Reconciling Personal and Intellectual Property in the Post-Copy Era

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When the Supreme Court decided Bobbs-Merrill v. Straus in 1908, the question of copy ownership was a simple one. The Court understood that a publisher’s attempt to leverage its intellectual property interests to restrain the resale of books did not undermine the personal property interests of book owners. A century later, the balance between those two interests is a source of deep uncertainty. According to copyright holders, you do not own the digital media you purchase online. According to the Ninth Circuit, you do not own the plastic disc containing your copy of AutoCAD. And according to the Librarian of Congress, you don't own your cell phone or gaming console. Both intangible copies and tangible chattels now appear to be subject to a new kind of property relation, one that was illegitimate until very recently.

Doctrinally, the question of copy ownership is important because it triggers exhaustion rules both at common law and under the Copyright Act. But more fundamentally, copy ownership mediates two competing interests—the personal property interests of consumers and the intellectual property interests of rights holders. Historically, the copy served as a useful token of ownership that legitimized a consumer’s otherwise infringing use of a work. But for a number of reasons, the copy no longer reliably serves this function.

The breakdown of copy ownership has its roots in disputes over computer software, where courts were more easily persuaded to consider consumer transactions characterized by one-time payments and perpetual possession as licenses. The circular logic of industry norms and consumer expectations might help explain this misstep. However, another explanation is the suspicion by courts that the copy is a less reliable signal of a consumer’s entitlement to exploit the underlying work. Software, unlike a book, is useless without the ability to reproduce it.

The software cases initiated a creeping erosion of copy ownership that reshaped how many courts think about the relationship between personal and intellectual property. Digital distribution and cloud-based storage render these concerns even more salient. A market defined by network access to remotely stored media challenges our traditional understanding of the copy. In a sense, this new market reality blurs the core distinction between the work and the copy.

If the copy is dead, must the notion of consumers’ personal property die with it? We argue that consumer ownership can and should remain a vital and coherent concept even in a world that has abandoned the traditional
copy. The copy, we argue, has been revealed as more metaphor than reality. But it is a metaphor that continues to serve a useful purpose in reconciling the competing interests of rights holders and consumers. Without some notion of copy ownership, copyright law risks further imbalance and subversion of its basic goals.

This Article will outline a path forward for copy ownership that preserves its longstanding benefits for consumers, the copyright system, and the economy at large. By recognizing the ongoing property interests of consumers in digital media, this approach will preserve flexibility in the marketplace by enabling business models premised on sales as well as those based on subscription and rental. Although licensed digital resale markets are likely to emerge in the near future, we will show why unregulated secondary markets remain preferable.