Intangible Digital Intellectual Property: A Transition at an Unbearable Cost

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I. INTRODUCTION AND COMMENT OVERVIEW

Every year, the latest and greatest digital devices impress consumers and the general public alike. Be it a new cell phone, a set-top television box that streams movies, or a new e-book reader, technologies are becoming more mainstream and more available to the public. As consumers adopt these new devices that enable content-targeted distribution en masse, content providers have a greater interest in developing content for these devices. While at first glance this appears to be beneficial to both parties, because consumers are able to purchase digital content and content providers can make money providing it, consumers are, often times unknowingly, getting the shorter end of the bargain. Intangible digital content, unlike its tangible analog and digital counterparts, typically comes with a host of exceptions, rules, and modifications to the rights that consumers are acclimated to receiving. As a result, serious legislative steps should be taken by Congress to ensure that consumers' interests are protected.

This Comment is divided into four Parts. First, the Comment will look at the current copyright laws that were originally written for analog content, including books, movies, and music; the first Part will also look

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at the modern legislative efforts regarding digital content that have already been made into law. Second, the Comment will address the reasons for the transition from both tangible analog and digital formats, such as DVDs or audio CDs, to intangible digital intellectual property (IDIP), such as iTunes MP3 files or Amazon Kindle e-books. Third, the Comment will look at the effects the transition to IDIP has on consumers in terms of pricing, distribution models, and intellectual property rights. Finally, the Comment will propose legislative suggestions that would address the effects on consumers of the transition to IDIP.

II. COPYRIGHT BACKGROUND AND HISTORY

In order to understand properly the ways that IDIP is redefining copyright law, it is important to have a basic understanding of the key doctrines that formed copyright law and shaped the rights that consumers are afforded through it. Copyright law covers nearly every type of consumable content available on the marketplace today: books, movies, magazines, newspapers, music, and more.

U.S. copyright law has its roots in the United States Constitution.[1] Article I, Section 8, Clause 8 of the Constitution delegates copyright powers to Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] In the most basic sense, copyrights can be identified as statutorily granted monopolies.[3] After a copyright has been granted, the government grants the holder an exclusive set of rights for a specific period of time.[4] These exclusive rights are outlined in 17 U.S.C. § 106; they include the "exclusive rights to do and to authorize" reproduction, distribution, preparation of derivative works, performance (depending upon the type of content), and display.[5] Like other forms of intellectual property, copyright is riddled with exceptions that have emerged from judicially engineered and statutorily created law.[6] Copyright law is concerned with maintaining the delicate balance between the rights of the copyright holder and the rights

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1. The concepts behind copyright law actually predate the creation of the United States and even the discovery of the North American continent. The earliest traces of copyright law can be seen emerging after the creation of the printing press. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 383 (4th ed. 2007).
2. U.S. CONST. art. I, § 8, cl. 8.
3. MERGES, MENELL & LEMLEY, *supra* note 1, at 384.
4. *Id.*
5. 17 U.S.C. § 106 (2006).
6. MERGES, MENELL & LEMLEY, *supra* note 1, at 384.

of the public.[7] One of a copyright's main limitations is that the work passes into the public domain after a specified period of time.[8] Other important limitations have been placed upon this monopoly, mostly with the purpose of ensuring that the balance does not tip too much in favor of the copyright holder.[9] These limitations are present throughout the course of the content's copyrighted period.[10]

Many of these exceptions grant rights to consumers of content, and they form a significant portion of the rights that individuals have come to expect when purchasing content, regardless of that consumer's knowledge of the legal existence of these rights. The first of these exceptions is fair use.[11] In the United States, the fair use doctrine was originally derived from both common law and case law.[12] Fair use was later codified into the Copyright Act of 1976.[13] The codification incorporated four main factors that had previously been set forth in *Folsom v. Marsh*.[14] These factors are:

> (1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[15]

Fair use acts as an affirmative defense to a violation of copyright law; therefore, it can only be used after a copyright holder has made a prima facie case against a purported copyright violator.[16] For a current example, suppose an iTunes user copies her music to her laptop to listen to songs at a party, and also assume that this procedure is prohibited by the iTunes licensing agreement. If one of the copyright holders chooses to sue her and establishes that she had in fact copied the music and violated one of the holder's exclusive rights, the iTunes user could then claim a fair use defense.[17] She would argue that it was not a commercial

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7. *Id.*
8. *Id.* at 474.
9. *Id.*
10. Obviously, these limitations disappear when the work enters the public domain. When this happens, the copyright holder is no longer granted any of the exclusive rights previously mentioned. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984).
11. MERGES, MENELL & LEMLEY, *supra* note 1, at 522.
12. *See generally* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).
13. *See* 17 U.S.C. § 107 (2006).
14. 9 F. Cas. at 342-49.
15. 17 U.S.C. § 107.
16. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (citing Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 561 (1985)).
17. *See id.*

use and that there was and is no effect upon the market, because she had previously purchased the music.[18] Although fair use is used as a legal defense, many consumers rely upon fair use as if it were an exception to the copyright holder's exclusive rights. For example, teachers display movie clips to classes, moms record their children dancing to Prince songs,[19] and deejays remix the hottest songs of the year into one track.[20] Even though fair use is limited to a defense, it is obviously an important consideration that consumers evaluate when using traditional content. Thus, this would inform consumers regarding their rights with IDIP.

A second exception to a copyright holder's exclusive rights is the first sale doctrine.[21] The first sale doctrine states that "the owner of a particular copy . . . lawfully made . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."[22] Essentially, the first sale doctrine allows a consumer to treat a legally obtained work as if it were her property; this includes sale, rental, or loan. The first sale doctrine serves as the bedrock for a variety of other industries, including movie rental companies and used record stores. Furthermore, the first sale doctrine is the foundation for the public library system. Without it, copyright holders could entirely restrict libraries or make their operation prohibitively expensive. While the first sale doctrine is more limited for commercial uses, it is very expansive for consumers.[23] Because of this, the first sale doctrine is quite possibly the strongest right that consumers have when purchasing content. The average consumer is more likely to want to listen to their music in multiple locations than to want to remix their music.

Just as there are limitations placed on a copyright holder's rights, there are also limitations placed upon content consumers, aimed specifically at digital content. In 1998, Congress enacted the Digital Millennium Copyright Act, or DMCA.[24] The DMCA was passed in the wake of an explosion of massive amounts of Internet piracy of copyrighted music on networks such as Napster.[25] The DMCA brought a host of changes to the copyright law,[26] most notably restrictions relating

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18. 17 U.S.C. § 107.
19. Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1151-52 (N.D. Cal. 2008).
20. DJ EARWORM—EARWORM MASHUPS, http://djearworm.com (last visited Oct. 21, 2010).
21. 17 U.S.C. § 109(a).
22. *Id.*
23. For example, 17 U.S.C. § 109(b) prohibits the rental of records.
24. *Id.* § 1201.
25. A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).
26. The DMCA also includes safe harbors for Internet Service Providers whose networks are used for illegally distributing pirated content. 17 U.S.C. § 1201.

to the anticircumvention of digital rights management, or DRM, technologies.[27]

The DMCA generally prohibits two things. First, the DMCA made it illegal to circumvent DRM, both for fair use purposes and for purposes of exercising rights granted by the first sale doctrine.[28] Second, the DMCA made it illegal to distribute both for-profit and not-for-profit tools that aid in DRM circumvention.[29]

This author would argue that the DMCA effectively invalidated the fair use and first sale doctrines, and because those doctrines provide the most protection to consumers in noncommercial contexts, the DMCA is a large road block to consumers' rights. Even if a consumer has legally purchased content, she is no longer afforded the ability to make fair use of the content nor to resell it in a legal manner, as normally permitted with tangible analog or digital property. In essence, the DMCA continues the tradition of treating IDIP differently than tangible analog and digital formats.[30] While the DMCA did introduce exceptions to the anticircumvention prohibition, these exceptions are essentially useless to the vast majority of consumers who legally purchase content.[31]

III. INTANGIBLE DIGITAL INTELLECTUAL PROPERTY: REASONS FOR THE TRANSITION

There are a host of reasons for the transition from analog and digital tangible intellectual property to IDIP; this transition can likely be seen as the final step in the digital revolution. While many of the factors supporting this transition come from independent sources, the conditions have often been synergistic, creating the perfect nexus for the transition to IDIP.

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27. DRM technologies allow content providers to attach restrictions on digital content, such as where the content may be viewed, how it may be viewed, the number of times it may be viewed, by whom it may be viewed, and how long it may be viewed. The restrictions that can be placed upon content are limited only by the imagination of the copyright holder and the skills of the DRM programmer.

28. 17 U.S.C. § 1201(a).

29. *Id.* § 1202.

30. *See generally* I. Trotter Hardy, *Not So Different: Tangible, Intangible, Digital, and Analog Works and Their Comparison for Copyright Purposes*, 26 U. DAYTON L. REV. 211, 244 (2001) (arguing that there is no legitimate distinction between digital and tangible formats).

31. *See* 17 U.S.C. § 1201(d)-(e), (h)-(i). The exceptions are targeted towards specific users and specific uses. On the whole, they do not assist the general consumer. Furthermore, they are mired in complications; they must be submitted to the Library of Congress and renewed every three years. While three years in the typical legislative cycle does not seem like a long time, three years in a technological field that changes rapidly is a relatively long period of time.

It could be argued that the biggest force behind the transition to IDIP is consumers' desire for digital content. This is supported by the MP3 revolution which occurred, in part, with the advent of Napster. When Napster was originally created, it allowed individuals to (illegally) share music online.[32] Consumers flocked to the service, which, at its peak had over twenty-six million online users.[33] This demand for easy, albeit free and illegal, access to music was unprecedented. Napster was eventually shut down in 2001 due to legal issues,[34] but users simply hopped from one P2P (Peer-to-Peer) service to the next, using each service until it too was shut down.[35] It took the music industry almost two years to respond by providing users with a legal alternative: the iTunes Music Store.[36] Launched in 2003, the iTunes store provided a digital music source that was as easy to use as the P2P services,[37] but entirely legal. On February 24, 2010, the service sold its ten billionth song and has expanded to other content, such as movies, music videos, and audiobooks.[38] The success of the iTunes store demonstrates the huge demand for legally purchased, intangible media. The demand for high quality, legal content can also be seen with the digital television (DTV) transition. Although the transition suffered several hiccups,[39] consumers who have adopted the new digital standard have seen the benefits, including better picture and sound.[40]

Another force contributing to the IDIP transition is the increased availability of broadband bandwidth.[41] It is gaining popularity because it

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32. A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

33. *Global Napster Usage Plummets, But New File-Sharing Alternatives Gaining Ground, Reports Jupiter Media Matrix*, ALLBUSINESS (July 23, 2001), http://www.allbusiness.com/technology/technology-services/796121-1.html.

34. *Napster*, 239 F.3d at 1011.

35. *Global Napster Usage Plummets, But New File-Sharing Alternatives Gaining Ground, Reports Jupiter Media Matrix*, *supra* note 33.

36. *Apple Launches the iTunes Music Store*, APPLE (Apr. 28, 2003), http://www.apple.com/pr/library/2003/apr/28musicstore.html.

37. *Id.*

38. Philip Elmor-DeWitt, *Apple iTunes: 10 Billion Songs Later*, CNNMONEY.COM, Feb. 24, 2010, http://tech.fortune.cnn.com/2010/02/24/apple-itunes-10-billion-songs-later/.

39. There were delays to the DTV transition that required postponement several times. John Eggerton, *Obama Signs DTV-Delay Bill*, BROAD. & CABLE (Feb. 11, 2009), http://www.broadcastingcable.com/article/174041-Obama_Signs_DTV_Delay_Bill.php.

40. Additionally, the transition cleared up spectrum space for additional broadcasts; the FCC is currently trying to market this spectrum space for new services and devices that will ultimately provide increased bandwidth to consumers. *The Digital TV Transition: What Is DTV*, DTV.GOV, http://www.dtv.gov/whatisdtv.html (last visited Oct. 21, 2010).

41. Broadband Internet access is generally defined as Internet access that has a speed (or bandwidth) faster than 768 kbps. *Statement of Chairman Kevin J. Martin*, FCC (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280909A2.doc.

is fast, nearly ubiquitous, and cheap.[42] While tangible content requires a wide array of physical material to produce and distribute, IDIP requires only two things: space to store the data and a way to transport it.

Lack of bandwidth, on the other hand, can be a constraining factor. In order to transmit content in a reasonable period of time, a considerable amount of bandwidth must be available; if it takes a significant period of time to transfer the content, IDIP loses its ease of access advantage. For example, a single song averaging four megabytes takes approximately nine and a half minutes to transfer over a standard (56.6 kbps) modem connection; the same file over an average cable modem connection takes only twenty-three seconds.[43] For a 700 megabyte movie, the respective times are almost eighteen hours compared to forty-five minutes.[44]

As the quality of a content file increases, so does the size. Therefore, it is essential that fast bandwidth is available to consumers regardless of their location, and this has finally come to fruition. Approximately sixty percent of U.S. households have broadband Internet connections; this percentage increases as households are more affluent and, thus, more financially able to consume content.[45] Not only is fixed bandwidth available in homes, offices, and schools, but wireless bandwidth is also increasing in proliferation. This allows users to browse the Internet, communicate, and purchase content practically anywhere. Almost half (forty-six percent) of U.S. adults own laptops, and over a quarter of those (twenty-eight percent) use wireless broadband technologies to access the Internet.[46]

These numbers underrepresent the true availability of wireless broadband access, and thus wireless content distribution, for three reasons. First, wireless broadband is in its infancy; just last year, Clearwire launched the first 4G network, known as WiMax, that offers connection speeds that rival those of traditional home broadband

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42. AT&T offers basic DSL (which offers basic broadband speeds) for approximately $15-20 per month. *AT&T DSL High Speed Internet*, AT&T, http://www.att.com/dsl/ (last visited Oct. 21, 2010).

43. *See* Jerry Kuzminsky, *Calculate Optimum Time To Transfer Files Depending on Connection*, EDUC. CTR. ON COMPUTATIONAL SCI. & ENG'G, http://www.edcenter.sdsu.edu/repository/calc_filetranstime.html (last visited Oct. 21, 2010).

44. *See id.*

45. Pew Res. Ctr., *Internet User Profiles Reloaded*, PEW INTERNET & AM. LIFE PROJECT (Jan. 5, 2010), http://pewresearch.org/pubs/1454/demographic-profiles-internet-broadband-cell-phone-wireless-users.

46. *Id.*

options.[47] Second, the data does not account for smartphone users, who can connect and purchase content on their phones over a wireless broadband connection that may be just as fast as traditional broadband connections. Third, many new devices are incorporating built-in wireless chipsets that allow the devices to access the Internet and purchase content independently of a computer or hardwired Internet connection; these include the Amazon Kindle[48] and the Apple iPad.[49] Given the low cost of wireless chipsets[50] and the recent launch of broadband wireless networks,[51] this category of self-connecting content delivery devices is sure to expand.

Broadband availability is not the only technological advancement that has contributed to the IDIP transition. New storage technology has driven down the cost of data storage while increasing the availability of even higher capacity storage options.[52] Some of these available options allow for the storage of thousands of movies at resolutions near or even exceeding DVD quality.[53] Screen technologies have also vastly improved; this includes the widespread adoption of high-quality LCD screens,[54] new multitouch technologies that have redefined user interfaces,[55] and e-ink displays that render text as if it were actually printed, thereby increasing readability.[56]

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47. Clearwire has speeds up to 6.0 mbps or 10.0 mbps. *What Is Clear*, CLEAR, http://www.clear.com/discover (last visited Oct. 21, 2010). Basic broadband has speeds between 768kbps and 1.5 mbps. *Statement of Chairman Kevin J. Martin*, *supra* note 41.

48. Options for the Amazon Kindle include a built-in 3G modem that operates without service fees. *Kindle Wireless Reading Device*, AMAZON, http://www.amazon.com/kindle (last visited Oct. 21, 2010).

49. The Apple iPad has an optional 3G modem that runs on the AT&T network with a monthly service fee. *iPad with Wi-Fi + 3G*, APPLE, http://www.apple.com/ipad/3g/ (last visited Oct. 21, 2010).

50. A 3G wireless chipset only costs $24.50 to add to a device such as the Apple iPad. Press Release, Andrew Rassweiler, Mid-Range iPad To Generate Maximum Profits for Apple, iSuppli Estimates, ISUPPLI (Feb. 10, 2010), http://www.isuppli.com/News/Pages/Mid-RangeiPad toGenerateMaximumProfitsforApple,iSuppliEstimates.aspx.

51. *What Is Clear?*, *supra* note 47.

52. *See Evolution to the SATA 6GB/s Storage Interface*, SEAGATE, http://www.seagate.com/docs/pdf/evolution_to_sata_6gb_storage.pdf (last visited Oct. 21, 2010).

53. *Id.*

54. *See* Sweta Dash, *LCD Panel Markets Bounce Back in Q3, but Q4 Outlook Is Uncertain*, ISUPPLI, http://www.isuppli.com:80/Pages/LCD-Panel-Markets-Bounce-Back-in-Q3-but-Q4-Outlook-Is-Uncertain.aspx (last visited Oct. 21, 2010).

55. The widespread adoption of multitouch screen systems can be seen with the iPod touch, iPhone, and iPad, which use multitouch screens that recognize inputs from multiple digits, greatly increasing the responsiveness and capabilities of the operating system. *iPad with Wi-Fi + 3G*, *supra* note 49.

56. This technology is found on e-book readers, such as the Amazon Kindle. *Kindle Wireless Reading Device*, *supra* note 48.

IV. INTANGIBLE DIGITAL INTELLECTUAL PROPERTY: EFFECTS OF THE TRANSITION

While the transition to IDIP is still ongoing, there are two poignant examples that show the legal problems that now face consumers as a result of intangible content being treated differently from tangible analog and digital content. Both of these examples relate to e-books. Because the e-book market is relatively new in comparison to music and movie distribution, it not only serves as a test bed for legal issues, but also as a predictor for potential consumer rights issues that may be forthcoming, even with other forms of IDIP.

The first example specifically addresses the rights of consumers who purchase e-books from the Amazon Kindle store. Although settled out of court, *Gawronski v. Amazon.com, Inc.*, was a case that brought to light major consumer rights issues regarding the first-sale doctrine.[57] Justin Gawronski purchased an e-book copy of George Orwell's *1984* from the Amazon Kindle store for academic purposes.[58] In addition to reading the book, he took notes on the Kindle device itself,[59] a feature that is touted in the Kindle's marketing.[60] Amazon then removed that specific edition of *1984* from the Kindle store and also remotely deleted all copies that users had purchased from the store.[61] This subsequently rendered useless all the notes that Justin had taken, as the book was no longer available on his Kindle, even though he had legally purchased it.[62] Amazon justified this removal through the contract that governed the purchase and use of books on the Kindle.[63] Although this was allowed by the Kindle contract, this action by Amazon appears to be a clear violation of the first sale doctrine.

The situation is analogous to Borders removing a book from its shelves and then proceeding to track down every person who had purchased the book and taking it from the consumer. This would cause an outrage; consumers are used to rights afforded by the first sale doctrine. Just because Gawronski purchased an e-book in lieu of a physical copy does not, and should not, permit Amazon to take that course of action, regardless of the Kindle contract. It is one thing to

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57. Complaint ¶ 1, Gawronski v. Amazon.com, Inc., No. 09CV01084, 2009 WL 2364172 (W.D. Wash. 2009).

58. *Id.* ¶ 25.

59. *Id.* ¶ 28.

60. In addition to this advertising, Amazon also sells a larger model, the Kindle DX, that is marketed directly towards students. *Kindle Wireless Reading Device*, *supra* note 48.

61. *Gawronski*, 2009 WL 2364172, ¶ 16.

62. *Id.* ¶ 26.

63. *See id.* ¶ 15. The agreement states that the "sale" of e-books is a license.

remove a book from digital shelves and wholly another to remove the books from users' devices, even if they are reimbursed. The copy a consumer has purchased is now hers; she is free to read it, lend it, or even burn it if she so chooses.

The second example is the pricing wars that have recently erupted after the release of the Apple iPad, which Apple hopes to be a competitor to the Amazon Kindle.[64] In a market for normal goods, the introduction of a new product typically results in prices dropping as a result of the increased competition. This, however, has not been the case with the introduction of the Apple iPad.[65] Although the Kindle and iPad are not necessarily direct competitors in terms of comparable features, they are perhaps the closest on the market. They both offer reading capabilities tied to a content marketplace.[66] With the introduction of the iPad, several publishers that sell content on the Kindle have requested (and ultimately obtained) price increases.[67] While this may be more profitable, consumers are now going to pay higher prices for the same content despite increased competition. Additionally, publishing a book in an intangible, digital format costs much less than the traditional distribution method.[68]

Not only has the law failed to ensure consumers' rights, the market has failed to provide consumers with correlative rights when purchasing IDIP as they receive when purchasing nondigital works.[69] There are two primary reasons for this.

First, the market failure appears to be a result of deliberate actions on the part of content providers. Content providers seem to be purposefully using the digital transition as a means of restricting previously established fair use principles. By setting precedent, consumers may simply expect fewer rights when dealing with IDIP as opposed to traditional content. Furthermore, content providers may be making a tactical move, deciding that it is best to limit consumers' digital rights

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64. *iPad with Wi-Fi + 3G*, *supra* note 49.

65. Slash Lane, *Apple iPad Deal Pushes Another Publisher To Renegotiate with Amazon*, APPLEINSIDER (Feb. 3, 2010), http://www.appleinsider.com/articles/10/02/03/apple_ipad_deal_pushes_another_publisher_to_renegotiate_with_amazon.html.

66. *See Kindle Wireless Reading Device*, *supra* note 48; *iPad with Wi-Fi + 3G*, *supra* note 49.

67. *See* Lane, *supra* note 65.

68. Motoko Rich, *Math of Publishing Meets the E-Book*, N.Y. TIMES, Feb. 28, 2010, http://www.nytimes.com/2010/03/01/business/media/01ebooks.html?emc=eta1.

69. To recap, content providers have historically chosen, and continue to choose, courses of action that are contrary to prevailing market notions. For example, content providers originally failed to provide digital content even though consumers demanded it so much that they resorted to piracy, such as with Napster. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

now so that when (and if) litigation or legislation ensues, they will be seen as relinquishing a great deal in the bargaining process. In the end, this bargaining process could still result in fewer consumer rights compared to analog content, but more "perceived" rights as compared to the original rights given to consumers.

The second reason why the market has not afforded consumers these rights is due to the nature of the purchase itself. First, consumers typically have restricted options for purchasing IDIP. These restrictions apply to both the marketplaces that are available for purchasing content and the devices that are available for consuming this content. For example, for years after the success of the iTunes store, there were very few strong competitors to Apple; if a consumer wanted to purchase music legally on the Internet, often it was iTunes or nothing. Consumers are additionally restricted to a certain number of devices that can be used for consuming purchased content. For several years after the creation of the iTunes store, music could only be played on Apple's own devices; the music could not be transferred to other third-party music players because the content was locked by DRM. While this is no longer the case for the iTunes store, e-books currently purchased from Amazon, for example, are only readable on Amazon-approved devices.[70]

IPID content encourages content ecosystems such as the Amazon Kindle bookstore or the iTunes store due to the nature of the content itself. Unlike a book that comes ready to read, digital content is not inherently consumable; it needs a supporting device to render it usable. Once again, this serves to limit consumer choices, thus putting them at a disadvantage when dealing with content providers. While there are devices that exist independently of a marketplace-device ecosystem, consumers then have the burden of obtaining content. For example, Sony makes a wide variety of e-book readers similar to the Amazon Kindle.[71] However, the consumer must first choose an e-book provider, download the files, and then transfer them to the reader. While this may be simple for the technically apt, the experience could be frustrating or confusing to other consumers. This process would be akin to a consumer purchasing paper, arranging with a distributor or author for a manuscript,

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70. Amazon has slowly been opening up this list of approved devices. Upon the original launch of the Kindle, Amazon e-books were only readable on a Kindle. Now, Amazon supports more devices such as Blackberry smartphones. *See Kindle Wireless Reading Device*, *supra* note 48. Consumers, however, are nonetheless reliant on Amazon to approve the devices; this is akin to Borders' or Barnes & Noble's stipulating a list of places where your purchased books may be read.

71. *All Reader Digital Books*, SONY, http://www.sonystyle.com/reader (last visited Oct. 21, 2010).

bringing it to a printer to have the pages printed with the text of a book, and then having it bound. It is inefficient for consumers to purchase analog content in this manner, which is why transactions like this do not happen. In the digital world, however, consumers are essentially given a nonchoice between a myriad of confusing steps to obtain content or purchasing content in an ecosystem that subsequently reduces their rights. As such, consumers are put at a disadvantage in the purchasing process.

V. INTANGIBLE DIGITAL INTELLECTUAL PROPERTY: THE NEXT STEP

Because of the legal and market failures, Congress should pass legislation that gives IDIP consumers specific rights and abilities for IDIP content. This will help ensure that consumer's rights are not eviscerated as a result of the transition to IDIP.

First, legislation should guarantee consumers a set of standard rights when purchasing IDIP, regardless of the source of the content. These rights should not be substantively different from those that consumers already receive when purchasing tangible analog and digital content; they should be the same because there is no material difference between intangible and tangible intellectual property.[72]

These rights should include the ability to rent, sell, or otherwise legally transfer digital content in the same manner that is allowed with tangible content. The mere fact that content is presented on a screen in lieu of a physical form should not preclude consumers from exercising rights to which they have become accustomed, and which they expect and deserve. These rights should also guarantee fair use of digital content; this would require a repeal of the DMCA[73] and a bar on the use

72. While there are differences between analog intellectual property and digital intellectual property, there is little or no difference to a consumer who has legally acquired the content. To the end consumer, a book is a book, a song is a song, and a movie is a movie. Content providers are generally seen as promoting differences between analog and digital content because digital content is much easier to distribute illegally (compare, for example, the difference required in time and resources to distribute unauthorized copies of a hardcover book versus a digital e-book that is a small, e-mailable file). For an extended discussion of this topic, see Hardy, *supra* note 30.

73. The DMCA forbids circumvention of DRM; if DRM were no longer legally usable to protect digital content, the law would be rendered moot. If legislative efforts are ultimately not able to bar the use of DRM completely, then the DRM component of the DMCA should be repealed. This would allow the sale and distribution of circumvention tools specifically for fair use. This might even strike a proper balance between protecting content providers from piracy (making it more difficult for the "casual" wrongdoer to illegally distribute content) and not restricting consumer's right to fair use.

of DRM.[74] Furthermore, these rights should be standardized across all content providers.

Currently, the rights of content consumers are not based upon standard copyright law but are instead based upon contractual agreements between the content provider and the consumer. For example, a user purchasing a book from the Amazon Kindle marketplace is not permitted, at a technical level, to loan the book to other individuals, unless the Kindle itself is loaned along with all of the consumer's other digital content.[75] However, the Barnes & Noble Nook, a Kindle competitor, allows users to loan out purchased eBooks to friends.[76] This disparity is not present with tangible content and if it were, consumers would rightly find it incredibly silly. Imagine, for example, that a consumer is not able to lend her copy of a recently purchased best seller to her friend simply because she purchased it from Borders as opposed to Barnes & Noble.

In order to implement the previous suggestions properly, legislation should also focus on either standardization of file formats or device interoperability. Currently, consumer's rights are impacted due to the lack of device and/or file interoperability. For example, if a consumer purchases a series of books for the Amazon Kindle and later decides that she prefers Sony e-book readers, the consumer is unable to transfer the books to her new reader; Amazon has locked her content. Thus, while the consumer has, in fact, purchased the books, she is not truly free to do what she wants with them. This would be akin to Borders prescribing that books purchased from them could only be read in consumer's homes and not on a train or in a car. Once again, this problem is unique to digital content because the content is not consumable in and of itself. Consumers' rights generally differ not only as a result of contracting with different content providers, but also by the very nature of differing file formats. By legally defining a single standard, this would eliminate one source of differing consumer rights. Format standardization would also make it easier for companies to comply with standardized rights legislation.

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74. This ban on the use of DRM would not apply to time-restricted DRM. The use of time-restricted DRM, in which content would be unviewable after a certain period of time, would be required to sustain IDIP rental services, from both libraries and commercial rental services.

75. *Kindle Wireless Reading Device*, *supra* note 48. Imagine the analogous situation in terms of traditional content; in order to loan out one book, a consumer would have to loan out all of their books to a single person at once.

76. *Nook*, BARNES & NOBLE, http://www.barnesandnoble.com/nook/ (last visited Oct. 11, 2010).

This process of format standardization would be no different than government-mandated standardized formatting of television broadcasts or cellular telephone networks.[77] Nor would this format standardization be logistically different from self-imposed regulation that currently governs computer manufacturers, such as IEEE standards that regulate protocols such as USB or Ethernet.[78] Both companies and consumers have reaped the benefits of standardization in other industries; therefore, it is unlikely that standardization in the emerging digital content industry will present problems that have not been previously addressed in other industries.[79] While this Comment proposes that the government mandate standardization, this standardization does not have to be carried out by the government itself (similarly to FCC regulation). Instead, the mandate could simply state that private industry must standardize through a private agency, such as the IEEE.

Additionally, a solution like this is not entirely out of the realm of current technology; just over a year ago, Walt Disney Co. announced the creation of a new rights-sharing platform called Keychest.[80] The point of Disney's Keychest is to provide a central link between different movie purchasing platforms; if a consumer purchases a movie from the iTunes store, a record of the purchase would be subsequently transferred to the central Keychest database.[81] If the consumer then attempts to watch it on another device, the second content provider for the device would then access the Keychest database, query whether the consumer had purchased that movie on another device, and, if so, allow the consumer to redownload or rewatch the movie on the second device for free.[82] This system would not eliminate DRM, but would instead simply act as a liaison between different content providers with the purpose of allowing consumers to view content on any device without repurchasing the same

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77. For more information on government standardization, see FCC, http://www.fcc.gov (last visited Oct. 15, 2010).

78. *About IEEE*, IEEE, http://www.ieee.org/about/index.html (last visited Oct. 21, 2010).

79. Imagine, for example, that every manufacturer of computers had different ports in lieu of an universal standard, such as USB. This would create a burden on stores, distributors, and end consumers; thus, these entities demand standardized ports. Because there is a large market for computers and competition between many manufacturers, those that do not supply normal standardized ports will likely lose business through lost sales. In the emerging digital content market, however, consumers do not have great choice when it comes to devices and content marketplaces. As such, they have less bargaining power and standards have not yet been achieved.

80. Ethan Smith, *Disney Touts a Way To Ditch the DVD*, WALL ST. J., Oct. 21, 2009, http://online.wsj.com/article/SB10001424052748703816204574485650026945222.html.

81. *Id.*

82. *Id.*

content.[83] Assuming mass adoption,[84] this system would provide consumers with more rights than they are currently afforded, namely the ability to view purchased content on many different devices without repurchasing it.

While the Keychest solution does sound enticing, it still relies on separate DRM and will be useless without mass adoption. Because of this, it is best that the legislature still prohibit the use of DRM and require standardization. This would eliminate the need for a Keychest-like system, and it would allow consumers, after purchasing content, to determine which of their devices to put content on, regardless of whether a third-party system is in place. While this sounds like a great deal of control in comparison to the Keychest system, it does not afford consumers any more control than they receive with tangible digital and analog content.

The final step that the legislature should take is implementing laws that specifically ensure that libraries are not left behind during the transition to IDIP. While it is highly unlikely that content publishers will completely stop distributing content in tangible formats, it is important that the legislature take steps to ensure that digital content is easily accessible to libraries, that the transition to IDIP will not affect a library's distribution model, and that libraries enjoy the benefits of IDIP. Currently, IDIP content delivery would not work well with a library's distribution model; content delivery is focused on, and typically locked to, a specific device or person. As such, the implementation of the previously mentioned changes to the law, particularly the elimination of DRM and the utilization of standardized formats, would generally negate this problem. Alternatively, because digital copies could be loaned out an infinite number of times due to the fact that there are no physical barriers to doing so, content providers could be statutorily allowed to employ less intrusive DRM to prevent files from being used after a certain period of time. This exception to the bar on the use of DRM would pertain specifically to libraries but could also be adapted for other rental type services, such as Netflix or iTunes.

VI. CONCLUSION

Copyright law plays an important role in the day-to-day events of nearly every individual, whether it is listening to music on the way to

83. *Id.*

84. This is a critical component of the Keychest architecture. Without it, consumers would not benefit fully; for example, where portable devices support Keychest but set-top television boxes do not.

work or at the gym, or reading a book or a newspaper in the evening. Increasingly, consumers are utilizing copyrighted material that is not only digital, but also completely intangible. Although consumers are reaping benefits from this transition through ease of use and portability, they are also losing rights and abilities that they once had with tangible digital and analog content. As such, it is of grave importance that Congress acts to ensure that consumers are granted correlative rights that they have come to expect with copyrighted works.