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Cooling-Off and Secondary Markets: Consumer Choice in the Digital Domain

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Cooling-Off & Secondary Markets: *Consumer Choice in the Digital Domain*

MICHAEL R. MATTIOLI[†]

ABSTRACT

This article studies the law and economics of cooling-off periods and secondary markets for online media. The discussion is fueled by a current debate: In July 2009, the online retail juggernaut, Amazon.com, remotely deleted literary classics from consumers' portable "Kindle" reading devices. The public outcry and class-action lawsuit that followed have reinvigorated an ongoing debate about how much control digital media distributors should wield. Pundits and plaintiffs argue that too often, digital distributors like Amazon impair consumer freedom by misusing Digital Rights Management (DRM) software systems. However, these same systems could also provide significant benefits that have largely gone ignored. This article argues that, with the help of DRM, lawmakers could provide for cooling-off periods and nurture secondary markets for downloaded media that would benefit consumers, copyright holders, and digital distributors.

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TABLE OF CONTENTS

I. Introduction	228
II. Digital Returns	231
A. Cooling-Off Periods in America	231
B. Cooling-Off Period in Europe	233
C. Digital Cooling-Off: The Economics of Choice	236
D. Digital Cooling-Off: Digital Rights Managemet	238
E. Summary and Implications	239
III. Digital Resale	240
A. First Sale in America	240
B. First Sale in Europe	245
C. Digital Resale: Economic Benefits	246
D. Digital Resale: Digital Rights Management	248
E. Summary and Implications	249
IV. Conclusion	250



I. INTRODUCTION

In July of 2009, thousands of copies of George Orwell’s *Nineteen Eighty-Four* mysteriously vanished into thin air. The novel describes a government that censors books by destroying them, but the culprit of “2009” wasn’t Big Brother — it was the nation’s largest online retailer, Amazon.com.¹

In a decision that surprised and angered owners of the “Kindle” electronic reading device, Amazon remotely deleted e-book versions of *Nineteen Eighty-Four* and other classics that customers had already purchased.² This disappearing act was made

¹ See, e.g., Brad Stone, Amazon Erases Orwell Books From Kindle, N.Y. TIMES, July 18, 2009, at B1, available at <http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html>; Geoffrey A. Fowler, Kindle’s Orwellian Moment, WALL ST. J., July 17, 2009, <http://blogs.wsj.com/digits/2009/07/17/an-orwellian-moment-for-amazons-kindle/>; Richard Waters, Digital Ownership, FIN. TIMES, July 22, 2009, <http://www.ft.com/cms/s/0/fbe93b60-7655-11de-9e59-00144feabdc0.html>; Davil L. Ulin, Amazon’s Troubling Reach, L.A. TIMES, July 28, 2009, <http://www.latimes.com/news/opinion/commentary/>. See also David Pogue, Some E-Books Are More Equal Than Others, N.Y. TIMES, July 17, 2009, <http://pogue.blogs.nytimes.com/2009/07/17/some-e-books-are-more-equal-than-others/>; Geoffrey A. Fowler, Buyer’s E-Morse: ‘Owning’ Digital Books, WALL ST. J., July 23, 2009, at A11, available at <http://online.wsj.com/article/SB124830307703373747.html>; Jonathan Zittrain, Lost in the Cloud, N.Y. TIMES, July 19, 2009, at A19, available at <http://www.nytimes.com/2009/07/20/opinion/20zittrain.html>; All Things Considered: Amazon’s ‘1984’ Deletion From Kindle Examined, (NPR’s radio broadcast July 24, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=106989048> (discussing Amazon’s book deletion with Jonathan Zittrain, professor of law at Harvard Law School and cofounder of the Berkman Center for Internet and Society and touching more broadly on society’s changing understanding of ownership in the age of digital downloads); Top 500 Retail Websites, <http://www.internetretailer.com/top500/list.asp> (naming Amazon the nation’s largest online retailer).

² See generally *supra* note 1. See also Amazon, Kindle Community, Discussions, http://www.amazon.com/tag/kindle/forum/ref=cm_cd_pg_newest_encoding=UTF8&cdThread=Tx1

possible by Digital Rights Management (“DRM”) software that allowed Amazon to send a “delete” command across its wireless network.³ The bookseller later explained that it had removed the books due to a legal issue involving the publisher.⁴

Not even a full refund and a public apology from Amazon's CEO, Jeff Bezos, quelled the public outrage that followed.⁵ Boycotts were quickly organized, and by the end of the month, a class action lawsuit was filed.⁶ It seemed that everywhere, pundits and plaintiffs alike were demanding that Amazon drop its use of DRM.⁷

Two years earlier, consumer freedom was at the center of a similar debate in the world of digital media. In February of 2007, Steve Jobs, CEO of Apple Inc., published an open letter calling on record companies to free their music of DRM, which was then widely used to curb illegal copying of music.⁸ Jobs argued that in a world without DRM, consumers would have greater freedom to enjoy downloaded music on different devices.⁹

[QUPINLUY4Q5M](#) (last visited Sept. 5, 2009)(showing comments and complaints directly posted by owners of the Amazon Kindle).

³ Stone, *supra* note 1; Fowler, *supra* note 1; Waters, *supra* note 1.

⁴ Fowler, *supra* note 1 (explaining that the publisher who made the e-book available on the Amazon Kindle Store did not have the rights to do so in the United States); Waters *supra* note 1; Ulin, *supra* note 1; *All Things Considered: Amazon's '1984' Deletion From Kindle Examined*, *supra* note 1.

⁵ Posting of an Apology from Amazon, Jeffrey P. Bezos, available at http://www.amazon.com/tag/kindle/forum/ref=cm_cd_et_md_pl?%5Fencoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdMsgNo=1&cdPage=1&cdSort=oldest&cdThread=Tx1FXQPSF67X1IU&cdMsgID=Mx2G7WLMRCU49NO#Mx2G7WLMRCU49NO (July 23, 2009)(“This is an apology for the way we previously handled illegally sold copies of 1984 and other novels on Kindle. Our “solution” to the problem was stupid, thoughtless, and painfully out of line with our principles. It is wholly self-inflicted, and we deserve the criticism we've received.”) ..See also, Brad Stone, *Amazon Faces a Fight Over Its E-Books*, N.Y. TIMES, July 27, 2009, at B3, available at <http://www.nytimes.com/2009/07/27/technology/companies/27amazon.html>.

⁶ *Gawronski v. Amazon.com, Inc.*, No. 2:09-cv-01084-JCC, 2009 WL 2364172 (W.D. Wash., July 30, 2009)(asserting causes of action for breach of contract, violation of the Computer Fraud and Abuse Act, Trespass to Chattels, Conversion, and violation of Washington state Consumer Protection laws). On September 25, 2009 the parties settled their dispute. The terms of this settlement would require Amazon to change its terms of service to guarantee that Amazon “will not remotely delete or modify” Kindle books unless a user requests such deletion, fails to pay for a downloaded e-book, a judicial or regulatory order requires such deletion, or if deletion is necessary to protect Amazon’s devices or network from malicious code. Stipulation of Settlement and [Proposed] Order of Dismissal at 4, *Gawronski v. Amazon.com, Inc.*, No. 09 Civ. 01084 JCC, WL 2009 3239326 (W.D. Wash., Sept. 25, 2009).

⁷ See, e.g., Corynne McSherry, *The Kindle Lawsuit: Protecting Readers From Future Abuses*, THE ELECTRONIC FRONTIER FOUNDATION, Aug. 5, 2009, <http://www EFF.org/deeplinks/2009/08/kindle-lawsuit-protecting-readers-future-abuses>. In early September 2009, Amazon offered to deliver new copies of the deleted books to affected customers free of charge. See, e.g., Miguel Helft, *Amazon.com Offers to Replace Copies of Orwell Book*, N.Y. TIMES, Sept. 5, 2009, at B2.

⁸ Steve Jobs, *Thoughts on Music*, (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/>. Just months following publication of Mr. Jobs’ open letter, the major record label, EMI, began selling songs on iTunes free of DRM. See Jeff Leeds, *EMI to Drop Digital Locks in Web Sales*, N.Y. TIMES, Apr. 3, 2007, at C1, available at <http://www.nytimes.com/2007/04/03/technology/03music.html>.

⁹ Jobs, *supra* note 8. “Jobs stated, ‘any player can play [media] purchased from any store, and any store can sell [media] which is playable on all players.’” *Id.* In part, Jobs’ push for DRM was likely prompted by events in Europe: Just two weeks before Jobs published his letter, the Norwegian Consumer Ombudsman, Bjoern Erik Thon, issued a landmark ruling against Apple, holding that its use of DRM unfairly tied music purchasers to Apple’s iPod music player. See Terje Solsvik & Wojciech Moskwa, *Norway tells Apple Change iTunes or Face Court*, REUTERS, Jan. 25, 2007. One week later, consumer protection agencies in

These recent events have generated a lively public debate over the degree of control that digital media distributors should be permitted to exercise over their products.¹⁰ Restrictive DRM systems and their misuse have occupied the spotlight in this discussion. However, alongside their perils, DRM systems also have significant upsides that have been largely overlooked: these systems could provide consumers with the ability to return and to resell digital media.

Business laws in many nations provide “cooling-off” periods, during which consumers may return purchases.¹¹ In America, the right is limited to face-to-face sales made in private homes, businesses, or convention halls, and only extends three days following the date of purchase.¹² In contrast, European cooling-off laws are more expansive, and include a right of return for goods ordered over the Internet.¹³

Traditionally, such cooling-off periods only applied to tangible goods, and not data-based services. However, a 2007 European Commission report questioned whether digital sales contracts or license agreements (like those used by Amazon) should also be subject to cooling-off statutes.¹⁴ This proposal raises an interesting question: is it really possible to “return” a downloaded e-book, song, movie, or software program?

Technically, the answer is no. Unlike physical books or albums, downloaded media only exists in the memory of electronic devices. As a result, the only way to “return” digital media is with the help of software. Using DRM, sellers could allow buyers to deactivate purchases within a cooling-off window.¹⁵

Such systems could also allow consumers to resell downloaded media. Copyright’s First Sale Doctrine already grants this right to owners of physical books,

Germany, the Netherlands, Finland and France followed suit, launching a joint initiative to require digital interoperability throughout the EU. See Toby Sterling, *Netherlands Joins European Rebellion Against Apple’s iTunes Rules*, ASSOCIATED PRESS, Jan 25, 2007. At the same time, the European Commission was advocating an EU-wide law mandating interoperability between digital media and playback devices. See Communication From the Commission to the Council, The European Parliament and The European Economic and Social Committee: The Management of Copyright and Related Rights in the Internal Market, Commission of the European Communities (Apr. 16, 2004) http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/126116_en.htm.

Against this backdrop, it came as welcome news to many when Apple announced in early 2009 that it had struck deals with major record labels that would allow it to offer millions of songs completely free of DRM. See Press Release, Apple, Inc., Changes Coming to the iTunes Store, (Jan. 6, 2009), <http://www.apple.com/pr/library/2009/01/06itunes.html>; Brad Stone, *Copy an iTunes Song? Go Ahead, Apple Says*, N.Y. TIMES, Jan. 6, 2009, at B1.

¹⁰ This Article frequently uses the term, “digital media” to refer to media (e.g., music, movies, books) transported to consumers over digital networks (e.g., the Internet).

¹¹ See generally Pamaria Rekaiti & Roger Van den Bergh, *Cooling-off Periods in the Consumer Laws of the EC Member States*, J. CONSUMER POL’Y 371, 399 (2000) (presenting a table of the different types of sales contracts and corresponding cooling-off periods for various EU nations).

¹² See FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429 (1995); FEDERAL TRADE COMMISSION, THE COOLING-OFF RULE: WHEN AND HOW TO CANCEL A SALE (May 1996), <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro03.pdf>.

¹³ See European Parliament, Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts (May 20, 1997) [hereinafter The Distance Selling Directive]; Rekaiti & Van den Bergh, *supra* note 11, at 399.

¹⁴ *European Commission Green Paper on the Review of the Consumer Acquis*, at 24, COM (2006) 744 final (Aug. 2, 2007) [hereinafter *Green Paper*].

¹⁵ This possibility and its challenges are discussed in greater detail in Section II.

albums, and movies.¹⁶ In a sense, online distributors sidestep this rule by entering into license relationships rather than truly transferring copy ownership.¹⁷ Some commentators argue that this legal loophole should be closed because it violates consumer expectations and the economic rationale behind the First Sale Doctrine.¹⁸ As with product returns, DRM could make digital media resale possible.

Digital media distributors are widely criticized for their tendency to restrict consumer choice.¹⁹ This Article explores how, with proper guidance, they could accomplish the opposite—replacing rights that have been lost across the digital divide. Part I studies cooling-off periods in the United States and the European Union and tells a story that connects peddlers in colonial America to lawmakers in present-day Europe. Going deeper, the discussion turns to consumer behavior—namely, why consumers choose to return goods, and how this freedom strengthens markets. Part II similarly analyzes the history of the right to resell copyrighted media in America and Europe and discusses the surprising economic benefits that a digital resale market could generate. Throughout this discussion, DRM systems that could provide digital returns and resale are discussed. Part III draws parallels between the concepts of digital returns and digital resale and notes the perils of excessive government involvement in establishing technology standards.

II. DIGITAL RETURNS

A. Cooling-Off Periods in America

Long before the age of digital downloads and “one-click” buying, consumers had a simpler way of shopping from home: the door-to-door salesman. In colonial America, many of the first such merchants were immigrants from Eastern Europe.²⁰ Often based in the manufacturing centers of Connecticut, these “Yankee peddlers”

¹⁶ 17 U.S.C.A. § 109 (West 2005 & Supp. 2010).

¹⁷ See Justin Graham, *Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape*, 2002 STAN. TECH. L. REV. 1, 22-23 (2002), available at http://stlr.stanford.edu/STLR/Articles/02_STLR_1.

¹⁸ See DEIRDRE MULLIGAN ET AL., HOW DRM-BASED CONTENT DELIVERY SYSTEMS DISRUPT EXPECTATIONS OF “PERSONAL USE,” (2000), available at http://groups.ischool.berkeley.edu/samuelsclinic/files/DRM_personal_use.pdf. Governments looking to standardize DRM face a difficult balancing act. Many technologists and legal experts agree that legislators rarely have the technical knowhow to intelligently select standards. In the past, weak standardization decisions by lawmakers have caused serious economic harm. For example, the Japanese government’s unwise selection of an analog HDTV standard in the late 1980s is widely considered to have slowed the development of digital television in Japan. On the other hand, too little government involvement could lead to a market of splintered technologies. These topics are discussed in further detail in Part III.

¹⁹ See, e.g., Letter from Corynne McSherry, Staff Attorney, Electronic Frontier Found, to Federal Trade Commission, FTC Town Hall: Digital Rights Management Technologies (Feb. 9, 2009), http://www.eff.org/files/filenode/DRM/DRMCOMMENTS_final.pdf.

²⁰ See generally NICOLE WOOLSEY BIGGART, CHARISMATIC CAPITALISM: DIRECT SELLING ORGANIZATIONS IN AMERICA 21 (University of Chicago Press 1989).

carried teas, books, soaps, clocks, news and other necessities to those living in the undeveloped countryside.²¹

The number of Yankee peddlers boomed in the first half of the nineteenth century, but following the Civil War, door-to-door sales took a precipitous drop.²² In part, this may have been due to the expansion of railroads: merchants who once relied on peddlers gained the ability to order goods directly from wholesale distributors with the confidence that shipments would arrive on time.²³

Ironically though, the same swift commercial expansion that left door-to-door salesmen out in the cold was responsible for their comeback: Large department stores of the early twentieth century provided consumers with vast selections and choice, but many manufacturers didn't enjoy sharing shelf space with direct competitors.²⁴ These companies turned back to the practice of selling goods on doorsteps and in living rooms.²⁵ By the late 1920s, kitchenware, sewing machines, vacuums, encyclopedias, religious books, textiles, shoes, and even automobiles were sold by direct-salesmen.²⁶ Unfortunately, door-to-door salesmen sometimes behaved unethically. As the Senate Committee on Commerce recognized in 1968, "no individual preys upon the elderly, the poor, the ignorant, the gullible, or the softhearted as much as the unscrupulous door-to-door salesman."²⁷ Most often, such hucksters used well-rehearsed stories that played upon home-dwellers' sympathies or fears.²⁸ A less common practice involved cultivating carefully-calculated relationships with customers. By paying regular "friendly" visits and appearing to take a personal interest in clients, these direct sellers extracted sales by making consumers feel personally obligated to buy. This was a particularly effective tactic for selling to the elderly and immigrants, many of whom felt uncomfortable traveling to large urban department stores.²⁹ Only upon cool reflection did the victims of such pressure tactics wish they could somehow cancel their sales.³⁰

By the 1960s, Congress recognized the need for a cooling-off period during which consumers could cancel imprudent purchases. However, American lawmakers would never envision this benefit broadly. An early bill introduced in the 1960s provided a two-day cooling-off period during which consumers could cancel purchases made in the home as a result of uninvited sales visits.³¹ Several years later, an FTC regulation expanded the

²¹ *Id.*; David Jaffee, *Peddlers of Progress and the Transformation of the Rural North, 1760-1860*, 78 J. AM. HIST. (No. 2) 511, (Sept. 1991); see also Priscilla Carrington Kline, *New Light on the Yankee Peddler*, 12 NEW ENG. Q. (No. 1) 80, (Mar. 1939) (discussing letters written by several early nineteenth-century Connecticut peddlers that provide an intimate view of the everyday business challenges these sellers faced); Joseph T. Rainer, *The "Sharper" Image: Yankee Peddlers, Southern Consumers, and the Market Revolution*, 26 BUS. & ECON. HIST. (No. 1) 27, (1997).

²² See Jaffee, *supra* note 21, at 522 (discussing the boom in Yankee Peddlers seen in the first half of the nineteenth century and citing United States census data reflecting 10,669 peddlers in 1850 and 16,594 in 1860); Jaffee, *supra* note 21, at 533 (discussing why the number of peddlers dropped after the end of the Civil War).

²³ BIGGART, *supra* note 20, at 23-26.

²⁴ *Id.* at 22.

²⁵ *Id.*

²⁶ *Id.* at 22-23; S. REP. No. 90-1417, at 2 (1968) (discussing the Consumer Sales Protection Act).

²⁷ S. REP. No. 90-1417 at 2.

²⁸ BIGGART, *supra* note 20, at 23-26.

²⁹ S. REP. No. 90-1417 at 2.

³⁰ *Id.* at 3 (discussing several real-life examples of such buyer's remorse).

³¹ See *id.* at 4 (discussing provisions of the Consumer Sales Protection Act).

right slightly, by including situations in which salespersons had been invited prior to their visits.³² The most recent version of the FTC cooling-off rule extends the period to three days.³³

The American cooling-off rule has never pertained to sales made via telephone or the Internet. Like door-to-door sales, online purchases are arguably made “in the home.” However, rule-makers remain unconvinced that an expansion of the rule is necessary. In the mid-1990s, the FTC worked to update its cooling-off rule and sought public comment on this question. In public hearings, several consumer advocacy groups argued that the rule should be expanded to encompass all telephone and mail order purchases. However, the FTC was unconvinced:

The Cooling-Off Rule was not intended to be a federal ‘satisfaction guarantee’ requirement or ‘buyers’ remorse’ insurance program . . . The Rule instead has the limited purpose of correcting the specific problem of sales being obtained through high pressure and deceptive sales tactics used on consumers at times and places in which consumers typically may not expect to be solicited for sales and find it difficult to extricate themselves from the situation.³⁴

Most states have followed this rationale in enacting their own cooling-off laws. Some readers may recall a commercial from the 1990s featuring an elderly woman who has taken an unfortunate fall. Life-saving help arrives when she shouts unhappily into a portable emergency bracelet, “Help! I’ve fallen and I can’t get up!” California enacted a seven-day cooling-off period for the door-to-door sale of such devices in 1992. Cooling-off rules enacted by other states have similarly been limited to sales made in the home.³⁵

It could be argued that online pop-up ads and junk email are just as invasive and deceptive as the unscrupulous salesmen envisioned by the FTC’s cooling-off rule. Nevertheless, American purchasers of online music, movies, and software remain without a right of return. However, as the next Section discusses, a cooling-off period for digital goods is a distinct possibility in Europe. The result could have a significant and surprising impact on American consumers and copyright holders.

B. Cooling-Off Period in Europe

Despite the speed and convenience the Internet brings to shopping, it still presents a drawback: online shoppers cannot closely examine goods. This limitation has caused frustration for consumers and vendors alike. For example, various sources suggest

³² See generally William L. Shanklin, *Evaluating the FTC Cooling-Off Rule*, 11 J. CONSUMER AFF. 101 (1977).

³³ Rule Concerning Cooling-Off Period for Sales Made at Home or at Certain Other Locations, 16 C.F.R. § 429; About the FTC Cooling-off Rule <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro03.pdf> (last visited Sept. 7, 2009).

³⁴ Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Locations, 60 Fed. Reg. 54,180, 54,184 (Oct. 20, 1995) (to be codified at 16 C.F.R. § 429).

³⁵ Colin Camerer, et al., *Regulation For Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1241-2 (2003).

that 20 to 40 percent of garments purchased online in recent years were eventually returned due to sizing problems.³⁶

Recognizing this problem, the European Commission has issued directives to ensure that those who order tangible goods online are on equal footing with shoppers who visit stores in person.³⁷ The *Distance Selling Directive*, set forth in 1997, directs all EU member states to require a cooling-off period of at least seven days for goods sold online. Consumers need not justify or explain their returns, and may not be penalized.³⁸

Since 1997, EU member states have worked to meet the Commission's mandate, but legal discord lingers. For example, Austria, Belgium, France, Ireland, Spain, and the Netherlands have met the Directive's minimum time requirement by enacting 7 day cooling-off periods.³⁹ However, Italy offers 10 days, and Sweden, Cyprus, Denmark and Finland provide 14 days.⁴⁰ Beyond differences in duration, the administration of cooling-off laws varies greatly between EU member states.⁴¹

Regulators at the European Commission believe this lack of uniformity erodes consumer confidence. Ideally, consumers could shop online anywhere in the EU without having to guess as to their right of return.⁴² In the course of solving this problem, the Commission has recently taken new proposals under consideration.

Among these proposals is a directive that would require a right of return for downloaded media. The concept was first introduced in the European Commission's 2007 *Green Paper on the Review of the Consumer Acquis*. Question "H1" in the *Green Paper* read as follows:⁴³

³⁶ See, e.g., U.S. Patent No. 7,469,218 col. 2 l.2-col. 2 l.4 (filed Apr. 14, 2003) (citing a return rate of up to 40%); Simon Marks, *A pioneer in online retail branches out*, N.Y. TIMES, July 25, 2008, available at <http://www.nytimes.com/2008/07/25/business/worldbusiness/25iht-wbspot26.html> (citing a leading retailers return rate at 25%). Some online retailers such as Zappos.com have turned this phenomenon to their advantage by offering customers free returns.

³⁷ See *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Implementation of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts*, at 5, COM (2006) 514 final (Sept. 21, 2006) [hereinafter *Distance Selling in the EU*]. The Directive on Electronic Commerce, issued in 2000, requires online vendors to provide consumers with important identifying information, including: the name and geographic and electronic address of the vendor—Article 5(1)(a), (b), (c)—a clear indication of the price—Article 5(2)—and a clear, reproducible copy of the sales contract terms and general conditions—Article 10(3). Council Directive 2000/31/EC, Art. 5, 10, 2000 O.J. (L 178). See generally *Copyright Law and Consumer Protection*, The European Consumer Law Group (2005), <http://www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf> [hereinafter *Copyright and Consumer Protection*]. See also Commission Recommendation, 2005 O.J. (L 276) 54 (recommending cross-border policies for managing the rights of users who distribute copyrighted works online).

³⁸ See *Distance Selling in the EU*, *supra* note 37, at 5.

³⁹ See *id.* at 19; Rekaiti, *supra* note 11, at 399.

⁴⁰ See *Distance Selling in the EU*, *supra* note 37, at 19.

⁴¹ For example, there are differences in how some nations mark the event that triggers a cooling-off period to begin tolling. *Id.* See also EC Consumer Law Compendium; Comparative Analysis (Dr. Hans Schulte-Nolke et al., eds. 2000).

⁴² *Green Paper*, *supra*, note 14, at 3.

⁴³ *Id.* at 24.

H1: “Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?”

Option 1: Status quo: i.e. the scope of application would be limited to sales of consumer goods, with the only exception of goods which are still to be produced

Option 2: The scope would be extended to additional types of contracts under which goods are supplied to consumers (e.g. car rental)

Option 3: The scope would be extended to additional types of contracts under which digital content services are provided to consumers (e.g. on-line music)

Option 4: Combination of Option 2 and 3.

The European Commission solicited responses to this question from consumer and business associations, Member States, the European Parliament, the European Economic and Social Committee, and various stakeholders in the reforms under consideration.

Opinions were sharply divided.⁴⁴ An overwhelming majority of legal practitioners, academics, and consumer groups voted in favor of extending distance selling rules (which include the EU’s cooling-off protections) to online media services, while representatives from media and technology industry groups voted for the status quo.⁴⁵ When questioned more deeply, industry respondents expressed concerns that the technological and administrative challenges involved might simply be too great.⁴⁶ But beyond these concerns lay a deeper and more vexing question: what degree of involvement should legislators have in implementing the technologies (i.e., DRM) that would make digital returns possible?⁴⁷

Oddly, it was not noted that a separate group within the European Commission was already addressing that very question. In July of 2006, the EU’s Directorate-General for Information Society and Media announced a new project to combat online piracy.⁴⁸ Prompted by disenfranchised copyright holders and consumers irked by compatibility problems, the group questioned industry experts about the possibility of standardizing

⁴⁴ See *Commission Staff Working Paper: Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis*, Health & Consumer Protection Directorate General, at 3, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/acquis_working_doc.pdf [hereinafter *Working Paper*].

⁴⁵ *Id.* at 7-8.

⁴⁶ *Id.*

⁴⁷ Further, an interesting definitional question was raised: how can a directive that governs “sales contracts” apply to digital media in the first place? After-all, services like iTunes do not purport to truly “sell” content, but instead provide consumers with licenses to play it. The Commission conceded that placing such licenses within the sweep of laws governing sales presents a legislative hurdle that should not be taken lightly. See *Copyright and Consumer Protection*, *supra* note 37, at 12.

⁴⁸ See *Public Consultation on Content Online in the Single Market*, European Commission, Information Society and Media Directorate General (July 28, 2006) [hereinafter *Single Market*], available at http://ec.europa.eu/avpolicy/docs/other_actions/col_question_en.pdf.

DRM geared toward preventing illegal copying.⁴⁹ These discussions led to a January 2008 announcement by Viviane Reding, EU Commissioner for the Information Society and Media, who stated that the Commission planned to “establish a framework for DRM transparency.”⁵⁰ The import of this statement (and the group's May 2009 “Final Report” which echoed the same words) was clear: the EU was planning to regulate DRM to prevent illegal copying.

It is unfortunate that those involved with the cooling-off question did not formally discuss Ms. Reding's announcement. Both groups are essentially trying to solve the same problem: how to regulate the alienation of digital property. It remains unclear how the EU will face these challenges.

As the industry and the law remain in flux, it is helpful to examine the economic advantages that cooling-off periods can provide. The next section reveals how a return policy for downloaded media could add efficiency to the online marketplace.

C. Digital Cooling-Off: The Economics of Choice

Every morning in New York, thousands of people pass through a tight, turbulent, urban knot called Times Square. There, at the “crossroads of the world,” visitors may be reminded of another great global nexus: the Internet. (Where else but online are “browsers” confronted with so many flashing banners and pop-up ads?) Like the Internet, Times Square is a spectacle of light and noise; of speed and drama. And, like the Internet, it is a marketplace.

One of the most recognizable sights in Times Square—as much a part of the terrain as the twenty-foot-tall bottle of Coke that hovers above 48th Street—are bargain electronics shops. Usually bathed in cold fluorescent light, the display windows of these shops overflow with impossibly low-priced cameras, computers, and music players. Why do these businesses thrive on Broadway and not, say, the Bronx or leafy Scarsdale? Do certain environments prime shoppers to make unwise purchases? How and when are cooling-off periods an appropriate remedy to such problems?

Questions like these are at the heart of a field known as Behavioral Economics.⁵¹ In contrast to the field of Classical Economics, which treats people as rational decision-makers, the behavioral school embraces the fact that, often despite our best efforts, we are imperfect creatures.⁵² We order chocolate ice cream, knowing that fresh fruit is healthier; we fail to cancel unwanted magazine subscriptions out of sheer laziness. As a nation, we have hobbled ourselves with debt born from irresponsible spending.

Recent studies on the psychology of spending show that our imperfect tendencies can be aggravated in certain conditions—for example, when emotions are

⁴⁹ See *Public Hearing on Content Online in the Single Market*, Hearing Before European Comm'n, (Oct. 11, 2006) [hereinafter *Public Hearing*], available at

http://ec.europa.eu/avpolicy/docs/other_actions/hearing%20col/final_agenda_hear_col_en.pdf.

⁵⁰ Press Release, European Comm'n, Comm'n Sees Need for a Stronger More Consumer-Friendly Single Market for Online Music, Films and Games in Europe. Brussels (Jan. 3, 2008).

⁵¹ See e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (discussing concepts of Behavioral Economics).

⁵² See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not An Oxymoron*, 70 U. CHI. L. REV. 1159, 1167-71 (2003).

running high.⁵³ Consumers in a “hot” mental state may overestimate how long they will derive enjoyment from their purchases, and may overemphasize the importance and value of short-term satisfaction.⁵⁴ In part, this explains why shoppers browsing the web or the chaotic streets of Times Square are so easily charmed and seduced by banners and flashing lights.

People also make poor decisions when they cannot accurately gauge risk.⁵⁵ As anyone who has ever paid too much for a car, a suit, or a meal knows, some shopping environments tend to lull purchasers into a sense of diminished risk. The case of door-to-door sales is a prime example.⁵⁶ In the comfort of their homes, consumers may enter a less deliberative state of mind, and become more trusting and receptive to strong sales tactics.⁵⁷ Arguably, the same conditions exist in the online marketplace. Most online shoppers trustingly agree to “click-wrap” licenses without carefully considering the risks. Only after the fact do many wish they had been more thoughtful.

Another cause of irrational spending stems from lack of information.⁵⁸ This often occurs when consumers cannot test goods prior to completing a sale. In the parlance of economists, these situations present “informational asymmetries.”⁵⁹ The experience is familiar to anyone who has purchased ill-fitting clothing from a catalog, or software that is incompatible with their computer. From an economic perspective, informational asymmetries present a market-wide threat: when consumers cannot distinguish between products of high and low quality prior to buying, market prices will tend to reflect the lower quality. As a result, producers of high-quality products are slowly edged out, leaving behind a market flooded with second-class goods.⁶⁰

More broadly, irrational spending works against a basic goal of modern economic policy known as “allocative efficiency.”⁶¹ Most simply, a state of allocative efficiency exists when goods within a market move to their most valued purposes. When consumers buy things they do not need, allocative efficiency is reduced, and market failure may result.⁶²

⁵³ *Id.* at 1188.

⁵⁴ Broadly, psychologists refer to this phenomenon as a failure in “affective forecasting.” Professors Daniel Gilbert of Harvard and Tim Wilson of the University of Virginia have written leading work on the subject. T.D. Wilson, J. Meyers, & D.T. Gilbert, *Lessons from the Past: Do People Learn from Experience that Emotional Reactions are Short Lived?*, 27 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN, 1648-1661 (2001). Professor Gilbert also authored a popular book on the subject geared toward a non-technical audience. DANIEL GILBERT, *STUMBLING ON HAPPINESS* (Random House 2007) (2006). *See also* Jon Gertner, *The Futile Pursuit of Happiness*, N.Y. TIMES, Sept. 7, 2003, at S6. Interestingly, recent research suggests that the degree to which a person can envision his or her future-self has a meaningful impact on present-day spending and investing habits. *See* Hal Ersner-Hershfield et al., *Don't Stop Thinking About Tomorrow: Individual Differences in Future Self-Continuity Account for Saving*, 4 JUDGMENT AND DECISION MAKING, 4, 280-86 (June 2009).

⁵⁵ Rekaiti, *supra* note 11, at 376-78.

⁵⁶ *See* Sunstein & Thaler, *supra* note 52, at 1188 (stating that, in the case of door-to-door sales, “cooling-off periods make the best sense,” in part because consumers may act impulsively in this setting).

⁵⁷ *Id.*

⁵⁸ *See* Rekaiti, *supra* note 11, at 379-81.

⁵⁹ *Id.*

⁶⁰ *Id.* (discussing how informational asymmetries may, in certain extreme cases, lead to market collapse).

⁶¹ *Id.* at 374-75.

⁶² *Id.*

Economists prescribe cooling-off periods to preserve market integrity in such cases.⁶³ Cooling-off periods that are even just a few days long, such as the one provided by the FTC for door-to-door sales, grant buyers a chance for cool reflection and meaningful evaluation of their purchases. Mandatory return policies can also encourage sellers to make sure that buyers are fully-informed, and may decrease incentives to work shoppers into “hot” states.⁶⁴ These benefits should not be viewed as mere consumer paternalism. As the wrenching financial collapse of 2008 and 2009 demonstrates, irrational spending doesn't only harm buyers—it has the power to devastate economies.

The online marketplace for digital media appears to be an ideal setting for mandatory cooling-off periods. Although the Internet is certainly less chaotic than 42nd Street, it presents goods to consumers with a similar degree of ease. Plus, like the electronics shops of Times Square, many online sellers present goods to consumers in a fanfare of “one-click” speed, noise, and pop-up imagery designed to induce a “hot” state of mind. Like the door-to-door sales for which cooling-off rules already exist, Internet sellers reach consumers in their homes, where perceptions of risk are easily diminished. Further, digital media has unique characteristics that make it even more suitable for cooling-off than physical goods. For example, economists recognize that a right of return is not feasible when goods depreciate in value during cooling-off windows.⁶⁵ Digital media, immutable by its very nature, cannot possibly depreciate in value due to possession during a cooling-off window.

This leads to an interesting point: one might question whether allocative efficiency can exist in a market of intangible “goods” that cannot be truly allocated or exhausted. In considering this question, one must keep in mind that while bits and bytes are infinite, capital is not. Thus the online marketplace is a realm where money, and not goods, can be harmfully misallocated. For these reasons, both consumers and distributors would benefit from a mandatory cooling-off window for digital media.

D. Digital Cooling-Off: Digital Rights Managemet

Having identified the benefits of cooling-off in the digital media market, it is important to discuss how this feat could be accomplished. Unlike tangible goods, media purchased online cannot truly be returned. This is because a downloaded file is not a thing, but rather a state in which a computer's memory may be ordered. And, just like human memories, downloaded files can be shared and replicated infinitely. It is just as impossible to return a downloaded song as it is to return a boring joke or a bad piece of advice.

While vendors cannot force users to delete digital purchases, they can use DRM software to simulate the effect of a product return by preventing a “returned” purchase from playing. In this way, DRM adds a degree of tangibility to the otherwise ethereal nature of digital media.

Although Amazon does not allow book returns on the Kindle, the company's recent book deletion debacle demonstrates how digital media can effectively be

⁶³ See Camerer, *supra* note 35, at 1238. See generally Rekaiti, *supra* note 11. But see *Id.* at 381 (discussing several important disadvantages of cooling-off periods).

⁶⁴ See Camerer, *supra* note 35, at 1240; Rekaiti, *supra* note 55, at 381.

⁶⁵ See Camerer, *supra* note 35, at 1240.

“returned.” There, books were remotely removed from the memory of Kindle electronic reading devices across the country when Amazon sent a “delete” command across its wireless network.⁶⁶ Amazon then offered a full refund to those customers who were impacted. In effect, Amazon accomplished a product return for downloaded media.

The company’s online video rental service demonstrates similar DRM technology at work. Amazon Video On Demand, launched in February of 2007, offers a convenient way to rent movies over the Internet. A consumer first selects from a library of titles available on the Amazon website.⁶⁷ Once a film is selected and paid for, it is transmitted directly into the customer’s broadband-connected computer or set-top movie player. The film, which is protected by DRM, “expires” 24 hours after it is first played.⁶⁸ Apple has provided a similar film rental service since January of 2008.⁶⁹

The same or very similar mechanisms could be used to effectuate returns across a broader range of media. In fact, the only major change to this model would be a means of refunding consumers who have deactivated (“returned”) media not yet viewed or played within a cooling-off window. A European company, the Tiscali Music Group, recently provided just such a service.⁷⁰ Music purchased on Tiscali’s service was protected by DRM software that permitted returns within the first seven days following purchases.⁷¹

Of course, an effective product return system for digital media would need to monitor whether books, films, and other media have already been viewed. Allowing consumers to, say, return movies that have already been watched would run counter to the entire economic rationale behind cooling-off. In the real world, worn pages and broken plastic wrapping reveal when goods have been used. In the digital domain, software can once again accomplish the same result. For example, the software behind Amazon’s online rental business monitors whether downloaded movies have been viewed. It would be necessary to incorporate similar capabilities into a DRM system used for digital returns. Further, it may be necessary for regulators to establish different return rules that apply to various types of digital media. For example, movies that have been viewed should not be returnable, but perhaps computer games should be. Rule makers would need to consider these issues with a keen awareness of consumer habits.

E. Summary and Implications

American cooling-off laws are rooted in a national history of pushy peddlers and unscrupulous door-to-door salesmen. U.S. consumer interest groups have argued that a right of return should also apply to “distance contracts” made via telephone or the

⁶⁶ See *supra*, Introduction at notes 1-7.

⁶⁷ See Amazon.com Video On Demand, <http://www.amazon.com/video> (displaying current titles available for rent and explaining how the system works).

⁶⁸ *Id.*

⁶⁹ See, e.g., John Markoff, *Enhancing Its Hits, Apple Adds Movie Rentals, UltralightLaptop*, N.Y. TIMES, Jan. 16, 2008, available at <http://www.nytimes.com/2008/01/16/technology/16apple.html>.

⁷⁰ See THE BERKMAN CENTER AT HARVARD LAW SCHOOL, iTUNES CASE STUDY: OVERVIEW AND SUMMARY OF CONCLUSIONS, (2006); The Tiscali Music Club, <http://www.tiscali.co.uk/music/> (linking to services).

⁷¹ Jonny Evans, *iTunes Dubbed Music Leader*, PC WORLD, Mar. 30, 2004 (discussing the Tiscali service and European cooling-off laws).

Internet. However, Congress and the FTC remain unconvinced that such measures are necessary.

In contrast, European lawmakers already provide a minimum right of return for physical goods sold online, and the European Commission may go one step further by allowing returns of downloaded media. If implemented wisely, such a law could empower consumers and benefit online distributors by encouraging greater market participation.

The difficulty inherent in building a system for digital returns could have interesting international implications. If the European Commission mandates a digital right of return throughout the EU, services like the iTunes Store and Amazon's Kindle Store will be forced to create special systems to manage European returns. After investing time and money into making this system work, these companies might decide to avoid the bifurcated challenge of providing digital returns in Europe, but not elsewhere. It might simply be more convenient to provide digital returns worldwide. Thus, a *de jure* right of return in Europe could, by infusion, become a *de facto* standard of American business.

In Europe and in America, a digital right of return would carry economic costs and benefits. The initial cost of licensing DRM systems and retooling existing operations could be high, an expense that might be passed along to consumers. However, as discussed earlier, cooling-off periods bring economic efficiencies by ensuring that consumer dollars are spent on the most highly-valued goods. Further, a cooling-off period for digital media could increase consumer activity in this growing market. With the knowledge that mistakes can be corrected, potential buyers might become more active in the downloading of digital media.

III. DIGITAL RESALE

A. First Sale in America

Isidor Straus was a respected American merchant, congressman, and co-owner of Macy's & Company from 1888 until his death aboard the Titanic in 1912.⁷² It is extraordinary that a man so worthy of headlines was also partially responsible for the birth of an important principle of copyright law: the First Sale Doctrine.

In 1908, Straus and Macy's were sued for copyright infringement by the Bobbs-Merrill Company, a book publisher based in Indiana.⁷³ Bobbs-Merrill owned the copyright to "The Castaway," a popular novel first published in May 1904.⁷⁴ In an attempt to control the retail price, the publisher placed a notice on every copy of the book, which read: "The price of this book at retail is \$1 net. No dealer is licensed to sell it

⁷² STEVEN D. COX, *THE TITANIC STORY: HARD CHOICES, DANGEROUS DECISIONS* 112 (Open Court 1999) (depicting a photograph of Isidor and his wife, Ida, both of whom tragically died in the infamous sinking of the Titanic ocean liner. According to the accounts of survivors, Ida had the opportunity to escape on a lifeboat, but refused to leave her husband's side.); JOHN WILLIAM LEONARD & ALBERT NELSON MARQUIS, *WHO'S WHO IN AMERICA* 702 (A.N. Marquis & Company 1899).

⁷³ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *THE ENCYCLOPEDIA OF INDIANAPOLIS* 336 (David J. Bodenhammer & Robert G. Barrows, eds., Indiana University Press 1994).

⁷⁴ HALLIE ERMINIE RIVES, *THE CASTAWAY* (The Bobbs-Merrill Company 1904).

at a less price, and a sale at a less price will be treated as an infringement of the copyright.”⁷⁵ Straus, aware of the notice, sold “The Castaway” at Macy’s for 89 cents a copy.⁷⁶

Conceding that the notice was not a contract,⁷⁷ the Bobbs-Merrill Company argued instead that Straus had violated its exclusive right to “vend” under the Copyright Act then in force.⁷⁸ Initially, the Supreme Court struggled to liken the case to prior suits involving notices stamped onto patented articles. Unable to draw apt analogies, the Court approached the issue as a case of first instance.⁷⁹

First, the Court explained that the “main purpose” of copyright was to ensure that authors had an exclusive right to reproduce works.⁸⁰ The Court then reasoned that, inherent to the act of replication is the distinction between incorporeal expressions and the solid, tangible articles in which expressions can be fixed.⁸¹ This division colored the Court’s statutory analysis of the phrase, “sole right to vend,” leading to the decision that the imposition of resale terms via a notice exceeded a copyright holder’s powers.⁸² Backing up this decision was the Court’s construction of the Constitutional basis for copyright—“to promote the progress of Science and useful Arts.”⁸³ A retail and used market for copyrighted works would respect this goal by encouraging the free flow of creative expression. However, the court remained neutral on the question of whether the same result could not be achieved by a license.⁸⁴

Just one year later, Congress embraced the *Bobbs-Merrill* decision in the Copyright Act of 1909. The Act elaborated on the tangible/intangible divide identified by the Supreme Court:

[A] copyright is distinct from the property in the material object copyrighted, and the sale . . . of the material object shall not constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object . . . [N]othing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work.⁸⁵

The legislative history of this section reflects that lawmakers believed copyright owners should not be able to exercise control over articles once they are in the stream of commerce.⁸⁶ However, if the purpose of this legislation was to discourage price-fixing, it is odd that Congress did not address the question of whether a copyright owner could control secondary-market sales by contract.⁸⁷

⁷⁵ *Bobbs-Merrill*, 210 U.S. at 341.

⁷⁶ *Id.* at 342.

⁷⁷ Shrink-wrap licenses and other pendant agreements are discussed later in this section.

⁷⁸ *Bobbs-Merrill*, 210 U.S. at 350 (“There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.”); *Id.* at 343.

⁷⁹ *Id.* at 346.

⁸⁰ *Id.* at 347 (“[I]t is evident that to secure the author the right to multiply copies of his work may be said to have been the main purpose of the copyright statutes.”).

⁸¹ *Id.*

⁸² *Id.* at 350.

⁸³ U.S. CONST. art. I § 8, cl. 8; *Bobbs-Merrill*, 210 U.S. at 346.

⁸⁴ *Bobbs-Merrill*, 210 U.S. at 351.

⁸⁵ The Copyright Act of 1909 § 41, Pub. L. No. 60-349, 35 Stat. 1075.

⁸⁶ H.R. REP. No. 60-2222, at 19 (1909).

⁸⁷ Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1472 (2004).

The question remained unaddressed by the courts and Congress through the incorporation of the First Sale Doctrine in the Copyright Act of 1976.⁸⁸ Some clarity came, if only in dicta, in the 1998 Supreme Court decision of *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*⁸⁹ L'Anza, a company that sold shampoo in America and abroad, sued Quality King for importing their products from Europe and reselling them in California at a discounted rate.⁹⁰ L'Anza's legal "hook" for a copyright claim was based upon the artwork and imagery printed on their shampoo bottles.⁹¹ While the decision focused on importation questions, the Court noted with approval that L'Anza contracted with its domestic distributors to control how and where its products were sold at retail in the United States.⁹²

Licensing usage rights to copyrighted works, rather than transferring ownership in the works themselves remained a viable route around the First Sale Doctrine. Because the law only extends to a copy "owner," mere licensees arguably have no right to resell or rent-out copies of works.⁹³

The limits of this reasoning were explored in the 1977 case of *United States v. Wise*.⁹⁴ There, a man named Woodrow Wise was charged with criminal copyright infringement for selling protected film reels to collectors.⁹⁵ The reels, which included the classic films, "Funny Girl" and "American Graffiti,"⁹⁶ had initially been distributed by Warner Brothers to military bases, television studios and prominent members of the film industry. The government argued that Wise was not protected by the First Sale Doctrine because studios had never "sold" the reels, but had instead distributed them under licenses that forbid resale.

The Ninth Circuit saw the question of ownership in economic terms. The Court refused to doggedly enforce the studio "licenses" merely because it was claimed that a property interest had not been transferred. Instead, the Court focused on the underlying economic realities of the exchange. In cases where recipients were under no obligation to return the reels, a sale was found.⁹⁷ This decision and its progeny revealed an important limitation to contracting-around the First Sale Doctrine.

At the dawn of the digital age, the distinction between tangible and intangible property, a first-sale foundation recognized in *Bobbs-Merrill*, became blurred. The problem first arose in the form of software rentals in the early 1980s. Although software was treated as copyrightable expression, the First Sale Doctrine in force at the time permitted copy owners to rent or lease program copies.⁹⁸ Fears that this would facilitate

⁸⁸ Copyright Act of 1976 §109, Pub. L. No. 94-553, 1976 Stat. 22.

⁸⁹ *Quality King Distrib., Inc. v. L'Anza Research Int'l Inc.*, 523 U.S. 135, 143 (1998).

⁹⁰ *Id.* at 138-39.

⁹¹ *Id.* at 135.

⁹² *Id.* at 143. Even if distributors violated these terms, L'Anza could just refuse to sell to them. The dynamics are different in the consumer market.

⁹³ §109, 1976 Stat. 22.

⁹⁴ *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977).

⁹⁵ *Id.* at 1183-84.

⁹⁶ *Id.* at 1184.

⁹⁷ *Id.* at 1191-92.

⁹⁸ See generally S. REP. NO. 101-265 (1990) (discussing the problem of software renting).

rampant copyright infringement led Congress to amend the First Sale Doctrine in 1990, excluding the rental of software.⁹⁹

By that time however, the software industry had already found its own solution: shrink-wrap licenses. Like *Bobbs-Merrill*, which stamped its notice on copies of “The Castaway,” software firms began placing restrictive resale limitations into their boxed software. However, unlike the book notices, these were carefully-crafted contracts that became active when consumers broke a box’s cellophane wrapping. Although judicial enforcement of this mode of assent initially wavered, shrink-wrap licenses were eventually held to be enforceable.¹⁰⁰

Today, Internet distribution has made it convenient for software vendors to incorporate licenses directly into their products. So-called “click-wrap” licensing is familiar to anyone who has downloaded and installed a computer program: A set of terms and conditions appear above a button labeled, “I Agree” or “I Accept.” Courts have generally treated click-wrap as a valid mode of assent, only finding invalidity where terms were not presented clearly and where assent seemed ambiguous.¹⁰¹

Digital media services like Amazon’s Kindle Store use click-wrap licenses with the effect of limiting First Sale Rights. For example, the Kindle’s terms of service state that downloads may be used “solely for . . . personal, non-commercial use.”¹⁰² The motivation behind such licenses appears to be two-fold: First, like software firms of the early 1980s, digital media distributors are trying to discourage rampant illegal duplication. But perhaps a more significant motivation is the same that drove *Bobbs-Merrill* to control secondary-sales: a fear of getting undercut. A thriving “used” market in digital media could be exceptionally damaging to online distributors.

Of course, the case of *Wise* suggests that the right to resell cannot be defeated by crafty licensing alone. That decision showed that courts will sometimes look to the underlying economic realities of transactions to determine whether copy ownership exists. There, “licensees” who were permitted to retain copies indefinitely were treated as copy owners. More recent decisions have applied *Wise* to the world of digital products. Absence of time limits or term of possession; pricing and payment schemes based on per-unit costs and not duration; licenses that principally serve to protect intangible copyrights rather than tangible rights in the chattel—any of these factors could lead to a finding of copy ownership and first sale rights.¹⁰³

Yet, a general foggy persistence with respect to the meaning of the First Sale Doctrine in the growing world of digital media. Seeking clarity, Congress recently commissioned a study that addressed the question of “whether the conduct of transmitting [a] work digitally, so that another person receives a copy of the work, falls within the scope of the [first sale] defense.”¹⁰⁴ Noting that digitally transferring media over the

⁹⁹ Copyright Act, 17 U.S.C. § 109; Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat 5089 (codified as amended at 17 U.S.C. § 109 (1994)).

¹⁰⁰ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (1996) (holding such a license enforceable for reasons of marketplace efficiency).

¹⁰¹ See e.g., *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2002).

¹⁰² AMAZON.COM INC., AMAZON KINDLE: LICENSE AGREEMENT AND TERMS OF USE, § 3, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200144530>.

¹⁰³ See, e.g., *Dak Indus., Inc. v. Microsoft Corp.*, 66 F.3d 1091, 1095-96 (1995).

¹⁰⁴ U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 78-79 (Aug. 2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

Internet inevitably creates new copies, the Report concluded that digital transfers violate the exclusive right of reproduction and thus are not protected by the First Sale Doctrine as it exists in the Copyright Act.¹⁰⁵

In the years that followed, Congress has tried to pass legislation that would facilitate the legal transfer of digital media in a secondary market.¹⁰⁶ The BALANCE Act,¹⁰⁷ a 2003 bill that was referred to the House Committee on the Judiciary in 2005, includes provisions that would legalize the sale and transfer of a digital media file, so long as the owner's copy was destroyed in the process.¹⁰⁸

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.¹⁰⁹

Of course, such provisions on their own would not prevent digital media distributors from forbidding transfers through license agreements. Taking this into consideration, the bill dramatically called for the end of click-wrap licensing in the realm of digital media: "When a digital work is distributed to the public subject to nonnegotiable license terms, such terms shall not be enforceable under the common laws or statutes of any State to the extent that they restrict or limit any of the limitations on exclusive rights under this title."¹¹⁰ Whether or not it ever passes into law, the BALANCE Act may be a glimpse of the future of digital resale in America.

Since the time of Isidor Straus, the First Sale Doctrine has prevented copyright holders from directly controlling secondary market sales. This lack of control has posed a threat to digital distributors, whose products are particularly vulnerable to wrongful replication and distribution. Evading the resale issue altogether, such distributors continue to require users to "click" their way to licensure, rather than true copy ownership. However, click-wrap licenses may only be a temporary dodge: judicial reluctance to enforce "licenses" grounded upon sale-like behavior, combined with the possibility of future consumer-friendly legislation could force distributors to face the challenges of digital first sale.

¹⁰⁵ *Id.* at 80.

¹⁰⁶ See Henry Sprott Long III, Commentary, *Reconsidering the "Balance" of the "Digital First Sale" Debate: Re-examining The Case For A Statutory Digital First Sale Doctrine To Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183, 1195 (2008).

¹⁰⁷ Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act, H.R. 1066, 108th Cong. (2003) (reintroduced in the 109th Congress as H.R. 4536) (also titled, "To amend title 17, United States Code, to safeguard the rights and expectations of consumers who lawfully obtain digital entertainment.").

¹⁰⁸ This is known as a "forward-and-delete" scheme, and is discussed in greater detail later in this article.

¹⁰⁹ The Balance Act, Section 4.

¹¹⁰ *Id.* at Section 3(b).

B. First Sale in Europe

In contrast to the US, the European Union has developed special resale rules for works distributed online. The WIPO Copyright Treaty (“WCT”)¹¹¹ and the WIPO Performances and Phonograms Treaty (“WPPT”),¹¹² both adopted in 1996, clearly distinguish between works distributed by tangible and intangible means. Under Article 6 of the WCT, first sale (known in Europe as “exhaustion”) applies to “fixed copies that can be put into circulation as tangible objects.”¹¹³ Article 8 does not extend this right to works transmitted “by wire or wireless means . . . in such a way that members of the public may access [them] from a place and at a time individually chosen by them.”¹¹⁴ Similar rules exist exclusively for audio recordings, under the WPPT.¹¹⁵

In harmony with these treaties, the European Commission promulgated the European Union Copyright Directive (“EUCD”) in 2001.¹¹⁶ Article 3 orders member states to provide copyright holders with an exclusive right to distribute works over the Internet. As Section 3(3) states, “The rights . . . shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.”¹¹⁷

Careful readers might assume that this legislation only prevents the public from using the Internet as a vehicle for conveying “used” media. In fact, the EUCD’s first sale restriction goes much deeper. The directive explicitly treats works originally purchased online as, in a sense, fruits of a poisoned tree: “The question of exhaustion does not arise in the case of services and online services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder.”¹¹⁸ Thus, a European consumer may not resell digital media purchased online, even if she first copies the works to a tangible medium—e.g., a blank CD.

European nations have enforced these restrictions. In Italy, the directive was implemented on April 29, 2003. Under this law, distribution of works online (referred to as “communication”) does not exhaust the owner’s ability to control subsequent transfers of copies.¹¹⁹ Similarly, the UK’s Copyright and Related Rights Regulations of 2003 set forth first sale rights for copies of works “put into circulation.”¹²⁰ However, this

¹¹¹ WIPO Copyright Treaty, *Adopted* Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 828 U.N.T.S. 3 [hereinafter WCT] available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

¹¹² WIPO Performances and Phonograms Treaty, *Adopted* Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 38542 [hereinafter WPPT] available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

¹¹³ WCT, Art. 6, n. 5.

¹¹⁴ WCT, Art. 8.

¹¹⁵ Compare WCT, Art. 12, with WPPT, Art. 14.

¹¹⁶ Council Directive 2001/29, *The Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, 2001 O.J. (L 167) 10-19.

¹¹⁷ *Id.* art. 3.

¹¹⁸ *Id.* ¶ 29.

¹¹⁹ See *Italy Implements Directive on Copyright in the Information Society*, SIB PRIMA, (Società Italiana Brevetti), June 2006, at 1, available at http://www.sib.it/images/stories/allegati/newsletterENG/sibprima06_06copyrightdesigns.pdf.

¹²⁰ See DIGITAL MEDIA PROJECT, THE BERKMAN CENTER FOR INTERNET & SOCIETY AT HARVARD LAW SCHOOL, *iTUNES: HOW COPYRIGHT, CONTRACT, AND TECHNOLOGY SHAPE THE BUSINESS OF DIGITAL MEDIA—A CASE STUDY*, 61 (2004), <http://cyber.law.harvard.edu/media/itunes>.

provision does not appear to include works transmitted “by communication to the public” via the Internet.¹²¹ To clear up any confusion, the UK Copyright Office has stated that, “exhaustion of rights is a concept normally only associated with the right to control distribution of tangible copies of protected works.”¹²²

The EU’s statutory division between physical goods and “communications” suggests a vision of the Internet as a broadcast medium, rather than a distribution channel.¹²³ However, as discussed ahead, the economic advantages of digital resale may cause that vision to change.

C. Digital Resale: Economic Benefits

At the most observable level, markets for second-hand goods encourage retail price competition. The Supreme Court recognized this when it established the First Sale Doctrine in *Bobbs-Merrill*.¹²⁴ There, a publisher was prohibited from fixing retail prices, in part because doing so would have forced consumers to pay greater than the market demanded. In a market where consumers may choose to resell works, price competition can help drive costs to lower levels that appropriately match demand.

In theory, a digital resale market would encourage even greater retail benefits. For example, presently, only a handful of online retailers (e.g., Amazon, iTunes, eMusic, etc.) have struck digital distribution contracts with record companies. A digital resale market that permitted online resale might not only drive prices down, but could also allow more online distributors to compete. This could result in a new generation of small online businesses drawing large revenues by expertly serving small markets on a global level.¹²⁵

Digital resale could also benefit consumers by facilitating the exchange of “used” media. As with cooling-off periods, the benefits of this activity can be understood by considering consumer behavior: A person deciding to purchase a new home or a new car will typically try to estimate likely resale value. Built into this assessment is an assumption that the transaction costs associated with finding buyers and transferring ownership are low compared to the total resale value the seller stands to recover. By facilitating nearly effortless transactions between buyers and sellers across the globe, the Internet has encouraged similar activity in markets for less valuable goods (one need only look to the overwhelming success of auction websites, such as eBay, for evidence of this). A resale market for digital goods would impose transaction costs that approach zero.¹²⁶ For example, a seller transferring a “used” digital copy of a Beatles album would

¹²¹ *Id.*

¹²² *Id.*

¹²³ Interestingly, this view was directly opposed in Congress’s DMCA Section 104 Report on the application of the first sale doctrine to digital media, discussed earlier. That report stated, “The transmissions discussed in this section are not broadcasts, but transmissions that, like point-to-point transmissions, involve the selection of specific recipients by the sender.” U.S. Copyright Office, DMCA Section 104 Report, (Aug. 2001) at note 269.

¹²⁴ See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

¹²⁵ See Chris Anderson, *The Long Tail*, WIRED, Oct. 2004 (discussing the growth potential of niche markets).

¹²⁶ R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577 (2003).

conceivably only need to go through a small amount of trouble to find and transfer the album to a willing buyer over the Internet.

The ability to resell downloaded texts could be particularly meaningful to students. In American colleges and universities, the price of textbooks is extremely high.¹²⁷ To help offset these costs, students regularly resell their textbooks after the end of a semester. This represents a major advantage that paper books presently have over digital texts. If digital resale remains unavailable, the economic advantages of traditional books could pose a roadblock to the adoption of electronic texts in America's schools.¹²⁸ Of course, the fact that digital media does not degrade over time could lead concerned retailers to raise their prices.¹²⁹ While this possibility should be a cause for concern, it is helpful to consider economic forces that would likely push retail prices in the opposite direction. For example, a used digital media market could benefit distributors and copyright holders by promoting increased sales in the primary market. A consumer who would not have downloaded a twenty dollar movie in the past might make the purchase if the option to easily resell the work existed.

A used digital media marketplace might also encourage distributors to innovate by providing interesting new shopping services. Many distributors today provide customized recommendations based on individual users' prior purchases. This concept could be taken further. For example, online media services could incorporate social networking features that recommend books, albums, or movies based on the collections of a user's social contacts. Another avenue for innovation in digital distribution is the incorporation of advertising.¹³⁰ For example, e-book retailers might someday offer books that are subsidized by ads.¹³¹ Just like today's web-based newspapers (e.g., NYTimes.com), these e-books would be free of charge to users willing to endure occasional advertisements. The publishing industry might take this concept one step further still: In a futuristic form of "product placement," future advertising-supported e-books might subtly incorporate ads directly into their narratives. Such an arrangement would require the cooperation of authors, and could raise challenging questions concerning artistic expression and originality.¹³² The incorporation of recommendations,

¹²⁷ In recent years, textbook prices have soared so high that the U.S. Congress requested that the Government Accounting Office (GAO) investigate the issue. The GAO's findings showed that over the past twenty years, the prices of textbooks have increased at the rate of 6 percent per year—nearly twice the rate of inflation. See UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, COLLEGE TEXTBOOKS: ENHANCED OFFERINGS APPEAR TO DRIVE RECENT PRICE INCREASES, GAO-05-806, available at <http://www.gao.gov/new.items/d05806.pdf> (last visited Sept. 30, 2009).

¹²⁸ See, e.g., Rajiv Batra et al., *Amazon Kindle and Sony Reader Locked Up: Why Your Books Are No Longer Yours*, THE COLUM. SCI. & TECH. L. REV. (Mar. 21, 2008), available at <http://www.stlr.org/2008/03/amazon-kindle-and-sony-reader-locked-up-why-your-books-are-no-longer-yours/>.

¹²⁹ iTunes Whitepaper, *supra* note 120, at 54.

¹³⁰ See Randal C. Picker, *The Mediated Book*, 12-13 (John M. Olin Law and Economics Working Paper, Paper No. 463, (2008) (revised 2009), available at <http://ssrn.com/abstract=1399613>. This thought-provoking working paper discusses, among other things, the notion of using electronic texts and reading devices as vehicles for advertising and how such advertisements could be updated on an ongoing basis via the wireless networking capabilities of e-book reading devices.

¹³¹ *Id.*

¹³² Troubling as this business model may sound, the influence of financial sponsors on artists is a tension that has existed for centuries.

social networking services, and advertising are just a few avenues that publishers and distributors could explore to compete with a digital resale market.

A digital resale market could also promote more transactions by making more works available. Like books taken out of print, digital works that are only appreciated by small niches of the public may fade from the market due to low demand. Alternatively, a copyright holder may remove a work from the market in order to increase demand. For example, the Walt Disney Company periodically places its most popular films in the metaphorical “Disney Vault,” where copies are not produced until demand rises.¹³³ A secondary market for digital media would help ensure that copyright holders could not so completely control the availability of their works.¹³⁴

Permission to resell and lend downloaded media would also allow libraries to purchase more digital media. In a 2005 public hearing before the Copyright Office, representatives of the American Library Association explained that, in the absence of a digital resale right, libraries simply have no means of lending-out such works.¹³⁵ As a result, most libraries in the country still purchase traditional physical media and are not directing funds into the digital marketplace.¹³⁶ Experts believe that this is a very large untapped market.¹³⁷

D. Digital Resale: Digital Rights Management

Although European consumers have no legal right to resell downloaded media, online resale remains a possibility in the United States. In light of this, and the economic benefits that it could bring, it is important to consider how digital resale could be accomplished.

There are two primary ways that a downloaded work could be reassigned: Transmission over a network (e.g., the Internet) and transfer by physical means (e.g., a blank CD). As Congress recognized in its 2001 Report on Digital First Sale, the most glaring problem with reselling a work online is that doing so creates multiple intermediate copies. Data traversing the Internet passes through many intermediary switches and routers, many of which retain temporary copies of the information. Under U.S. law, such duplicates, even if only temporarily stored in RAM, are capable of violating a copyright holder’s exclusive right to reproduction.¹³⁸

¹³³ See Reese, *supra* note 126, at 602.

¹³⁴ As discussed earlier, improper control over secondary markets was at the heart of the Supreme Court’s recognition of The First Sale Doctrine. These concerns arguably apply to related activities that impede the free flow of copyrighted works.

¹³⁵ UNITED STATES COPYRIGHT OFFICE, INQUIRY REGARDING SECTIONS 109 AND 117: COMMENTS OF THE LIBRARY ASSOCIATIONS, Docket No. 000522150-0150-01 (2000) [hereinafter *Copyright Hearing*].

¹³⁶ Beyond hindering economic activity, this has also resulted in a denial of digital media to those who cannot afford it themselves. In the near future, more and more works may be distributed exclusively online, which could lead to a troubling scenario in which important art, music, and literature are unavailable to certain swaths of the public.

¹³⁷ See *Copyright Hearing*, *supra* note 13, at 5 (“America’s libraries have long been among the nation’s largest volume-producers of copyrighted works”); *Id.* at note 4 (“[T]he 8,891 U.S. public library systems alone spent \$789 million on library materials, including electronic formats, in 1995. The 3,303 U.S. academic libraries spent \$1.3 billion on information resources in . . . 1994. These libraries now spend well over \$2 billion.”).

¹³⁸ See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993).

However, the Congressional Report on Digital First Sale recognized that technological systems exist that could, for practical purposes, resolve this problem by ensuring the deletion of the original copy after it has been transferred. Such DRM schemes are known as “forward-and-delete.”¹³⁹ Like a fax machine combined with a paper shredder, such a scheme would instantly delete local copies of songs or movies upon transmission.¹⁴⁰ A more primitive approach, perhaps with lower risks of piracy, would involve the transfer of a work to storage media, such as a blank CD or memory card. In this scenario, a “copy-and-delete” approach analogous to the forward-and-delete scheme could ensure that sellers would not retain local copies.

Another option would not involve actual deletion, but would instead incorporate a password-like access key.¹⁴¹ Media distributed under such a scheme could only be played by the individual to most recently register the access key with a central server.¹⁴² Thus, a song could be “resold” by mere transfer of the access key and the digital file itself. However, a weakness with this approach lies in its reliance on a centralized authentication server. If the centralized system were to ever fail, consumers would be unable to carry-out transfers.¹⁴³

E. Summary and Implications

The Constitution proposes copyright as an incentive to advance human expression, not a right to control the countless tributaries and headwaters of commerce. Recognizing this, American courts have long refused to grant copyright holders absolute dominion over their works. The first sale doctrine, first codified in 1909, marks a perimeter beyond which copyright alone cannot reach.

However, in the 1980s, software distributors found a way to overstep first sale with the aid of contracts. Aware that the First Sale Doctrine only applies to the “owners” of copies, these firms used pendent licenses to restructure sales as mere “licenses” to use. In their wisdom, American courts have suggested this legal fiction should only go so far: when the underlying economic structure of a transaction suggests the presence of a sale, labels are ignored and copy ownership should be found. Unfortunately though, most click-wrap licenses used by digital media distributors have gone unchallenged and licensing remains a reality of the digital marketplace. But American consumers are still pushing Congress for clarity. The BALANCE Act, or a similarly-modeled future bill, could invalidate click-wrap licensing of downloaded media and endorse forward-and-delete transfer schemes.

¹³⁹ See U.S. Copyright Office, DMCA Section 104 Report, (Aug. 2001) [hereinafter Section 104 Report].

¹⁴⁰ *Id.*

¹⁴¹ See John T. Mitchell, “DRM: The Good, The Bad, and the Ugly,” Address Before the Symposium sponsored by the Center for Intellectual Property in the Digital Environment, University of Maryland University College (October 11, 2004), available at http://interactionlaw.com/documentos/DRM_good_bad_ugly.pdf, at 32.

¹⁴² *Id.*

¹⁴³ Software developers consulted in the preparation of this article have also pointed out that DRM systems are frequently cracked. This is a broader concern that would need to be studied prior to adoption of any single technology standard.

In contrast, European legislators explicitly reject the notion that consumers may have a right to resell downloaded media. Under WIPO treaties and EC directives, many European nations have viewed such copies as “communications” rather than goods. In many ways, this stance seems short-sighted: digital resale could lead to lower prices, greater service to niche markets, and the increased investment of libraries. These economic benefits, combined with America’s more open attitude toward the resale of downloaded works, could lead to a digital secondary market in America.

It is interesting to ponder the economic and legal impact that Europe might experience if digital first sale became part of American law. As with digital product returns, it is unlikely that online distributors would wish to manage bifurcated systems that serve European consumers differently than Americans. Thus, an American right to resell could, in a sense, seep into the European market, not as legislation, but merely in the form of business infrastructure. Ultimately, this consumer-friendly policy might sit comfortably alongside Europe’s vision of digital cooling-off laws.

IV. CONCLUSION

This article began by considering the widespread criticism that digital media distributors have received for restricting consumer choice. Why was an apology and a refund not enough to satisfy those impacted by Amazon’s remote book deletion? Why did Steve Jobs, the founder of an online media empire, advocate the end of DRM? The reasons set forth by pundits, plaintiffs, and increasingly by regulators, is that distributors should not be permitted to block the pathway to consumer choice. And yet, as gatekeepers, distributors also hold the keys to restoring consumer freedoms that have been lost across the digital divide.

There is an inverse symmetry between American and European cooling-off and first sale laws. Cooling-off laws in the United States are based upon the narrow circumstance of pushy door-to-door salesmen. In contrast, European cooling-off laws are more expansive, and recognize the fact that distance contracts can be just as improvident as those made face-to-face. At the same time, while European regulators have explicitly excluded a right to resell downloaded works, American lawmakers have left the possibility open.

In American and in Europe, making digital cooling-off periods and secondary markets a reality would require cooperation between digital media distributors and lawmakers. Specifically, distributors would need to adopt DRM systems like those discussed earlier in this Article. Ideally, any such standards would be used industry-wide, to ensure easy exchanges between the customers of competing services.

This level of interoperability may only be possible through legislated standardization. While the subject of standardization is beyond the scope of this article, it is valuable to briefly note the challenges that lawmakers might face. Policy makers typically follow one of three approaches in developing, selecting and deploying technology standards:¹⁴⁴ they may shape the fine-grained details of a technology, ask private bodies or firms to develop standards (usually involving a “beauty contest”), or

¹⁴⁴ Johnathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 385 (MIT Press, 2005).

they may allow standards to compete in the open market.¹⁴⁵ Choosing the best path is a difficult task. Too little guidance can lead to a market of splintered technologies; too much control could unwisely force consumers and firms to accept inferior technology.¹⁴⁶

Advocates of regulation often point to the successful deployment of mobile phone standards in Europe during the late 1980s. Unlike their American counterparts, European regulators mandated the entire mobile industry adopt a single digital standard: GSM.¹⁴⁷ The decision has been cited as a prime reason why Europe jumped ahead of the United States in cellphone adoption during the 1990s.¹⁴⁸ Consumers enjoyed greater confidence that their phones would work well throughout Europe, and manufacturers enjoyed the benefits of scale economies for a single technology.¹⁴⁹

Of course, governments have had failures in setting standards as well. A strong argument for regulatory minimalism can be based on the development of HDTV standards in the 1980s. In a remarkable case of shortsightedness, Japanese regulators endorsed a completely analog (non-digital) standard for high definition television.¹⁵⁰ Unfortunately, the technology was obsolete almost as soon as it was implemented. By the time manufacturers and consumers had bought-in to this system, the digital revolution was well underway.

Given such failures, it may be best to take a moderate approach. Independent bodies have had great success in developing and maintaining many de jure standards that internet users rely upon.¹⁵¹ For example, the Institute of Electrical and Electronics Engineers (IEEE) has successfully overseen the development of the 802.11 (Wi-Fi) standard for wireless internet access.¹⁵² Similarly, the Internet Engineering Task Force (IETF) is responsible for TCP/IP—the lowest-level standard upon which the entire Internet operates.¹⁵³

Based on these examples, it would be wisest for regulators to assign the development of digital returns and resale technology standards to an independent body. The organization could be selected by way of a contest, in which various organizations would compete by submitting DRM proposals to a board of judges. To avoid mistakes like Japan's HDTV debacle, regulators would be advised to refrain from requiring specific technologies. Instead, broad performance requirements would likely lead to the strongest standards.

If properly implemented, the economic benefits of digital returns and resale could be substantial. A right to return downloaded media would likely increase economic efficiency and consumer spending in the online market. Online media resale could lead to lower prices, greater service to niche markets, wider adoption of digital textbooks by students, and massive investments from libraries.

¹⁴⁵ *Id.* at 386.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 280.

¹⁴⁸ See David J. Goodman, Standards for Personal Communications in Europe and the United States, PROGRAM FOR INFORMATION RESOURCES POLICY (1998), available at http://www.pirp.harvard.edu/pubs_pdf/goodman%5Cgoodman-p98-1.pdf, 31-35.

¹⁴⁹ NUECHTERLEIN & WEISER, *supra* note 144, at 280.

¹⁵⁰ See Darcy Gerbarg, The Economics, Technology and Content of Digital TV 275 (Springer 1999).

¹⁵¹ NUECHTERLEIN & WEISER, *supra* note 144, at 390.

¹⁵² *Id.*

¹⁵³ *Id.*

The Internet is a ghost world, a place without weight or position. Amazingly, copyright holders and media distributors are conquering these ethereal plains; they have built storefronts that draw consumers from across the globe. And yet, a critical issue has gone ignored: the alienation of digital property. In America and Europe, owners of physical media enjoy varying rights of return and resale, both of which yield economic benefits. Potentially, cooling-off periods and secondary markets for digital goods could yield even greater economic and social benefits. The first step in achieving this goal must be to refresh and refocus the debate concerning digital rights management. Lawmakers, media distributors, copyright holders, and the public would benefit by recognizing that, alongside their perils, DRM systems have the potential to bring consumer choice to the digital domain.