

Understanding ownership and property in the Digital Age  
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What does it mean to “own” something? A simple question (with a complicated answer, of course) that, astonishingly, goes unasked in a recent [article](#) in the Pennsylvania Law Review entitled, *What We Buy When We “Buy Now,”* by Aaron Perzanowski and Chris Hoofnagle (hereafter “P&H”). But how can we reasonably answer the question they pose without first trying to understand the nature of property interests?

P&H set forth a simplistic thesis for their piece: when an e-commerce site uses the term “buy” to indicate the purchase of digital media (instead of the term “license”), it *deceives* consumers. This is so, the authors assert, because the common usage of the term “buy” indicates that there will be some conveyance of property that necessarily includes absolute rights such as alienability, descendibility, and excludability, and digital content doesn’t generally come with these attributes. The authors seek to establish this deception through a poorly constructed survey regarding consumers’ understanding of the parameters of their property interests in digitally acquired copies. (The survey’s considerable limitations is a topic for another day....)

The issue is more than merely academic: [NTIA and the USPTO have just announced](#) that they will hold a public meeting

to discuss how best to communicate to consumers regarding license terms and restrictions in connection with online transactions involving copyrighted works... [as a precursor to] the creation of a multistakeholder process to establish best practices to improve consumers’ understanding of license terms and restrictions in connection with online transactions involving creative works.

Whatever the results of that process, it should not begin, or end, with P&H’s problematic approach.

Getting to their conclusion that platforms are engaged in deceptive practices requires two leaps of faith: First, that property interests are absolute and that any restraint on the use of “property” is inconsistent with the notion of ownership; and second, that consumers’ stated expectations (even assuming that they were measured correctly) alone determine the appropriate contours of legal (and economic) property interests. Both leaps are meritless.

## Property and ownership are not absolute concepts

P&H are in such a rush to condemn downstream restrictions on the alienability of digital copies that they fail to recognize that “property” and “ownership” are not absolute terms, and are capable of being properly understood only contextually. Our very notions of what objects may be *capable* of ownership change over time, along with the scope of authority over owned objects. For P&H, the fact that there are restrictions on the use of an object means that it is not properly “owned.” But that overlooks our everyday understanding of the nature of property.

Ownership is far more complex than P&H allow, and ownership limited by certain constraints is still ownership. As Armen Alchian and Harold Demsetz note in [The Property Right Paradigm](#) (1973):

In common speech, we frequently speak of someone owning this land, that house, or these bonds. This conversational style undoubtedly is economical from the viewpoint of quick communication, but it masks the variety and complexity of the ownership relationship. **What is owned are *rights to use resources, including one’s body and mind, and these rights are always circumscribed, often by the prohibition of certain actions.*** To “own land” usually means to have the right to till (or not to till) the soil, to mine the soil, to *offer* those rights for sale, etc., but not to have the right to throw soil at a passerby, to use it to change the course of a stream, or to *force* someone to buy it. What are owned are socially recognized rights of action. (Emphasis added).

Literally, everything we own comes with a range of limitations on our use rights. Literally. Everything. So starting from a position that limitations on use mean something is not, in fact, owned, is absurd.

Moreover, in defining what we buy when we buy digital goods by reference to analog goods, P&H are comparing apples and oranges, without acknowledging that *both* apples and oranges are *bought*.

There has been a fair amount of discussion about the nature of digital content transactions ([including by the USPTO and NTIA](#)), and whether they are analogous to traditional sales of objects or more properly characterized as licenses. But this is largely a distinction without a difference, and the nature of the transaction is unnecessary in understanding that P&H’s assertion of deception is unwarranted.

Quite simply, we are accustomed to *buying* licenses as well as products. Whenever we buy a ticket — *e.g.*, an airline ticket or a ticket to the movies — we are buying the right to *use* something or gain some temporary privilege. These transactions are governed by the terms of the license. But we certainly *buy* tickets, no? Alchian and Demsetz again:

The domain of demarcated uses of a resource can be partitioned among several people. More than one party can claim some ownership interest in the same resource. One party may own the right to till the land, while another, perhaps the state, may own an easement to traverse or otherwise use the land for specific purposes. ***It is not the resource itself which is owned; it is a bundle, or a portion, of rights to use a resource that is owned.*** In its original meaning, property referred solely to a right, title, or interest, and resources could not be identified as property any more than they could be identified as right, title, or interest. (Emphasis added).

P&H essentially assert that restrictions on the use of property are so inconsistent with the notion of property that it would be deceptive to describe the acquisition transaction as a purchase. But such a claim completely overlooks the fact that there are restrictions on any use of property in general, and on ownership of copies of copyright-protected materials in particular.

Take analog copies of copyright-protected works. While the lawful owner of a copy is able to lend that copy to a friend, sell it, or even use it as a hammer or paperweight, he or she can not offer it for rental (for certain kinds of works), cannot reproduce it, may not publicly perform or broadcast it, and may not use it to bludgeon a neighbor. In short, there are all kinds of restrictions on the use of said object — yet P&H have little problem with defining the relationship of person to object as “ownership.”

## **Consumers’ understanding of all the terms of exchange is a poor metric for determining the nature of property interests**

P&H make much of the assertion that most users don’t “know” the precise terms that govern the allocation of rights in digital copies; this is the source of the “deception” they assert. But there is a cost to marking out the precise terms of use with perfect specificity (no contract specifies *every* eventuality), a cost to knowing the terms perfectly, and a cost to caring about them.

When we buy digital goods, we probably care a great deal about a few terms. For a digital music file, for example, we care first and foremost about whether it will play on our device(s). Other terms are of diminishing importance. Users certainly care whether they can play a song when offline, for example, but whether their children will be able to play it after they die? Not so much. That eventuality may, in fact, be specified in the license, but the nature of this particular ownership relationship includes a degree of rational ignorance on the users’ part: The typical consumer simply doesn’t care. In other words, she is, in Nobel-winning economist Herbert Simon’s term, “[boundedly rational](#).” That isn’t deception; it’s a feature of life without which we would be overwhelmed by “information overload” and unable to operate. We have every incentive and ability to know the terms we care most about, and to ignore the ones about which we care little.

Relatedly, P&H also fail to understand the relationship between price and ownership. A digital song that is purchased from Amazon for \$.99 comes with a set of potentially valuable attributes. For example:

- It may be purchased on its own, without the other contents of an album;
- It never degrades in quality, and it's extremely difficult to misplace;
- It may be purchased from one's living room and be instantaneously available;
- It can be easily copied or transferred onto multiple devices; and
- It can be stored in Amazon's cloud without taking up any of the consumer's physical memory resources.

In many ways that matter to consumers, digital copies are superior to analog or physical ones. And yet, compared to physical media, on a per-song basis (assuming one could even purchase a physical copy of a single song without purchasing an entire album), \$.99 may represent a considerable discount. Moreover, in 1982 when CDs were first released, they cost an average of [\\$15](#). In 2017 dollars, that would be [\\$38](#). Yet today most digital album downloads can be found for \$10 or less.

Of course, songs purchased on CD or vinyl offer other benefits that a digital copy can't provide. But the main thing — the ability to listen to the music — is approximately equal, and yet the digital copy offers greater convenience at (often) lower price. It is impossible to conclude that a consumer is duped by such a purchase, even if it doesn't come with the ability to resell the song.

In fact, given the price-to-value ratio, it is perhaps reasonable to think that consumers know full well (or at least suspect) that there might be some corresponding limitations on use — the inability to resell, for example — that would explain the discount. For some people, those limitations might matter, and those people, presumably, figure out whether such limitations are present before buying a digital album or song. For everyone else, however, the ability to buy a digital song for \$.99 — including all of the benefits of digital ownership, but minus the ability to resell — is a good deal, just as it is worth it to a home buyer to purchase a house, regardless of whether it is subject to various easements.

## **Consumers are, in fact, familiar with “buying” property with all sorts of restrictions**

The inability to resell digital goods looms inordinately large for P&H: According to them, by virtue of the fact that digital copies may not be resold, “ownership” is no longer an appropriate characterization of the relationship between the consumer and her digital copy. P&H believe that digital copies of works are sufficiently similar to analog versions, that traditional doctrines of exhaustion (which would permit a lawful owner of a copy of a work to dispose of that copy as he or she deems appropriate) should apply equally to digital copies, and thus that the inability to alienate the copy as the consumer wants means that there is no ownership interest *per se*.

But, as discussed above, even ownership of a *physical* copy doesn't convey to the purchaser the right to make or allow *any* use of that copy. So why should we treat the ability to *alienate* a copy as the determining factor in whether it is appropriate to refer to the acquisition as a purchase? P&H arrive at this conclusion only through the illogical assertion that

Consumers operate in the marketplace based on their prior experience. We suggest that consumers' "default" behavior is based on the experiences of buying physical media, and the assumptions from that context have carried over into the digital domain.

P&H want us to believe that consumers can't distinguish between the physical and virtual worlds, and that their ability to use media doesn't differentiate between these realms. But consumers *do* understand (to the extent that they *care*) that they are buying a different product, with different attributes. Does anyone try to play a vinyl record on his or her phone? There are perceived advantages and disadvantages to different kinds of media purchases. The ability to resell is only one of these — and for many (most?) consumers not likely the most important.

And, furthermore, the notion that consumers better understood their rights — and the limitations on ownership — in the physical world and that they carried these well-informed expectations into the digital realm is fantasy. Are we to believe that the consumers of yore understood that when they bought a physical record they could sell it, but not rent it out? That if they played that record in a public place they would need to pay performance royalties to the songwriter and publisher? Not likely.

Simply put, there is a wide variety of goods and services that we clearly *buy*, but that have all kinds of attributes that do not fit P&H's crabbed definition of ownership. For example:

- We *buy* tickets to events and membership in clubs (which, depending upon club rules, may not be alienated, and which *always* lapse for non-payment).
- We *buy* houses notwithstanding the fact that in most cases all we own is the right to inhabit the premises for as long as we pay the bank (which actually retains more of the incidents of "ownership").
- In fact, we *buy* real property encumbered by a series of restrictive covenants: Depending upon where we live, we may not be able to build above a certain height, we may not paint the house certain colors, we may not be able to leave certain objects in the driveway, and we may not be able to resell without approval of a board.

We may or may not know (or care) about all of the restrictions on our use of such property. But surely we may accurately say that we *bought* the property and that we "own" it, nonetheless.

The reality is that we are comfortable with the notion of *buying* any number of limited

property interests — including the purchasing of a license — regardless of the contours of the purchase agreement. The fact that some ownership interests may properly be understood as licenses rather than as some form of exclusive and permanent dominion doesn't suggest that a consumer is not involved in a transaction properly characterized as a sale, or that a consumer is somehow deceived when the transaction is characterized as a sale — and P&H are surely aware of this.

## **Conclusion: The *real* issue for P&H is “digital first sale,” not deception**

At root, P&H are not truly concerned about consumer deception; they are concerned about what they view as unreasonable constraints on the “rights” of consumers imposed by copyright law in the digital realm. Resale looms so large in their analysis not because consumers care about it (or are deceived about it), but because the real object of their enmity is the lack of a “digital first sale doctrine” that exactly mirrors the law regarding physical goods.

But Congress has already determined that there are sufficient distinctions between ownership of digital copies and ownership of analog ones to justify treating them differently, notwithstanding ownership of the particular copy. And for good reason: Trade in “used” digital copies is *not* a secondary market. Such copies are identical to those traded in the primary market and would compete directly with “pristine” digital copies. It makes perfect sense to treat ownership differently in these cases — and *still* to say that both digital and analog copies are “bought” and “owned.”

P&H's deep-seated opposition to current law colors and infects their analysis — and, arguably, their failure to be upfront about it is the real deception. When one starts an analysis with an already-identified conclusion, the path from hypothesis to result is unlikely to withstand scrutiny, and that is certainly the case here.

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