

COMMENT

BALANCING THE RESALE RIGHTS OF VIDEO GAME CONSUMERS AND PUBLISHERS IN AN INCREASINGLY DIGITAL AGE

CAMILO FLORES†

I. INTRODUCTION

Every year, major video game publishers display their upcoming blockbuster games at the Electronic Entertainment Expo, commonly known as “E3.”¹ Heading into E3 2013, Microsoft had every reason to believe that the Xbox One, its next generation video game console, would continue Microsoft’s success in the video game console market. For thirty straight months, Microsoft carried unbelievable momentum after dominating the U.S. market with its top selling video game console, the Xbox 360.² As E3 approached, consumers anxiously awaited the reveal of the next generation Xbox.

In an unexpected turn of events, however, the announcement of the Xbox One caused Microsoft’s stocks to dip almost immediately, while Sony’s stocks jumped ten percent.³ Two months before the release date of the Xbox One, Reuters, the world’s largest international multimedia news agency, revealed a study showing that only twenty-seven percent of consumers under forty planned on purchasing an Xbox One compared to forty one percent of consumers under the age of forty who planned on

† Wake Forest University School of Law, Juris Doctor Candidate 2015. The author would like to thank his family for their selfless and unconditional support. He would also like to thank the *Journal’s* editorial staff for their contributions.

1. *About E3*, ELEC. ENTMT EXPO, <http://www.e3expo.com/show-info/2101/about-e3> (last visited Nov. 14, 2013).

2. Taylor Soper, *Xbox 360 Marks 30 Straight Months Atop U.S. Market*, GEEKWIRE (July 19, 2013, 9:51 AM), <http://www.geekwire.com/2013/npd-xbox-30-consecutive-months>.

3. Chris Miles, *Xbox One Announcement Sends Rival Stock Soaring*, ARTS.MIC (May 21, 2013), <http://www.mic.com/articles/43577/xbox-one-announcement-sends-rival-stock-soaring>.

purchasing a PlayStation 4.⁴ This dramatic turn of events begs the question: Where did Microsoft go wrong?

One of the main contributions to the Xbox One's massive backlash was the decision to restrict consumers' rights to trade in and resell used video games.⁵ In a move that shocked consumers, Microsoft's new licensing policy allowed publishers to block consumers from trading in and reselling the hard copies of their video games.⁶ Additionally, Microsoft's new policy restricted the consumers' ability to lend video games to only one other individual.⁷ To Microsoft's surprise, consumers reacted overwhelmingly negatively,⁸ leading former president of the Interactive Entertainment Business at Microsoft to reverse the Xbox One's used-game policy through a press release, stating that consumers may "[t]rade in, lend, resell, gift, and rent disc-based games just like [they] do today—There will be no limitations to using and sharing games."⁹ Although Microsoft ultimately reversed its decision, the damage to Xbox and Microsoft's brand proved costly. Only time would tell if Microsoft's policy reversal will lead to holiday sales. However, the International Data Corporation, a global provider of market intelligence, predicted that the PlayStation 4 would outsell the Xbox One during the 2014 holiday season.¹⁰ These studies, consumer reactions, and financial implications all point to the fact that consumers are unwilling to concede their rights when it comes to the hard copies

4. Malathi Nayak, *Sony's PS4 Tops Xbox One as Gamers' Holiday Choice: Reuters/Ipsos poll*, REUTERS (Sept. 29, 2013, 6:36 PM), <http://in.reuters.com/article/2013/09/29/us-microsoft-sony-poll-idINBRE98S08C20130929>.

5. Luke Plunkett, *The Xbox One Just Had a Very Bad Day*, KOTAKU (June 6, 2013), <http://kotaku.com/the-xbox-one-just-had-a-very-bad-day-511766497>.

6. *See Xbox One: A Modern, Connected Device*, XBOX (June 6, 2013, 3:03 PM), <http://news.xbox.com/2013/06/connected>.

7. *See id.*

8. Jonathan Leack, *Microsoft Didn't Expect the Xbox One's DRM Backlash*, CRAVEONLINE (Sept. 5, 2013), <http://www.craveonline.com/gaming/articles/565045-microsoft-didnt-expect-the-xbox-ones-drm-backlash>.

9. Don Mattrick, *Your Feedback Matters—Update on Xbox One*, XBOX (June 19, 2013), <http://news.xbox.com/2013/06/update>.

10. *IDC Predicts Worldwide Game Console Shipments Will be Up in 2013 with PS4 Outselling Xbox One this Holiday Season*, BUSINESSWIRE (Oct. 2, 2013, 8:30 AM), <http://www.businesswire.com/news/home/20131002005133/en/IDC-Predicts-Worldwide-Game-Console-Shipments-2013>.

of their video games.¹¹

II. POTENTIAL SUCCESS AND INITIAL QUESTIONS

Although the Xbox One will most likely be a success,¹² Microsoft's recent experience raises numerous questions about the future of video game consumers' property rights and the used video game industry. Will consumers have the same "first sale" doctrine rights to sell their digital video games that have been afforded to physical copies? Should publishers have the ability to overturn the first sale doctrine's exception for video games to block the sales of physical copies as well? Microsoft, and publishers like it, are attempting to shape both company and consumer rights for the future of digital goods while also changing current precedent with hard copies of video games.¹³ Consumers have, unsurprisingly, reacted negatively to such changes.¹⁴

Part III of this comment provides the legal background detailing the advent of the first sale doctrine and its current status in the video game industry. Part IV addresses the common argument that the first sale doctrine has lost its relevance by providing evidence that physical media is here to stay for the foreseeable future. It also addresses the future of physical media and discusses the importance of reaffirming the first sale doctrine for physical copies of video games. Part V argues that modern video game consoles, despite extra functionality, still fit the "limited purpose" exception of the first sale doctrine. Part VI addresses piracy concerns and distinguishes the role of piracy in video game consoles from computer software piracy. Part VII critiques the idea of a "Digital First Sale Doctrine" and advocates the restriction of reselling used digital goods. Finally, Part VIII proposes language amendments to 17 U.S.C.A. § 109(B)(ii), the current limited purpose exception, to fulfill both consumers' and video game developers' interests.

11. See Luke Plunkett, *When Will Gamers Say Enough Is Enough?*, KOTAKU, (June 7, 2013, 3:00 AM), <http://www.kotaku.com/video-game-companies-arent-letting-us-do-anything-511789152>.

12. Sam Mattera, *Why the Xbox One Will Still Be a Massive Success*, MOTLEY FOOL, <http://beta.fool.com/sammattera/2013/06/14/the-xbox-one-will-still-be-a-massive-success/37178> (last visited Nov. 14, 2013).

13. See Tom McShea, *Sony's Triumphant Night*, GAME SPOT (June 10, 2013), <http://www.gamespot.com/features/sonys-triumphant-night-6409715>.

14. *Id.*

A legal battle over consumers' rights to resell their physical and digital video games seems inevitable. Various reasons include the evolution of the video game industry into a digital market,¹⁵ as well as mounting tension between video game publishers and used game resale companies.¹⁶ Ultimately, companies such as Microsoft will continue to attempt to restrict consumers' rights in order to quash the used video game industry. This comment aims to address the likely arguments of companies, such as Microsoft, for removing modern video game consoles from the first sale doctrine.

III. LEGAL BACKGROUND OF THE FIRST SALE DOCTRINE

In 2012, GameStop generated revenues of approximately \$9.55 billion, continuing its dominance of the used games industry.¹⁷ Publishers took notice, arguing that GameStop received undeserved profits never seen by the publisher.¹⁸ What allows GameStop to resell these used video games?

The answer is the first sale doctrine, codified in 17 U.S.C.A. § 109.¹⁹ The doctrine allows an "owner of a particular copy . . . lawfully made under this title . . . without the authority of the copyright owner, to sell . . . that copy."²⁰ The doctrine originally arose from a 1908 case, *Bobbs-Merrill Co. v. Straus*, where an author included the following language in the front cover of his novel: "[n]o dealer is licensed to sell [the novel] at a less price, and a sale at a less price will be treated as an infringement of the copyright."²¹ The Court held that the attempted license was invalid, ensuring that a copyright owner's interest in his or her copyright ends at the first transfer, while allowing a consumer to sell or dispose of the property as he or she sees fit.²²

15. James Brightman, *EA is "Going to Be a 100% Digital Company, Period" says Gibeau*, GAMESINDUSTRYINTERNATIONAL (July 2, 2012, 2:59 PM), <http://www.gamesindustry.biz/articles/2012-07-02-ea-is-going-to-be-a-100-percent-digital-company-period-says-gibeau>.

16. *Developers Respond to GameStop's Used Games Market Comments*, GAMEPOLITICS.COM (Aug. 23, 2011), <http://www.gamepolitics.com/2011/08/23/developers-respond-gamestop-p039s-used-games-market-comments#.UIMy2GTXg0M>.

17. *GameStop Revenue in 2012*, WIKIINVEST, [http://www.wikinvest.com/stock/Gamestop_op_\(GME\)/Data/Revenue/2012?ref=chart](http://www.wikinvest.com/stock/Gamestop_op_(GME)/Data/Revenue/2012?ref=chart) (last visited Nov. 17, 2013).

18. GAMEPOLITICS.COM, *supra* note 16.

19. 17 U.S.C. § 109 (2008).

20. 17 U.S.C. § 109(a) (2008).

21. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 341 (1908).

22. *Id.* at 350.

Since *Bobbs-Merrill Co. v. Straus*, the first sale doctrine has evolved with technology, most notably after a legal dispute between Nintendo and Blockbuster in 1989.²³ Tired of losing revenue to the used game industry, Nintendo filed suit against Blockbuster to enjoin Blockbuster from renting Nintendo products.²⁴ At the time, the application of the first sale doctrine to video games was unprecedented.²⁵ In response, the House Judiciary Committee passed the Computer Software Rental Amendments Act, an addition to the first sale doctrine, banning consumers from renting computer software they had purchased.²⁶ The Act however, contained an exception for a “computer program embodied in or used in conjunction with a *limited purpose* computer that is *designed for playing video games*.”²⁷ The Act ensured that Blockbuster could continue to rent Nintendo’s video games to consumers because the Super Nintendo Entertainment System, along with other video game consoles of the time, fell under the classification of a “limited purpose computer,” which is “designed for playing video games.”²⁸ Although Blockbuster has since closed its doors to the rental business,²⁹ the battle between video game developers and used game resale companies continues to this day. Companies such as GameStop and GameFly continue to center their business around the sale and rental of used video games.³⁰

23. Lane Kelley, *Rental Firms Win Game Edge*, S. FLA. SUN-SENTINEL, Sept. 19, 1990, at 3D, available at 1990 WLNR 3811498.

24. *Id.*

25. Mark C. Humphrey, *Digital Domino Effect: The Erosion of First Sale Protection for Video Games and the Implications for Ownership of Copies and Phonorecords*, 42 SW. U. L. REV. 441, 442 (2013).

26. Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134–37 (codified at 17 U.S.C. § 109(b)(1)(A) (2006)).

27. 17 U.S.C. § 109 (2008) (emphasis added).

28. *See* 17 U.S.C. § 109.

29. Roger Yu, *Blockbuster To Close U.S. Retail Stores, Mail DVD Operation*, USATODAY (Nov. 7, 2013, 9:34 AM), <http://www.usatoday.com/story/money/2013/11/06/blockbuster-closing/3456271>.

30. Aaron Leach, *GameStop & GameFly Express Excitement Over Xbox One’s New Found Freedoms*, GAMERANT (June 21, 2013), <http://gamerant.com/gamestop-gamefly-xbox-one-used-games-support>.

IV. PHYSICAL MEDIA IS NOT DEAD YET—WHY THE FIRST SALE DOCTRINE IS STILL RELEVANT

Some argue that the first sale doctrine has outgrown its utility due to the continuing shift from a physical media market to a purely digital market.³¹ Electronic Arts, for example, claims their business model will revolve entirely around digital downloads in the future.³² The truth, however, is that physical media is not going anywhere, any time soon.³³ Due to longer video game console life cycles, increasing game sizes, limited video game console storage, Internet bandwidth caps, and slower Internet speeds, physical media will stay relevant at the very least long enough to make increased protection of the used game industry viable and necessary.

Sony has reaffirmed that the PlayStation 3's life cycle will be ten years regardless of the release of the PlayStation 4,³⁴ and stated that the PlayStation 4's life cycle will be similar.³⁵ As a result, the PlayStation 4 will utilize physical media for the next ten years. Furthermore, larger video games will approach total sizes of fifty gigabytes³⁶ compared to the total storage size of 500 gigabytes on the PlayStation 4 itself,³⁷ which means that a user could have only ten games installed on their video game console without the use of physical media. Another factor worth considering is that sixty four percent of broadband subscribers in the United States have a cap

31. See Justin Brenis, *Industry Leaders See Digital Gaming as the Inevitable Revolution*, VENTUREBEAT (Dec. 14, 2011, 2:28 PM), <http://www.venturebeat.com/2011/12/14/ea-ex-ec-sees-digital-gaming-as-inevitable-revolution>.

32. Brightman, *supra* note 15.

33. See generally Kishen Patel, *Take-Two CEO Says Physical Media Will Remain Triumphant over Digital Distribution*, PLAYSTATIONLIFESTYLE.NET (Oct 19, 2010), <http://www.playstationlifestyle.net/2010/10/19/take-two-ceo-says-physical-media-will-remain-triumphant-over-digital-distribution>.

34. Andy Robinson, *PS3 Will Last 'a minimum' of 10 Years—Sony*, CVG, (June 15, 2011, 9:18 AM), <http://www.computerandvideogames.com/307428/ps3-will-last-a-minimum-of-10-years-sony>.

35. Andrei Dobra, *PlayStation 4 Life Cycle Will Be Similar to PlayStation 3*, SOFTPEDIA (Sept. 17, 2013), <http://news.softpedia.com/news/PlayStation-4-Life-Cycle-Will-Be-Similar-to-PlayStation-3-383732.shtml>.

36. A gigabyte is a measurement of data, equaling 1,000 megabytes or 1,000,000 kilobytes.

37. Blair Inglis, *You Can't Install PS4 Games to External Hard Drives*, TSA, <http://www.thesixthaxis.com/2013/09/02/you-cant-install-ps4-games-to-external-hard-drives> (last visited Nov. 16, 2013).

on their monthly Internet usage.³⁸ Data caps limit the amount of bandwidth, or data, that a user may consume.³⁹ Given these caps, consumers would only be able to download a certain number of games per month. This is particularly problematic given the fact that one in three Xbox 360 users already consumes eighty gigabytes per month due to Netflix subscriptions alone, while most AT&T accounts have a 125 gigabyte cap.⁴⁰ Under this unworkable system, a user could only download one game per month, and is forced to wait until the next month to download another. Lastly, slow Internet speeds in the United States make downloading large file sizes a difficult option for consumers,⁴¹ giving consumers yet another reason to opt for physical media rather than a purely digital market.

Although the digital revolution undoubtedly will change the way consumers purchase video games and likely will dominate the physical media market eventually, the truth is that physical media is not dead yet. Companies like Electronic Arts may strive for a purely digital market; however, they are limited by forces outside of their control such as Internet company bandwidth caps.⁴² In fact, when questioned whether Microsoft ever considered developing the Xbox One without a disc drive, Albert Penello, senior director of Microsoft, stated that Xbox One consumers are “always going to need a disc” because Microsoft “realize[d] the size of the games that are coming.”⁴³ At a very minimum, physical media will remain relevant long enough to warrant revisiting the first sale doctrine.

38. Stacey Higginbotham, *Which ISPs Are Capping Your Broadband, and Why?*, GIGAOM (Oct. 1, 2012), <http://www.gigaom.com/2012/10/01/data-caps-chart>.

39. See Janko Roettgers, *Netflix Data: AT&T Caps Not That Generous After All*, GIGAOM (May 18, 2011, 4:38 PM), <http://gigaom.com/2011/05/18/netflix-data-caps>.

40. *Id.*

41. Patel, *supra* note 33.

42. See generally Matt Clark, *ISP Data Caps in the Era of Downloadable Games*, IGN (Feb. 14, 2013), <http://www.ign.com/articles/2013/02/14/isp-data-caps-in-the-era-of-downloadable-games>.

43. Eddie Makuch, *Microsoft Talks Digital-Only Future, Kinect, and Why Xbox is Worth \$100 More than PlayStation 4*, GAMESPOT (Sept. 3, 2013), <http://www.gamespot.com/articles/microsoft-talks-digital-only-future-kinect-and-why-xbox-one-is-worth-100-more-than-playstation-4/1100-6413920>.

V. DEFENDING VIDEO GAME CONSOLES' EXEMPTION—
DISTINGUISHING MODERN SYSTEMS FROM PERSONAL
COMPUTERS

Though Microsoft's reversal of their used game policy has protected consumers' rights for now, their attempt to block the resale of physical goods indicates that the future of the first sale doctrine may be in jeopardy. To stop the used game industry, video game publishers may argue that modern video game consoles no longer fit the first sale doctrine's exception of a "limited purpose computer."

Senior vice president of the Online Audience Business Group at Microsoft Corp., Yusuf Mehdi, stated that Microsoft is "trying to provide a central device in the living room that for the first time can unify all forms of entertainment in one simple effort . . . Xbox One is key to opening up that world of next-generation entertainment."⁴⁴ Though no video game publisher has yet to take this approach in court, removing video games from the exception outlined in 17 U.S.C.A. § 109 could spell the end of the used game market under the current framework of the first sale doctrine. In fact, Microsoft may be trying to build the foundation for such a legal battle. In September 2013, Microsoft revealed its first commercial for the Xbox One.⁴⁵ Interestingly, the commercial does not reference a single video game; instead, it highlights the Xbox One's voice commands that can turn on the console, begin a Skype phone call, or turn on an NFL game.⁴⁶ The commercial is a clear indication that Microsoft intends to rebrand modern video game consoles as next-generation entertainment systems. Given the new direction of these commercials, Microsoft would likely succeed in challenging the current framing of modern video game consoles as limited purpose machines. Unless the legislature amends the first sale doctrine, such a challenge would spell the end of consumers' rights to sell the physical copies of their video games.

44. Dave Cook, *Microsoft Defends Xbox One Pricing, Says Kinect and Entertainment Are Key Differentiators*, VSG24/7 (Sept. 4, 2013), <http://www.vg247.com/2013/09/04/microsoft-defends-xbox-one-pricing-says-kinect-and-entertainment-are-key-differentiators>.

45. Bryan Bishop, *First Xbox One Commercial Targets NFL Fans, Not Gamers*, VERGE (Sept. 5, 2013, 5:00 PM), <http://www.theverge.com/microsoft/2013/9/5/4699018/microsoft-targets-nfl-fans-first-with-new-xbox-one-commercial>.

46. *Id.*

It is important to note that the Computer Software Rental Amendments Act specifically states that video game consoles “may be designed for other purposes” and remain exempt under the Act.⁴⁷ While this language appears comforting for supporters of the first sale doctrine, opposition may argue that video game consoles are essentially personal computers. For example, users can install the operating system Linux on the PlayStation 3, effectively turning the PlayStation 3 into a personal computer.⁴⁸ Even so, Sony does not develop or even support a version of Linux for the PlayStation 3.⁴⁹ In fact, Sony continuously updated the PlayStation 3’s firmware⁵⁰ in order to prevent users from using Linux and does not formally endorse its use.⁵¹

As a result, it is imperative that the legislature amends the first sale doctrine to protect consumers’ rights to resell their physical property. Because the drafters of the Computer Software Rental Amendments Act did not envision video game consoles becoming the multi-purpose systems they are today,⁵² it is necessary to revisit the limited purpose exception.

VI. DEFENDING VIDEO GAME CONSOLES’ EXEMPTION – THE PIRACY ISSUE

Publishers may argue that video game consoles no longer fit the limited purpose exception by likening modern video game piracy to software piracy. When drafting the Computer Software Rental Amendments Act, the House Judiciary Committee intended to protect computer software,⁵³ which was easily copied with no further modification to the computer needed. The exception for limited purpose video game consoles was included

47. 17 U.S.C. § 109 (2008).

48. *Open Platform for PlayStation 3*, PLAYSTATION.COM, <http://www.playstation.com/ps3-openplatform/index.html> (last visited Nov. 16, 2013).

49. *Id.*

50. Firmware is the software that is embedded in a piece of hardware. Tim Fisher, *Firmware*, ABOUT TECHNOLOGY, <http://pcsupport.about.com/od/termsf/g/firmware.htm> (last visited Sept. 1, 2014).

51. Ben Kuchera, *Hacker Vows to Fight Sony’s PS3 Update, Restore Linux*, ARSTECHNICA (Mar. 30, 2010, 9:26 AM), <http://www.arstechnica.com/gaming/2010/03/hacker-vows-to-fight-sony-ps3-update-restore-linux-support>.

52. Humphrey, *supra* note 25.

53. *Id.*

because it was “virtually impossible” to copy video game cartridges.⁵⁴

While piracy is admittedly a larger concern and copying video games is easier now than in the past,⁵⁵ the statistics are likely not as high as reported.⁵⁶ In analyzing piracy statistics for video games, it is important to note two factors. First, there are critical distinguishing characteristics between computer video game piracy and video game console piracy.⁵⁷ Second, it is essential to separate piracy in the United States versus the rest of the world.

As stated above, the limited purpose exception in the first sale doctrine aimed to protect software developers because of the ease of software piracy. Modern video games and video game systems are clearly distinguishable from software and personal computers because video game consoles require hardware modifications or firmware modifications⁵⁸ to use pirated video games, whereas copying software on a computer requires no such modification.⁵⁹ One study of piracy across the globe echoed this sentiment. Across a three-month span in 2010 and 2011, Robert Veitch of the Copenhagen Business School and Kevin Bauer of the University of Waterloo analyzed the file-sharing data of 12.6 million users and 173 video games for the PC, Xbox 360, Playstation 3, Nintendo Wii, Nintendo DS, iOS/Mac, and PlayStation Portable (PSP).⁶⁰ They ultimately found that computer video game piracy was disproportionately higher than video game console piracy, most likely due to the fact that “[c]onsole games are much harder to pirate than PC versions, as the console hardware needs to be modified.”⁶¹

54. Karl Vick, *Super Mario Ruled Intellectual Property*, ST. PETERSBURG TIMES, Sept. 22, 1990, at 8A, available at 1990 WLNR 1770752.

55. See Emma Woollacott, *Finally, Some Objective Figures on Games Piracy*, FORBES (May 15, 2013, 10:34 AM), <http://www.forbes.com/sites/emmawoollacott/2013/05/15/finally-some-objective-figures-on-games-piracy>.

56. Megan Farokhmanesh, *Video Game Piracy Is Not as High as Reported, Study Says*, POLYGON (May 15, 2013, 9:23 PM), <http://www.polygon.com/2013/5/15/4334688/video-game-piracy-is-not-as-high-as-reported-study-says>.

57. See Woollacott, *supra* note 55 (noting that consoles must be modified to play pirated games, whereas PC's do not require modification).

58. Sam Cook, *PS3 Custom Firmware Released, Allows Hacked Consoles Back on PSN*, GEEK (Oct. 24, 2012, 7:29 AM), <http://www.geek.com/games/ps3-custom-firmware-released-allows-hacked-consoles-back-on-psn-1523995>.

59. Humphrey, *supra* note 25.

60. Woollacott, *supra* note 55.

61. *Id.*

The Xbox 360 for example, requires the purchase of a “mod chip” in order to play pirated video games.⁶² A mod chip is an electronic device that disables restrictions in devices.⁶³ To install the mod chip, a user must open the Xbox 360 with special tools, which in turn voids the Xbox’s warranty.⁶⁴ At this point, the user has two options: soldering⁶⁵ the mod chip onto the motherboard,⁶⁶ or using pogo pins⁶⁷ to attach the mod chip to the motherboard.⁶⁸ The user must download a video game from the Internet and burn, or copy, the data to a DVD-R.⁶⁹ The user is now ready to play pirated video games.

The software protected by the limited purpose exception, however, can be pirated simply by installing the disk onto a new computer.⁷⁰ Worst case scenario, the user will need to “patch” the software, meaning the user will need to open a patching program from the Internet that will automatically remove any restrictions on the software.⁷¹

62. *Xbox 360 Mod Chip—What Is It, and Should You Get One*, NCGNC.ORG (Feb. 21, 2012), <http://ncgnc.org/xbox-360-mod-chip-what-is-it-and-should-you-get-one>.

63. Jason Rybka, *Modchips—What Are They and Should You Use One?*, ABOUTTECHNOLOGY, <http://vgstrategies.about.com/od/faqglossary/a/modchips.htm> (last visited July 22, 2014).

64. Rybka, *supra* note 63; NCGNC.ORG, *supra* note 62.

65. Soldering is a process used to join metal through melting the two metals together. Xev, *Microelectronics PCB Soldering or, The Idiot’s Guide to Attaching a Modchip*, XBOX-SCENE, <http://www.xbox-scene.com/articles/soldering2.php> (last visited Sept. 13, 2014); *Joining Metal*, BITESIZE, <http://www.bbc.co.uk/schools/gcsebitsize/design/resistantsmaterials/jointsrev4.shtml> (last visited Sept. 13, 2014).

66. A motherboard is the main printed circuit board that allows the parts of a computer to communicate with one another. *Motherboard*, COMPUTER HOPE, <http://www.computerhope.com/jargon/m/mothboar.htm> (last visited Jul. 20, 2014).

67. Pogo pins are used to connect two circuit boards together. *Details Regarding Pogo Pin*, SLIDESHARE, <http://www.slideshare.net/Craigmoore001/details-regarding-pogo-pin> (last visited Jul. 20, 2014).

68. Xev, *supra* note 65.

69. *See DVD Media Formats Explained*, CDROM2GO.COM, <http://www.cdrom2go.com/dvd-media-formats.aspx#dash> (last visited July 20, 2014).

70. William N. Hughet, *The Computer Software Rental Amendments Act of 1990: A Solution to the Problem of Pirating Computer Programs or an Exercise in Futility?* 16 J. CORP. L. 931, 934 (1991) (noting that copying the software protected by the first sale doctrine is “easy and quick” and “requires no detailed knowledge of how the copied software functions”).

71. Ross Gardler, *What Is A Software Patch*, OSSWATCH, <http://oss-watch.ac.uk/resources/softwarepatch> (last updated Nov. 8, 2013).

Furthermore, the PlayStation 3 demonstrated how effective video game consoles can be at preventing video game piracy.⁷² Due to constant firmware upgrades, the PlayStation 3 has dealt with piracy more effectively than the Nintendo Wii or Xbox 360.⁷³ A lack of protection from piracy should not displace modern video game consoles from the limited purpose exception.

A second important point is that piracy statistics are inaccurate for first sale doctrine purposes because the majority of video game piracy occurs abroad.⁷⁴ In the same study cited above, Veitch and Bauer found that the countries with the most piracy included Romania, Croatia, Ukraine, Greece, Poland, Italy, Armenia, and Serbia.⁷⁵ As a result, piracy statistics tend to be an inaccurate representation of piracy in the United States, an important point when considering piracy's relevance to United States legislation.

This evidence indicates that modern video game systems, although pirated more than in the past, are not within the legislative intent of the protection of the Computer Software Rental Amendments Act. Because video game consoles require extensive modifications for piracy, including using mod chips or modifying the console's firmware, modern video game console piracy is clearly distinguishable from personal computer and software piracy. Additionally, available piracy statistics are unreliable for first sale doctrine purposes because they do not represent an accurate depiction of piracy in the United States.

VII. FIRST SALE DOCTRINE CANNOT WORK FOR DIGITAL GOODS

Video game consoles may continue to fit the limited purpose exception given the fact that their main purpose is to run video games and that video game console piracy is distinguishable from software piracy. The first sale doctrine, however, cannot apply to the digital market. In 1997, Congressmen Dick Boucher and Tom Campbell attempted to "digitize" the first sale doctrine by allowing users to transfer title to their digital copies so long as

72. Josh Lewis, *Capcom: PS3 Has the Lowest Rate of Piracy on Any Platform*, PLAYSTATIONLIFESTYLE.NET (Sept. 30, 2011), <http://www.playstationlifestyle.net/2011/09/30/capcom-ps3-has-the-lowest-rate-of-piracy-on-any-platform>.

73. *Id.*

74. Woollacott, *supra* note 55.

75. *Id.*

where a digital book may be transferred a limited amount of times from one device to another, deleting the original file from the transferring user's storage media.⁸⁴ Presumably, Amazon would take a commission on each transfer as well.⁸⁵ Although Amazon's efforts may appear exciting for consumers' rights in an increasingly digital age, it is important to distinguish the patent-hopeful system from a legal system that allows users to trade digital goods free of restriction. Under Amazon's system, users are tied to the system itself, giving Amazon assurance that the user's original file is deleted at transfer.⁸⁶ Additionally, and most importantly, the system gives Amazon a means to cash in on the transfer directly. This system is clearly distinguishable from a company such as ReDigi, despite the similarities in their systems. Although ReDigi ensured that files were genuine by tying all songs to iTunes accounts, ReDigi circumvented iTunes in each sale. Allowing such a system is detrimental to public policy since used digital files are cheaper than their "new" counterparts, even though the two are identical files. Although companies like Amazon may succeed with a used digital media market, the success will be tied to a strict system rather than a legal system with an unrestricted digital resale market. For this reason, an amended "first sale" doctrine must protect publisher's rights by restricting the right of resale of digital goods to the publisher itself.

VIII. HOW TO AMEND THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT TO BALANCE CONSUMER AND PUBLISHER RIGHTS

In some ways, modern video game consoles differ vastly from their older counterparts that were protected under the first sale doctrine, illustrating the need to amend the limited purpose language. Modern consoles, such as the PlayStation 4, play Blu-Ray videos⁸⁷ and allow users to use the Internet, straight from the

TO%2Fsrchnum.htm&r=1&f=G&l=50&s1=8364595.PN.&OS=PN/8364595&RS=PN/8364595.

84. *Id.*

85. *Amazon Considering Sales of "Used" Kindle Books*, GEEKS ARE SEXY, <http://www.geekaresexy.net/2013/02/08/amazon-considering-sales-of-used-kindle-books> (last visited Sept. 1, 2014).

86. *Id.*

87. *PlayStation 4 FAQ*, PLAYSTATION, <http://us.playstation.com/ps4/features/ps4-faq> (last visited Jan. 21, 2015).

console.⁸⁸ Because of these extra features, video game consoles may not fit the limited purpose exception of the first sale doctrine as intended by the drafters of the Computer Software Rental Amendments Act.

In fact, one 2014 Business Intelligence report shows that video game consoles are the most popular streaming devices for televisions.⁸⁹ A 2013 Marketing Charts study shows that users dedicated fifty two percent of their time on the PlayStation 3 playing videos, listening to music, and using the internet, while using forty eight percent of their time playing video games on and offline.⁹⁰ Proponents of removing the limited purpose language may point to these studies to argue that video game consoles no longer fit the legislative intent of the limited purpose exemption.

The Business Intelligence report however, also shows that over half of U.S. households *already own* at least one video game console.⁹¹ This important statistic illustrates the real story. Video game consoles such as the Playstation 4⁹² and Xbox One⁹³ cost four times the amount of the most popular and expensive streaming devices on the market, including the Apple TV,⁹⁴ Amazon Fire TV,⁹⁵ and Roku 3.⁹⁶ Simply put, consumers do not purchase \$399 video game consoles primarily to stream videos on their TVs, but instead are utilizing the console's secondary features since they already own the devices.⁹⁷ The Marketing Charts study also concedes that Americans "still use their game

88. *Using the Browser*, PLAYSTATION, <http://manuals.playstation.net/document/en/ps4/browser/browse.html> (last visited Jan. 21, 2015).

89. Mark Hoelzel, *Video Game Consoles are Still the Most Popular Streaming Devices for TVs*, BUSINESS INSIDER (June 10, 2014, 5:50 PM), <http://www.businessinsider.com/video-game-consoles-are-still-the-most-popular-streaming-devices-for-tvs-2014-6>.

90. *Game Consoles Increasingly Being Used to Stream Video*, MARKETING CHARTS (Mar. 15, 2013), <http://www.marketingcharts.com/online/game-consoles-increasingly-being-used-to-stream-video-27813>.

91. *Id.*

92. *PlayStation 4 Systems*, PLAYSTATION, <http://www.playstation.com/en-us/explore/ps4/systems> (last visited Sept. 13, 2014).

93. *Xbox Consoles*, XBOX, <http://www.xbox.com/en-US/xbox-one/consoles?xr=shellnav> (last visited Sept. 13, 2014).

94. APPLE, <http://store.apple.com/us/buy-appletv/appletv> (last visited Sept. 13, 2014).

95. *Amazon Fire TV*, AMAZON, <http://www.amazon.com/Fire-TV-streaming-media-player/dp/B00CX5P8FC> (last visited Jan. 21, 2015).

96. *Roku 3*, ROKU, <https://www.roku.com/products/roku-3> (last visited Sept. 13, 2014).

97. See Hoelzel, *supra* note 89.

consoles mostly for playing video games.”⁹⁸ Although these extra features, such as streaming, distinguish modern video game consoles, the main purpose of purchasing a video game console over a more inexpensive streaming device remains clear: playing video games.⁹⁹

Ultimately, even though video game consoles may not fit the traditional definition of limited purpose machines in the sense that they have multiple functions, they still fit the legislative intent of the drafters of the Computer Software Rental Amendments Act because they are used primarily for video games. For this reason, legislators should amend the Computer Software Rental Amendments Act to include a predominant factor test to determine the main purpose of a video game console.

As discussed earlier however, the Computer Software Rental Amendments Act must also balance publishers’ rights in the digital age. The first sale doctrine aimed to allow consumers the ability to resell their *physical* products, not digital.¹⁰⁰ As a result, the exception afforded to video game consoles should clarify that the exception applies solely to *physical* copies.

Thus, this comment advocates that 17 U.S.C.A. § 109(B) (ii) be amended as follows:

(B) This subsection does not apply to—

... **(ii)** a *physical copy of a computer program* used in conjunction with a computer that is *primarily used by the consuming public* for playing video games.

Such an amendment reaffirms the first sale doctrine for physical goods by utilizing a predominate factor test, leaving no room for confusion or interpretation of the term limited purpose machine and its application to modern video game consoles. The test places modern video game consoles neatly into the exception, even when considering their extra benefits such as playing Blu-Ray movies, running Netflix, and using the Internet. Users may continue to install operating systems such as Linux onto their video game consoles without the fear of removing themselves from the limited purpose exception. Additionally, the amendment

98. MARKETING CHARTS, *supra* note 90.

99. *See id.*

100. Theodore Serra, Note, *Rebalancing at Resale: ReDigi, Royalties, and the Digital Secondary Market*, 93 B.U. L. REV. 1753, 1767, 1769 n. 88 (2013).

simultaneously balances the legitimate concerns of video game companies and developers by excluding the digital market from the limited purpose exception.

IX. CONCLUSION

Ultimately, video game companies and developers that condemn GameStop and the used video game industry can take control by continuing to push the industry towards a purely digital market. This transition, however, consists of multiple factors outside of the control of video game companies and developers. So long as Internet providers continue to throttle¹⁰¹ and cap video game users' bandwidth, for example, a purely digital market will never dominate the physical goods market due to slow speeds and limited access. Even executives at Microsoft concede that, although a purely digital market is inevitable, the unprecedented size of modern video games requires the use of physical discs for the foreseeable future.¹⁰²

Until that time comes, the first sale doctrine should continue to protect consumers' rights to resell their physical video games. Through the introduction of the Xbox One in May, Microsoft illustrated the mounting frustration video game companies have felt towards the used game industry. Microsoft attempted to redefine consumers' rights with the Xbox One, and they will not be the last company to do so. Until we reach a purely digital age, it is imperative to affirm the longstanding rights of consumers to resell the physical products they own.

101. "Throttling" is an intentional slowing of Internet service as users consume more data. *What is Bandwidth Throttling*, WISEGEEK, <http://www.wisegeek.com/what-is-bandwidth-throttling.htm> (last visited Sept. 1, 2014).

102. Makuch, *supra* note 43.