

Reconciling Personal and Intellectual Property in the Post-Copy Era

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Two fundamental concepts in intellectual property law are in tension—copyrights and copies. These concepts represent and delineate two distinct sets of interests at stake in copyright law. Ownership of the copyright confers the rights holder exclusivity over an intangible creative work; ownership of the copy secures domain over the use and alienation of a concrete instantiation of the work, even in ways that would otherwise violate the exclusive rights of the copyright holder. For the better part of the last century, copyright law has mediated this tension through exhaustion, the principle that once a rights holder transfers a copy of a work to a new owner, its rights against that owner are diminished. Rather than an idiosyncratic carveout or exception, exhaustion is an inherent part of copyright law's balance between the rights of creators and the rights of the public. It is a fundamental component of the intellectual property system that preserves the value proposition that encourages consumer participation in lawful markets for copyrighted works.

But two developments threaten to curtail exhaustion and undermine consumer property rights. First, content owners, particularly in the software industry, have endeavored to eliminate the personal property interests of consumers by redefining the notion of ownership, characterizing their transactions with consumers as licenses rather than sales. Second, the familiar notion of the copy is rapidly disappearing from copyright markets. Once characterized by the distribution of tangible products, these markets are now defined by exchanges of networked information. In a marketplace that deemphasizes copies and undermines ownership, the future of consumer property interests looks bleak.

The equilibrium between personal and intellectual property that exhaustion enabled depends on doctrinal assumptions about the copyright marketplace that are quickly becoming outdated. One response to these developments is to concede that both exhaustion and consumer property rights are a thing of the past. But a copyright system governed solely the terms dictated by rights holders tips the scales too far in their favor. Rather than abandoning the counterweight of consumer property rights, we argue it must be preserved, but in a manner that recognizes the differences between digital and analog distribution. By examining the basic functions of copy ownership, this Article will attempt to construct a notion of consumer property rights in digital media that acknowledges the shift away from tangible artifacts while preserving exhaustion's central role in the intellectual property system.