

Beyond Exhaustion: Why Sell When You Can Service?

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This article examines three models of commercializing IP that requires deployment of physical or digital goods. While the obvious model might be sales, current judicial interpretations of exhaustion and first sale doctrine are challenging IP owners' ability both to control their IP and to engage in legitimate price discrimination across markets. These and other concerns had already led the modern proprietary software industry to employ a "lease-license" model that avoided a sale of not only the IP and software, but also the medium conveying the code (e.g., CD-ROM). Intriguingly, the private and nonprofit life sciences R&D sector also adopted this model so that biological materials conveyed under a material transfer agreement are also lease-licensed. Numerous other examples abound. But an older alternative to sales of IP protected goods is rapidly gaining favor again: delivering goods as services. Early deployment of both telephone networks and computer systems, including significant hardware in both, was as a service. Today, even bicycles and automobiles are delivered as services in some innovative business models. While some still question the legitimacy of the lease-license model—is it really a covert sale?—the service model seems to avoid this controversy. The service model also brings benefits for consumers that can be weighed against the consumer benefits of a sale model. This is best exemplified by active consumer choice between buying digital copies of music and subscribing to digital music streaming services. This Article describes these three commercialization models, analyzes recent developments in exhaustion and first sale doctrine, and argues that exhaustion may become moot as producers and consumers migrate to service models.