications of their purchases.¹⁴²

This Note's proposed legislation is not the first proposal for mandating notification of restrictions on consumer rights in digital products. Representatives Boucher and Doolittle introduced the Digital Media Consumers' Rights Act in 2002,¹⁴³ and the same bill was reintroduced in 2005.¹⁴⁴ Both versions of the bill, however, neither of which reached the House floor, applied only to "prerecorded digital music disc product[s]," or physical CDs.¹⁴⁵ As the internet and the accompanying virtual economy continue to grow and change, any viable legislative solution must avoid being linked too closely with current technologies, lest it become obsolete through industry innovation.¹⁴⁶

The proposed statute sets forth a number of fundamental rights of ownership, and requires a conspicuous notice if any of those rights are unavailable to consumers who purchase the product.¹⁴⁷ Specifically, the statute requires notice either on the product itself or above the "buy button" on the website where it is sold. The fundamental rights included in the statute are the rights to resell the product, to lend or lease it to a third party, to use it without subsequent reauthorization by the rights holder, to use it for commercial pur-

¹⁴¹ For the proposed statutory language, see *infra* Appendix.

¹⁴² 15 U.S.C. § 4402 (2012). This statute was chosen as a model for the proposed legislation because of its emphasis on the details of notification. This made it a more suitable model than the Digital Media Consumers' Rights Act (DMCRA) proposed legislation described below, which focused instead on the details of the particular products and industries to which the statute would apply. See *infra* notes 143–44.

¹⁴³ Digital Media Consumers' Rights Act of 2002, H.R. 5544, 107th Cong. (2002).

¹⁴⁴ Digital Media Consumers' Rights Act of 2005, H.R. 1201, 109th Cong. (2005).

¹⁴⁵ *Id.* § 3; H.R. 5544 § 3.

¹⁴⁶ A more recent legislative proposal would have amended the DMCA to prohibit circumvention of technological restrictions (i.e., DRM) only if such circumvention was for the purposes of infringing copyright law. Unlocking Technology Act of 2013, H.R. 1892, 113th Cong. (2013). Although this solution is laudably technology-neutral, it is still insufficient, because it leaves less sophisticated consumers unable to exercise the rights of ownership that DRM systems seek to restrict.

¹⁴⁷ See *infra* Appendix.

poses, and to continue to access and use it indefinitely.¹⁴⁸ The third and last rights are related; if a program requires a periodic “check-in” with a central server, and the company who maintains that server shuts it down or goes out of business, the consumer loses access to that program unless the company makes changes to avoid this outcome.

To see how this would work in practice, it is helpful to turn back to the Kindle eBook example. eBooks in the Kindle Store are all sold under a license agreement that bans lending and commercial use and restricts the type of devices that can read the books.¹⁴⁹ Most are also sold with DRM schemes in place that limit the number of devices to which the books can be downloaded.¹⁵⁰ The default limit is six devices¹⁵¹ but individual publishers can set that limit lower;¹⁵² thus requiring a consumer who wants to read their eBook on an additional device without removing it from the others to repurchase the eBook once that limit is reached. Currently, books listed in the store do indicate what the download limit is for that title, but only if it is different than the default of six downloads.¹⁵³ A consumer without outside knowledge of Amazon’s policy who bought an eBook with the default limit would not have notice of the limit until they tried to download to a seventh device.¹⁵⁴ The default Kindle eBook, therefore, triggers sev-

¹⁴⁸ See *infra* Appendix.

¹⁴⁹ *Kindle Store Terms of Use*, *supra* note 9 (authorizing the viewing, use, and display of Kindle Content “solely on the Kindle or a Reading Application or as otherwise permitted as part of the Service, solely on the number of Kindles or Supported Devices specified in the Kindle Store, and solely for your personal, non-commercial use”).

¹⁵⁰ See *id.*

¹⁵¹ *Transferring, Downloading, and Sending Files to Kindle 2nd Generation*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_navbox_multiple_200375630?nodeId=200375630&#multiple (last visited Dec. 29, 2014) (noting that most books purchased on a Kindle 2nd Generation device can be accessed on up to six devices); see also *Kindle 1st Generation Tips & Assistance*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=glp_search_1-5?ie=UTF8&nodeId=200169400&qid=1408390514&sr=1-5 (last visited Dec. 29, 2014) (noting that most books purchased on a Kindle 1st Generation device can only be accessed on up to six devices).

¹⁵² See Dan Cohen, *KindleGate: Confusion Abounds Regarding Kindle Download Policy*, GEAR DIARY (June 21, 2009, 10:00 AM), <http://geardiary.com/2009/06/21/kindlegate-confusion-abounds-regarding-kindle-download-policy/>.

¹⁵³ See, e.g., *Campbell Biology (9th Edition) [Print Replica] [Kindle Edition]*, AMAZON, <http://www.amazon.com/Campbell-Biology-9th-Jane-Reece-ebook/dp/B006MKVKZ6/> (last visited Dec. 29, 2014). This book is limited to two simultaneous downloads, which means that a student who bought the book could read it simultaneously on his laptop and his Kindle, but not on the desktop at his parents’ house unless he removed it from one of the first two devices. See *id.* In addition, the limit is not easily visible; purchasers must scroll down below the official reviews to see it, and can easily purchase the eBook without doing so. See *id.*

¹⁵⁴ *Id.*; see also *The Lord of the Rings: One Volume [Kindle Edition]*, AMAZON, <http://www>

eral of the provisions of the statute. “Buying” a Kindle eBook does not grant the purchaser the right to lend, the right to resell, the right to use commercially, or, in practice, the right to continually access the item without reauthorization.¹⁵⁵ Under the proposed legislation, Amazon would therefore be required to add a notice to each book’s sale page¹⁵⁶ with the relevant statutory language corresponding to those rights.

Under the proposed statute, Amazon would not have to alter its license terms or the underlying technical framework of its eBook service. It would, however, have to change the layout of its website slightly. Currently, the Amazon Kindle Store website has a bar across the top with a search function, and the “buy” button is directly below on the right.¹⁵⁷ The statutory notice would appear between those two features, pushing the “buy” button slightly down the page.¹⁵⁸ The text of the notice would read, in large, red font:

NOTICE: Buying this product does not allow you to use it like an owner. The following restrictions are in effect:

You cannot resell or give away this product.

You cannot lend or lease this product to anyone else.

You cannot use this product without the continuing permission of the seller and/or a third party.

You cannot use this product for any commercial reason.¹⁵⁹

For the sake of standardization, this notice does not further specify *how* the enumerated rights are restricted. In this case, the “continuing permission” subnotice is included based on the download limit, which is not mentioned. The hope is that consumers will see the general notice, become alarmed, and seek clarification from the seller,

.amazon.com/Lord-Rings-One-J-R-R-Tolkien-ebook/dp/B007978OY6/ref=tmm_kin_swatch_0?_encoding=UTF8&sr=1-1&qid=1394485038 (last visited Dec. 29, 2014) (the sale page for this edition of Tolkien’s book trilogy). There is a label indicating whether lending features are enabled, in the same location as the device limit notice mentioned. See *supra* note 153.

¹⁵⁵ *Kindle Store Terms of Use*, *supra* note 9. Currently, periodic software updates to the Kindle sometimes require updating the eBook files as well, which can sometimes lead to the deletion of eBooks. For example, a Georgetown professor visiting a conference in Singapore updated his Kindle software, only to discover that all his eBooks had been deleted because he was no longer in the United States and that Google Books was not yet available in Singapore. Posting of Jim O’Donnell to LibLicense-L Discussion Forum (Aug. 15, 2013, 19:55:41 CST), available at <http://listserv.crl.edu/wa.exe?A2=LIBLICENSE-L;1e13597c.1308>.

¹⁵⁶ E.g., *The Lord of the Rings*, *supra* note 154.

¹⁵⁷ See, e.g., *id.*

¹⁵⁸ See *infra* Appendix, § (b)(3).

¹⁵⁹ See *infra* Appendix, § (b).

leading in this case to an Amazon-crafted notice elsewhere on the page that describes the download limit.

The idea behind this proposal is that it will allow customers to make more informed choices about the copyrighted goods they buy, which in turn will lead to rights holders making more diverse options available. As the iTunes and Tor Books examples show, there is consumer demand for less-restrictive options.¹⁶⁰ In order for those options to thrive, consumers must be aware of them when they are buying products. For example, the Google Play store, which sells eBooks and other digital products for computers and Android mobile phones, offers some of its eBooks without DRM restrictions, at the discretion of the publisher.¹⁶¹ There is no way to tell, however, whether any particular book has such restrictions or not; thus, users can only find out whether they are able to, for example, reformat an eBook to work with a different device by buying and downloading the book and then attempting to reformat it.¹⁶² Universal labeling requirements for copyrighted goods would enable consumers to more easily choose the option they prefer, while avoiding the unpleasant surprise of an unexpected restriction.

The notification approach is preferable to other proposed options for several reasons. In brief, the notification approach allows for consumer choice and market pressure to correct the problem, without more intrusive government interference, which could be more costly and have more unintended consequences. This pressure has not yet forced significant change because of consumer difficulty in reading and understanding the lengthy legal documents in which these restrictions are hidden.¹⁶³ The notification approach, which, due to its nature, can only be implemented by Congress through legislation, would address this issue.

One potential concern regarding this approach is that the proposal may cause higher prices for consumers, either because of the costs of complying with a new regulatory requirement, because companies will raise costs to offset the increased risk of piracy of the unprotected products, or to appease content publishers who provide content to eBook or other sellers. Although this concern may be realized in isolated situations, past policy changes by some retailers show that higher

¹⁶⁰ See *supra* Part II.C.

¹⁶¹ See *Google Play Books User Policies*, *supra* note 140.

¹⁶² *Id.* (“At this point, it is not possible to view the digital rights settings for individual books.”).

¹⁶³ See *supra* notes 134–35 and accompanying text.

prices are not an inevitable consequence of removing restrictive terms or DRM.¹⁶⁴ In addition, any cost or burden of labeling copyrighted goods can be avoided by changing the terms of the license agreements under which they are sold to less-restrictive versions that do not trigger the notice requirement.

Ultimately, the best answer to many potential criticisms of this proposal is that it offers a choice, rather than mandating any one course of action. A retailer that finds introducing labels too onerous a burden may decline to sell products that require them. The goal of the proposed statute is not to *force* a change in substantive behavior, but rather to provide incentives for behavior that favors the support and protection of consumer property rights. The strength of that incentive will be in proportion to consumer demand for those rights, relative to other trade-offs that may be discovered. If publishing companies discover that selling eBooks without digital rights management requires higher prices, then they may raise prices, or they may offer both options and allow consumers to vote with their wallets.

One right not included in this Note's proposal is the right to reverse engineer a product; that is, to take a product apart and examine it to determine how it works, and how other products or services can be made compatible with it. Other advocates for change in the area of digital ownership have included this right as a centerpiece of their criticisms, characterizing it as a limitation on consumer rights that also restricts competition in the marketplace.¹⁶⁵ Although the arguments in support of this position are convincing, the purpose of this Note's proposed statute is to inform consumers of their rights, or lack thereof, in a particular product, to the extent that they may be unpleasantly surprised without such a notification. Reselling a purchased book or program is a functionality a typical consumer may expect, or wish to take advantage of; decompiling source code in order to change or customize a computer program is a step beyond the competence or interest of the typical consumer.¹⁶⁶

¹⁶⁴ See Smith & Kane, *supra* note 136.

¹⁶⁵ Annalee Newitz, *Dangerous Terms: A User's Guide to EULAs*, ELECTRONIC FRONTIER FOUND. (Feb. 17, 2005), <https://www.eff.org/wp/dangerous-terms-users-guide-eulas>.

¹⁶⁶ The issue of the technological sophistication (or lack thereof) of a typical consumer is a major reason why solutions that address only the legality of circumventing DRM, such as the Unlocking Technology Act of 2013, are insufficient. See Unlocking Technology Act of 2013, H.R. 1892, 113th Cong. (2013). The typical consumer expects to use his purchases in a certain way, and to the extent that he is surprised by limitations on his rights post-purchase, whether the mechanism that restricts him is legal or technological is beside the point.

Lack of general interest in a right is not, of course, a reason not to protect it. This particular proposed statute, however, is aimed at the rights whose loss might be unexpected and upsetting for a significant proportion of consumers, or those rights that consumers might accidentally exercise regardless of the legal restrictions to the contrary. In addition, it is difficult to distill the concept of reverse engineering to a simpler phrase of more obvious meaning that would be suited to this type of warning label. There is a need to keep the mandated language as simple as possible, in order not to dilute the strength of the notice or deter consumers from reading and understanding it. A subnotice for restrictions on reverse engineering would not be well-suited to this purpose.

CONCLUSION

Today, digital and copyrighted goods are becoming an ever-greater part of the economy, and of the lives of consumers. In the process, consumer property rights in our increasingly digital world are eroding under the weight of competing intellectual property rights and the ubiquitous license agreements that enforce and expand upon them. If this trend continues, consumers face a future in which many of their daily activities are limited by unintelligible license agreements, with accompanying headaches, uncertainties, and potential legal liability.

To forestall these consequences, consumers must be able to choose products that fit their needs, and to demand change from products or companies that restrict their rights. This requires that consumers be informed about their rights and the restrictions placed upon them by some products and companies. This Note's proposed legislative solution guarantees notification without overreaching to stifle the environment of competition in the marketplace or provoke unintended consequences for future technologies. Congress should enact this legislation to protect consumer property rights in the digital age.

APPENDIX

The following proposed statute is modeled on the smokeless tobacco notification statute.¹⁶⁷

(a) Definitions. For the purpose of this section:

(1) The term “agreement” means any legally binding conditions on the use of a product, including practical restrictions, such as “digital rights management” or “software locks,” that may not legally be circumvented by the consumer or end-user of the product.

(2) The term “buy button” means an interactive element whose activation indicates initiation of or consent to a transaction.

(3) The term “proprietor” means any person or entity who has the legal and actual ability to control the form or content of the physical or virtual display of goods subject to a transaction.

(4) The term “virtual” means existing as data transferred over a communications network, which is displayed to a user by means of a personal computer or other device capable of connecting to the network.

(5) The term “transaction” means a sale of or offer to sell a product, or the execution of a license agreement or other transfer of rights to the use of a product, from the holder of a copyright, patent, or other intellectual property right, or their authorized representative or licensed distributor, to an individual consumer intended to be the end user of the product.

(b) General rule

(1) It shall be unlawful for any person to, under an agreement which restricts any of the rights enumerated in paragraph (4)(A), license, distribute, sell, or offer for sale, within the United States any product unless the location of sale or transfer displays the following notice:

“NOTICE: Buying this product does not allow you to use it like an owner. The following restrictions are in effect.”

The notice required by paragraph (1) shall be followed by any or all of the applicable specific subnotices, as enumerated in paragraph 4.

(2) The label statements required by paragraph (1) shall be introduced by the proprietor of the space, physical or virtual, in which the

¹⁶⁷ 15 U.S.C. § 4402 (2012). This statute was chosen as a model, above the DMCRA proposed legislation, because of its emphasis on the details of the notification, rather than the details of the particular products and industries to which the statute would apply. See *supra* note 142.

product is displayed for sale. All persons or entities qualifying as proprietors under this section are responsible for ensuring the required warning is included.

(3) Each label statement required by paragraph (1) shall be—

(A) in the case of a transaction taking place at a physical location, located on the two principal display panels of the package, and of such a size to comprise at least 20 percent of each such display panel; or

(B) in the case of a transaction taking place through a virtual or electronic communication, located immediately above the buy button; and

(C) in 17-point conspicuous and legible type and in red text on a white background, or white text on a black background, in a manner that contrasts by typography, layout, or color, with all other material displayed in the same location, except that if the text of a label statement would occupy more than 70 percent of the area specified by subparagraph (A), such text may appear in a smaller type size, so long as at least 60 percent of such warning area is occupied by the label statement.

(4) Required subnotices.

(A) The subnotices of paragraph (5) shall be displayed by a proprietor immediately below the notice specified in paragraph (1), in any order, in the case of a virtual transaction subject to an agreement withholding or restricting the right or ability of the consumer or end-user to:

(i) resell or otherwise transfer the product to a third party, other than to require that any such resale or transfer include all copies of the product and all accompanying documentation; or

(ii) lease or loan the product to a third party, whether for compensation or not; or

(iii) use the product without the monitoring or subsequent permission of the seller or rights-holder, in any form or by any mechanism, including required network connections at any interval; or

(iv) use the product on a continuous and indefinite basis, regardless of any change in the status of the relevant intellectual property rights or the identity of the owners of those rights; or

(v) use the product for commercial purposes, other than those granted exclusively to the copyright holder in section 106 of Title 17.

(B)(i) if (4)(A)(i) applies, the subnotice “You cannot resell [or give away] this product.” The bracketed text shall not be included in cases where transfer not for compensation is permitted.

(ii) if (4)(A)(ii) applies, the subnotice “You cannot lend or lease this product to anyone else.”

(iii) if (4)(A)(iii) applies, the subnotice “You cannot use this product without the continuing permission of the seller and/or a third party.”

(iv) if (4)(A)(iv) applies, the subnotice “Your access to this product is not guaranteed.”

(v) if (4)(A)(v) applies, the subnotice “You cannot use this product [this feature] for any commercial reason.” The bracketed text shall replace the words “this product” if only a component or subpart of the product is restricted in this way. If the bracketed text is used, additional text shall be included after the subnotice to indicate which feature or component is restricted.

(c) *Applicability.* This section shall apply only to sales, licenses, distributions, or offers for sale of products intended for use by individual consumers. This section shall not apply to the resale or redistribution of such products by individual consumers to other individuals.