

# RETHINKING REDIGI: HOW A CHARACTERISTICS-BASED TEST ADVANCES THE “DIGITAL FIRST SALE” DOCTRINE DEBATE

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## INTRODUCTION

In 2011, digital music sales through online stores exceeded physical sales (composed of compact disc, cassette, and LP sales) for the first time.<sup>1</sup> For as much as the digital music revolution can be said to have begun with the release of the iPod in 2001,<sup>2</sup> or the launch of the iTunes Music Store in 2003,<sup>3</sup> it was only more recently that digital music sales followed that revolution to its eventual conclusion<sup>4</sup> and eclipsed traditional physical sales. With billions of songs sold each year, the widespread prevalence of digital music files or downloads<sup>5</sup> necessitates a fundamental understanding of the bundle of rights a purchaser of a song or album enjoys. In particular, questions that surround whether a purchaser of a legally<sup>6</sup> acquired digital music download may resell her copy of a song to a third party under copyright law's "first sale"

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<sup>1</sup> THE NIELSEN COMPANY & BILLBOARD'S 2011 MUSIC INDUSTRY REPORT (2012), available at <http://narm.com/PDF/NielsenMusic2011YEUpdate.pdf>.

<sup>2</sup> Press Release, Apple, Apple Presents iPod (Oct. 23, 2001), <http://www.apple.com/pr/library/2001/10/23Apple-Presents-iPod.html>.

<sup>3</sup> Press Release, Apple, Apple Launches the iTunes Music Store (Apr. 28, 2003), <http://www.apple.com/pr/library/2003/04/28Apple-Launches-the-iTunes-Music-Store.html>.

<sup>4</sup> See Michelle Castillo, *Just One More Year Until Digital Music Beats Physical CD Sales*, TIME TECH (Mar. 31, 2011), <http://techland.time.com/2011/03/31/just-one-more-year-until-digital-music-beats-physical-cd-sales>.

<sup>5</sup> In this Note, I will use the terms "digital files," "digital music downloads," and "digital copies" as shorthand to refer to those files or copies that have been downloaded on the Internet from a legal online music marketplace, such as the iTunes Store or Amazon MP3. This is in distinction to music files sold on a compact disc, which are also digital. However, the files on a compact disc are fixed in a tangible medium of expression that leaves no doubt as to the applicability of the first sale doctrine. While digital files downloaded over the Internet can be said to be fixed in the hard drive or flash memory on which they are stored, for the purpose of this Note and the larger issue of digital first sale, I will assume that a purchaser of legally downloaded digital music is not engaging the secondary market by selling the physical storage space on which the files are located.

<sup>6</sup> Similarly, this Note presumes that any digital music file or copy possibly subject to the first sale doctrine was acquired legally and the copy obtained is not piratical.

doctrine<sup>7</sup> have become increasingly important to answer as more files are sold on the primary market,<sup>8</sup> creating the potential for consumers to engage with a secondary market.<sup>9</sup>

Whether or not the first sale doctrine applies to digital music downloads was the central question before the U.S. District Court for the Southern District of New York in *Capitol Records v. ReDigi*.<sup>10</sup> Self-described as the “future of digital music,”<sup>11</sup> ReDigi is an online cloud storage<sup>12</sup> service that allows users to resell legally purchased digital music on a secondary market.<sup>13</sup> ReDigi claimed that its service was legally viable largely in light of the first sale doctrine.<sup>14</sup> Capitol Records claimed that the first sale doctrine did not apply because the doctrine only exhausts the copyright owner’s right of distribution, not the right of reproduction, and alleged that what ReDigi encourages its users to do infringes upon the exclusive right of reproduction.<sup>15</sup> In March 2013, the

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<sup>7</sup> The first sale doctrine is a limitation which, provided certain statutory requirements are satisfied, is placed upon the author or owner of a copyrighted work to exclusively distribute copies of the work after the first sale. See 17 U.S.C. § 109 (2012).

<sup>8</sup> A primary market is a market for goods or services that are newly available for buying and selling. BLACK’S LAW DICTIONARY 1056 (9th ed. 2009). Within the last ten years, the number of primary markets for digital music sales has increased greatly. Apple, Amazon, Google, and Microsoft all currently offer digital music sales through a primary market. For a general comparison of digital music stores, see *Comparison of Online Music Stores*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Comparison\\_of\\_online\\_music\\_stores](http://en.wikipedia.org/wiki/Comparison_of_online_music_stores) (last visited Aug. 30, 2013).

<sup>9</sup> In contrast, a secondary market is a market for goods or services that have previously been available for buying and selling. BLACK’S LAW DICTIONARY 1057 (9th ed. 2009). Flea markets, second-hand stores, and thrift shops are all quintessential examples of secondary markets.

<sup>10</sup> *Capitol Records v. ReDigi Inc.*, No. 12 Civ. 95(RJS), 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013).

<sup>11</sup> *Newsroom*, REDIGI, <http://newsroom.redigi.com> (last visited Aug. 30, 2013).

<sup>12</sup> *Id.* Cloud storage generally represents a shift from a reliance on local resources to “on-demand network access to a shared pool of configurable computing resources.” *NIST Cloud Computing Program*, NAT’L INST. STANDARDS & TECH., <http://www.nist.gov/itl/cloud> (last updated June 20, 2013). While digital files, including music downloads, have traditionally been stored on a user’s local hard drive inside her computer, now they can be stored remotely on a hard drive in a data center independent of the user’s location. Joanna Stern, *What is the “Cloud”?*, ABC NEWS (June 26, 2012), <http://abcnews.go.com/Technology/cloud-computing-storage-explained/story?id=16647561>. This enables the user to have access (provided there is Internet connectivity) to her media, even if she is not near her personal computer.

<sup>13</sup> After Capitol Records filed its complaint, but before the court’s decision, ReDigi launched “ReDigi 2.0,” which changed the way files were uploaded to the ReDigi Cloud. *ReDigi*, 2013 WL 1286134, at \*2 n.3. Following the court’s lead, this Note will only address ReDigi’s original implementation, because in the context of the debate over the existence of a digital first sale doctrine, the particular qualities of the changed software are not nearly as important.

<sup>14</sup> Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion for a Preliminary Injunction at 17, *Capitol Records v. ReDigi*, No. 12-cv-0095 (S.D.N.Y. Jan. 27, 2012), 2012 WL 2281961.

<sup>15</sup> Plaintiff’s Memorandum of Law in Support of Motion for a Preliminary Injunction at 2, *Capitol Records v. ReDigi*, No. 12-cv-0095 (S.D.N.Y. Jan. 27, 2012), 2012 WL 2281995.

court held that the first sale doctrine does not apply to digital music files.<sup>16</sup>

Both ReDigi and some commentators explained<sup>17</sup> how it is possible for the doctrine to apply, even though a copy of the digital music download is technically created—or reproduced—in the process.<sup>18</sup> While acknowledging the somewhat complicated technological and legal maneuvers required to arrive at such a result, it is at least reasonable—despite the contrary decision of the district court—to argue that the first sale doctrine applies to digital files under current copyright laws.<sup>19</sup> Still, the normative question as to whether the first sale doctrine should apply, and how to determine whether it should apply, is both more difficult and more compelling. Many have already concluded that extending the first sale doctrine to digital copies is possible and would be beneficial to the music market generally.<sup>20</sup> This Note will approach the question of extending the first sale doctrine into the digital realm by analyzing the characteristics of physical copies that already avail themselves of the doctrine and determining whether those relevant characteristics are also present in certain digital copies.<sup>21</sup> It will conclude that, in many circumstances—including ReDigi’s—those characteristics are lacking and no digital first sale doctrine should exist.

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<sup>16</sup> *ReDigi*, 2013 WL 1286134, at \*3 (“The novel question presented in this action is whether a digital music file, lawfully made and purchased, may be resold by its owner through ReDigi under the first sale doctrine. The Court determines that it cannot.”). The judgment of the court is well-reasoned, but does not preclude the purpose of the Note, which does not focus on the issue of statutory interpretation. Rather, this Note considers certain characteristics that digital media files exhibit and whether the first sale doctrine should be made available to them specifically because the files possess those characteristics. See *infra* Part III.

<sup>17</sup> Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion for a Preliminary Injunction, *supra* note 14, at 9 (“The only copying which takes place in the ReDigi service occurs when a user uploads music files to the ReDigi Cloud . . . Such copying is paradigmatic noncommercial personal use excepted from copyright infringement liability under by the Fair Use Doctrine.” (footnote omitted)); Sarah Abelson, Note, *An Emerging Secondary Market for Digital Music: The Legality of ReDigi and the Extent of the First Sale Doctrine*, 29 ENT. & SPORTS LAW. 8 (2012).

<sup>18</sup> See *infra* Part II.B.

<sup>19</sup> ReDigi has indicated that it will appeal the district court’s decision to the Court of Appeals for the Second Circuit. See Ben Sisario, *A Setback for Resellers of Digital Products*, N.Y. TIMES (Apr. 1, 2013), <http://www.nytimes.com/2013/04/02/business/media/redigi-loses-suit-over-reselling-of-digital-music.html>.

<sup>20</sup> Abelson, *supra* note 17, at 9 (concluding that “the doctrine ought not be eliminated simply because the mediums by which consumers buy and sell copyrighted works has outgrown the statutory language”); Matthew J. Turchyn, Comment, *It Looks like a Sale; It Quacks like a Sale . . . But It’s Not? An Argument for the Application of the Duck Test in a Digital First Sale Doctrine*, 5 J. BUS. ENTREPRENEURSHIP & L. 31, 56 (2011) (“The means exist to institute a digital First Sale Doctrine at a reasonable cost, and these measures should be pursued.”).

<sup>21</sup> This Note does not principally focus on the merits of the mechanics of how the first sale doctrine could apply to digital copies and will not advocate for a legislative clarification that explicitly allows or prohibits the practice, in part because a number of attempts to update § 109 have failed. See *infra* Part I.D.

Part I will describe the evolution of the first sale doctrine, including its common law origins, statutory basis, and attempts to reform the doctrine. Part II will briefly discuss the problems underlying application of the doctrine to digital media files and analyze the arguments made by proponents of an extension. Part III will identify the requisite characteristics that define physical copies that are already subject to the first sale doctrine. By developing and then applying a so-called “characteristics-based test,” this Part will conclude that the doctrine can theoretically apply to digital copies, but not to the type of digital music downloads that ReDigi allows to be resold through its service. Part IV will argue that there are additional benefits of a characteristics-based test—including benefits that go beyond application to ReDigi—that serve as a means to answer the threshold normative question about a digital first sale doctrine more generally.

### I. THE HISTORY OF FIRST SALE

Under the first sale<sup>22</sup> doctrine, the owner of a “lawfully made” copy may sell that particular copy “without the authority of the copyright owner” to a new owner.<sup>23</sup> After the first sale—most often as the lawful purchase of a copy—has taken place, the copyright owner’s interest in *that particular copy* is exhausted and future distributions of the work embodied in that copy do not infringe on the copyright owner’s distribution right.<sup>24</sup> This enables a secondary market to exist, since the original copyright owner no longer has the power to exert control over that particular copy and cannot stop a subsequent sale, even while continuing to own the underlying copyright.<sup>25</sup>

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<sup>22</sup> William Patry has described the “first sale” moniker as a “misnomer” because:

[T]he section does not refer to a sale and covers all transactions in which title to the copy is voluntarily (or involuntarily in the case of bankruptcy) parted with, such as giving away copies. In the case of the United States, use of the term ‘first sale’ has also led unnecessarily to confusion in the relationship between the Section 602(a)(1) importation right (which refers to ‘acquiring’ copies overseas) and to Section 109(a).

<sup>4</sup> WILLIAM PATRY, PATRY ON COPYRIGHT § 13:36.50 (2012). In international agreements, the doctrine is more logically referred to as “exhaustion,” as the “distribution right is said to ‘exhaust’ after the first sale.” U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 92 n.301 (2001) [hereinafter SECTION 104 REPORT], available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>. For this Note, both the first sale doctrine and the exhaustion doctrine should be viewed as functionally equivalent and will be used interchangeably.

<sup>23</sup> 17 U.S.C. § 109(a) (2012). (“[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”).

<sup>24</sup> 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.12 (2013).

<sup>25</sup> *Id.*

Notwithstanding the recently addressed issue of statutory interpretation concerning the phrase “lawfully made under this title,”<sup>26</sup> the first sale doctrine has been relatively well understood in regard to copyrighted works distributed physically.<sup>27</sup> For example, consider the lawful purchase of a physical book. When an author or copyright owner makes a copy of the book and sells that particular copy to a purchaser, the purchaser may later choose to resell it to another person without first obtaining the approval of the author or copyright owner. Furthermore, the purchaser may choose to lend, rent,<sup>28</sup> share, or even destroy the book because she has a property ownership interest in that particular copy. In contrast, applicability of the first sale doctrine to digital media files remains unsettled, as will be discussed in Part II, despite the fact that it is not a particularly new or novel subject; rather, it has long been the interest of both scholars<sup>29</sup> and legislators.<sup>30</sup> In order to address the more modern issues and the normative question about an extension, a full understanding of the first sale doctrine’s history is required.

#### A. *Doctrine Origins*

Copyright is often described as a bundle of rights.<sup>31</sup> While the rights themselves have changed over time,<sup>32</sup> copyright owners currently

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<sup>26</sup> See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (holding that a copy lawfully made abroad and first sold abroad is still subject to the first sale doctrine within the United States).

<sup>27</sup> Until *Kirtsaeng*, there had not been a Supreme Court decision addressing the first sale doctrine in over fifteen years. See *Quality King Distribs., Inc. v. Lanza Research Int’l, Inc.*, 523 U.S. 135 (1998) (holding that the first sale doctrine is applicable to copies from foreign jurisdictions, but perhaps only those that are first made in the United States, exported, and then imported).

<sup>28</sup> Netflix’s traditional DVD rental service can exist due to this provision, with Netflix purchasing DVDs from the studios in order to rent them to its subscribers. Furthermore, because of the first sale doctrine, when the rental service cannot obtain large quantities of DVDs from the studios, Netflix can simply go to the primary market and purchase a sufficient number of copies there. See Ben Fritz, *Netflix Joins Redbox to Defy Disney’s New DVD Policy*, L.A. TIMES (June 7, 2012), <http://articles.latimes.com/2012/jun/07/entertainment/la-et-ct-disney-netflix-20120607>. But see 17 U.S.C. § 109(b), which limits the first sale doctrine when it comes to the rental or lease of computer software and sound recordings, except by nonprofit libraries or nonprofit educational institutions.

<sup>29</sup> See, e.g., Needham J. Boddie, II et al., *A Review of Copyright and the Internet*, 20 CAMPBELL L. REV. 193, 226–27 (1998); Anne K. Fujita, *The Great Internet Panic: How Digitization Is Deforming Copyright Law*, 2 J. TECH. L. & POL’Y 1 (1996); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1266 (2001).

<sup>30</sup> See *infra* Part II.D.

<sup>31</sup> *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 495 (2001) (describing “copyright as a bundle of discrete ‘exclusive rights’”); 2 PATRY, *supra* note 22, § 5.2 (section titled “Copyright is a bundle of discrete rights”); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 295

enjoy the exclusive rights of reproduction, preparation of derivative works, distribution, and public performance, among others.<sup>33</sup> These exclusive rights, however, are subject to certain caveats, known as “limitations and exceptions.”<sup>34</sup> The first sale doctrine is the principle exception to the right of distribution.<sup>35</sup> It is an affirmative defense to what otherwise would be a violation of the copyright owner’s exclusive right to distribute copies.<sup>36</sup>

The underlying principle that later gave rise to the doctrine was notably discussed in *Stevens v. Gladding*,<sup>37</sup> where the Supreme Court explained that the copyright interest in a work exists beyond the physical manifestation of any one particular copy.<sup>38</sup> There, the plaintiff sold a copperplate—which enabled the creation of a map of Rhode Island—to the defendant.<sup>39</sup> The Court held that the defendant only had an interest in the physical property of the copperplate and not necessarily an interest in the copyright to produce maps with the plate.<sup>40</sup> This separation of the property right from the copyright, and the fact that there is “no necessary connection between them,”<sup>41</sup> demonstrated the capacity for a copyright owner to reserve a particular set of rights, even after a sale is made.<sup>42</sup>

The Supreme Court established the outer boundary of this separation principle in *Bobbs-Merrill Co. v. Straus*.<sup>43</sup> In that case, a book publisher tried to restrain a retailer from selling copies of *The Castaway* by Hallie Erminie Rives at eighty-nine cents, by prescribing a requirement inside the book that one dollar was the minimum sale

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(1988) (“Even without such debates, intellectual property—like all property—remains an amorphous bundle of rights.”).

<sup>32</sup> 3 PATRY, *supra* note 22, § 8.1 (describing the evolution of the bundle of rights from the 1790 Copyright Act to the Digital Millennium Copyright Act).

<sup>33</sup> 17 U.S.C. § 106 (2012).

<sup>34</sup> *Limitations and Exceptions*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/copyright/en/limitations/index.html> (last visited Aug. 30, 2013). Copyright law in the United States includes a variety of different limitations and exceptions. See 17 U.S.C. §§ 107–22.

<sup>35</sup> 4 PATRY, *supra* note 22, § 13:16.

<sup>36</sup> *See id.*

<sup>37</sup> 58 U.S. 447 (1854).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 453 (“[T]he incorporeal right subsists wholly separate from and independent of the plate, and does not pass with it by a sale thereof on execution.”). However, modern questions about the first sale doctrine are often superseded by contractual limitations placed upon the purchaser through a licensing agreement. In *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), the Court dismissed the publisher’s claim that the reseller was contractually obligated to honor the publisher’s request, regardless of the exhaustion of the right to vend, because there was no relationship between the publisher and the reseller.

<sup>41</sup> *Gladding*, 58 U.S. at 452; see also 17 U.S.C. § 202 (2012) (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).

<sup>42</sup> *See Gladding*, 58 U.S. at 453.

<sup>43</sup> 210 U.S. 339 (1908).

price.<sup>44</sup> The copyright owner of the book sought to enforce its exclusive right to “vend,”<sup>45</sup> and thereby prevent the retailer from making subsequent sales for less than one dollar.<sup>46</sup> The Court held that in the absence of a contractual provision specifying otherwise,<sup>47</sup> the exclusive right to vend exhausts after the first sale to a purchaser.<sup>48</sup> It further found that a contrary ruling would enlarge the purpose of the statute and extend the “authority to control all future sales” to the copyright owner—a grant not within the legislative intent.<sup>49</sup>

### B. Codification in the 1909 & 1976 Copyright Acts

One year after *Bobbs-Merrill*, Congress adopted the findings of the Supreme Court and codified the first sale doctrine in the Copyright Act of 1909.<sup>50</sup> Section 41 provided that “nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”<sup>51</sup> Aside from minor amendments, the doctrine remained in this form for more than sixty years.<sup>52</sup> Following a wholesale reevaluation of copyright law that began in the late 1950s,<sup>53</sup> Congress repealed the 1909 Act and replaced it with the Copyright Act of 1976.<sup>54</sup> In doing so, Congress enumerated the exclusive rights the owner of a copyright is entitled to in section 106.<sup>55</sup>

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<sup>44</sup> *Id.* at 341–42.

<sup>45</sup> The exclusive right to “vend” described here was later codified in the Copyright Act of 1909, but should be understood to mean the same thing as the Copyright Act of 1976’s modern right of “distribution.” See Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC’Y U.S.A. 1, 42 (2011) (recounting the legislative history that confirms the new right to “distribute” was meant to be inclusive of the previous right to “vend”).

<sup>46</sup> *Bobbs-Merrill*, 210 U.S. at 342.

<sup>47</sup> *Id.* at 350. This is in contrast to recent software first sale cases, where courts have found that a license agreement may foreclose the possibility of resale. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010). The sale vs. license debate is relevant in the context of digital music downloads, as Apple’s iTunes Store terms provide for a “sale” while other services, such as Amazon’s Amazon MP3 terms, provide for a “license.” This is why ReDigi only permits the resale of songs downloaded from Apple’s service. See *Help & Support*, REDIGI, <https://www.redigi.com/help> (last visited Aug. 30, 2013).

<sup>48</sup> *Bobbs-Merrill*, 210 U.S. at 351.

<sup>49</sup> *Id.* Some commentators have alleged that the Court “read into the statut[e]” in reaching this conclusion and creating the limitation. See Jenny Lynn Sheridan, *Does the Rise of Property Rights Theory Defeat Copyright’s First Sale Doctrine?*, 52 SANTA CLARA L. REV. 297, 357 (2012).

<sup>50</sup> Copyright Act of 1909, Pub. L. No. 60-349, § 41, 35 Stat. 1075, 1084 (1909).

<sup>51</sup> *Id.*

<sup>52</sup> 4 PATRY, *supra* note 22, § 13.7.

<sup>53</sup> 1 *id.* § 1.72.

<sup>54</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–1332 (2012)).

<sup>55</sup> 17 U.S.C. § 106.



The first sale doctrine is associated with the right of distribution,<sup>56</sup> which gives the copyright owner the exclusive right to distribute copies of a copyrighted work to the public, either through out-right sale, rental, lease, or lend.<sup>57</sup> Section 109(a) correspondingly codifies the first sale doctrine, allowing the owner of a copy to sell that particular copy without the permission of the copyright owner.<sup>58</sup> The 1976 Act neither expanded nor contracted the scope of the 1909 Act's first sale doctrine.<sup>59</sup>

Section 109(a) limits a copyright owner's right to control future distributions of copies "lawfully made under this title," but does not otherwise specify qualities or characteristics about those copies.<sup>60</sup> While the legislative history reveals that Congress considered application of the doctrine in a variety of practical contexts,<sup>61</sup> the statute does not explicitly require that the copies have a physical manifestation in order to be subject to the first sale doctrine.<sup>62</sup> The question of whether a digital first sale doctrine can exist today can essentially be traced to the lack of clarity and guidance in the 1976 Act.

### C. *The Digital Millennium Copyright Act*

In 1998 Congress passed the Digital Millennium Copyright Act (DMCA),<sup>63</sup> which, among other things, implemented two World Intellectual Property Organization treaties that had been passed by that international body in 1996.<sup>64</sup> While the DMCA itself did not make any statutory changes to the first sale doctrine, section 104 of the DMCA

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<sup>56</sup> *Id.* § 106(3).

<sup>57</sup> *Id.* The first sale doctrine does not limit the § 106(1) right of reproduction in any way. Thus, if there is an unauthorized reproduction of a copyrighted work, it is no defense to assert that the distribution of that copy was protected by the first sale doctrine. *See Capitol Records v. ReDigi Inc.*, No. 12 Civ. 95(RJS), 2013 WL 1286134, at \*10 (S.D.N.Y. Mar. 30, 2013) (citing *Design Options v. BellePointe, Inc.*, 940 F. Supp. 86, 91 (S.D.N.Y. 1996)).

<sup>58</sup> 17 U.S.C. § 109(a) ("[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

<sup>59</sup> H.R. REP. NO. 94-1476, at 79 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693 (stating that the recodification merely "restates and confirms the principle . . . which has been established by the court decisions and . . . present law.").

<sup>60</sup> *See* 17 U.S.C. § 109(a).

<sup>61</sup> For example, Congress affirmed that the doctrine would enable a library to lend books it had purchased. H.R. REP. NO. 94-1476, at 79 ("A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.").

<sup>62</sup> *See* 17 U.S.C. § 109(a). The legislative history simply affirms that "the copyright owner's rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it." H.R. REP. NO. 94-1476, at 62.

<sup>63</sup> Digital Millennium Copyright Act, Pub L. No. 105-304, 112 Stat. 2860 (1998).

<sup>64</sup> U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (1998), *available at* <http://www.copyright.gov/legislation/dmca.pdf>.

directed the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to create a report that would consider whether a digital first sale doctrine exists, and in the alternative, whether one should be created.<sup>65</sup> The resulting *DMCA Section 104 Report* provides valuable insight into the question of digital first sale not only through its conclusion but also through its findings.<sup>66</sup>

The report addressed whether a digital transmission of a work, such that an additional copy is made, can fit within the scope of the first sale doctrine.<sup>67</sup> The report agreed with the earlier thoughts of the Working Group on Intellectual Property Rights<sup>68</sup> and found that the process of transmitting a file through the Internet in order to facilitate a sale violates the copyright owner's exclusive right of reproduction, removing it from the auspices of the first sale defense.<sup>69</sup> Even while acknowledging that such an interpretation could be criticized as being unnecessarily strict,<sup>70</sup> the report concluded that the first sale doctrine does not apply to works transmitted digitally.<sup>71</sup>

Beyond its determination that this type of transmission does not qualify for the doctrine, the report further concluded that there *should not* be an amendment establishing a digital first sale doctrine.<sup>72</sup> Rejecting comparisons to physical goods as the basis for a new exception, the report held that the significant differences between physical transfers and digital transfers mean that no new exception is required.<sup>73</sup> Furthermore, the report dismissed so-called "forward-and-delete" technologies that could ensure that the original digital copy would be deleted upon sale and transmission through the Internet.<sup>74</sup> Aside from technical implausibility of such a complex mechanism at the time of writing, the report—without saying so explicitly—foreclosed the

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<sup>65</sup> Digital Millennium Copyright Act § 104. Congress specifically asked for the report to consider "the relationship between existing and emergent technology and the operation of section[] 109" and make recommendations "including any legislative recommendations the Register and the Assistant Secretary may have." *Id.*

<sup>66</sup> SECTION 104 REPORT, *supra* note 22.

<sup>67</sup> *Id.* at 78–80.

<sup>68</sup> See INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter REPORT OF THE WORKING GROUP], available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

<sup>69</sup> SECTION 104 REPORT, *supra* note 22, at xviii ("The first sale doctrine is primarily a limitation on the copyright owner's exclusive right of distribution. It does not limit the exclusive right of reproduction.")

<sup>70</sup> *Id.* at 80 ("Some commenters suggested that this reading of section 109 is unduly formalistic. The language of the statute, however, must be given effect.")

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 96 ("Based on the foregoing discussion, and for the reasons set forth below, we recommend no change to section 109 at this time.")

<sup>73</sup> *Id.* at 97 ("[W]e do not find this analogy compelling for several reasons.")

<sup>74</sup> *Id.* at 98.

possibility of this type of scheme enabling a digital first sale doctrine in the future, as it predicted that they would be expensive and not sufficiently effective.<sup>75</sup> Perhaps the most definitive determination the report made was the finding that tangibility is the key characteristic a copy must possess for application of the doctrine.<sup>76</sup>

#### D. *The BALANCE Act*

Against the recommendation of the report, Representative Zoe Lofgren of California introduced the Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003,<sup>77</sup> to amend section 109 to specifically include digital sales.<sup>78</sup> The purpose of the legislation was to restore the balance of rights between copyright owners and the owners of copies by reinvigorating the first sale doctrine in light of new technologies like the Internet.<sup>79</sup> The bill failed to pass in the 108th session of Congress, and while it was reintroduced in 2005, it similarly was never brought to a vote in the 109th session.<sup>80</sup>

Despite the findings of the Copyright Office and the failure of Congress to grant explicit authorization otherwise, there have been numerous attempts to use the first sale doctrine to sell a copy of a digitally downloaded music file. For example, months after the launch of the iTunes Music Store in 2003, George Hotelling purchased a copy of the song *Double Dutch Bus* by Devin Vasquez and attempted to sell it on eBay, intentionally pressing up against the boundaries of the first sale doctrine.<sup>81</sup> While eBay removed the auction from its site,<sup>82</sup> Hotelling

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<sup>75</sup> *Id.* at 84 (“In order to achieve a result that occurs automatically in the physical world, a publisher would have to pay for an expensive (and less than 100 percent reliable) technology and pass that cost along to the consumer, while at the same time potentially making the product less desirable in the marketplace.”).

<sup>76</sup> *Id.* at 86 (“The *tangible* nature of [a] copy is . . . a defining element of the first sale doctrine and critical to its rationale.” (emphasis added)). Tangibility, a concept that depends upon a physical or corporeal presence that can be touched, seen, and possessed, BLACK’S LAW DICTIONARY 1592 (9th ed. 2009), will be discussed at great length in Part III.

<sup>77</sup> H.R. 1066, 108th Cong. (2003).

<sup>78</sup> *Id.* § 4 (“Section 109 of title 17, United States Code, is amended by adding at the end the following: ‘(f) The privileges prescribed by subsections (a) and (c) apply in a case in which the owner of a particular copy or phonorecord of a work in a digital or other nonanalog format, or any person authorized by such owner, sells or otherwise disposes of the work by means of a transmission to a single recipient, if the owner does not retain the copy or phonorecord in a retrievable form and the work is so sold or otherwise disposed of in its original format.’”).

<sup>79</sup> *Id.* § 2.

<sup>80</sup> H.R. 4536, 109th Cong. (2005).

<sup>81</sup> George Hotelling, *Does the Right of First Sale Still Exist?*, 90% CRUD (Sept. 3, 2003), [http://george.hotelling.net/90percent/geekery/does\\_the\\_right\\_of\\_first\\_sale\\_still\\_exist.php](http://george.hotelling.net/90percent/geekery/does_the_right_of_first_sale_still_exist.php) (“I bought the song just as legally as I would a CD, so I should be able to sell it used just as legally right?”).

<sup>82</sup> *Id.*

was eventually successful in selling the song, even though to do so, he had to relinquish control of his iTunes account by giving the purchaser his login credentials.<sup>83</sup> This solution allowed Hotelling to sell *the song*, but not in a way that tested the merits of the first sale doctrine as applied to the individual digital file.

In 2008, a music service called Bopaboo privately launched to a limited, non-public audience.<sup>84</sup> The service functioned as a secondary market, similar to eBay, allowing purchasers of downloaded music to sell used songs to third parties.<sup>85</sup> However, after receiving complaints from copyright owners in the music industry, the service shut down and never publicly launched.<sup>86</sup> Today, ReDigi has tried to succeed where Bopaboo failed, by presenting a cogent defense for how the first sale doctrine can apply to digital music downloads.<sup>87</sup>

## II. DIGITAL DIFFICULTIES: THEORIES ON WHETHER A DIGITAL FIRST SALE DOCTRINE CAN EXIST AND THE FUNDAMENTAL QUESTION LEFT UNANSWERED

Application of the first sale doctrine to digital media files presents a classic question of statutory interpretation mixed with a technical question of how a digital transfer is actually accomplished. While these two questions are relevant to understanding what is at stake in a digital first sale doctrine, they both fundamentally address implementation issues and effectively presuppose a discussion of whether it is normatively advisable to extend the doctrine in the first place, and if so, how to decide how far the doctrine reaches. As a result, it is necessary to discuss these questions, albeit briefly.

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<sup>82</sup> Evan Hansen, *eBay Mutes iTunes Song Auction*, CNET (Sept. 5, 2003), [http://news.cnet.com/2100-1027\\_3-5071566.html](http://news.cnet.com/2100-1027_3-5071566.html).

<sup>83</sup> Evan Hansen, *Apple Customer Resells iTunes Song*, CNET (Sept. 10, 2003), [http://news.cnet.com/2100-1027\\_3-5074086.html](http://news.cnet.com/2100-1027_3-5074086.html). Instead of directly sending the winner of the auction a copy of the song, thereby implicating the right of reproduction, Hotelling said that “[i]n order to close the deal . . . he had to transfer control of his entire iTunes Music Store account to [the buyer].” *Id.*

<sup>84</sup> Sam Diaz, *Bopaboo May Feel like eBay but Will End Up Looking like Original Napster*, ZDNET (Dec. 11, 2008), <http://www.zdnet.com/blog/btl/bopaboo-may-feel-like-ebay-but-will-end-up-looking-like-original-napster/11202>.

<sup>85</sup> Nakimuli Davis, *Reselling Digital Music: Is There a Digital First Sale Doctrine?*, 29 LOY. L.A. ENT. L. REV. 363, 368 (2009).

<sup>86</sup> CMU Editorial, *RIAA Issues Cease and Desist on ReDigi*, COMPLETE MUSIC UPDATE (Nov. 16, 2011), <http://www.themuwebsite.com/article/riaa-issues-cease-and-desist-on-redigi>.

<sup>87</sup> Defendant’s Memorandum of Law in Support of Motion for a Preliminary Injunction, *supra* note 14.

A. *Nimmer Argues No Digital First Sale Doctrine Exists*

Renowned copyright law scholar and treatise author David Nimmer directly addressed the question of whether there is a digital first sale doctrine and came to the conclusion that one does not exist, in part due to the limitations of current technology.<sup>88</sup> Nimmer's first sale analysis requires satisfaction of four relevant "ingredients"<sup>89</sup> before the doctrine can apply to a particular copy.<sup>90</sup> To qualify, the copy must have been produced with the authorization of the copyright owner, transferred under the authority of the owner, possessed (before sale) by a lawful owner of the copy, and "simply distribute[d]" by that lawful owner.<sup>91</sup> Nimmer asserts that the fourth ingredient is not satisfied in the case of digital copies.<sup>92</sup> Instead of only a distribution, Nimmer says a reproduction has taken place as well in a digital transfer.<sup>93</sup>

The technological process involved in reselling a digital music download through the Internet requires the digital bits representing the song on the original purchaser's computer to be recreated on the subsequent purchaser's computer.<sup>94</sup> Such a transfer of data through the Internet necessarily results in not only a copy being made on the subsequent purchaser's computer, but also temporary copies made through the intermediary devices in facilitating the networked transfer.<sup>95</sup> Additionally, if only instantaneously, more than one copy of the file exists simultaneously.<sup>96</sup> Because section 109(a) only refers to a "particular copy" being subject to the first sale doctrine, Nimmer concludes that the selling of a song through the Internet implicates the copyright owner's section 106 right of reproduction.<sup>97</sup> This is because the reassembled bits that comprise the copy on the other side of the sale are not technically the same as the "particular copy" that emanated from

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<sup>88</sup> 2 NIMMER, *supra* note 24, § 8.12[E].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See generally SECTION 104 REPORT, *supra* note 22.

<sup>95</sup> 2 NIMMER, *supra* note 24, § 8.12[E].

<sup>96</sup> *Id.* ReDigi disputes this characterization and claims that with its technology, there are never two copies at the same time, even during transmission through the Internet. Matt Peckham, *ReDigi CEO Says the Court Just Snatched Away Your Right to Resell What You Legally Own*, TIME TECH (Apr. 25, 2013), <http://techland.time.com/2013/04/25/redigi-ceo-says-the-court-just-snatched-away-your-right-to-resell-what-you-legally-own/#ixzz2WffSaWnn> ("[W]e went to great lengths to say we're actually going to pick up those bits that are moving around on your drive and we're going to move them, literally, a portion at a time, so that what's in the cloud is never at the same time on your device.").

<sup>97</sup> 2 NIMMER, *supra* note 24, § 8.12[E].

the original purchaser,<sup>98</sup> removing the seller from the protection of the first sale doctrine.

### B. *The ReDigi Fair Use Solution*

ReDigi describes the transaction that occurs when a digital music file is sold through its service in a different way than Nimmer does. ReDigi believes that its two-step description of the transaction does not implicate the copyright owner's right of reproduction.<sup>99</sup> This conceptualization primarily relies on another limitation and exception to copyright: section 107's fair use doctrine.<sup>100</sup>

As opposed to a potential direct transaction for a digital music download between an original purchaser and a subsequent purchaser, ReDigi acts as an intermediary that facilitates both the transfer of bits that make up the digital copy and the payment.<sup>101</sup> The first step requires the original purchaser to upload a copy of the digital music file to the user's personal "Cloud Locker" on ReDigi's servers.<sup>102</sup> The digital music file is automatically deleted from the original purchaser's computer by the ReDigi software.<sup>103</sup> While this uploading of the original file does make a copy, ReDigi argues that the newly created copy is a permissible fair use.<sup>104</sup> Even though fair use is a complicated topic subject to much debate, certain uses that depend on making a "space-shifted"<sup>105</sup> copy for

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<sup>98</sup> *Id.*

<sup>99</sup> See Answer at 9, Capitol Records v. ReDigi, No. 12-cv-0095 (S.D.N.Y. Jan. 19, 2012) ("No copy of the file in the ReDigi Cloud is made when the Eligible File is sold by one ReDigi user to another ReDigi user.").

<sup>100</sup> 17 U.S.C. § 107 (2012). Fair use is an affirmative defense that prevents a rigid application of copyright law in a way that would stifle creativity. See generally 4 NIMMER, *supra* note 24, § 13.05. The four factors that a court considers when conducting a fair use analysis include the purpose and character of the use, the nature of the copyrighted work, the amount of the portion used, and the effect of the use upon the potential market. 17 U.S.C. § 107. For a comprehensive list of cases where fair use was found to apply, as well as cases in which it was found to not apply, see *Summaries of Fair Use Cases*, STANFORD COPYRIGHT & FAIR USE, [http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/9-c.html](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html) (last visited Aug. 30, 2013).

<sup>101</sup> Answer, *supra* note 99, at 7–10.

<sup>102</sup> *Id.* A "Cloud Locker" describes space reserved for a user on ReDigi's servers where the user can store her own music files for streaming access. Once a file has been uploaded to the Cloud Locker, no copy of the file is permitted to remain on the user's computer or devices. *Id.*

<sup>103</sup> *Id.* Deletion of the file from the original purchaser's computer is critical, as it ensures that two versions of the file do not exist simultaneously.

<sup>104</sup> Transcript of Proceedings at 13, Capitol Records v. ReDigi, No. 12-cv-0095 (S.D.N.Y. Feb. 6, 2012) ("Uploading to a cloud and downloading is a quintessential fair use."); see also Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction, *supra* note 14, at 9.

<sup>105</sup> When uploading a file to the cloud, the copy has been "space-shifted" since it no longer occupies the "space" on the user's local hard drive, but instead resides on a remote server. See Brief of Amicus Curiae Google Inc. in Support of Defendants at 9–11, Capitol Records v.

personal consumption may be considered a “paradigmatic noncommercial fair use.”<sup>106</sup> Thus, a new copy is created,<sup>107</sup> but it is a copy that can be defended against the copyright owner’s right of reproduction.<sup>108</sup>

The second step of the process is the sale. ReDigi asserts that no reproduction occurs when the sale takes place.<sup>109</sup> With the digital music download now stored in the user’s Cloud Locker on ReDigi’s servers, a sale between two users of ReDigi’s service only results in a change of the file pointer<sup>110</sup> that designates the previously uploaded file as being owned by a particular user.<sup>111</sup> At the moment of the sale, when the ownership interest is transferred, ReDigi simply changes the file pointer to reflect the subsequent purchaser as the new owner, while the original purchaser loses access to the file and is credited with payment.<sup>112</sup> With the digital music file located in the Cloud Locker, the transaction is complete when this reassignment takes place.<sup>113</sup> Aside from altering the file pointer, ReDigi makes no other changes.<sup>114</sup> Later, the subsequent purchaser may choose to download the file from the Cloud Locker and maintain a local copy on her computer; ReDigi considers this a fair use reproduction as well, just like the initial upload from the original purchaser.<sup>115</sup>

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MP3Tunes, LLC, 821 F. Supp. 2d 627 (S.D.N.Y. 2011) (No. 07 Civ. 9931), 2011 WL 3681733. However, the concept of “space-shifting” is not limited to cloud-related uses: the ripping of a Compact Disc to a computer, followed by the transfer of the files to a portable music player, is also accurately described as “space-shifting.” *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

<sup>106</sup> See *Diamond Multimedia Sys.*, 180 F.3d at 1079 (noting that the process of creating copies of songs from a Compact Disc for playback on a digital audio device is a “paradigmatic noncommercial personal use”); Transcript of Oral Argument at 12, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480) (“The record companies, my clients, have said, for some time now, and it’s been on their website for some time now, that it’s perfectly lawful to take a CD that you’ve purchased, upload it onto your computer, put it onto your iPod.”). *But see* *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (rejecting the “space-shifting” argument in the context of Napster’s file sharing network).

<sup>107</sup> Transcript of Proceedings, *supra* note 104, at 13–14 (counsel for ReDigi implicitly agreeing with the court’s description that “the only copying which takes place in the ReDigi service occurs when a user uploads user files to the ReDigi cloud”).

<sup>108</sup> *Id.*

<sup>109</sup> Answer, *supra* note 99.

<sup>110</sup> A file pointer, or record locator, is a database solution that allows ReDigi to keep track of the owner of each file on its servers. See Declaration of Larry Rudolph ¶ 10, *Capitol Records v. ReDigi*, No. 12-cv-0095 (S.D.N.Y. Jan 27, 2012).

<sup>111</sup> Answer, *supra* note 99.

<sup>112</sup> *Id.* at 3. Notably, payment comes in the form of “ReDigi coupons” or credits to buy new songs in the ReDigi market, and not in dollars. *Id.*

<sup>113</sup> *Id.* at 8.

<sup>114</sup> *Id.* at 9.

<sup>115</sup> See *id.*

C. *Differing Characterizations of the Transaction Ignore the Fundamental Normative Question*

Because section 109(a) specifically refers to a “particular copy,” accurately describing the individual process elements that are necessary for a person to use ReDigi’s service is critical. Whether or not a business that is reliant upon the first sale doctrine can survive largely depends on whether the transaction is viewed as a fair use and a reassignment of a file pointer or as an unauthorized reproduction of a copyrighted work. But the descriptions that both Nimmer and ReDigi use only advance arguments concerning statutory construction. By jumping ahead to a second set of difficult questions, they essentially put the cart before the horse and avoid the fundamental issues that ground the discussion regarding whether a digital first sale doctrine should exist at all.

III. SHOULD—NOT CAN—THE FIRST SALE DOCTRINE APPLY TO DIGITAL FILES?

The normative question of whether a digital first sale doctrine should exist can be answered in a variety of ways. One method could be to compare the economic justifications for the first sale doctrine in a physical world with those in a digital world, and see whether, after balancing the relevant equities, the original need for the doctrine remains. However, the method developed by this Note is much more simple; instead, the question is answered by relying on what is already known and accepted about the first sale doctrine, focusing on the similarities between physical and digital copies, and not on their metaphysical differences.

This approach requires consideration of the various characteristics that define both types of copies. While the district court plainly produced an answer about statutory interpretation, the court very explicitly<sup>116</sup> did not confront the particular approach that this Note discusses. In that sense, the outcome of *Capitol Records v. ReDigi* left many questions unanswered, including those that assuredly will not be addressed even as the case is appealed to the Second Circuit.<sup>117</sup>

This Note tries to answer the question by considering a series of key characteristics of copies that have already been subject to the first sale doctrine: alienation and tangibility, rivalrousness, and excludability.

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<sup>116</sup> The court had no interest in addressing any policy issues. *Capitol Records v. ReDigi Inc.*, No. 12 Civ. 95(RJS), 2013 WL 1286134, at \*1 (S.D.N.Y. Mar. 30, 2013) (“Because this is a court of law and not a congressional subcommittee or technology blog, the issues are narrow, technical, and purely legal.”).

<sup>117</sup> See Sisario, *supra* note 19.



These characteristics are some of the more commonly referenced qualities in academic discussions about the first sale doctrine—both physical and digital—and thus may provide the foundation for an extension of the doctrine that does not depend on a tortured statutory interpretation. An examination of these characteristics in the context of ReDigi’s secondary market for digital music downloads leads to the conclusion that there should not be a digital first sale doctrine that enables ReDigi, in particular, to operate. However, this result does not preclude the possibility of the doctrine from applying to different types of services in other contexts, as will be discussed in Part IV.

A. *Alienation and Tangibility: Revealing the Tension Between Property and Intellectual Property*

American law has long disfavored restraints on alienation of private property.<sup>118</sup> In fact, the preference for alienation is one of the principles that gave life to the first sale doctrine.<sup>119</sup> Without a right to freely alienate personal property, it follows that the first sale doctrine would be inoperative, even when dealing with real property.<sup>120</sup> It is easy to imagine a restriction that a copyright owner could put in place that goes beyond the price floor established in *Bobbs-Merrill*,<sup>121</sup> thereby preventing future alienation of the property in a more general way. For example, consider an author of a fictional book who requires a lawful purchaser of a particular copy to only lend that copy to friends or family for up to one hour at a time, such that the recipient could not easily read the entire novel. This type of restriction could motivate the recipient to purchase another copy to complete the reading (providing an obvious monetary benefit to the author), and would further require the owner of

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<sup>118</sup> Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 981 (1928) (“The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.” (quoting *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907) (internal quotation mark omitted))); see also *Potter v. Couch*, 141 U.S. 296, 315 (1891) (noting that “the right of alienation is an inherent and inseparable quality of an estate of fee-simple”).

<sup>119</sup> H.R. REP. NO. 98-987, at 2 (1984), reprinted in 1984 U.S.C.C.A.N. 2898, 2999 (“The first sale doctrine has its roots in the English common law rule against restraints on alienation of property.”).

<sup>120</sup> The ability to restrain an owner of any piece of physical property from transferring title to a prospective acquirer naturally precedes any question about rivalry or excludability.

<sup>121</sup> *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (noting that the publisher included a notice in the book prohibiting sale of any copy for less than one dollar); Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More like a Book*, 48 VILL. L. REV. 13, 111 (2003) (“Take a look at an old Victrola recording jacket and you’ll see it purports to license use of the recording to one Victrola machine and to deny authority to retransfer one’s copy of the recording.” (quoting Pamela Samuelson)). For a discussion of *Bobbs-Merrill*, see *supra* Part I.A.

the copy to be subject to indefinite control by the author as well. Years later, the long arm of the author would still be controlling what any future owner of that book could do with it.

There exists a tension between the intellectual property embedded within a copy and the traditional real property rights associated with that copy. In many ways, the section 106 right to distribute is in direct conflict with the presumption against limitations on alienation.<sup>122</sup> The first sale doctrine is an attempt to create a boundary between the rights of intellectual and physical property.<sup>123</sup> The doctrine attempts to give clarity to where the right to distribute in regards to *the work* is exhausted and when personal property rights and the principle of free alienation in regard to *the copy* take over.<sup>124</sup>

The common law hostility towards restrictions on alienation came about centuries ago, long before a world with digital copies.<sup>125</sup> Although some pre-*Bobbs-Merrill* cases describe the principle of alienation as applying to “chattels”<sup>126</sup> and “general property in movables,”<sup>127</sup> there is no reason that the concept of alienation necessarily precludes application to intangible digital copies. There is no general prohibition against alienation of intangible property, of course. Consider, for example, that without the ability to alienate intangible property, a patent owner would not be able to sell her discovery to another who was more able to benefit from its use or an author would not be able to sell her fictional story to a movie studio for feature film development. While there are notable differences between a patent and a digital music download, suffice it to say that general acceptance of the former as something that can be alienated means that the latter should not be precluded simply because of its intangibility.

Conflation of alienation with the need for the copy to be tangible has led to questionable conclusions. For example, the *Section 104 Report* made a recommendation against a digital first sale doctrine in part because it found the concept of tangibility to be a foundational element of the doctrine.<sup>128</sup> In fact, the *Section 104 Report* used a derivation of the

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<sup>122</sup> Dan Karmel, *Off the Wall: Abandonment and the First Sale Doctrine*, 45 COLUM. J.L. & SOC. PROBS. 353, 374 (2012).

<sup>123</sup> Andrew D. Schwarz & Robert Bullis, *Rivalrous Consumption and the Boundaries of Copyright Law: Intellectual Property Lessons from Online Games*, 10 INTELL. PROP. L. BULL. 13, 23 (2005).

<sup>124</sup> *Id.*; see also Michael J. Madison, *The End of the Work as We Know It*, 19 J. INTELL. PROP. L. 325, 345 (2012) (discussing the boundary between the work and a copy of the work).

<sup>125</sup> See Schwarz & Bullis, *supra* note 123, at 23–24.

<sup>126</sup> Chafee, *supra* note 118, at 981 (quoting *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907)).

<sup>127</sup> *Id.*

<sup>128</sup> SECTION 104 REPORT, *supra* note 22, at 86 (“The tangible nature of [a] copy is . . . a defining element of the first sale doctrine and critical to its rationale.”).

root word “tangible” no less than forty times in its findings.<sup>129</sup> But this Note argues that the *Section 104 Report* relied much too heavily on tangibility in forming its conclusion,<sup>130</sup> as it need not be the cornerstone of the first sale doctrine, digital or otherwise.<sup>131</sup> As a threshold matter, in order for a copy to even possibly be subject to the first sale doctrine, it must have the potential to be freely alienable. The normative question about the digital first sale doctrine should not be instantly foreclosed by concluding that an intangible copy cannot be alienated.

B. *Rivalrousness: How Infinitely Copyable Files Don't Have To Be Nonrivalrous*

Rivalrousness is an economic concept that addresses the capacity for multiple people to simultaneously consume a resource.<sup>132</sup> An individual apple is the classic example of a purely rival good, since one person's consumption of an apple necessarily means that another cannot consume it.<sup>133</sup> Likewise, an idea is the classic example of a purely nonrivalrous good, since one person's consumption of an idea is unaffected by another's simultaneous use of it as well.<sup>134</sup> A joke that can be spread freely to an unlimited number of people is also an example of a nonrivalrous good.<sup>135</sup>

Some economists have suggested that rivalrousness is the critical characteristic that a copy—whether tangible or intangible—must exhibit for first sale purposes.<sup>136</sup> A digital file is usually considered nonrivalrous because of the ease with which it can be copied at a near-zero marginal cost and widely shared with others.<sup>137</sup> However, this need not always be the case, and digital copies should not necessarily be disqualified from the doctrine because they *can be* rivalrous under certain circumstances, most notably with the use of Digital Rights Management.<sup>138</sup> While the default presumption that digital files are nonrivalrous and not subject to

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<sup>129</sup> See *id.*

<sup>130</sup> See Schwarz & Bullis, *supra* note 123, at 23 (“[I]t is not the tangibility of the good that matters, it is merely the rivalrous nature.”).

<sup>131</sup> *Id.*

<sup>132</sup> See BRETT FRISCHMANN, *INFRASTRUCTURE* 26 (2012).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Schwarz & Bullis, *supra* note 123, at 23.

<sup>137</sup> WILL PAGE, *IS THE PRICE OF RECORDED MUSIC HEADING TOWARDS ZERO?* 5 (2006), available at <http://www.prsformusic.com/SiteCollectionDocuments/Independent%20research%20papers/WillPage-TransmissionConfPaper.pdf> (“This is because online developments allow us to make and distribute copies of ‘digital content’ at a fraction of what the cost used to be, so the marginal cost of production (think reproduction) has fallen.”).

<sup>138</sup> *Id.* For a discussion of Digital Rights Management see *infra* notes 144–51 and accompanying text.

particular problems of rivalry—as seen in the tragedy of the commons<sup>139</sup>—is accurate, it is certainly possible to graft enough qualities onto digital files as to make them the functional equivalent of rivalrous goods. This type of artificially engineered rivalrousness is what can save a digital first sale doctrine.

Conflating rivalrousness with tangibility was an innocent and inconsequential error when copies only existed as physical goods.<sup>140</sup> This is because, even in a digital world, tangibility and rivalrousness are highly correlated.<sup>141</sup> By their nature, physical or tangible resources are rivalrously consumed<sup>142</sup> because they are limited by their physical manifestations. However, the converse is decidedly not true: rivalrous goods are not always tangible.<sup>143</sup>

Through the use of Digital Rights Management (DRM),<sup>144</sup> digital music files may qualify as rivalrous goods. It is possible that a digital music file wrapped in DRM only permits playback on a handful of computers when authentication via a username and password is required. A copyright owner could choose to artificially limit the total number of copies in distribution and only permit future consumption when another person's consumption ceases. Thus, even though multiple people could have the underlying bits that comprise the file—meaning that there is no exclusive possession—only a limited number of them would be functional. With considerable limitations placed on each file, once nonrivalrous digital files now become rivalrous digital files.

It is important in this context to distinguish between original expression and the copies that embody the expression. As to the underlying work, it is impossible—both in an abstract and in a technical sense—to add DRM in such a way as to make the expression itself rivalrous. The intangible expression will always be nonrivalrous; that is to say, one additional person's consumption of the expression comes at

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<sup>139</sup> Dennis S. Karjala, *Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505 "The Copyright Term Extension Act"*, 105th Cong. (1998), available at <http://www.public.asu.edu/~dkarjala/legmats/1998Statement.html> (“The tragedy of the commons’ is that failure to recognize perpetual and transferable property rights in tangible property leads inevitably to ‘overgrazing,’ as soon as the item of property enters the public domain from which everyone may draw freely.”).

<sup>140</sup> See Schwarz & Bullis, *supra* note 123, at 23 (“In the context of the early 20th century, the line was articulated as first versus second sale, a boundary that corresponded neatly with the point at which the content was put into physical form.”).

<sup>141</sup> *Id.*

<sup>142</sup> That is not to say that all physical resources are necessarily consumed in a conventionally rivalrous fashion. For example, transportation infrastructure, such as roads and highways, are partially nonrivalrous. See FRISCHMANN, *supra* note 132, at 62–63.

<sup>143</sup> Schwarz & Bullis, *supra* note 123, at 23.

<sup>144</sup> Digital Rights Management describes a set of technologies that control access to digital copies of works after they are sold to consumers. For a general discussion about the history of DRM, see Bill D. Herman, *A Political History of DRM and Related Copyright Debates, 1987–2012*, 14 YALE J.L. & TECH. 162 (2012).

zero marginal cost.<sup>145</sup> Consumption by any one person does not result in either the temporary or permanent depletion of the work as an intellectual and intangible good.<sup>146</sup> For the purposes of the first sale doctrine, DRM should be understood as a means to control consumption of the *copies* and not the work itself. Only these representations of the work can be controlled, in a sense, by the external limitations that DRM places upon them.<sup>147</sup>

But DRM is not a panacea, neither in regard to enabling a digital first sale doctrine, nor generally.<sup>148</sup> Just because a digital media file is sold and distributed with DRM does not mean that the copy is *indefinitely* rivalrous. Depending on the particular technology used, DRM can be removed from the underlying copy with relatively little effort, rendering the downloaded file just as nonrivalrous as if it had been first distributed without any technological protection.<sup>149</sup> While this presents a problem for the copyright owner who wishes to only make her works available with this sort of protection, it does not introduce any unique problems for first sale purposes. Removing DRM from a particular copy would disqualify that copy from first sale availability for two reasons. First, the copy would no longer be lawful, since the owner would violate section 1201 of the DMCA through the act of circumvention.<sup>150</sup> Since the resulting copy of the song would potentially be unlawful, it would also not be subject to the first sale doctrine.<sup>151</sup> But even if it were lawful, the second problem is that the unprotected resulting file would now no longer be rivalrous. A copy stripped of its

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<sup>145</sup> See FRISCHMANN, *supra* note 132, at 254 n.1.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* Scholarly work that is written in furtherance of a degree can serve as a helpful parallel when considering how an artificial means of rivalrousness can be added. While multiple authors can each publish the same thesis, only the first to do so successfully gets the credit and commensurate reward for the work. Thus, while the expression underlying the work is not rivalrous, there is a social construct which adds the quality. See *id.* (discussing rivalrousness in regards to Ph.D. candidates).

<sup>148</sup> However, for interesting developments regarding DRM, see *infra* Part IV.C.

<sup>149</sup> Dana B. Robinson, *Digital Rights Management Lite: Freeing Ebooks from Reader Devices and Software*, 17 VA. J.L. & TECH. 152, 155–56 (2012) (noting that it is “common knowledge that DRM is easily broken”).

<sup>150</sup> 17 U.S.C. § 1201(a)(1)(A) (2012) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”).

<sup>151</sup> 17 U.S.C. § 109(a) (“[T]he owner of a particular copy or phonorecord *lawfully* made under this title . . .” (emphasis added)). The conclusion that the resulting copy is not lawful is not necessarily a black and white issue. However, if a copy is created as the result of an unlawful act (violating the anti-circumvention prohibition), it follows that the copy itself cannot be considered “lawfully made” for section 109 purposes. A different but related issue comes up in the context of ripping a CD to a computer, selling the physical copy, and retaining the digital copies. See William Patry, *First Sale, Hard Copies, and Digital Copies*, PATRY COPYRIGHT BLOG (Oct. 25, 2005), <http://williampatry.blogspot.com/2005/10/first-sale-hard-copies-and-digital.html>. The digital copies would be lawful fair use copies that were created under section 107, see discussion *supra* notes 105–06 and accompanying text, thus, they too would seem to be subject to the first sale doctrine, regardless of whether the original physical CD remains.

DRM would have the same problems as an unprotected, nonrivalrous copy in that an additional person could enjoy it without the original owner of that copy giving up access. Thus, while circumvention of DRM itself is a problem, the relevant issue that alters the digital first sale analysis actually concerns the ease with which DRM can be removed, which eliminates the engineered rivalrousness as well.

C. *Excludability: How Piracy Affects Control of the Market*

Excludability is an economic concept that refers to the ability of one to prevent—or exclude—another from consuming a resource.<sup>152</sup> While excludability is related to rivalrousness, it is an inherently different idea. Nonexcludable goods are usually considered to be pure public goods—such as national defense—since any one individual cannot be prevented from enjoying the benefits.<sup>153</sup> Though it is difficult or costly to exclude others from consuming something ephemeral like an idea, it is much easier to exclude another from consuming the aforementioned apple. Generally, it is the physical nature of the apple that enables the seller to exclude those who do not wish to pay a certain price for the good. While the degree or amount of excludability can vary with a particular resource,<sup>154</sup> physical goods are usually excludable because it is not possible for more than one person to simultaneously possess them.<sup>155</sup>

Digital copies are excludable in some respects. Copyright owners can easily decide not to make their works available for download on a primary market: they have the power to exclude by refusing to exercise their section 106 right of distribution to sell a copy of the work.<sup>156</sup> Without a distribution, the intangible digital file is more similar to the unsold apple than a freely spreadable idea. However, in other respects, digital copies are nonexcludable. Even while remaining excludable in relation to the primary market, there is a potential for widespread unauthorized reproduction that leads to an inability for the copyright owner to properly—meaning, without excessive burden and extraordinary cost—exclude those who have not lawfully obtained

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<sup>152</sup> David J. Brennan, *Fair Price and Public Goods: A Theory of Value Applied to Retransmission*, 22 INT'L REV. L. & ECON. 347, 350 (2002).

<sup>153</sup> *Id.* at 350 (“Another attribute has been identified as being associated with public goods; that they are non-excludable such that non-payers cannot be excluded from their benefits.”).

<sup>154</sup> See FRISCHMANN, *supra* note 132, at 25–26. One classic way to exclude is by creating a toll, but other forms of exclusion are available as well. Consider a national park that is open to all, but is naturally difficult to visit due to terrain conditions—there is no exclusion due to financial pressure, but rather, geographic access.

<sup>155</sup> *Id.*

<sup>156</sup> This comes at a high cost. Even ideas can be excludable through the concept of secrecy. See generally *id.* at 25–26.

access to the work.<sup>157</sup> If the copyright owner retains the ability to exclude on the primary market, but in effect retains no ability to actually exclude due to the widespread prevalence of piratical copies, the excludability of the digital copies is weakened overall.

While this potential is not fundamentally different than the one that has existed for physical goods,<sup>158</sup> it is different as a matter of degree. The near-zero marginal cost associated with reproduction of a digital copy should prompt meaningful reconsideration of the file's excludability. It remains true that the amount of excludability a good exhibits does not directly address the question of excludability itself, but it does speak to secondary considerations about the ability of this principle to remain relevant, especially when questioning whether a first sale doctrine ought to extend to digital copies.

#### D. *Application of a Characteristics-Based Test to ReDigi's Secondary Market*

Taking notice of these qualities leads to the formation of a "characteristics-based test" to determine whether the first sale doctrine should apply to a particular digital copy. The test can be simply stated: if a digital copy shares certain qualities with copies that are already known to be subject to the first sale doctrine, then the digital copy should also be subject to the doctrine. The test provides the normative answer about the doctrine—an answer that was not provided in the *ReDigi* case.<sup>159</sup> This is because the characteristics-based test is not designed to resolve the questions of statutory interpretation that the court was tasked with answering; rather, it addresses a question that persists beyond the

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<sup>157</sup> The scope and cost of piracy is heavily contested. See Geoffrey A. Fowler, *Estimates of Copyright Piracy Losses Vary Widely*, WALL ST. J., June 2, 2006, at A13.

<sup>158</sup> For example, imagine an expensively priced physical book. It is possible for the copyright owner to price that book so high that all but one purchaser is excluded. However, if that one purchaser then goes to a photocopier and creates multiple copies of the book to share with her friends who were not willing to pay as high a price, the copyright owner has effectively lost her ability to exclude those consumers.

<sup>159</sup> Again, this was no accident. Judge Sullivan made it clear he was not addressing any normative questions in this case, stating at the start of oral argument that:

There are a lot of people who are very interested in what the law should be and what would be a wise way to arrange ourselves with respect to this kind of technology and having access to music or other things like this [sic] digital recordings. That's a fascinating issue in its own right, but that's not really what we're here to decide today. We're here today to decide what the law is and what is the proper application of that law. And so certainly I think the law ought to be different, but if the law is clear and the application is obvious, then that's what we're going to do.

Transcript of Oral Argument at 3, *Capitol Records v. ReDigi*, No. 12-cv-0095 (S.D.N.Y. Oct. 22, 2012).

particular facts of *ReDigi* and will remain for as long as copies of digital media files are sold and distributed through the Internet.

A test that closely tracks the first sale doctrine of the “physical world” is only appropriate if the existing doctrine produces normatively advisable results. This Note asserts that the current doctrine generally strikes the correct balance between the relevant interests of those who hold the copyright in a work and those who own copies of the work.<sup>160</sup> Thus, even though the technology and the environment have changed in this new digital arena, the characteristics-based test also provides normatively good outcomes because the underlying justifications put forth for the doctrine have not changed. The balance achieved by the test reflects the balance already established in the existing doctrine and simply applies it in a new setting.

Application of the test to *ReDigi*’s secondary market commands that the digital first sale doctrine should not be available in this case. This answer is not unlike that which the *Section 104 Report*<sup>161</sup> and the *Report of the Working Group* announced,<sup>162</sup> however, it is an answer that is better justified as it tries to solve the digital first sale question from a different perspective. Even though there is no reason that the intangible digital copies in which *ReDigi* transacts are inherently barred from being alienable due to their intangibility, they are both nonrivalrous and effectively nonexcludable.<sup>163</sup> Thus, the first sale doctrine should not apply to the type of sales that *ReDigi*’s service enables.

This conclusion is not based off of any argument regarding the tangibility of the copies. As previously mentioned, the focus on tangibility is mistaken.<sup>164</sup> Insofar as alienation and tangibility are relevant, *ReDigi*’s model does not by its nature offend the notion of a first sale doctrine. In fact, this conclusion in no way precludes another secondary digital market place from relying on the first sale doctrine.

A recent European Union court judgment regarding application of its exhaustion doctrine to copies sold through the Internet is instructive.<sup>165</sup> In that case, German company *UsedSoft* resold software licenses that had been purchased from U.S. software company *Oracle*.<sup>166</sup>

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<sup>160</sup> See Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 894–901 (2011) (describing a variety of rationales for the doctrine).

<sup>161</sup> SECTION 104 REPORT, *supra* note 22.

<sup>162</sup> REPORT OF THE WORKING GROUP, *supra* note 68.

<sup>163</sup> See *supra* Part III.B–C.

<sup>164</sup> See *supra* note 130 and accompanying text.

<sup>165</sup> Case C-128/11, *UsedSoft GmbH v. Oracle Int’l Corp.*, 2012 E.C.R. I-00000, available at <http://curia.europa.eu/juris/document/document.jsf?docid=124564&doclang=en>. Of course, the ruling by the European Court of Justice does not affect domestic interpretation of section 109 or any part of U.S. law. Nonetheless, it provides an example of how statutory language that does not make reference to the tangibility of copies can be interpreted to permit a digital first sale doctrine.

<sup>166</sup> *Id.* ¶ 24.



UsedSoft would acquire “already used” licenses for Oracle programs from third parties and resell them to others through the Internet, thus removing Oracle from the process and profits of providing access to the new user with a new license.<sup>167</sup> Largely parallel to the arguments presented in *ReDigi*, Oracle accused UsedSoft of violating the European-equivalent of the section 106 right of reproduction,<sup>168</sup> while UsedSoft said their operation was valid in light of the European exhaustion doctrine.<sup>169</sup>

The court addressed whether the tangibility of a copy of computer software was a relevant factor<sup>170</sup> and concluded that both tangible and intangible copies are included in the exhaustion doctrine.<sup>171</sup> Specifically, the court noted that the relevant Article of Law did not distinguish between tangible and intangible copies<sup>172</sup> (just as section 109 does not) and that from an economic point of view, whether the sale of a copy is made through a physical medium or the Internet is inconsequential.<sup>173</sup> This observation is consistent with the characteristics-based test, as it relies on observations that concern what the court calls the “functional equivalent”<sup>174</sup> of the digital copy in relation to a distribution that takes place via a physical medium. The European court invoked the interpretative principle of equal treatment<sup>175</sup> in order to reach the conclusion that the digital transfer was significantly similar, which is a concept that does not necessarily exist in American law. However, the idea that the court demonstrates—and the simple power of identifying direct parallels through varying mediums—is at the core of the characteristics-based test.<sup>176</sup>

The inquiry must then turn to rivalrousness and whether the music files sold through ReDigi’s secondary market are rivalrous goods. While in theory music files sold through the Internet can be rivalrous due to

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<sup>167</sup> *Id.* ¶ 25.

<sup>168</sup> Council Directive 2001/29, art. 4, 2001 O.J. (L 167) 10 (EC); see *UsedSoft*, 2012 E.C.R. I-00000, ¶ 11.

<sup>169</sup> Council Directive 2009/24, art. 4(2), 2009 O.J. (L 111) 42 (EC); see *UsedSoft*, 2012 E.C.R. I-00000, ¶ 10.

<sup>170</sup> *UsedSoft*, 2012 E.C.R. I-00000, ¶¶ 53–61.

<sup>171</sup> *Id.* ¶ 61.

<sup>172</sup> *Id.* ¶ 55.

<sup>173</sup> *Id.* ¶ 61 (“It should be added that, from an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of a program by downloading from the internet are similar.”).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Perhaps as a result of this decision, ReDigi has announced it will soon be expanding its service into Europe. REDIGI, <http://www.reddigi.com> (last visited Aug. 30, 2013) (“Due to popular demand, European music lovers will soon be able to buy and sell pre-owned music on ReDigi.”).

the use of DRM,<sup>177</sup> the files that ReDigi exclusively sells necessarily do not have DRM, which necessarily means they are nonrivalrous goods.

This conclusion stems from the fact that ReDigi only allows for the sale of a digital music file that an original purchaser has acquired through Apple's iTunes Store service.<sup>178</sup> Until 2007, all of the music files that iTunes sold were wrapped in DRM.<sup>179</sup> This means that even if a purchaser sent dozens of copies of that file to her friends—thus destroying exclusive possession of the copy—only the copy that the original purchaser authenticated would be functional; the rest would just be bits on a hard drive. Following the problems that the industry experienced with unauthorized digital distribution via Napster and Grokster, the record labels were reluctant to sell music online without a series of technological protections.<sup>180</sup> However, years after the iTunes Music Store launched (and even years before<sup>181</sup>), questions about the usefulness and efficacy of DRM increased, especially since the technology often times prevented law-abiding purchasers from trying to do legal things,<sup>182</sup> while pirates found ways around the controls.<sup>183</sup> In recent times, this problem has manifested itself when a consumer wishes to create a backup copy of a DVD that has been lawfully purchased.<sup>184</sup>

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<sup>177</sup> See *supra* notes 144–51 and accompanying text.

<sup>178</sup> *Frequently Asked Questions*, REDIGI, <http://newsroom.redigi.com/faq> (last visited Aug. 30, 2013). ReDigi also allows a user to resell a music file that has been already purchased through ReDigi. *Id.* Of course, this can only happen once that music file—which must be an iTunes download—was uploaded to ReDigi and sold to a user in the first place.

<sup>179</sup> See Press Release, Apple, Apple Unveils Higher Quality DRM-Free Music on the iTunes Store (Apr. 2, 2007), <http://www.apple.com/pr/library/2007/04/02Apple-Unveils-Higher-Quality-DRM-Free-Music-on-the-iTunes-Store.html>.

<sup>180</sup> STEVEN LEVY, *THE PERFECT THING: HOW THE IPOD SHUFFLES COMMERCE, CULTURE, AND COOLNESS* 161 (2006) (describing the limitations of Apple's "Fair Play" DRM technology).

<sup>181</sup> Cryptography and computer security expert Bruce Schneier has been skeptical of DRM's usefulness for some time. See Bruce Schneier, *The Futility of Digital Copy Prevention*, CRYPTOGRAM NEWSL., May 15, 2001, available at <http://www.schneier.com/crypto-gram-0105.html> ("The end result will be failure. All digital copy protection schemes can be broken, and once they are, the breaks will be distributed . . . law or no law." (ellipsis in original)).

<sup>182</sup> For an example of consumer displeasure with DRM in the home video market context, see *Customer Reviews: Green Lantern (Two-Disc Combo: Blu-ray 3D / Blu-ray)*, AMAZON.COM, [http://www.amazon.com/Green-Lantern-Three-Disc-Combo-UltraViolet/product-reviews/B005164U5C/ref=cm\\_cr\\_pr\\_hist\\_1?ie=UTF8&showViewpoints=0&filterBy=addOneStar](http://www.amazon.com/Green-Lantern-Three-Disc-Combo-UltraViolet/product-reviews/B005164U5C/ref=cm_cr_pr_hist_1?ie=UTF8&showViewpoints=0&filterBy=addOneStar) (last visited Aug. 30, 2013) (filtered by 1-star reviews).

<sup>183</sup> Robert Levine, *Unlocking the iPod*, CNNMONEY (Oct. 23, 2006, 2:54 PM), [http://money.cnn.com/magazines/fortune/fortune\\_archive/2006/10/30/8391726](http://money.cnn.com/magazines/fortune/fortune_archive/2006/10/30/8391726) (discussing the attempts of hackers to remove the DRM from songs sold on iTunes).

<sup>184</sup> In October 2012, the Copyright Office rejected an exemption that would allow for the removal of DRM in order to create space-shifted copies for backup purposes. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,620, 65,276–79 (Oct. 26, 2012) (codified at 37 C.F.R. § 201.40 (2012)). Nonetheless, the perception that DRM removal for this purpose is permissive is so widespread that even self-described "techie" members of Congress impliedly provide incorrect information. See Darrell Issa, *IAMA Congressman Darrell Issa, Internet Defender and Techie. Ask Away!*, REDDIT, [http://www.reddit.com/r/IAMA/comments/qlqys/iama\\_congressman\\_](http://www.reddit.com/r/IAMA/comments/qlqys/iama_congressman_)

Eventually, Apple CEO Steve Jobs published an open letter appealing to the music labels to allow his company to sell music without DRM,<sup>185</sup> and since 2009, all of the music files that iTunes has sold have not been wrapped in DRM.<sup>186</sup>

Without DRM—or any other equivalent technology that would prevent unlimited simultaneous consumption of the digital file—ReDigi enables the resale of nonrivalrous goods that do not satisfy one of the key characteristics a copy should exhibit for first sale purposes under the test. If ReDigi’s secondary market facilitated the sale of digital copies that original purchasers acquired from the pre-2007 iTunes Store, the rivalrous files would not run afoul of the requirements of the test. But ReDigi’s technology necessarily depends on the copies being DRM-free for the second step of the secondary market transaction that takes place: reassignment of the pointer file to the new owner.<sup>187</sup> Reassignment takes place without reproduction, but also without any mechanism to allow for a copy wrapped in DRM to suddenly be consumed by another in a rivalrous fashion. It is the relative ease with which the transaction takes place—just as a physical sale of a CD at a garage sale would—that demonstrates how ReDigi’s model does not allow for the sale of DRM files. If DRM were involved, much more would need to be involved than a simple reassignment of a pointer file.

Similarly, the digital files ReDigi enables to be sold are effectively nonexcludable. Once a copyright holder chooses to make her work available on a digital music download service at any price, it requires only one lawful purchase before the possibility of widespread unlawful dissemination—or piracy—arises. Especially for works that are highly sought-after, massive downstream piracy through illicit channels is possible when just one copy of an unprotected work is made available.<sup>188</sup> The continuing piracy problem the industry faces is highly relevant in this regard, as it effectively destroys the author’s capacity to exclude. A work can go from legally available in a controlled market to illegally

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darrell\_issa\_internet\_defender/c3ykqxs (last visited Aug. 30, 2013) (“You can in fact make personal copies for your own use. A good example would be ripping a DVD so you can play it on your iPad. That use is not prohibited.”).

<sup>185</sup> Steve Jobs, *Thoughts on Music*, APPLE (Feb. 6, 2007), <http://web.archive.org/web/20070207234839/http://www.apple.com/hotnews/thoughtsonmusic> (accessed through the Internet Archive index).

<sup>186</sup> See Press Release, Apple, Changes Coming to the iTunes Store (Jan. 6, 2009), <http://www.apple.com/pr/library/2009/01/06Changes-Coming-to-the-iTunes-Store.html>.

<sup>187</sup> Answer, *supra* note 99.

<sup>188</sup> See, e.g., Jordan Sargent, *Kanye West’s ‘Yeezus’ Has Sprung a Leak*, SPIN (June 14, 2013, 12:35 PM), <http://www.spin.com/articles/kanye-west-yeezus-leak>. Furthermore, some websites exist solely to track the early release of leaked albums, likely demonstrating a general interest in unauthorized access to these works. See HAS IT LEAKED?, <http://hasitleaked.com> (last visited Aug. 30, 2013); LEAKS ALL DAY, <http://www.leaksallday.com> (last visited Aug. 30, 2013).

available on the black market with a global online audience within just a matter of moments.<sup>189</sup>

ReDigi's software attempts to reduce the problems of excludability (and to a certain extent, because they are inherently related, the problems of rivalry). During the process of uploading a song to ReDigi's Cloud Locker (either for storage or eventual sale) the software automatically checks for remaining copies of the song on the user's computer or connected devices.<sup>190</sup> This is representative of the type of forward-and-delete scheme that the *Section 104 Report* had contemplated but, at the time, ultimately dismissed.<sup>191</sup> Here, the software attempts to limit the concerns about piracy by prohibiting any copy of the song from remaining on the user's computer after upload to the Cloud is successful.<sup>192</sup>

However, the fair use copy a user makes in order to listen to the song on her portable music device cannot be reached by ReDigi's software if the device is not connected to the computer. For example, a user may purchase a song from iTunes, copy it to her iPhone, detach the iPhone, and then upload the song to the ReDigi Cloud Locker. While the software would try to delete all copies of the song except for the one now in the cloud, it could not delete the copy on the iPhone until the device is reconnected. Thus, even though a forward-and-delete technology like the one ReDigi uses<sup>193</sup> is more sophisticated than those previously described and deployed—and is closer to what the *Section 104 Report* envisioned as necessary to support a digital first sale doctrine<sup>194</sup>—it remains imperfect. It certainly cannot remedy a scenario in which a user legally acquires a copy of a song and shares it on a peer-to-peer network or publicly accessible file locker. As such, the files ReDigi transacts in are nonexcludable—even with a forward-and-delete scheme—confirming that they ought not to be subject to the digital first sale doctrine.

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<sup>189</sup> Often times, artists are forced to move up the release dates of their albums in order to counteract the availability of the leaked album online. See, e.g., Press Release, Interscope Records, 50 Cent Moves Up Release Date After New Album *Before I Self Destruct* Leaks (Nov. 4, 2009), <http://www.prnewswire.com/news-releases/50-cent-moves-up-release-date-after-new-album-before-i-self-destruct-leaks-69011492.html>.

<sup>190</sup> See Transcript of Proceedings, *supra* note 104, at 55 (counsel for ReDigi explaining the effectiveness and limitations of the software).

<sup>191</sup> SECTION 104 REPORT, *supra* note 22, at 98.

<sup>192</sup> See Transcript of Proceedings, *supra* note 104, at 55.

<sup>193</sup> As a technical matter, ReDigi does not describe its process as a “forward-and-delete” scheme. See Peckham, *supra* note 96.

<sup>194</sup> SECTION 104 REPORT, *supra* note 22, at 82 (defining an “effective” forward-and-delete solution as one that “ensure[s] that the single act of sending the work to a recipient results in a copy of the work being retained by the recipient alone”).

#### IV. BEYOND REDIGI: THE BENEFITS OF RELYING ON A CHARACTERISTICS-BASED TEST WHEN CONSIDERING A DIGITAL FIRST SALE DOCTRINE

In answering the normative question about whether a digital first sale doctrine should exist, this Note proposes the characteristics-based test as a simple solution for a variety of reasons. First, it addresses the question in a way that avoids implicating a variety of secondary issues that are tempting—but perhaps unnecessary—to introduce or ask. For example, arguments concerning whether a different result is required due to the absence of a metaphysical connection between an owner of a particular physical copy and a digital copy are set aside. Similarly, economic arguments about whether a digital first sale doctrine is too problematic for a twenty-first century music industry to sustain itself are outside the scope of the test. By only taking account of the qualities of copies that are already subject to the doctrine, and testing digital copies against that standard, a simple solution is revealed. However, it also provides for a standard that can be used for judging whether other forms of intellectual property beyond digital music files should be subject to the first sale doctrine and allows for the possibility that new technology will affect whether certain digital copies are eligible in the future. Finally, the test produces a somewhat counterintuitive result, finding that DRM may actually aid in permitting a digital first sale doctrine to exist, which generally runs against conventional wisdom.

##### A. *Applicability to Other Types of Intellectual Property*

The test is not only applicable to digital media files like music or movies. While certain kinds of DRM can make these files rivalrous, not all intellectual property requires the type of technology access controls that were once embedded in music files purchased on iTunes in order to make a digital copy rivalrous. Consider licensed software<sup>195</sup> that requires the entry of an alpha-numeric product code to authenticate prior to full use of the software, or sometimes, any use at all.<sup>196</sup> The software itself

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<sup>195</sup> Since the first sale doctrine only applies to *owners* of particular copies, there is much debate as to whether the copyright owner's interest in licensed copies of works can or should be exhausted after an initial distribution. The distinction is particularly important when transactions of digital goods appear to be sales, but are technically characterized as licenses. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (holding that significant transfer and use restrictions attached to the transaction, among other things, rendered it a license, not a sale). Some have proposed a simple “duck test” solution for distinguishing when copies are sales and not licenses. Turchyn, *supra* note 20. The characteristics-based test is compatible with this “duck test,” as it simply focuses on the qualities of a copy, and not its nominal designation.

<sup>196</sup> For an example, see *How to Identify, Locate, and Replace a Product Key*, MICROSOFT, <http://support.microsoft.com/kb/811224> (last visited Aug. 30, 2013).

may be freely downloaded, infinitely copied, and is not excludable, but without the product code, it is substantially less useful.

Application of the characteristics-based test to such a digital good demonstrates that the software, in conjunction with the product code, should be subject to the digital first sale doctrine. A software licensor can ensure that only one purchaser may use a licensed copy of the software at any given time.<sup>197</sup> As a result, the software can only be rivalrously consumed. Similarly, the software licensor may choose to only issue a certain number of product codes.<sup>198</sup> Because it is up to the software licensor to control the number of licenses, the copyright owner can effectively exclude those who do not pay for access to the work. Notwithstanding statutory questions about whether the software sold constitutes either a license or a sale,<sup>199</sup> a licensed copy of a piece of software could be subject to a digital first sale doctrine because it meets the standards of the characteristics-based test: an alpha-numeric product code may not be tangible, but it can be rivalrous and excludable.

B. *Forward-and-Delete and New DRM Developments: The Possibility of New Technology Allows for Changes to the Analysis*

The *Section 104 Report* discusses forward-and-delete technology as a means of ensuring that multiple copies are not created in the digital transmission of a file.<sup>200</sup> However, the report concludes that such a technology should not enable a digital first sale doctrine because of the potential for hacking, the high cost of implementation, and—at the time—the unavailability of workable solutions.<sup>201</sup> Even still, the report seemed to dismiss any “forward-and-delete” scheme from enabling first sale in the future, regardless of whether some of the issues are resolved, perhaps because of the difficulty or untenability of asking copyright

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<sup>197</sup> Certain schemes may even allow for the same user to use only one instance of the software at any given time. For example, while a user could have installed the software on both her desktop and laptop computers, she may only be permitted to use one licensed version at any given time. Usage of both simultaneously would be prohibited. However, if a software licensor *cannot* ensure the same product code will not be used simultaneously by a limitless number of people, the artificially added rivalrousness quickly vanishes.

<sup>198</sup> The licensor may also choose to price discriminate use of the software by the type of license issued. For example, a licensor may sell a non-commercial license for educational use more cheaply than a generally applicable license that could be used for business purposes. See *Eligibility Guide: Students*, ADOBE, <http://www.adobe.com/education/student-eligibility-guide.edu.html> (last visited Aug. 30, 2013).

<sup>199</sup> Turchyn, *supra* note 20.

<sup>200</sup> SECTION 104 REPORT, *supra* note 22, at 83–85.

<sup>201</sup> *Id.* at 98.

holders to take on the costs of such a system that only serves to limit their exclusive rights.<sup>202</sup>

But forward-and-delete mechanisms should not be so readily ignored. Insofar as a scheme can be developed that would approximate the qualities of rivalrousness and excludability onto digital files by actively managing the number of copies that may exist at any one time, the technology can be particularly relevant as a way for a copy to pass the characteristics-based test. A well-functioning technology may be costly, and not always perfect,<sup>203</sup> but anything that restores the necessary characteristics to otherwise simultaneously consumed and non-exclusively possessed digital files is worthy of further consideration and possible deployment. The characteristics-based test does not foreclose the possibility of such a technology from evolving; it allows for any new development that restores the necessary qualities to factor into the digital first sale analysis, independently of where any burdens may fall on the parties involved.

Developments in this area of technology may prove to be incredibly influential in allowing a digital first sale doctrine to exist. In January 2013, the United States Patent and Trademark Office granted Amazon a patent for “a secondary market for digital objects” that contemplates the permissive transfer of used digital goods.<sup>204</sup> Amazon’s patent describes a system much like ReDigi’s, though, without requiring an initial upload to the “digital locker” (or in ReDigi’s terms, the “Cloud Locker”), which avoids many of the potential reproduction issues.<sup>205</sup> The ownership rights associated with a purchase through Amazon’s digital storefront for music, e-books, applications, etc., could be transferred to another user through an electronic marketplace.<sup>206</sup> While ReDigi avoided directly justifying the legality of its service on a forward-and-delete mechanism,<sup>207</sup> Amazon’s patent seems to embrace it.<sup>208</sup> It

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<sup>202</sup> *Id.* (“Conditioning a curtailment of the copyright owners’ rights on the employment of an expensive technology would give the copyright owner every incentive *not* to use it.”).

<sup>203</sup> The report mentions that “the technology would probably not be 100 percent effective,” *id.*, but this is somewhat of a red herring, as achieving 100% effectiveness with any technology is largely illusory.

<sup>204</sup> U.S. Patent No. 8,364,595 (filed May. 5, 2009) (issued Jan. 29, 2013). Apple filed a similar patent application weeks later. U.S. Patent Application No. 20130060616 (filed Mar. 7, 2013).

<sup>205</sup> U.S. Patent No. 8,364,595, *supra* note 204 (“A personalized data store may also be known as a digital locker and may be implemented as a non-resident, user-specific storage location of digital objects . . .”).

<sup>206</sup> *Id.*

<sup>207</sup> See Peckham, *supra* note 96.

<sup>208</sup> See Press Release, ReDigi, ReDigi Issues Statement on Amazon’s Patent for the Resale of “Used” Digital Goods (Feb. 6, 2013), <http://www.prnewswire.com/news-releases/redigi-issues-statement-on-amazons-patent-for-the-resale-of-used-digital-goods-190036661.html> (“As ReDigi understands Amazon’s patent, it is for a marketplace that employs a seller to buyer ‘copy and delete’ mechanism, in which a user sells a ‘copy’ of a digital good to another user

should be noted that the patent also describes the potential for artificial limitations to be placed on the number of times a used digital object can be transferred.<sup>209</sup> This would be an external restriction, not imposed by the tenants of a possible digital first sale doctrine, but by contractual limitations imposed by copyright holders. Still, the type of system described in the patent—one that projects the qualities required to pass the characteristics-based test onto otherwise nonrivalrous and nonexcludable files—is promising.

C. *Counterintuitive Conclusions: DRM May Enable a Digital First Sale Doctrine*

Because the characteristics-based test relies upon the concepts of rivalrousness and excludability, digital rights management lends itself as a possible means for artificially grafting these characteristics onto digital files, thus enabling access to the first sale doctrine. However, others have definitively reached the opposite conclusion: that DRM forecloses the possibility of a digital first sale doctrine altogether.<sup>210</sup>

In some ways, it is true that *current* DRM technology effectively prevents digital copies from being subject to the first sale doctrine, as copies are usually permanently associated with an individual's account without a means of transferring ownership.<sup>211</sup> In that sense, DRM makes it practically impossible to create a secondary market for the exchange of these files, since only the original purchaser has the means to decrypt the file. While recognizing that this is the current state of technology, there is nothing to necessarily prevent future DRM schemes from allowing such a transfer. Consider a general mechanism that would not rely on an individual's greater account for authentication, but instead

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while both the buyer and seller simultaneously own the copy (even if only for an instant in time), and then supposedly the seller's copy is subsequently 'deleted.'").

<sup>209</sup> U.S. Patent No. 8,364,595, *supra* note 204 ("When a digital object exceeds a threshold number of moves or downloads, the ability to move may be deemed impermissible and suspended or terminated.").

<sup>210</sup> See Perzanowski & Schultz, *supra* note 160, at 902–03 (discussing criticism of the DMCA because it allows DRM to "thwart first sale by preventing users from accessing and using copies acquired through secondary markets"); Matthias Marcus Glatthaar, *Resale of Digital Music: Capitol Records v. Redigi 5* (Apr. 30, 2012) (working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2172403](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2172403) ("In the digital world, digital rights management (DRM) seems to be an obvious choice to prevent a secondhand market for digital files.").

<sup>211</sup> Apple's DRM authentication, which remains in use for movies, television shows, books, etc., ties purchases to a user's account. See *iTunes Store: About Authorization and Deauthorization*, APPLE, <http://support.apple.com/kb/HT1420> (last visited Aug. 30, 2013). For an in-depth discussion of the technology, see Daniel Eran Dilger, *How FairPlay Works: Apple's iTunes DRM Dilemma*, ROUGHLYDRAFTED MAG. (Feb. 26, 2007), <http://www.roughlydrafted.com/RD/RDM.Tech.Q1.07/2A351C60-A4E5-4764-A083-FF8610E66A46.html>.



was dependent on individual file authentication. Thus, a movie that a user purchases from iTunes would not be subordinate to her iTunes account; rather, it would be independently authorized and easily severable from other purchases she makes.

Alternatively, consider a more complex system that allows for the authorized redistribution of protected content through a process of decryption and re-encryption.<sup>212</sup> Instead of authorized digital media being sent to one individual's compliant device,<sup>213</sup> where it would likely remain indefinitely, it is possible to create a scheme that enables not only the transfer of the underlying digital object, but also the technical transfer of the requisite licenses indicating ownership, as well as the security keys that enable playback.<sup>214</sup> With a mature backend structure in place, this content redistribution scheme would even allow for the original copyright owner to benefit from the secondhand sale.<sup>215</sup> Even though "traditional" DRM is no longer the industry-standard when it comes to digital music, this type of system—one that gives users the flexibility to consume today and redistribute tomorrow—has the potential to attach to other types of media, which enables a digital first sale doctrine and does not prohibit one.<sup>216</sup>

This is not meant to advocate for the deployment of DRM on all digital copies in order for those copies to be eligible for first sale. DRM carries with it an additional set of positive and negative consequences that go beyond first sale eligibility.<sup>217</sup> To only look at the right of first sale in an evaluation of a digital copy owner's rights ignores other important limitations and exceptions that are generally encumbered by

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<sup>212</sup> SRIJITH K. NAIR ET AL., ENABLING DRM-PRESERVING DIGITAL CONTENT REDISTRIBUTION (2005), available at <http://srijith.net/publications/conf/CEC2005.pdf>.

<sup>213</sup> *Id.* at 1 ("The current approach to solve this problem is to distribute content to only so called *compliant devices* . . . . Protected content cannot be legitimately distributed to non-compliant devices.").

<sup>214</sup> *Id.* at 5.

<sup>215</sup> *Id.* Similarly, ReDigi says that its service pays back a portion of the purchase price of a pre-owned song to the artist. See REDIGI, <http://www.reddigi.com> (last visited Aug. 30, 2013) ("ReDigi users support artists with 20% of all pre-owned music sales going directly to the syndicated artist.").

<sup>216</sup> However, while recent patents by Apple and Amazon may reveal an interest in developing such a system by certain industry players, legitimate concerns remain regarding the incentives for copyright holders to support a solution that comes at a non-zero cost. See SECTION 104 REPORT, *supra* note 22, at 98 ("Conditioning a curtailment of the copyright owners' rights on the employment of an expensive technology would give the copyright owner every incentive *not* to use it.").

<sup>217</sup> Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (discussing the effect of DRM on privacy); Christopher May, *Digital Rights Management and the Breakdown of Social Norms*, FIRST MONDAY (Nov. 3, 2003), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/rt/prinrtFriendly/1097/1017> (discussing the effect of DRM on the relationship between private rights and social benefit).

DRM, such as fair use.<sup>218</sup> This Note only identifies DRM as a possible means of adding rivalrousness and excludability to digital copies, not the exclusive means. The characteristics-based test does not depend on the presence of DRM; rather, DRM is simply one plausible way to satisfy the requirements of the test.

#### CONCLUSION

The resolution of the ReDigi case before the Southern District of New York is important—in a very practical sense—for the near-term future of the digital first sale doctrine. ReDigi must forge its business in a legal climate that necessitates a statutory debate over the meaning of “that particular copy” and the technical process involved in transmitting a copy of a digital file through the Internet. Notwithstanding the fact that the Southern District found that there is an impermissible reproduction occurring that violates a copyright holder’s exclusive rights, the decision will be largely confined to the factual circumstances that the ReDigi case—and the original technology<sup>219</sup>—presents. ReDigi is simply one example of how a particular service could rely upon a digital first sale doctrine. Furthermore, the decision against ReDigi, even if upheld on appeal, will not end the normative debate.

It is in this larger discussion of whether there *should* be a digital first sale doctrine that this Note proposes taking a step back and answering the question by using a characteristics-based test. Thus, if a digital copy shares certain qualities with copies that are already known to be subject to the first sale doctrine, then the digital copy should also be subject to the doctrine. The simplicity of this test is part of what makes it so alluring: instead of focusing on grandiose questions about the fundamental nature of digital files or the inherent differences between physical and digital copies, the characteristics-based test simply looks to the relevant similarities.

Application of the test to ReDigi’s digital secondary market does not produce a favorable result for the service. But ReDigi is not the be-all and end-all when it comes to the digital first sale doctrine. The first sale limitation on an author or copyright owner’s exclusive right of distribution *should* exist for digital copies, but only in certain circumstances, and not in ReDigi’s case.

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<sup>218</sup> Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J.L. & TECH. 49 (2006); see also Fred von Lohmann, *Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension Between Them*, ELECTRONIC FRONTIER FOUND. (Apr. 16, 2002), available at [https://www.eff.org/sites/default/files/cfp\\_fair\\_use\\_and\\_drm\\_0.pdf](https://www.eff.org/sites/default/files/cfp_fair_use_and_drm_0.pdf).

<sup>219</sup> See *supra* note 13.