

Virtual Property and Copyright: Taking the First Sale Doctrine into the Cloud

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Traditionally, a balance existed between the personal property rights in copies of a work of authorship and the copyright rights in that work of authorship. This balance provided rights to both the users and producers of physical copies of works of authorship. The first sale doctrine provides the best example of this balancing. However, with the transition from physical copies of works such as album, tapes and optical discs to computer-mediated copies of works such as MP3 files, the personal property portion of the balance seems to have dropped out of the equation and out of the discussion. Often discussions about copyright issues in these new media areas seem to assume that all that is left, all that is present is the work of authorship and the copyright rights. The explanation for this lies in the seeming nonrivalrousness of computer-mediated copies, a result of the current ease of copying and distributing copies in computer-mediated formats. This same set of characteristics has and continues to motivate the development of digital rights management technology. While good arguments can be made in favor of DRM that restricts unauthorized copying and distribution of computer-mediated copies, an examination of many of the criticisms of DRM stem from technological restrictions on uses previously guaranteed by personal property rights. This raises the question of whether some form of the first sale doctrine should be applied to computer-mediated copies of copyrighted works.

One approach to this question would be to apply the theory of virtual property derived from experience with objects in virtual worlds. The concept of virtual property may provide a means to add the personal property rights side of the equation back into discussion. There is no inherent conflict between virtual property rights and copyright rights, at least no greater conflict than exists between the personal property rights in physical copies and the copyright rights in the underlying work of authorship. An examination of property rights and copyright rights in virtual world objects demonstrates this lack of conflict. Further, an examination of virtual world objects also demonstrates that computer-mediated formats are not inherently nonrivalrous. Whether to apply a virtual property system to computer-mediated copies of copyright protected works depends on the answers to several questions. First, at what point is a computer-mediated copy “rivalrous enough” to gain property protection? Second, is a publicly ordered system of property protection preferable to a privately ordered system? Third, are the relevant normative justifications for virtual property sufficient to dictate technological standards?

A second approach to the question would be to examine market produced alternatives to the first sale doctrine. These include different models developing both around the distribution and performance of sound recordings and around the distribution of e-books. In particular, recent controversies surrounding the removal of previously purchased and downloaded e-books from Kindle readers and the limitations placed on library lending of e-books deserve close consideration.