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RESELLING DIGITAL MUSIC: IS THERE A DIGITAL FIRST SALE DOCTRINE?

*Nakimuli Davis**

I. INTRODUCTION

Two years ago you set up your iTunes and eBay accounts and began purchasing digital music for your iPod and MP3 players. You have sold previously purchased compact disks (CDs) to retailers, but now, after reviewing your digital music library, you want to sell digital files as well. Luckily, you read about a new company, Bopaboo, designed to help consumers sell their used MP3s and other digital music. Unfortunately, you could be violating copyright laws by reselling your digital music.

Section 102(a)(2) of the Copyright Act of 1976 (the Act) provides protection for “musical works, including any accompanying words.”¹ For a work to be protected, it must be original, and must be “fixed in any tangible medium of expression.”² A copyright owner has the exclusive right to reproduce all or any part of the work, distribute copies, publicly display, publicly perform, and prepare derivative works of the copyrighted material.³ Copyright owners are given these rights to incentivize them to continue creating works, which benefits society as a whole.⁴

Copyright ownership is vital in the music industry because the rights afforded to copyright holders determine profit and royalty distribution.⁵ Copyrights developed at a time when sound recordings were disseminated and acquired in physical form, such as CDs and cassettes, and record

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1. 17 U.S.C. § 102(a)(2) (2006).

2. *Id.*

3. *See id.* § 106.

4. *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30, 36 (1939).

5. *See* Brian Mencher, *Digital Transmissions: To Boldly Go Where No First Sale Doctrine Has Gone Before*, 10 UCLA ENT. L. REV. 47, 53 (2002).

companies, producers, artists, and songwriters were compensated based on album or CD sales.⁶ Basically, a copyright interest is a protected property interest that entitles the author to a bundle of exclusive rights including the right to distribute or sell their work for profit.⁷

Nevertheless, there are limitations, such as the first sale doctrine, on the author's right to distribute.⁸ After the first sale of the legally copyrighted work, the copyright holder no longer has a right to restrict or prevent subsequent sale of their work.⁹ Thus, purchasers are free to resell CDs that were lawfully purchased without obtaining the copyright holder's approval.¹⁰ Today, however, music is sold less often in physical form and more in the form of digital files.¹¹ Thus, issues concerning the applicability of the first sale doctrine that existed when music was primarily sold and distributed in CDs have evolved into whether the doctrine now applies to music sold as digital files.

Part II of this article reviews the right of first sale and music sold in digital media. Part III discusses differing views on whether a consumer can subsequently sell a legally purchased digital copy of a sound recording. Finally, part IV discusses the likely result of this new phenomenon.

II. THE FIRST SALE DOCTRINE

A. Right of First Sale under the Copyright Act

Under section 106 of the Act, the copyright holder of a sound recording has the exclusive right to "distribute copies or phone records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."¹² This right to distribute, however, is limited by the first sale doctrine.¹³ In *Bobbs-Merrill Co. v. Straus*, the United States Supreme Court construed the exclusive right to vend under the pre-1909 Copyright Act to apply only to the initial sale; the right to

6. Kristine J. Hoffman, *Fair Use or Fair Game? The Internet, MP3 and Copyright Law*, 11 ALB. L.J. SCI. & TECH. 153, 166 (2000).

7. 17 U.S.C. § 106 (2006).

8. *Id.* § 109.

9. *Id.* § 109(a).

10. Mencher, *supra* note 5, at 49.

11. John Gerome, 2008: *Album Sales Plunged, Downloads Up*, THE HUFFINGTON POST, Jan. 1, 2009, http://www.huffingtonpost.com/2009/01/01/2008-album-sales-plunged_n_154641.html.

12. 17 U.S.C. § 106 (2006).

13. *Id.* § 109(a).

vend could not be used to prevent or restrict any subsequent resale of the copyrighted work.¹⁴ Currently, under subsection 109(a) of the Act, one with a lawful copy of a copyrighted work “is entitled to dispose of [the work] by sale, rental, or any other means.”¹⁵ However, one may not rent, lease, or lend sound recordings.¹⁶ Nonetheless, under section 109(a), the first sale of a lawfully made copy of a sound recording terminates the copyright holder’s authority to interfere with subsequent sales of that particular copy.¹⁷ Still, the copyright owner maintains the right to reproduce new copies of the song for first sale.¹⁸

Copyright holders of sound recordings originally distributed their works to the public in some physical form, such as CDs and cassettes; however, consumers increasingly purchase digital music today.¹⁹ As a result, there are looming issues concerning the first sale doctrine and whether it properly extends to digital music.

In fact, hearings on enacting the Digital Millennium Copyright Act (DMCA) obligated the United States Copyright Office (the Copyright Office) to issue a report on “the relationship between existing and emergent technology and the operation of” the first sale doctrine pertaining to computer software.²⁰ The Copyright Office recommended that the Act not be amended to facilitate a digital first sale right.²¹ This decision was due in part to the fact that an additional copy of the work is produced via digital

14. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.12 (B)(1) (2008).

15. H.R. Rep. No. 94-1476, at 79 (1976); see also 17 U.S.C. § 109(a) (2006) (“Notwithstanding the provisions of section 106(3), the 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.”).

16. See 17 U.S.C. § 109(b)(1)(A) (2006). This portion of the Act is not directly addressed here as this paper primarily focuses on resale; however, Bopaboo allows trading digital music which could potentially equate to lending or leasing.

17. *Id.* § 109(a); see also *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 480 (9th Cir. 1994).

18. See, e.g., *Columbia Pictures Indus. Inc. v. Redd Home Inc.*, 749 F.2d 154, 160 (3d Cir. 1984) (holding that losing the distribution right under the right to first sale “did not result in the forfeiture or waiver of all of the exclusive rights found in section 106”); *U.S. v. Moore*, 604 F.2d 1228, 1232 (9th Cir. 1979); *U.S. v. Wise*, 550 F.2d 1180, 1187 (9th Cir. 1977).

19. See generally Jeff Leeds, *Apple, Digital Music’s Angel, Earns Record Industry’s Scorn*, N.Y. TIMES, Aug. 27, 2005, at A1 (discussing the recent battle over song pricing on iTunes).

20. NIMMER AND NIMMER, *supra* note 14, at § 8.12(E).

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

transfer which would interfere with reproduction rights.²² Essentially, the first sale doctrine is an extension of the notion that ownership of an object is distinct from ownership of the copyright in the object.²³ As one commentator stated:

The first sale doctrine extinguishes the distribution right once the copyright owner receives compensation for a copy because a guaranteed one-time compensation per copy is deemed by the copyright law to provide sufficient incentive to spur creation. There is, therefore, no reason to allow the copyright owner to control what the purchaser and future owners do with the work.²⁴

Further, one court provided that after the first sale, “the right to prevent unauthorized vending . . . is not so much a supplement to the intangible copyright” but rather an attempt to devise a method of “controlling the disposition of the tangible personal property which embodies the copyrighted work.”²⁵ Therefore, after the first sale, “the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints of alienation.”²⁶

B. Progression of Music Resale

The introduction of CDs in the 1980s revolutionized the music industry by providing increased clarity and consistent quality of performance for a sound recording.²⁷ There is no difference in sound quality between a new and well-maintained used CD.²⁸ So, as quickly as CDs were introduced, used CDs were sold in the market. Reselling CDs was particularly undesirable for a copyright owner because the copyright holder only receives a profit from the original sale of the CD to the retailer.²⁹ Therefore, the record company, publisher, artist, songwriter, and

22. *Id.*

23. See 17 U.S.C. § 202 (2006).

24. Cary T. Platkin, Comment, *In Search of a Compromise to the Music Industry's Used CD Dilemma*, 29 U.S.F. L. REV. 509, 515 (1995) (quoting Kenneth R. Corsello, Note, *The Computer Software Rental Amendments Act of 1990: Another Bend in the First Sale Doctrine*, 41 CATH. U. L. REV. 177, 188–89 (1991)).

25. *C.M. Paula Co. v. Logan*, 355 F. Supp. 189, 191 (N.D. Tex. 1973).

26. *Id.*

27. Lawrence J. Glusman, Comment, *It's My Copy, Right? Music Industry Power to Control Growing Resale Markets in Used Digital Audio Recordings*, 1995 WIS. L. REV. 709, 709 (1995).

28. *Id.*

29. Platkin, *supra* note 24, at 510.

distributor do not receive any profits or royalties from subsequent sales.³⁰ Anne Pager, owner of CD Trader, a small used CD retailer, said that sixteen years ago “sales were booming,” but that was before iPod, Napster and digital downloading.³¹ Now, for Pager, when CD sales are down, used CD sales are also down.³² Reselling CDs is even more problematic for the music industry because consumers purchase used CDs as a replacement for new CDs rather than as a supplement to them.³³

Nonetheless, since CDs were introduced as a method of mass distribution of music,³⁴ other equally and even better quality mass distribution mediums have evolved: iPods, MP3s and digital files. Consequently, it was only a matter of time before someone would attempt to resell digital music. Hence in 2001, the Copyright Office suggested that Congress prevent extending the first sale doctrine to digital media.³⁵ Then in September 2003, George Hotelling attempted to resell a digital copy of a song he bought from iTunes on eBay.³⁶ Although eBay cancelled his auction, he was ultimately successful in reselling a digital copy of a song for fifty cents.³⁷ Hotelling transferred a copy of the song by changing his account credit card to a prepaid card and giving a friend his iTunes account information and password.³⁸ Although Hotelling went through a lot of trouble and money to effectuate the resale, he “wanted to show how this could be done by someone selling a digital copy of a song to a complete stranger.”³⁹ In 2008, reselling digital music evolved into a business model for a digital music services company that purports to legally allow people to resell their digital music.⁴⁰

30. *Id.* (citing SIDNEY SHEMEL & M. WILLIAM KRASILOVSKY, *THE BUSINESS OF MUSIC* 3 (rev. and enlarged 6th ed. 1990)).

31. Robert Siegel, *All Things Considered: Used-CD Shops Criticize Resale Laws* (NPR Radio Broadcast May 29, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=10520699>.

32. *Id.* Furthermore, now at least two states have enacted new laws that require stores to obtain identification from the sellers, maintain records of all transactions for at least three years, and hold sold items for thirty days before reselling them.

33. Platkin, *supra* note 24, at 510 n.12 (stating that lower priced CDs are more likely to be purchased than new CDs).

34. Glusman, *supra* note 27, at 710.

35. See generally DMCA REPORT, *supra* note 21.

36. Evan Hansen, *Apple Customer Resells iTunes Song*, CNET NEWS, Sept. 10, 2003, http://news.cnet.com/2100-1027_3-5074086.html.

37. *Id.* (stating that eBay has a “downloadable media policy” which “prohibits the listing of items or products to be delivered electronically through the Internet.”)

38. *Id.*

39. *Id.* (an Apple representative commented that it is “impractical, though perhaps within someone’s rights, to sell music purchased online.”)

40. See *infra* Part II.C.

C. Bopaboo

Bopaboo is a Washington, D.C.-based company that seemingly provides a legal method for people to sell used digital music and purchase digital music, free of digital rights management (DRM) systems.⁴¹ The service is an “eBay-like marketplace” for “used” digital music files.⁴² The seller registers with Bopaboo and is given an MP3 store where he can upload music he wishes to sell; Bopaboo takes a percentage of the sales.⁴³ Alex Meshkin, Bopaboo’s CEO, argues this business model is legally permissible.⁴⁴ However, there are at least two issues with Meshkin’s argument.

First, there is no doubt that the right of first sale applies to physical goods;⁴⁵ however, there are differences between physical and digital media. Sam Diaz, a ZDNet blogger, opines that although the right of first sale applies to CDs and DVDs, for digital files you are not *really* “selling” the MP3 file but rather a copy of the MP3 file since “uploading it doesn’t really take it off of your hard drive.”⁴⁶ Diaz’s argument has weight since it was a primary concern for the Copyright Office in deciding to not extend the first sale doctrine to digital music.⁴⁷ Similarly, Fred Von Lohmann, senior staff attorney for the Electronic Frontier Foundation,⁴⁸ says that although the issue involving MP3 resales has never been addressed in court, there are potential problems with Bopaboo’s legal argument.⁴⁹ Von Lohmann acknowledged that while it is true that people can sell CDs and

41. Greg Sandoval, *Reselling MP3s: The Music Industry’s New Battleground?*, CNET NEWS, Dec. 11, 2008, http://news.cnet.com/8301-1023_3-10120951-93.html?tag=mncol;title. See also Wikipedia, Digital Rights Management, http://en.wikipedia.org/wiki/Digital_rights_management (last visited Sept. 16, 2009).

42. Sam Diaz, *Bopaboo May Feel Like eBay but Will End up Looking Like Original Napster*, ZDNET NEWS & BLOGS, Dec. 11, 2008, <http://blogs.zdnet.com/BTL/?p=11202>.

43. Sandoval, *supra* note 41.

44. *Id.* (quoting Meshkin as stating that the law “allows consumers to sell digital media files in the same way they do physical media”).

45. *Id.* (quoting Von Lohmann: “If you buy a song from iTunes’ (DRM-free) . . . you can immediately go and sell a copy of the song on Bopaboo . . . [and] would be assured of getting a discount on your iTunes purchase. There is no doubt that the first-sale law was drafted with physical objects in mind . . . you are allowed to sell books or CDs. But when it comes to selling MP3s, it’s an untested legal question.”).

46. Diaz, *supra* note 42.

47. See *supra* Part II.B.

48. Founded in 1990, the Electronic Frontier Foundation is an advocacy group that supports Internet user rights by confronting issues and defending free speech, privacy, innovation and consumer digital rights. See Electronic Frontier Foundation, About EFF, <http://www.eff.org/about> (last visited April 18, 2009).

49. Sandoval, *supra* note 41.

other physical goods, it has not been established that they can sell digital media under the first sale doctrine.⁵⁰ Von Lohmann stated:

We shouldn't lose our first-sale rights just because the second-hand stores involved are online Up to now, there hasn't been a huge opportunity for people to spend large amounts of money on digital music, but . . . some music fans will have thousands of dollars invested in their digital libraries It would be a big change if you weren't allowed to sell them.⁵¹

Second, many digital music stores forbid the resale. Amazon.com, for example, requires that consumers agree to "copy, store, transfer, and burn" digital music, but not to "redistribute, transmit, assign, sell, broadcast, rent, share, lend, modify, adapt, edit, sub-license or otherwise transfer" the digital music.⁵²

Many opine that Bopaboo's business model will likely fail and that the music industry will do all it can to ensure it does.⁵³ Since music sales for 2008 increased primarily because of the growth in digital music sales,⁵⁴ it is only a matter of time before the music industry definitively strives to ensure that companies like Bopaboo fail. This is primarily because Bopaboo has the potential to dramatically decrease these increased sales by providing a cheaper way for people to purchase digital music while allowing the seller to maintain a digital copy of the music.

III. SHOULD THE FIRST SALE DOCTRINE EXTEND TO DIGITAL MUSIC?

A. Arguments Against Applicability

1. The Copyright Office Suggests No Extension

In declining to extend the first sale doctrine to digital media, the Copyright Office explained how the constraints of tangible property are not as significant in the digital arena.⁵⁵ This is so because digital copies do not

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Jonathan Skillings, *Music Sales for 2008 Ride Digital Coattails*, CNET NEWS, Jan. 1, 2009, http://news.cnet.com/8301-1023_3-10130206-93.html (noting that 1.07 billion digital tracks were sold in 2008, which is a 27% increase from 2007).

55. Eurie Hayes Smith IV, *Digital First Sale: Friend of Foe?*, 22 CARDOZO ARTS & ENT. L.J. 853, 854 (2005).

degrade with time and use like physical copies do, digital works can be flawlessly reproduced and instantly disseminated, and digital transmissions can have a greater adverse effect on the market for the original copy.⁵⁶ Moreover, unless “forward-and-delete” software is used, deleting the work will require that affirmative steps be taken by the sender subsequent to the transmission, which is a difficult act to prove.⁵⁷ The “forward-and-delete” mechanism forwards and simultaneously deletes the digital media, thereby ridding the concern that the initial copy of the copyrighted material is not distributed.⁵⁸ Rather, an identical copy is made and distributed while leaving the initial copy on the computer’s hard drive.⁵⁹ Despite these concerns, the issue has not been addressed in court and if Bopaboo is successful, the issue will likely be litigated rather quickly.⁶⁰ Nonetheless, there are proponents for and against a digital first sale doctrine.

2. Threat to Viability

Although the music industry did initially fight a consumer’s ability to resell CDs, it failed as the first sale doctrine clearly applied in that instance.⁶¹ The music industry was successful, however, in lobbying for an exception to the first sale doctrine that prohibits rentals of sound recordings because in that instance consumers would rent albums, make copies at home, and skip paying for a new album.⁶² To address this issue, Congress passed the Record Rental Amendment, which prohibited an owner of a copy of a sound recording from renting it to the public for commercial advantage.⁶³ This was in response to a direct threat to the record industry’s viability: “[t]he record producers achieved their goal [of getting Congress to act] because they were able to point out a real threat to their survival made plausible by the ease with which records can be copied.”⁶⁴

Now, because of the nature of digital music, particularly one’s ability to possess multiple copies of the music (each with equal quality), the music industry faces a financial threat if the first sale doctrine does apply to digitally sold music. Therefore, if the music industry is successful in

56. *Id.*

57. *Id.* at 855.

58. NIMMER AND NIMMER, *supra* note 14, at § 8.12(E).

59. *Id.*

60. Sandoval, *supra* note 41.

61. See 17 U.S.C. § 109 (2008); see also Glusman, *supra* note 27, at 717; Platkin, *supra* note 24, at 515.

62. Platkin, *supra* note 24, at 517.

63. *Id.* at 518.

64. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 8.14, at 223 (1989).

showing an apparent threat to its sustainability by extending the first sale doctrine to digital music, it may be successful in preventing such an extension.⁶⁵

3. The Sold Copy is Not the Same as the Original Copy

Digital media presents challenges to the first sale doctrine that are not present for physical media. There are two important limitations in the first sale doctrine that controls its applicability to digital music. First, the doctrine requires “lawful ownership” and most software and other digital content is licensed, which limits the level of ownership the user obtains.⁶⁶ Second, the first sale doctrine applies to a particular “copy” of the work and when distributing files digitally, the computer makes a new identical copy of the work which is then distributed.⁶⁷ This new copy is an illegal copy because the file was created and distributed without the copyright holder’s permission.⁶⁸

The latter concern invokes the copyright holder’s reproduction rights and thus prevents the first sale doctrine from applying because the first sale doctrine provides an exception to the exclusive right to distribute not reproduce the copyrighted work.⁶⁹ As such, the original purchaser could sell numerous copies of the same digital song.⁷⁰ Meshkin argues that Bopaboo has developed song-identification technology that prevents one from uploading the same song multiple times regardless of how the file may be altered; however, he had no solution for the fact that a copy of a file is always produced and stored on the computer when MP3s are transferred.⁷¹ He simply stated that the music industry has to take risks, and such risks occur when music is sold without DRM.⁷²

B. Arguments For Applicability

1. It May Already Apply

Notwithstanding the U.S. Copyright Office’s recommendation to not

65. See, e.g., Glusman, *supra* note 27, at 717.

66. 17 U.S.C. § 109(a) (2006).

67. *Id.*

68. *Id.* § 106.

69. *Id.* § 106(1); see also *id.* § 109(a).

70. See generally Jonathan Skillings, *Digital Music Gains, but CD Losses a Pain*, CNET NEWS, Dec. 18, 2008, http://news.cnet.com/8301-1023-3_3-10126331-93.html.

71. Sandoval, *supra* note 41.

72. *Id.*

extend the first sale doctrine, Nimmer examined whether the doctrine, as written, already applies to digital music. The elements to assert a first sale defense are: (a) the copy was lawfully produced, (b) it was transferred under plaintiff's authority, (c) the defendant is the lawful owner of the copy, and (d) the defendant simply distributed that particular copy.⁷³ If one lawfully obtained a copy of a copyrighted work and employs the forward-and-delete method when reselling and transferring the copy, then each element of the defense is effectively met and there is no need for a statutory amendment to cover digital music.⁷⁴

2. Previous Concerns No Longer Exist

Although the Copyright Office recommended not to extend section 109(a) to digital music, it left the possibility for extension if circumstances changed.⁷⁵ One commentator, Eurie Hayes Smith IV, argues that three developments over the years support an argument for extending the first sale doctrine to digital media.⁷⁶ First, Smith argues that the properties of tangible media, particularly that it is finite and exhaustible can be imposed on digital music via DRM software.⁷⁷ DRM, he argues, can be used to control distribution, sale, and use of the digital content restricting one's ability to copy and distribute the file.⁷⁸ Second, Smith argues the enforcement methods available, particularly the DMCA, can be used to sue infringers and deter others from illegally downloading digital music.⁷⁹ However, Smith's argument may be obsolete as The Recording Industry Association of America (RIAA) has recently disclosed that it will partner with ISPs to deter illegal downloads rather than file suit against each individual person suspected of violating copyright laws.⁸⁰ Third, Smith apparently proposes that courts would be willing to extend a fair use exception to copies that are automatically stored by the computer when the file is transferred since a fair use exception has "already been granted for temporary copies stored in RAM during audio streaming."⁸¹ Therefore, Smith argues that previous concerns that prevented extending the doctrine

73. NIMMER AND NIMMER, *supra* note 14, at § 8.12(E).

74. *Id.* (providing an example showing how this doctrine may apply).

75. Smith, *supra* note 55, at 856.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 857.

80. Greg Sandoval, *RIAA Drops Lawsuits; ISPs to Battle File Sharing*, CNET NEWS, Dec. 19, 2008, http://news.cnet.com/8301-1023_3-10126914-93.html?tag=mncol;title.

81. Smith, *supra* note 55, at 857.

no longer exist so the music industry must seek new justifications to exclude.

IV. CONCLUSION

The music industry has reason to battle Bopaboo's business model because it could potentially reduce its viability. Additionally, proponents for extending the right of first sale have an equally valid argument since the copyright holder already realizes a financial reward from the initial sale. Potential solutions and outcomes for allowing the resale of digital music include: (1) by licensing rather than selling digital music, the right of first sale becomes unimportant and copyright holders are compensated for their work, as they could contract to receive royalties and payments via licensing, (2) by allowing the extension and providing artist royalties for resale, some of the concerns may be distinguished, or (3) follow the Copyright Office's suggestion to not extend section 109 to digital media. Nonetheless, if Bopaboo proves successful, the issue of whether the doctrine should be extended would be addressed by courts.

