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## **A COMPARATIVE APPROACH TO THE LAW AND ECONOMICS OF SECONDARY MARKETS FOR DIGITAL GOODS**

While there are large markets for second hand cars, books and clothing, such markets hardly exist for digital goods. Why? Do the economics of secondary markets not transfer to the digital world? Are digital goods less suitable for resale? Is there no supply or no demand? Does the digital world bear specific problems requiring more legal protection for rightsholders? ...

Many of these posed questions have been asked before and numerous diverging answers have been rendered depending on the background – rightsholder vs. consumer – of the person giving the responses. However, the discussion has just recently gained momentum again as courts in Europe and the USA have rendered decisions greatly affecting the legal basis for the resale of digital goods. While the European Court of Justice (ECJ) has allowed the resale of used software in July 2012 in its *UsedSoft* judgment, the US District Court for the Southern District of New York prohibited the resale of MP3 files by *Redigi* in March 2013. Of course, both decisions are based on different legal statutes in different jurisdictions. Diverging judgments are, therefore, no surprise. However, the underlying economic theories should be more or less the same in both jurisdictions. Furthermore, considering how easily digital files can move from one jurisdiction to another within seconds and how large the market share for digital goods has become in recent years, such legal differences are creating large-scale problems and legal uncertainty. Therefore, in the long run, the judicial systems on both sides of the Atlantic might need to come to a common solution that best reflects the underlying economic theories and issues.

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The article, therefore, reviews the legal frameworks for the resale of digital goods in Europe and the US in light of the underlying economic theories and as affected by the recent court decisions. Building on these findings and using a comparative methodology, an abstract legal solution to the resale dilemma for digital goods will be suggested. To achieve this goal, the following approach is used:

Firstly, the existing literature on the economics of secondary markets for digital goods (with a focus on software and music) is reviewed. This analysis is necessary to truly appreciate the problems at hand and to ensure that the suggested solution reflects applicable economic theories. Furthermore, a review of the legal frameworks in the US and the European Union is also being conducted.

Secondly, the aforementioned court decisions are reviewed in light of the findings from the first section. This section will show, inter alia, that the ECJ has been willing to bend the existing legal statutes rather creatively to come to a solution that allows an aftermarket for software products.

Lastly, the first and second sections are combined to suggest a potential solution for the digital resale dilemma. Considering that the jurisdictions on both sides of the Atlantic have used different arguments, it will be tested how these arguments would stand an analysis in the other legal environment. While using arguments from both jurisdictions and building on the underlying economic theories, the suggested solution will be abstract from both jurisdictions. This abstraction ensures an application of the economic theories, the appreciation of the technological issues and the adherence to general legal understandings. This section will also take into consideration recent technological advancements and methods used by companies to overcome problems inherent in the secondary market for digital goods.

*The suggested presentation will be based on the aforementioned outlined article, which is currently work-in-progress. It has not yet been submitted for publication and the feedback received during the conference would allow me to strengthen the paper before submitting it to US law reviews in the Spring 2014 submission cycle.*