

GAME OVER, INSERT COIN TO CONTINUE: ENTERING A NEW ERA OF VIDEO GAME INTELLECTUAL PROPERTY ENFORCEMENT

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I. INTRODUCTION

During the late 1960s, a German-born engineer and inventor named Ralph Baer began to create and experiment with a new form of entertainment media.¹ Baer developed a prototype gaming console that he named the “Brown Box,” which was “powered by D-cells and wired to a black-and-white TV.”² The system was capable of playing rudimentary games such as ping-pong, volleyball, football, and gun games,³ using colored, transparent overlays as back-

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¹ See generally Ralph Baer, *Video Game History*, RALPHBAER.COM, http://www.ralphbaer.com/video_game_history.htm (last visited Mar. 22, 2012) (providing a timeline of Ralph Baer’s involvement in the early development of video games).

² Greg Orlando, *Console Portraits: A 40-Year Pictorial History of Gaming*, WIRED (May 15, 2007), http://www.wired.com/gaming/gamingreviews/multimedia/2007/05/gallery_game_history (“Called the ‘Brown Box’ the proto-console was a nondescript unit powered by D-cells and wired to a black-and-white TV.”).

³ The term “gun game” is not a reference to the first-person shooter (“FPS”) video games of the modern era; rather, it references video games that used an external peripheral known as a light gun, similar to the ones found in games like Nintendo’s classic *Duck Hunt* (Nintendo Entertainment System, 1984) or Namco’s arcade hit *Time Crisis* (Arcade, 1995). See *Top 25 Videogame Consoles of All Time*, IGN, <http://www.ign.com/top-25-consoles/25.html> (last visited Mar. 22, 2012) (“The Odyssey also launched the very first home light gun ever produced, called the Shooting Gallery.”); see generally Todd Campbell, *Answer Geek: How Video Game Guns Work*, ABC NEWS,

grounds.⁴ On January 15, 1968, Baer filed a patent for his new invention—the first ever patent for a home video game console system.⁵ In 1971, television manufacturer Magnavox obtained an exclusive license from Baer for the Brown Box patent.⁶ The following year, the Magnavox Odyssey, a production-engineered version of the Brown Box,⁷ was released to critical acclaim; it sold over 300,000 units despite lacking color, video, and sound.⁸

Ralph Baer, who is considered by many to be the “father of video-games,”⁹ ushered in a new era of home media entertainment and “sparked a revolution—one that has shaped the way humans play, and even how they interact with one another.”¹⁰ Since the introduction of Baer’s invention, the video game market has evolved into a multi-billion dollar industry. In 2010, the consulting firm PricewaterhouseCoopers (“PwC”) valued the global video game market at about \$56 billion.¹¹ *Call of Duty: Modern Warfare 3*, one of the major video game blockbusters of 2011, earned \$750 million in the first five days of sales following its release.¹² With figures like this, it comes as no surprise that “PwC predicts that video games will be the fastest-growing form of media over the next few years, with sales rising to \$82 billion by 2015.”¹³ Trends indicate that the value of the video game market may already be toppling other forms of me-

<http://abcnews.go.com/Technology/story?id=119237&page=1#.T2vapo6Q324> (last visited Mar. 22 2012) (discussing the light gun technology in video games).

⁴ Baer, *supra* note 1.

⁵ *Id.*

⁶ Ralph Baer, *Genesis: How the Home Video Games Industry Began*, RALPHBAER.COM (1998), http://www.ralphbaer.com/how_video_games.htm (last visited Oct. 19, 2012); *see also* Baer, *supra* note 1 (describing that, between March and September 1971, “Magnavox sign[ed] an exclusive License Agreement.”).

⁷ *See* Baer, *supra* note 6 (“Magnavox finally took a license in 1971 and their 1972 Odyssey Home Video Game, a production-engineered version of our Brown Box, was the result. It started the Home TV Game market.”).

⁸ *Top 25 Videogame Consoles of All Time*, *supra* note 3.

⁹ *See DC 2008: Ralph Baer Receiving Pioneer Award*, IGN (Dec. 20, 2007), <http://www.ign.com/articles/2007/12/20/dc-2008-ralph-baer-receiving-pioneer-award> (“Today the 2008 Developers Choice Awards has named its ‘Pioneer’ recipient: Ralph Baer, creator of the Magnavox Odyssey and the ‘father of videogames.’”).

¹⁰ Orlando, *supra* note 2.

¹¹ Tim Cross, *All the World’s a Game*, *ECONOMIST* (Dec. 10, 2011), <http://www.economist.com/node/21541164> (“According to PricewaterhouseCoopers (PwC), a consulting firm, the global video-game market was worth around \$56 billion last year.”).

¹² *Id.* (“The latest instalment [sic] [of *Call of Duty*], ‘*Modern Warfare 3*,’ released on November 8th, set a record of its own with \$750m in its first five days.”).

¹³ *Id.*

dia. In 2011, gaming became the United Kingdom's biggest entertainment sector with £1.93 billion in sales.¹⁴ By comparison, sales for DVDs and other video formats totaled only £1.80 billion, and the music industry grossed only £1.07 billion.¹⁵

Considering the rise in popularity of video games, there is an understandable desire for video game companies to protect and enforce their intellectual property rights. In particular, video game developers have focused their attention on restricting the resale of used video games that some industry representatives claim is leading to the collapse of the gaming industry.¹⁶ A potent combination of recent legal decisions, software distribution tactics, and technological advances have opened new avenues for companies to safeguard their interests by restricting the ability of gamers and retailers to distribute used games.

This article considers new opportunities for video game companies to enforce their intellectual property rights. Part II examines the judicial system's role in developing new intellectual property enforcement measures for video game companies. It specifically considers the Ninth Circuit's 2010 decision *Vernor v. Autodesk, Inc.*¹⁷ and its implications for determining who really "owns" a video game once it is purchased.¹⁸ Part III considers the software distribution tactics and technological developments that have enabled video game companies to exert greater control over their intellectual property rights and to restrict the market for used video games.

II. *VERNOR V. AUTODESK, INC.*, VIDEO GAME INTELLECTUAL PROPERTY ENFORCEMENT, AND THE ATTACK ON THE USED VIDEO GAME MARKET

Recently, the Ninth Circuit decided *Vernor v. Autodesk, Inc.*, a case that paved the way for novel judicial doctrine on who owns video game intellectual property. Part II.A provides an overview of the court's reasoning in *Vernor v.*

¹⁴ *Game Sales Surpassed Video in UK*, BBC NEWS (Mar. 21, 2012), <http://www.bbc.co.uk/news/technology-17458205>.

¹⁵ *Id.*

¹⁶ Kate Cox, *Denis Dyack Claims Used Games Will Destroy Gaming*, KOTAKU (Mar. 28, 2012), <http://kotaku.com/5897199/denis-dyack-claims-used-games-will-destroy-gaming> (Denis Dyack, founder of Silicon Knights, advances the argument that used video games are cannibalizing the industry).

¹⁷ 621 F.3d 1102 (9th Cir. 2010).

¹⁸ *Id.* at 1102.

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*Autodesk, Inc. and MDY Indus., LLC v. Blizzard Entm't, Inc.*¹⁹ two cases that have seemingly changed the very nature of video game intellectual property rights. Part II.B considers the significance of these legal developments on video game intellectual property enforcement and its potential impact on the used video game market.

A. Changing Video Game Legal Doctrine: Vernor v. Autodesk, Inc. and MDY Indus., LLC v. Blizzard Entm't, Inc.

In 2008, the United States District Court for the Western District of Washington heard the case of Timothy Vernor, a businessperson who made his living selling items on the popular Internet auction site eBay.²⁰ Over three years, Vernor had legally acquired packages of Autodesk's copyrighted AutoCAD software, which he then attempted to sell on eBay.²¹ On each attempt, Autodesk sent "a Digital Millennium Copyright Act ('DMCA') notice to eBay claiming that the sale would infringe its copyright."²² Vernor responded to each DMCA take down notice by notifying Autodesk that he had acquired the AutoCAD software legally and that he was not infringing on Autodesk's copyright.²³ In 2005, an Autodesk attorney explained to Vernor that Autodesk does not allow the resale of its software products and that any such sale was an infringement of copyright.²⁴ Vernor held two additional copies of the AutoCAD software that he had hoped to sell on eBay.²⁵ In bringing a declaratory action against Autodesk, Vernor hoped to obtain a ruling from the court that his resale of the AutoCAD software would be lawful under the first-sale doctrine.²⁶ This doctrine is de-

¹⁹ 629 F.3d 928 (9th Cir. 2010), *reh'g denied as amended*, Nos. 09-15932, 09-16044, 2011 WL 538748, (9th Cir. Feb. 17, 2011).

²⁰ *Vernor v. Autodesk, Inc.*, 555 F. Supp. 2d 1164, 1165 (W.D. Wash. 2008).

²¹ *Id.* at 1165.

²² *Id.* at 1165–66 ("Mr. Vernor sold three packages on eBay, but each time he put a package up for auction, an exchange of DMCA notices from Autodesk, suspension of the auction by eBay, counter-notices from Mr. Vernor, and reinstatement of the auction followed.").

²³ *Id.* at 1166.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Vernor*, 555 F. Supp. 2d at 1166 ("Mr. Vernor seeks a declaration that his resale of AutoCAD is lawful, and also presses a claim for unfair competition under either California or Washington law.").

signed to “permit[] a person who owns a lawfully-made copy of a copyrighted work to sell or otherwise dispose of the copy.”²⁷

In its analysis, the district court noted that the first-sale doctrine is only a narrow limitation on the copyright holder’s rights.²⁸ However, “[w]hen a copyright holder chooses to sell a copy of his work, . . . he ‘exhaust[s] his exclusive statutory right to control its distribution.’”²⁹ To articulate this principle, the court provided a simple example that explained how “the first-sale doctrine permits a consumer who buys a lawfully made DVD copy of ‘Gone with the Wind’ to resell the copy, but not to duplicate the copy.”³⁰

Before resolving the first-sale issue, the court analyzed whether Cardwell, Thomas, & Associates (“CTA”), the company from which Vernor had purchased the most recent copies of the AutoCAD software, had merely licensed the software from Autodesk or whether Autodesk had sold the software to CTA.³¹ CTA had acquired the software through a settlement agreement with Autodesk; the terms of which required compliance with the Autodesk Software License Agreement.³² In relevant part, this license agreement “grant[ed] a non-exclusive, nontransferable license to use” the AutoCAD program.³³ The license agreement also prohibited the rent, lease, and transfer of the software to any other person without Autodesk’s prior written consent.³⁴

Relying on precedent set-forth in *United States v. Wise*,³⁵ the court decided that the critical factor in determining whether a transaction is a license or a sale is “whether the transferee kept the copy acquired from the copyright holder.”³⁶ Looking back to a 1960 licensing case *Hampton v. Paramount Pictures*

²⁷ *Id.* at 1168; *see* 17 U.S.C. § 109(a) (2006) (“Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”); *Id.* § 106(3) (stating that Section 106(3) grants the copyright owner certain exclusive rights subject to 17 U.S.C. §§ 107–22).

²⁸ *Vernor*, 555 F. Supp. 2d at 1168.

²⁹ *Id.* (quoting *Quality King Distribs., Inc. v. L’anza Research Int’l, Inc.*, 523 U.S. 135, 152 (1998)).

³⁰ *Id.*

³¹ *See generally id.* at 1169–74.

³² *Id.* at 1166.

³³ *Id.* (quoting from the Grant of License section in the Autodesk Software License Agreement).

³⁴ *Vernor*, 555 F. Supp. 2d at 1166 (quoting from the Restrictions section in the Autodesk Software License Agreement).

³⁵ 550 F.2d 1180, 1187 (9th Cir.1977).

³⁶ *Vernor*, 555 F. Supp. 2d at 1170.

Corp.,³⁷ the court noted that when a transferee was required to return film prints, there was no sale, but when the transferee was not required to return the film prints, there was a sale.³⁸

By adhering to the *Wise* precedent, the district court purposefully turned away from an alternative line of precedent that it dubbed the *MAI* trio.³⁹ The trio involved three other Ninth Circuit cases: *MAI Sys. Corp. v. Peak Computer, Inc.*;⁴⁰ *Triad Sys. Corp. v. Se. Express Co.*;⁴¹ and *Wall Data Inc. v. Los Angeles County Sheriff's Dep't*.⁴² Each case involved software licenses and the courts maneuvering around the protections of the first-sale doctrine and fair use.⁴³ The primary question at issue in these cases was the question of when a person becomes an “owner of a copy” of software under 17 U.S.C. § 117.⁴⁴ If the district court had followed the *MAI* trio precedent, instead of the *Wise* precedent, it would have concluded that “Autodesk did not sell AutoCAD copies to CTA [because t]he terms of the Autodesk License are either indistinguishably similar to or more restrictive than the licenses found not to be sales in the *MAI* trio.”⁴⁵

³⁷ 279 F.2d 100 (9th Cir.1960).

³⁸ *Vernor*, 555 F. Supp. 2d. at 1170.

³⁹ *See id.* at 1172 (“If the court were to apply this trio of precedent (the ‘*MAI* trio’) to the license before it, it would conclude that Autodesk did not sell AutoCAD copies to CTA.”).

⁴⁰ 991 F.2d 511, 517–18 (9th Cir. 1993).

⁴¹ 64 F.3d 1330, 1332 (9th Cir. 1995).

⁴² 447 F.3d 769, 784–85 (9th Cir. 2006).

⁴³ *See Vernor*, 555 F. Supp. 2d at 1171 (“[S]ince MAI licensed its software, [its] customers do not qualify as ‘owners’ of the software and are not eligible for protection under § 117.” (quoting *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 n.5 (9th Cir. 1993))); *see also Triad Sys. Corp.*, 64 F.3d at 1337 (“To allow Southeastern to use Triad’s software as it wishes would cause Triad to lose licensing revenues from the ISOs, who ‘have a substantial motivation to obtain access’ to Triad’s software. In short, we detect no appreciable public benefit arising from Southeastern’s practice to justify this continuance under the fair use doctrine. We therefore agree with the district court’s thoughtful analysis and its rejection of Southeastern’s fair use claim.” (citations and footnotes omitted)); *Vernor*, 555 F. Supp. 2d at 1172 (*Wall Data* considered a “license agreement that imposed restrictions on copying the software, restrictions on the number of users, and restrictions on transferring the software on computers within the licensed entity.” Though “the license imposed no limits on resale of the software,” the court still concluded that “the restrictions were ‘sufficient to classify the transaction as a grant of license to Wall Data’s software, and not a sale of Wall Data’s software.’” (citing *Wall Data*, 447 F.3d at 775 n.5, 785)).

⁴⁴ *See Vernor*, 555 F. Supp. 2d at 1171 (“As with the first-sale doctrine, courts have determined that a person becomes an “owner of a copy” of software under § 117 only in certain transactions.”).

⁴⁵ *Id.* at 1172.

As a result, Vernor would have been prohibited from availing himself of the first-sale doctrine.⁴⁶

Although recognizing that computer software is not like the film prints at issue in *Hampton*, the district court nonetheless followed *Wise*.⁴⁷ The court justified this approach by finding that the core question of the case was not technological—Vernor was not seeking to take advantage of new technology to ease copying but rather “was seeking to sell a package of physical objects which contain copies of copyrighted material.”⁴⁸ This issue was directly in play in *Wise* and was beyond the scope of the *MAI* trio. Following the *Wise* precedent, the court concluded “that the transfer of AutoCAD packages from Autodesk to CTA was a sale with contractual restrictions on use and transfer of the software” rather than a mere license to use.⁴⁹ As such, Mr. Vernor was entitled to invoke the first-sale doctrine and his resale of the AutoCAD software was not a copyright violation.⁵⁰ The court also discarded any other potential liability arguments against Vernor.⁵¹

Following its defeat at the district court, Autodesk appealed the case to the Ninth Circuit.⁵² The Ninth Circuit reversed, holding that: “Autodesk’s direct customers are licensees of their copies of the software rather than owners.”⁵³ Therefore, because Vernor did not purchase the AutoCAD software copies from an owner, the court concluded that he may not invoke the first-sale doctrine.⁵⁴ Returning to a discussion on the first-sale doctrine, the court noted that the first-sale doctrine “does not apply to a person who possesses a copy of the copyright-

⁴⁶ *See id.*

⁴⁷ *Id.* at 1174.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Vernor*, 555 F. Supp. 2d at 1174.

⁵¹ *See id.* at 1175 (“There is no indication that Mr. Vernor’s customers will make copies other than those necessary for their use of the software. Moreover, there is no indication that Mr. Vernor *knows* that his customers will make copies other than those necessary for their use of the software. For those reasons, there is no merit to the contention that Mr. Vernor induces copyright infringement.”); *see also id.* at 1176 (“Not only has Autodesk failed to surmount the thorny issues of privity and mutual assent inherent in its contention that its License binds Mr. Vernor and his customers, it has ignored the terms of the License itself. The Autodesk License is expressly ‘nontransferable.’ Autodesk does not explain how a nontransferable license can bind subsequent transferees.” (citation omitted)).

⁵² *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1103–04 (9th Cir. 2010).

⁵³ *Id.*

⁵⁴ *Id.* at 1104.

ed work without owning it, such as a licensee.⁵⁵ The court then revisited the *Wise* and *MAI* trio cases.⁵⁶ But rather than selecting one branch of precedent over the other, the Ninth Circuit aimed to reconcile the two legal theories.⁵⁷ Creating a three-part test to determine whether a software user is an owner or a licensee, the court wrote that:

We read *Wise* and the *MAI* trio to prescribe three considerations that we may use to determine whether a software user is a licensee, rather than an owner of a copy. First, we consider whether the copyright owner specifies that a user is granted a license. Second, we consider whether the copyright owner significantly restricts the user's ability to transfer the software. Finally, we consider whether the copyright owner imposes notable use restrictions.⁵⁸

Based on this three-part test, the court held that “a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions.”⁵⁹

Using this new test, the court then concluded that CTA was only a licensee of Autodesk's software and that, as a result, neither CTA nor Vernor was entitled to invoke the first-sale doctrine.⁶⁰ To make this determination, the court looked at the actions of Autodesk and the terms of its License Agreement.⁶¹ It stated “that the license [was] nontransferable, the software could not be transferred or leased without Autodesk's written consent, and the software could not be transferred outside the Western Hemisphere.”⁶² Moreover, the court described how the License Agreement “imposed use restrictions against the use of the software outside the Western Hemisphere and against modifying, translat-

⁵⁵ *Id.* at 1107–08 (citing 17 U.S.C. § 109(d) (2006)) (quoting *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 146–47 (1998)) (“[T]he first-sale doctrine would not provide a defense to . . . any non-owner such as a bailee, a licensee, a consignee, or one whose possession of the copy was unlawful.”).

⁵⁶ *Id.* at 1110–11.

⁵⁷ *Id.*; see *Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1058 (9th Cir. 2006) (“[W]e are required to reconcile prior precedents if we can do so.”).

⁵⁸ *Vernor*, 621 F.3d at 1110–11.

⁵⁹ *Id.* at 1111.

⁶⁰ *Id.* at 1112 (rejecting the availability of the essential step defense to either party); see *id.* at 1109–10 (“Congress enacted the essential step defense to codify that a software user who is the ‘owner of a copy’ of a copyrighted software program does not infringe by making a copy of the computer program, if the new copy is ‘created as an essential step in the utilization of the computer program in conjunction with a machine and . . . is used in no other manner.’” (citation omitted)).

⁶¹ *Id.* at 1111–12.

⁶² *Id.* at 1111.

ing, or reverse-engineering the software, removing any proprietary marks from the software or documentation, or defeating any copy protection device.”⁶³ Finally, the License Agreement “provided for termination of the license upon the licensee’s unauthorized copying or failure to comply with other license restrictions.”⁶⁴

Based on these considerations, the court concluded that Autodesk’s customers are licensees of the software rather than owners.⁶⁵ The Ninth Circuit vacated the district court’s opinion favoring Vernor and remanded.⁶⁶ Though Vernor appealed to the United States Supreme Court, certiorari was denied.⁶⁷

Three months after *Vernor*, the Ninth Circuit decided another landmark case, which theoretically extended the *Vernor* holding to video games. In *MDY Indus., LLC v. Blizzard Entm’t, Inc.*,⁶⁸ MDY Industries brought an action for declaratory judgment against Blizzard concerning Blizzard’s popular massively multiplayer online role-playing game (“MMORPG”) World of Warcraft (“WoW”).⁶⁹ As described by the court, “WoW players roleplay [sic] different characters, such as humans, elves, and dwarves . . . [with the] central objective [of] advanc[ing] the character through the game’s [seventy] levels by participating in quests and engaging in battles with monsters.”⁷⁰ The WoW software has two components: game client software that a player installs on the computer and game server software that the player accesses on a subscription basis by connecting to WoW’s online servers.⁷¹ As an MMORPG, WoW has neither single-player nor offline modes.⁷² In order to play the game, the user must agree to Blizzard’s End User License Agreement (EULA).⁷³

⁶³ *Id.* at 1111–12.

⁶⁴ *Vernor*, 621 F.3d at 1112.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1115–16.

⁶⁷ *Id.*, *cert. denied*, 132 S. Ct. 105, 105 (2011).

⁶⁸ 629 F.3d 928 (9th Cir. 2010).

⁶⁹ *Id.* at 934–35; *see generally* *Game Guide*, BATTLE.NET, <http://us.battle.net/wow/en/game/guide/> (last visited Mar. 26, 2012) (containing information regarding Blizzard’s World of Warcraft).

⁷⁰ *MDY Indus.*, 629 F.3d at 935.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See generally* *World of Warcraft Terms of Use*, BLIZZARD ENTM’T, http://us.blizzard.com/en-us/company/legal/wow_tou.html (last updated Aug. 22, 2012).

MDY's sole member, Michael Donnelly,⁷⁴ had developed a software program called Glider, a "bot" that independently played through the early character levels for WoW players.⁷⁵ Though Mr. Donnelly originally designed Glider for personal use,⁷⁶ he began selling the program through MDY's website for fifteen to twenty-five dollars per license in the summer of 2005.⁷⁷ Before marketing Glider, Donnelly reviewed Blizzard's EULA and client-server manipulation policy and concluded that Blizzard had not prohibited the use of bots.⁷⁸ When Blizzard's anti-hacking program, Warden, began to detect Glider in late 2005, Blizzard responded by banning most Glider users.⁷⁹ Blizzard considered Glider harmful to the playing experiences of other game subscribers,⁸⁰ and many players themselves found the software frustrating.⁸¹ In response, MDY modified its Glider to avoid detection and offered additional detection evasion for a small price increase—indicating a full awareness that bot use was prohibited in WoW.⁸²

Blizzard claimed that, in a three and a half year period, it received 465,000 complaints regarding WoW bots, several thousand of which specified Glider.⁸³ Additionally, "the parties . . . stipulated that Glider is the principal bot used by WoW players."⁸⁴ The district court had found both MDY and Donnelly liable for secondary copyright infringement, violations of DMCA §§ 1201(a)(2)

⁷⁴ Collectively, MDY Industries and Michael Donnelly will be referred to as MDY. *See MDY Indus.*, 629 F.3d at 934–35 ("MDY Industries, LLC and its sole member Michael Donnelly ('Donnelly') (sometimes referred to collectively as 'MDY') developed and sold Glider.").

⁷⁵ *Id.* at 935 ("A user need not be at the computer while Glider is running.").

⁷⁶ *Id.* ("Donnelly is a WoW player and software programmer. In March 2005, he developed Glider, a software 'bot' (short for robot) that automates play of WoW's early levels, for his personal use.").

⁷⁷ *Id.* at 936 ("As of September 2008, MDY had gross revenues of \$3.5 million based on 120,000 Glider license sales.").

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See MDY Indus.*, 629 F.3d at 935–36 ("Blizzard contends that Glider disrupts WoW's environment for non-Glider players by enabling Glider users to advance quickly and unfairly through the game and to amass additional game assets.").

⁸¹ *See, e.g.,* Mike Fahey, *Blizzard Sues WoW Glider*, KOTAKU (Feb. 19, 2007), <http://kotaku.com/237889/blizzard-sues-wow-glider> ("It was only a matter of time before Blizzard and Vivendi took up arms against the creator of WoW Glider, a program that basically turns your character into one of those annoying bots you see running about Felwood, getting all the essence of water so you can't make your damn Robe of the Archmagi.").

⁸² *MDY Indus.*, 629 F.3d at 936.

⁸³ *Id.*

⁸⁴ *Id.*

and (b)(1), and tortious interference with contract.⁸⁵ The district court then entered judgment against the defendants for \$6.5 million and permanently enjoined MDY from further distributing Glider.⁸⁶ MDY and Donnelly then appealed to the Ninth Circuit.

Similar to *Vernor*, the *MDY Industries* appellate judges discussed ownership versus licensing.⁸⁷ Applying the three-part test established in *Vernor*,⁸⁸ the Ninth Circuit held that, despite purchasing the game, WoW players are only licensees, not owners, of WoW's game client software.⁸⁹ As a result, "Blizzard reserves title in the software and grants players a non-exclusive, limited license."⁹⁰ Because players were licensees and not owners of the game client software, Blizzard was also entitled to impose transfer restrictions on players seeking to transfer the license.⁹¹ Specifically, Blizzard could require that "the player . . . (1) transfer all original packaging and documentation; (2) permanently delete all of the copies and installation of the game client; and (3) transfer only to a recipient who accepts the EULA."⁹² Additionally, players are not entitled to sell or give away their account.⁹³ Blizzard was also allowed to instate a variety of use restrictions on the licensees, including:

The game must be used only for non-commercial entertainment purposes and may not be used in cyber cafes and computer gaming centers without Blizzard's permission. Players may not concurrently use unauthorized third-party programs. Also, Blizzard may alter the game client itself remotely without a player's knowledge or permission, and may terminate the EULA and ToU [Terms of Use] if players violate their terms. Termination ends a player's license to access and play WoW. Following termination, players must immediately destroy their copies of the game and uninstall the game client from their computers, but need not return the software to Blizzard.⁹⁴

⁸⁵ *Id.* at 935.

⁸⁶ *Id.* at 937.

⁸⁷ *MDY Indus.*, 629 F.3d at 938–39 ("We consider whether WoW players, including Glider users, are owners or licensees of their copies of WoW software.")

⁸⁸ *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1110–11 (9th Cir. 2010).

⁸⁹ *MDY Indus.*, 629 F.3d at 938.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 938–39.

In other words, Blizzard was given incredibly broad power to determine how their intellectual property could be used simply as an extension of their click-wrap licensing agreement.⁹⁵

Ultimately, the court did not find any copyright infringement.⁹⁶ However, perpetuating the assertion that users of game software are licensees, the court reasoned that the Glider was not a violation of copyright but rather a contractual violation.⁹⁷ Particularly, it held that, “for a licensee’s violation of a contract to constitute copyright infringement, there must be a nexus between the condition and the licensor’s exclusive rights of copyright.”⁹⁸ While Blizzard’s copyright infringement claims against MDY and Donnelly were reversed, the court affirmed violations of the DMCA.⁹⁹ In pertinent part, MDY’s actions violated 17 U.S.C. § 1201(a)(2) of the DMCA because the six conditions to violate the DMCA with respect to WoW’s dynamic non-literal elements were satisfied.¹⁰⁰ The court remanded to the district court and denied MDY’s petition for rehearing.¹⁰¹

Vernor and *MDY Industries* represent a paradigmatic shift in the jurisprudence regarding video game intellectual property. The concept that a person does not own purchased software is entirely novel and cuts against the traditional principles associated with the first-sale doctrine.¹⁰² But so long as a video game company includes a licensing provision as part of its software agreement, the first-sale doctrine will virtually have no effect.¹⁰³ Video games have already

⁹⁵ For a basic description of click-wrap licensing agreements, see Cory Janssen, *Clickwrap Agreement*, TECHNOPEdia, <http://www.techopedia.com/definition/4243/clickwrap-agreement> (last visited Nov. 20, 2012).

⁹⁶ *MDY Indus.*, 629 F.3d at 940–41.

⁹⁷ *See id.* (discussing the copyright infringement standard on breach of a licensing agreement: “To recover for copyright infringement based on breach of a license agreement, (1) the copying must exceed the scope of the defendant’s license and (2) the copyright owner’s complaint must be grounded in an exclusive right of copyright (e.g., unlawful reproduction or distribution).”).

⁹⁸ *Id.* at 941 (footnote omitted).

⁹⁹ *Id.*

¹⁰⁰ *See generally id.* at 952–54 (discussing interpretations of the DMCA and very specific technological aspects of WoW design that are beyond the limited scope of this article); *id.* at 948–52 (discussing the justifications behind the purposeful deviation by the Ninth Circuit from previously established Federal Circuit case law in their interpretation).

¹⁰¹ *MDY Indus.*, 629 F.3d at 934.

¹⁰² *See* 17 U.S.C. § 109 (2006) (providing the statutory basis for the first-sale doctrine).

¹⁰³ *See* David Kravets, *Guess What, You Don’t Own That Software You Bought*, WIRED (Sept. 10, 2010, 2:01 PM), www.wired.com/threatlevel/2010/09/first-sale-doctrine (“A federal appeals court said Friday that software makers can use shrink-wrap and click-wrap licenses to

begun to adopt EULAs that explicitly restrict the purchase of a video game to mean merely obtaining a license from the developer for its use¹⁰⁴—a practice that has led to some of the developments discussed in Part III of this article. Although these cases are both from the Ninth Circuit, their persuasive value in other jurisdictions has significant implications for the enforcement of intellectual property rights of video game companies across the nation.

B. *The Impact of Vernor and MDY Industries: Setting the Stage for an Attack on the Used Video Game Market*

The principle that a person who purchases video game software is only a licensee instead of an owner of the software—as held in *Vernor* and affirmed in *MDY Indus.*—has considerable implications for the used video game market. This section considers the public response to these two cases, as well as their implications for the used video game market.

Following *Vernor*, there was extensive debate about the case’s potential impact on the used video game market. Because “[v]ideo games . . . no doubt

forbid the transfer or resale of their wares, an apparent gutting of the so-called first-sale doctrine.”). While this appears to be the case for video games, it is worthwhile to note that the first-sale doctrine has not been defeated entirely by the Ninth Circuit. In *UMG Recordings, Inc. v. Augusto*, the Ninth Circuit held that UMG had conveyed title to the recipients of promotional compact discs despite restrictive labeling on the packaging. 628 F.3d 1175, 1180 (9th Cir. 2011). The holding was based on the nature of UMG’s distribution, which the court found unsatisfactory to justify a finding that UMG had licensed the CDs instead of transferring ownership under the *Vernor* three-part test. *Id.* at 1180–83.

¹⁰⁴ For example, Bethesda’s *The Elder Scrolls V: Skyrim* (Multiplatform, 2011), one of the most commercially and critically successful games of 2011, included licensing language in the game’s EULA. The EULA was included in the game’s instruction manual, which was not accessible until after the gamer opened the package. See *End User License Agreement, in THE ELDER SCROLLS V: SKYRIM GAME MANUAL*, BETHESDA SOFTWARES (2011). The relevant part of the EULA’s introduction reads:

By clicking “I Agree”, by installing the product, or by accessing or using the product or other software, if any, provided to you in the package, you acknowledge that you have read all of the terms and conditions of this agreement, understand them, and agree to be legally bound by them.

Id. Section 3 of the EULA further specifies:

You may not cause or permit the sale, disclosure, copying, renting, licensing, sublicensing, leasing, disseminating, uploading, downloading, transmitting, or otherwise distributing the Product, the Documentation or any of the other components of the Package by any means or in any form, without the prior written consent of the Licensor [Bethesda Softworks LLC].

Id. § 3. Using a license agreement like this enables the game developer to restrict unapproved sales, similar to those made by Autodesk in *Vernor v. Autodesk*.

fall under the realm of software,”¹⁰⁵ some argued that the ruling could ostensibly affect the ability of software users to sell their used video games at garage sales or consignment stores.¹⁰⁶ *Vernor* threatened to pervade the lives of individual gamers and influence their ability to control what they had for a long time considered their personal property.

Vernor has posed an even bigger threat to the retail companies whose primary mode of business is buying and selling used video games. While some stores have created a secondary market for buying and selling used video games,¹⁰⁷ the success of companies like GameStop, which rely heavily on used game sales as a source of revenue, are significantly more at risk. GameStop has become “dangerously dependent on used games”¹⁰⁸ by creating a market where “[t]he company gives customers credit for their used games that can be used to buy other previously owned or . . . new games.”¹⁰⁹

Under this model, used video games have become vital to GameStop’s profit margins. In the year leading up to January 28, 2012, 27.4% of GameStop’s total sales came from used video game software¹¹⁰ while new video game software accounted for 42.4% of the company’s sales.¹¹¹ Although the sales figures for used video game software were less than the sales for new vid-

¹⁰⁵ *Vernor v. Autodesk: New Verdict Could Block GameStop Used Games Sales*, CBSNEWS.COM (Oct. 19, 2010, 3:46 PM), http://www.cbsnews.com/8301-505124_162-42240881/vernor-v-autodesk-new-verdict-could-block-gamestop-used-games-sales [hereinafter *Block GameStop Used Games Sales*].

¹⁰⁶ *Id.* (“In that case, *Vernor v. Autodesk*, the 9th U.S. Circuit Court of Appeals prohibited customers from reselling certain software to other customers. Victor Godinez, of *The Dallas Morning News*, who broke the story, says that it could effect [sic] any garage sale or consignment store.”). According to the article, the reasoning in *Vernor v. Autodesk*, “could technically make selling, say, used Atari 2600 Donkey Kong cartridges at a garage sale illegal.” *Id.*

¹⁰⁷ For example, Best Buy and Target both have markets for used video games. *See id.* (“Video games would no doubt fall under the realm of software, and, if the ruling does stand, it will affect Target (TGT), Best Buy (BBY) and other companies recently getting into the used software business.”).

¹⁰⁸ *Id.* GameStop has an interesting history as a video game retailer. Many of the companies that make-up what is now GameStop were pioneers of the used video game retail market. *See* *Company History*, GAMESTOP, http://news.gamestop.com/about_us/company_history (last visited Mar. 30, 2012).

¹⁰⁹ *Block GameStop Used Games Sales*, *supra* note 105.

¹¹⁰ *GameStop Reports Sales and Earnings for Fiscal 2011*, GAMESTOP (Mar. 22, 2012, 8:30 AM), <http://news.gamestop.com/press-release/business/gamestop-reports-sales-and-earnings-fiscal-2011>. Used sales accounted for \$2,620.2 million. *Id.*

¹¹¹ *Id.* The sales for new video games accounted for \$4,048.2 million. *Id.* New video game hardware accounted for 16.9% of sales while “other” merchandise accounted for 13.3%. *Id.*

eo game software, the gross profit margin for used video games was substantially higher: used video games accounted for 46.6% of the company's gross profits while new video games accounted for only 20.7%.¹¹² Fiscally speaking, GameStop grossed over \$1.2 billion from used video game sales during this time period—nearly \$400 million more than new video game sales.¹¹³

While this is a great business model for GameStop, game developers have strongly opposed the used video game market due to its effect on the gaming industry. As the sales figures indicate, the used game market model is a brilliant business insofar as its return on investment. That business, however, comes at the expense of the companies developing the games:

Instead of buying games at a set price from a distributor and reselling them for a small markup after shipping the game across the country or importing them from another continent, GameStop buys used games for around half of what they sell them for in the store, and there is no cost to ship the games. There is also no pesky publisher or distributor to get a cut of the profit. GameStop may make a few dollars from the sale of each new game, but the company can make \$25 or more from the sale of a used game.¹¹⁴

In other words, used video game sales deprive game developers of initial sale profits from their products—“[w]hen the next customer comes in and buys that game, all the revenue goes to the retailer; the developer is only able to generate cash from new sales.”¹¹⁵ Because of this, used video games have a negative reputation in the gaming industry, being labeled as the industry's “silent killer.”¹¹⁶ Denis Dyack, head of the development studio Silicon Knights,¹¹⁷ asserts

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Ben Kuchera, *A War on Used Games Is a War on GameStop, but We Explain Why that Won't Happen*, PENNY ARCADE (Mar. 29, 2012), <http://www.penny-arcade.com/report/editorial-article/a-war-on-used-games-is-a-war-on-gamestop-here-comes-the-science>.

¹¹⁵ Don Reisinger, *How Much Do Industry CEOs Hate Used Games? A Whole, Whole Lot*, CNET (Mar. 28, 2012, 10:21 AM), http://news.cnet.com/8301-13506_3-57405801-17/how-much-do-industry-ceos-hate-used-games-a-whole-whole-lot; see Cox, *supra* note 16 (“Publishers and distributors, however, make no revenue when a game changes hands for the second or third time, and are often hostile to the used market.”).

¹¹⁶ Reisinger, *supra* note 115.

¹¹⁷ Silicon Knights was incorporated in 1992 and has developed critically successful hit video games like *Blood Omen: Legacy of Kain* (Sony PlayStation, 1996) and *Eternal Darkness: Sanity's Requiem* (Nintendo GameCube, 2002). See SILICON KNIGHTS, <http://www.siliconknights.com> (last visited Apr. 4, 2012).

that “used games are cannibalizing the industry.”¹¹⁸ The consequence, Dyack argues, is that the video game industry will be unable to survive.¹¹⁹

Interestingly, the video game industry has not yet tried to use *Vernor v. Autodesk* or its progeny to launch a large-scale, direct attack on GameStop and other used video game retailers. Considering the apparent bitterness of game developers towards the used video game market,¹²⁰ it is surprising that the industry has not pursued this litigious route. A likely explanation is the concern of public backlash. Considering the popularity of used video games, as demonstrated by their sales numbers, it is reasonable to assume that game companies are concerned about frustrating a substantial sector of consumers to the point that they might cease purchasing video games altogether. As explained in Part III, the industry appears to have adopted a number of alternative approaches that will slowly and subtly chip away at the used video game market, a tactic that will likely raise less public disapproval.

Unfortunately for used video game retailers, legal counters to the effects of *Vernor v. Autodesk* are ineffective. The two possible options available to companies like GameStop are: (1) hope for an overriding case from the United States Supreme Court or (2) petition for a legislative solution. Although the Supreme Court denied certiorari in *Vernor*,¹²¹ if a split develops among the circuit courts, the Supreme Court may be inclined to consider the issue and resolve the conflict of laws. While this could result in a favorable holding for the used game market, used game retailers should not put much faith in this avenue because it is not a strong possibility. A circuit split could take years to develop, during which time the game industry could develop new tactics for controlling and restricting the sale of used games.¹²²

Alternatively, used game retailers could seek a legislative solution from Congress.¹²³ A long-standing practice of American government allows Congress to clarify an existing federal law by enacting new legislation or amending the

¹¹⁸ Cox, *supra* note 16.

¹¹⁹ *Id.*

¹²⁰ See, e.g., *id.*; Dean Takahashi, *Reader Poll: Are Used Games Bad for the Video Game Industry?*, VENTUREBEAT (Feb. 20, 2009, 11:40 PM), <http://venturebeat.com/2009/02/20/reader-poll-are-used-games-bad-for-the-video-game-industry>.

¹²¹ *Vernor v. Autodesk, Inc.*, 132 S. Ct. 105, 105 (2011).

¹²² See generally *infra* Part III (describing various distribution tactics and technological advances that can be used to undercut used video game sales).

¹²³ See *supra* note 27 and accompanying text (describing 17 U.S.C. § 109(a) (2006) and relevant text).

current legislation to resolve the ambiguity.¹²⁴ The effect of such changes can effectively override a federal court's prior determination about that federal law.¹²⁵ Congress could act with or without the incentive of a Supreme Court decision to clarify whether the *Vernor* holding undercuts the congressional intent of the first-sale doctrine in 17 U.S.C. § 109(a). While this would be more effective than awaiting a Supreme Court decision, used game retailers may find this avenue similarly difficult. Although Congress has the power to enact and amend legislation, "[it] is busy and has limited resources, and so more often than not would leave even problematic legislation in place."¹²⁶ Therefore, rallying Congress to the cause may be difficult to manage, especially since *Vernor v. Autodesk* is still relatively new and no circuit split has developed to compel a resolution of the law.

Although the ultimate importance of *Vernor v. Autodesk* may not yet be realized, the same principles advanced in the holding of this case have subtly permeated the video game market through a variety of distribution tactics and technological developments that video game companies are using to limit the unwanted circulation of their software. Part III will discuss the measures that game companies have been using to enforce their newly bolstered video game intellectual property rights.

III. VIDEO GAME INTELLECTUAL PROPERTY ENFORCEMENT MEASURES: DISTRIBUTION TACTICS AND TECHNOLOGICAL DEVELOPMENTS

The gaming industry has seen a gradual rise in the number of new distribution tactics and technological developments designed to curb the sale of used video games and to improve the control that game companies have over their intellectual property. This part considers three major developments in this area: online passes for video game software, digital distribution platform use, and possible system designs for the next generation video game hardware aimed specifically at enforcing a video game company's intellectual property rights.

¹²⁴ For an example of the Supreme Court stating that Congress can amend a law to correct an ambiguity see *Maryland v. Soper*, 270 U.S. 36, 43–44 (1926).

¹²⁵ See, e.g., Drew S. Days, III, *Race and the Constitution*, 45 N.Y.L. SCH. L. REV. 101, 104 (2000–01) (footnotes omitted) (“[I]n the 1980's the Court gave a very restrictive reading to Section 2 of the 1965 Voting Rights Act and attempted to cut back on the reach of Title VII of the 1964 Civil Rights Act prohibiting racial and various other forms of discrimination in employment. Congress' response was to amend both acts extensively to require broader and more generous application of both federal laws.”).

¹²⁶ Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 39 (2007).

A. Online Passes

In early 2010, the video game company Electronic Arts (“EA”)¹²⁷ started to use a new distribution tactic designed to encourage gamers to buy new software instead of purchasing used software at discounted prices. Titled “Project Ten Dollar,” EA began to include game content that was free to users who had purchased the software new but which would cost those who purchased the software used additional money.¹²⁸ A number of games that EA produced were released following Project Ten Dollar’s protocol, including critical successes like *Dragon Age: Origins* and *Mass Effect 2*.¹²⁹ At release, both games included a one-time use online code that allowed purchasers to download an additional piece of the game that was otherwise inaccessible on the packaged disc.¹³⁰

Since the introduction of Project Ten Dollar, the use of online passes has become common in the industry.¹³¹ The passes have been used in a number

¹²⁷ EA is one of the largest video game companies in the world and is responsible for a number of long-running, critically successful video game franchises such as *Madden NFL* and *Battlefield*. See ELECTRONIC ARTS, <http://aboutus.ea.com/home.action> (last visited Sept. 27, 2012).

¹²⁸ See Luke Plunkett, *Electronic Arts’ “Project Ten Dollar” Isn’t as Ominous as It Sounds*, KOTAKU (Feb. 10, 2010, 5:30 AM), <http://kotaku.com/5468378/electronic-arts-project-ten-dollar-isnt-as-ominous-as-it-sounds> (“You may have noticed that in the past few months, EA has begun to provide content that’s free to purchasers of new games, but costs serious money for those buying second-hand. It’s no co-incidence. It’s called ‘Project Ten Dollar.’”).

¹²⁹ *Dragon Age: Origins* (Multiplatform, 2009) and *Mass Effect 2* (Multiplatform, 2010–11) were both developed by BioWare but published by EA. Both games have been financially and critically successful. See Andy Chalk, *BioWare “Surprised” by Mainstream Success of Dragon Age*, THE ESCAPIST (Mar. 11, 2010, 1:17 PM), <http://www.escapistmagazine.com/news/view/99058-BioWare-Surprised-by-Mainstream-Success-of-Dragon-Age>; Dustin Quillen, *Mass Effect 2 Week One Sales Top 2 Million*, IUP.COM (Jan. 29, 2010), <http://www.iup.com/news/mass-effect-2-week-sales>.

¹³⁰ See Justin McElroy, *Riccitiello Talks ‘Project Ten Dollar’ and Digital Distribution*, JOYSTIQ (Feb. 10, 2010, 10:45 AM), <http://www.joystiq.com/2010/02/10/riccitiello-talks-project-ten-dollar-and-digital-distribution> (“Crack open a fresh copy of *Mass Effect 2*, *The Saboteur* or *Dragon Age: Origins* and you’ll see it: A code to download some piece of game content that those suckers buying used will have to pay for.”); Marcus Yam, *EA’s ‘Project \$10’ to Squeeze Used Game Buyers*, TOM’S GUIDE (Feb. 10, 2010, 4:10 PM), <http://www.tomsguide.com/us/ea-project-ten-dollars-dlc,news-5797.html> (“EA’s ‘Project Ten Dollar’ first appeared in last year’s *Dragon Age* and, more recently, in *Mass Effect 2*.”).

¹³¹ See Chris Pereira, *OP-ED: Online Passes Aren’t the Unfair Evil They’re Made Out to Be*, IUP.COM (Jan. 31, 2012), <http://www.iup.com/news/op-ed-online-passes-arent-evil> (“Since Electronic Arts introduced the concept in 2010 with Project \$10, more and more publishers have adopted the practice of locking out certain features for those who purchase used games.”); Jim Sterling, *Confirmed: Online Passes for All Future Online Sony Games*, DESTRUCTOID (Oct. 3, 2011, 4:45 PM), <http://www.destructoid.com/confirmed-online->

of different ways to restrict content from those who bought the game used. Some companies have used online passes to restrict portions of the single-player story itself, so that a portion of the game content is unavailable without the one-time use code.¹³² Furthermore, online passes have been implemented to restrict access to multiplayer game modes for people who purchase a used copy of the video game.¹³³ A third alternative is to restrict a player's access to in-game credits that can be used to unlock additional features already included on the disc.¹³⁴

passes-for-all-future-online-sony-games-212882.phtml (“Online Pass will be incorporated into *Uncharted 3* and future Sony Computer Entertainment Worldwide Studios (SCE WWS) games with online functionality, the company told Destructoid. ‘We will provide further information in the future.’ So there you go. It’s pretty much a given that if Sony’s bringing out a game with multiplayer, you’re going to have to input a code.”).

¹³² This has been the case with a number of recent blockbuster titles that are focused primarily on the game’s single-player campaign. Developer Rocksteady’s *Batman: Arkham City* included an online pass for special character missions otherwise unavailable on the disc. See Pereira, *supra* note 131 (“*Arkham City* prevented used game players from playing as Catwoman.”). *Kingdoms of Amalur: Reckoning*, co-developed by 38 Studios and Big Huge Games, withheld several single-player missions from the game disc that were available through the online pass. See *id.* (“*Reckoning* has a questline [sic] known as The House of Valor that is only accessible by redeeming an included code (or buying the DLC separately, which developer 38 Studios has noted is not located on the disc and was always meant to be released as DLC)); Jim Sterling, *38 Studios Explains Kingdoms of Amalur Online Pass*, DESTRUCTOID (Jan. 27, 2012, 5:45 PM), <http://www.destructoid.com/38-studios-explains-kingdoms-of-amalur-online-pass-220491.phtml> (“38 Studios has attempted to justify the content being gated behind an online pass in *Kingdoms of Amalur: Reckoning*. When asked why an entire quest line was being held to ransom in exchange for new sales, the developer said it was originally planned as paid DLC.”).

¹³³ This has been the case with Slant Six Games’ *SOCOM: U.S. Navy SEALs Fireteam Bravo 3*. See, e.g., Kath Brice, ‘Project Ten Dollar’ Will Alienate Consumers, Warns Retail, GAMESINDUSTRY (Feb. 19, 2010, 10:45 AM), <http://www.gamesindustry.biz/articles/project-ten-dollar-will-alienate-consumers-warns-retail> (“Sony appears to be going one step further with reports stating that online play in the latest *SOCOM* game for PSP will be locked until users redeem a code online. Players with a secondhand copy will need to purchase a new code at a cost of \$20.”). Insomniac Games also used a similar tactic with its first-person shooter *Resistance 3*. See Pereira, *supra* note 131 (“*Resistance 3* . . . locks out multiplayer and doesn’t offer a trial as many others do.”).

¹³⁴ EA’s snowboarding game *SSX* used this type of online pass. See Pereira, *supra* note 131 (“*SSX*’s alternative has been more widely accepted: you can play the single-player and online multiplayer, you just can’t receive credits earned from playing Global Events without redeeming the code or buying the DLC. Rather than throw those credits out, they’re saved until you decide to redeem the code or purchase the \$10 DLC. As if that wasn’t reasonable enough, the credits from Global Events aren’t even necessary to unlock all of the game’s content, as anyone can earn credits in Explore mode.”).

Regardless of the type of restriction, the expansion of online passes has been controversial. Aside from the additional cost of purchasing an online pass for those who purchased a used game, some critics have complained that online passes create unfair hurdles for many gamers who have purchased a new copy of the game as well.¹³⁵ For instance, in games where “single-player content is locked, new game buyers without an Internet connection are locked out of content they paid for.”¹³⁶ Also, the system is not perfect; mistakes have been made in the distribution of online codes, including instances where the game company printed incorrect codes¹³⁷ or simply failed to include the code.¹³⁸ Equally frustrating, a number of gamers have complained that online passes in new games can expire.¹³⁹ The possibility of code expiration is often tucked away in the EULA of many games, which few gamers think to check before purchasing the game.¹⁴⁰ These types of situations have served only to increase the public dissatisfaction with the already unpopular online pass system.¹⁴¹

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Chris Pereira, *Driver: San Francisco Online Pass Goes Free After Printing Gaffe*, IUP.COM (Sept. 6, 2011), <http://www.1up.com/news/driver-san-francisco-online-pass-free-printing-gaffe> (“Following an error with printing codes for Uplay Passports that would provide access to multiplayer and other content in *Driver: San Francisco*, Ubisoft has decided to release the Passport for free to gamers worldwide.”).

¹³⁸ Chris Pereira, *Batman: Arkham City's Catwoman Code Issues Being Looked Into*, IUP.com (Oct. 19, 2011), <http://www.1up.com/news/batman-arkham-city-catwoman-code-issues-looked-into> (“As if online passes and retailer exclusives didn't already upset enough gamers on their own, *Batman: Arkham City* buyers are reporting problems with the codes that should have been included with the game, in particular those to unlock the Catwoman DLC. There are a number of issues that have been encountered: some are missing the voucher that should have the Catwoman code on it, others have the voucher but no code was printed on it, and others received *multiple* vouchers.”).

¹³⁹ See Jessica Conditt, *EA: Online Pass Can Expire for New-Game Purchases, but It Shouldn't*, JOYSTIQ (Dec. 3, 2011, 1:30 PM), www.joystiq.com/2011/12/03/ea-online-pass-can-expire-for-new-game-purchases-but-it-should (“EA's Online Pass can indeed expire for some new games, blocking buyers out of online content until they download a new pass or attain one from EA directly, EA confirmed to Joystiq. As a rule, no Online Pass should expire, but a few titles will have a time limit on their use, even for new purchases, EA said.”).

¹⁴⁰ See *id.* (“*Dragon Age 2*, for example, has an Online Pass that expires on March 31, 2012, according to EA's EULA description.”).

¹⁴¹ See, e.g., *EA Announces New Multiplayer Server Shutdowns*, ESCAPIST (Mar. 19, 2012), <http://www.escapistmagazine.com/forums/read/7.354990-EA-Announces-New-Multiplayer-Server-Shutdowns> (““You went way out of the way to justify your ‘Online Pass’ . . . as being there to support the online servers (since those dirty second hand purchasers didn't invest in supporting those servers). Now you are telling me that you are going to shut down the online service for a game that started the joke that is your ‘Online Pass’ service,” the user wrote.

The use of online codes may also have a direct impact on the sales and marketing practices of used game retailers. In March 2010, James Collins, a California resident, filed a class action lawsuit against GameStop in the United States District Court for the Northern District of California regarding his experience with used games and online codes.¹⁴² Collins bought a used copy of *Dragon Age: Origins* from a GameStop store in Hayward, California for fifty-five dollars—only five dollars less than a brand new copy.¹⁴³ While attempting to play the game, Collins realized he had to pay an additional fifteen dollars in order to access the online features that would have otherwise come standard with a new copy of the game, effectively increasing the total cost of the used game above a new copy of the game.¹⁴⁴

According to the settlement agreement, reached in April 2012, “GameStop must, for the next two years, post signs on the shelves where used games are sold in California stores, and online, warning consumers that certain downloadable content may require an additional purchase.”¹⁴⁵ Additionally, the settlement gave “consumers . . . the opportunity to recover the additional \$15 they would have been required to pay to access the downloadable content.”¹⁴⁶ The success of this lawsuit requires GameStop to adopt additional measures to ensure that gamers are fully aware of the additional costs that online passes and downloadable content can impose when a customer purchases a used game. While the settlement is geographically limited to California, the possibility of similar lawsuits arising elsewhere in the United States is not farfetched. Consumers who are fully aware of the additional costs associated with purchasing used games may end up simply buying the game new, advancing industry objectives of eliminating the used video game market.

‘So please explain to me exactly how was the ‘Online Pass’ not nothing more than a money grab? And exactly how are you justifying shutting these servers down again?’”

¹⁴² Colin Campbell, *GameStop Will Warn Consumers About Online Fees*, IGN (Apr. 10, 2012), <http://games.ign.com/articles/122/1222710p1.html>; *Baron and Budd Reaches Settlement With GameStop Regarding Downloadable Content (DLC) and Used Video Games*, BUSINESSWIRE (Apr. 10, 2012, 1:29 PM), <http://www.businesswire.com/news/home/20120410006525/en/Baron-Budd-Reaches-Settlement-GameStop-Downloadable-Content> [hereinafter *Baron and Budd*].

¹⁴³ *Id.*

¹⁴⁴ *Baron and Budd*, *supra* note 142.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (“Consumers who purchased qualifying used games and who are enrolled in GameStop’s ‘PowerUp Rewards’ customer loyalty program can receive a \$10 check and a \$5 coupon. Consumers who purchased a qualifying game, but are not members of GameStop’s loyalty program, can receive a \$5 check and a \$10 coupon.”).

In light of the developing technologies and distribution tactics discussed in Parts III.B and III.C below, it is unclear how much longer online passes will be used to restrict content in order to drive gamers away from the used game market.¹⁴⁷ Nonetheless, online passes are currently an important part of intellectual property enforcement for video game companies.

B. Digital Distribution Platforms

Digital distribution has become an increasingly effective way for video game companies to restrict the unwanted distribution of their software and to combat the used games market. Like film and music, “[g]ames . . . are moving away from boxed copies towards digitally distributed content.”¹⁴⁸ Though originally limited primarily to computer games, digital distribution platforms have spread to most major video game consoles and will likely play a vital role in the future of game distribution.¹⁴⁹

The modern era of digital distribution in video games started with the release of “Steam,” a digital distribution platform designed by the video game developer Valve Software and originally released in 2002.¹⁵⁰ In its early days, Steam acted as a means of digitally distributing update patches and “Mods” to the gaming community in a consistent and easy-to-access way.¹⁵¹ In the decade

¹⁴⁷ As will be discussed in Parts III.B and III.C, many predict that digital distribution is the future of gaming. If digital distribution becomes the primary means of acquiring video game software, the opportunity for buying used video games will essentially disappear. This would mean that the need for online passes would also diminish in the process. See Pereira, *supra* note 131 (“Were it not for the increasingly common practice of games being purchased digitally, I do think we could have reached a day where online passes were taken too far.”).

¹⁴⁸ Keith Stuart, *Video Games Join Film and Music to Embrace the Digital Revolution*, THE GUARDIAN (Dec. 22, 2011), <http://www.guardian.co.uk/technology/2011/dec/25/video-games-digital-downloads-revolution>.

¹⁴⁹ See Michael Macaulay, *Digital vs. Disc*, LEVEL UP VIDEO GAMES (June 24, 2011), <http://levelupvideogames.blogspot.com/2011/06/digital-vs-disc.html> (“According to an NPD Group report, consumers bought and downloaded 11.2 million full-game PC titles through services like Steam and Direct2Drive [versus] 8.2 million bought at retail stores in the first half of 2010. These sales made up for 43 percent of overall game revenue mainly due to the general higher price retail stores charge. With the expansion and integration of online capabilities on PSN and Xbox Live, it may be only a matter of time until more full console games become available online.”).

¹⁵⁰ See Wagner James Au, *Triumph of the Mod*, SALON (Apr. 16, 2002, 3:30 PM), <http://www.salon.com/2002/04/16/modding> (describing the early days of Steam).

¹⁵¹ See *id.* (“Valve Software . . . unveiled Steam, a broadband distribution network that would offer instant updates to recent Valve games and new titles from Valve and other companies.”).

since, the Steam catalogue has expanded to include over 1,500 game titles, including full versions of brand new retail games released by major developers.¹⁵² After downloading the free Steam service to their computers, users are able to download games from Steam's library and create their own digital portfolio of video games.¹⁵³ As an additional incentive, Steam is often able to provide price drops for digital downloads due to the money saved on normal packaging and distribution costs.¹⁵⁴ Today, the Steam model stands as the iconic platform for digital distribution of video games for computers.¹⁵⁵

As video game consoles became more technologically advanced and Internet-capable, opportunities for digital distribution emerged for Microsoft's Xbox 360, Sony's PlayStation 3, and, to a lesser extent, Nintendo's Wii.¹⁵⁶ Such

Listed among the new titles was 'Day of Defeat,' . . . a *mod*—a fan-made modification to a pre-existing game.”).

¹⁵² *Store:* *Games,* STEAM, http://store.steampowered.com/search/#category1=998&advanced=0&sort_order=ASC&page=1 (last visited Apr. 8, 2012).

¹⁵³ STEAM, <http://store.steampowered.com/about> (last visited Apr. 8, 2012).

¹⁵⁴ See Tim Willingham, *Steam: Valve's Ingenious Digital Store [infographic]*, DAILY INFOGRAPHIC (Feb. 24, 2012), <http://dailyinfographic.com/steam-valves-ingenious-digital-store-infographic> (“The Valve team noticed that video games don't have to have a \$60 price tag. Lower pricing means more volume sold—cutting out the packaging and selling digitally is very cost affective [sic]. They are constantly having specials, game bundles and discounts because they know the profit of a customer doesn't end with one sale.”).

¹⁵⁵ This can be clearly demonstrated by the recent sales of CD Projekt RED's critically acclaimed role-playing game *The Witcher 2: Assassins of Kings*. See Owen Hill, *GOG release The Witcher 2 Sales Stats. Steam Dominates All Competitors Combined*, PC GAMER (Nov. 11, 2011, 4:57 PM), <http://www.pcgamer.com/2011/11/11/gog-release-witcher-2-sales-stats-steam-dominates-all-competitors-combined> (“Direct2Drive, Impulse and Gamersgate's combined sales combined hit only 10,000 sales of CD Projekt's RPG, whereas GOG managed to shift a cool 40,000 copies. Then there's Steam. Valve's digital distribution service managed to shift 200,000 copies in the same time period. That's 4x it's [sic] competitor's sales figures combined.”).

¹⁵⁶ For a description of the Xbox 360's digital distribution platform, Xbox LIVE Marketplace see Nick Breckon, *Microsoft Announces Xbox 360 Game Digital Distribution, Launches August*, SHACK NEWS (June 1, 2009, 12:43 PM), <http://www.shacknews.com/article/58908/microsoft-announces-xbox-360-game>. For a description of the PlayStation 3's digital distribution platform, PlayStation Network (“PSN”) see *PLAYSTATION Network Introduction.*, PLAYSTATION.COM, [http://faq.en.playstation.com/app/answers/detail/a_id/797/~playstation-network-introduction](http://faq.en.playstation.com/app/answers/detail/a_id/797/~/playstation-network-introduction) (last visited Apr. 6, 2012). For a general introduction to the type of material available on the Wii's digital distribution platforms, WiiWare and the Virtual Console (collectively, Wii's “Network Services”) see *Enhance Your Wii*, NINTENDO, <http://www.nintendo.com/wii/enhance> (last visited Apr. 6, 2012); see also Ben Gilbert, *Nintendo Marketing Exec Says GameCube Games Coming to WiiWare*, JOYSTIQ (July 20, 2011,

distribution platforms allow gamers to download video games directly to their console's hard drive,¹⁵⁷ at any time of day and from the comfort of their own home. Though purchasing physical copies of video games remains the norm,¹⁵⁸ statistics indicate that gamers are gradually shifting away from purchasing new retail games and towards buying either used or digitally distributed games.¹⁵⁹ By offering new titles for download shortly after (or concurrent with) their retail release, game companies are further incentivizing gamers to purchase digital copies of the games instead of physical copies from retailers.¹⁶⁰

Digital distribution is an extremely clever way for video game companies to more tightly control their intellectual property. Consumers who purchase a video game through digital distribution are inherently constrained in their ability to later distribute the software. Because the game is digitally transferred and stored on their system's hardware, there is no physical copy that can be lent to a friend (who might otherwise purchase a copy of the game) or be

12:00 PM), <http://www.joystiq.com/2011/07/20/nintendo-marketing-exec-says-gamecube-games-coming-to-wiiware>. The reason that the Wii's digital distribution platforms are less impressive than the Xbox 360's or the PlayStation 3's is that the Wii does not provide digital download access to newly released, full retail games—the system only allows you to download older generation video games or smaller “indie” games. See Jeffrey L. Wilson, *The Top 10 Best Nintendo Wii Games for 2011*, PC MAG. (Dec. 2, 2011), <http://www.pcmag.com/slideshow/story/291248/the-top-10-best-nintendo-wii-games-for-2011> (“Virtual Console is where you can download and play retro video games—even titles from non-Nintendo systems such as the Commodore 64 or Turbo Grafx-16. WiiWare is the showcase for original downloadable titles such as *Gradius ReBirth*.”).

¹⁵⁷ See Josh Lowensohn, *A Brief History of Downloadable Console Games*, CNET (June 5, 2009, 10:00 AM), http://news.cnet.com/8301-10797_3-10257724-235.html (describing how Microsoft and Sony have both developed their systems to download full games directly to the system's hard drive).

¹⁵⁸ David Riley, *2011 Total Consumer Spend on All Games Content in the U.S. Estimated Between \$16.3 to \$16.6 Billion*, NPD GRP. (Jan. 12, 2012), http://www.thenpdgroup.com/wps/portal/npd/us/news/pressreleases/pr_120116 (“[S]pending on new physical content at retail continues to account for the majority of the total consumer spend on games content.”).

¹⁵⁹ *Id.* (“Bright spots came from HD console software sales, which were up 9 percent in 2011, as well as increases in the consumer spend on used games sales, full-game digital downloads and downloadable content, and mobile gaming apps.”).

¹⁶⁰ For an example of how new titles are released in digital form contemporaneously with their retail release date see Owen Good, *Infamous 2 Waits a Whole Two Weeks Before Hitting PSN*, KOTAKU (June 23, 2011, 11:30 PM), <http://kotaku.com/5815055/infamous-2-waits-a-whole-two-weeks-before-hitting-psn> (describing how *Infamous 2* was released just two weeks after its retail release).

resold to a retailer like GameStop.¹⁶¹ Consequently, as gamers lose the ability to distribute physical copies of their video games, the used game market will simultaneously decline as fewer and fewer used copies will be in circulation.¹⁶²

As a conceptual extension of *Vernor v. Autodesk*, the terms of use for digital distribution platforms provide another measure for game companies to control gamer rights regarding intellectual property. For example, the Steam Subscriber Agreement, which details the rights and obligations of Steam subscribers, explicitly states that, “[a]ll title, ownership rights and intellectual property rights in and to the Software and any and all copies thereof, are owned by Valve US and/or its affiliates’ licensors.”¹⁶³ While the agreement allows a Steam subscriber to personally use the software, the agreement states that subscribers “are not entitled to . . . sell, grant a security interest in or transfer reproductions of the Software to other parties in any way, nor to rent, lease or license the Software to others without the prior written consent of Valve.”¹⁶⁴ Under the agreement, the greatest liberty that consumers have with the intellectual property is to create game Mods but only for a very small portion of the games available in the Steam catalogue.¹⁶⁵ Similar restrictive terms are used for the Xbox

¹⁶¹ See Lowensohn, *supra* note 157 (“There are serious benefits to distributing game code digitally, especially for publishers. With built-in digital rights management, they get tighter control over leaks, and with the removal of a used market, their sales potential increases.”).

¹⁶² See Stace Harmon, *Will Downloadable Titles Kill Off the Pre-Owned Market?*, IGN (Dec. 13, 2011), <http://games.ign.com/articles/121/1214654p1.html> (Chris Avellone of game developer Obsidian Entertainment “revealed that digital distribution could also have an even greater payoff when it comes to the contentious issue of the pre-owned market. ‘Of course, one of the greatest things about digital distribution is what it does to reduce the used game market. I hope digital distribution stabs the used game market in the heart.’”).

¹⁶³ *Steam Subscriber Agreement* § 2(E), STEAM, http://store.steamgames.com/subscriber_agreement (last visited Apr. 9, 2012).

¹⁶⁴ *Id.* § 2(F).

¹⁶⁵ See *id.* § 2(C) (“[Y]ou may use the SDK or such other tools only on a non-commercial basis, and solely to develop a modified game for Valve products compatible with and using the Source Engine (a “Mod”) or to create derivative works of Valve game content (such as new levels for games, virtual items, or audio-visual content) based on Valve game assets (“Derivative Works”). Except as expressly set forth in any applicable Subscription Terms, (i) you may reproduce and distribute Mods in object code form, solely to licensed end users of Valve games that are compatible with and using the Source Engine; and (ii) you may reproduce and distribute Derivative Works in object code form, solely to licensed end users of the Valve game from which the Valve Derivative Works were derived. In each case, except as otherwise expressly set forth in any applicable Subscription Terms, such reproduction and distribution right is conditioned upon your making the Mod or Derivative Work publicly available without charge on a non-commercial basis.”).

LIVE Marketplace,¹⁶⁶ the PlayStation Network,¹⁶⁷ and the Wii's Network Services.¹⁶⁸

While digital distribution for home consoles is still a relatively novel technology, its rising significance is impossible to deny. In the fourth-quarter of 2011, “[d]igital game sales reached a total of \$3.33 billion . . . [between] the U.S. and Europe,”¹⁶⁹ with the United States alone capturing \$2.04 billion.¹⁷⁰ By comparison, physical sales in the United States totaled \$4.5 billion, a decrease of 3% from the prior year.¹⁷¹ This “means that digital games are about a third of the size of the physical retail game software business”¹⁷²—an astonishing fact considering how new the technology of digital distribution is. Also, as discussed below in Part III.C, it is likely that the usage of digital distribution will increase in the next generation of video game hardware. In light of all of these factors, the importance of digital distribution for video game intellectual property enforcement should not to be understated.

¹⁶⁶ See *Xbox LIVE Terms of Use* § 12, XBOX.COM (Dec. 2011), <http://www.xbox.com/en-US/Legal/LiveTOU> (last visited Apr. 9, 2012) (“Any software or content (e.g., text, images, video, graphics, music, sound, or games) . . . we provide as part of the Service is licensed and not sold. We reserve all other rights not expressly granted in this contract. The Software license ends when your Service ends unless we notify you otherwise. You must then uninstall the Software, or we may disable it. You must not work around any technical limitations in the Software.”).

¹⁶⁷ See *Terms of Service and User Agreement* § 7, PLAYSTATION.COM (June 29, 2010), <http://us.playstation.com/support/useragreements/termsserviceagreemt/index.htm> (extensive detailing of restrictions on the use of property obtained through PlayStation Network).

¹⁶⁸ See *Wii Network Services User Agreement (EULA)*, NINTENDO (June 22, 2010), http://www.nintendo.com/consumer/systems/wii/en_na/gi_system.jsp?menu=documents&submenu=rvl-doc-eula. Chapter 1, Article 1—the Grant of License—states that “Nintendo grants you a personal, limited, non-exclusive, revocable (in whole or in part) license to use the Wii Network Service, pursuant to this agreement.” *Id.* at ch. 1, art. 1. Chapter 6, Article 2—the Intellectual Property provision of the EULA—states that “[Nintendo] own[s] all right, title and interest in, or have the right to distribute, use or sublicense, the Wii Network Service and the Nintendo IP. [Nintendo] do[es] not provide you with any interest in the Wii Network Service or the Nintendo IP.” *Id.* at ch. 6, art. 2.

¹⁶⁹ Dean Takahashi, *Digital Game Sales Reach \$3.3B in U.S. and Europe in Q4*, VENTURE BEAT (Mar. 22, 2012, 10:30 AM), <http://venturebeat.com/2012/03/22/digital-game-sales-reach-3-3b-in-u-s-and-europe-in-q4>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

C. Looking Forward: Next Generation Video Game Hardware and Intellectual Property Enforcement

Traditionally, “[v]ideo game console makers have tended to operate on approximately five-year cycles[,] . . . [meaning] manufacturers generally wait about five years between new consoles, give or take a year.”¹⁷³ A look at the past two cycles of hardware is indicative of this trend: “Sony’s PlayStation 2 was released in 2000 and its PlayStation 3 in 2006. Microsoft’s original Xbox came out in 2001 and its Xbox 360 in 2005. And Nintendo’s GameCube first launched in 2001, and its Wii hit store shelves in 2006.”¹⁷⁴ While console makers have been claiming that the current generation will have a longer life cycle,¹⁷⁵ rumors about the next generation of consoles are circulating the Internet.¹⁷⁶ As discussed in this section, a number of these rumors indicate that the next generation hardware will have built-in features designed to limit intellectual property freedoms and to strike another major blow against the used game market.

One major change that many are speculating about is the possibility of Sony’s PlayStation 4 and Microsoft’s Xbox 720 abandoning physical game formats in favor of digital distribution for video game software.¹⁷⁷ Early rumors

¹⁷³ Daniel Terdiman, *When Will the Next Next-Generation of Game Consoles Arrive?*, CNET (May 21, 2008, 4:00 PM), http://news.cnet.com/8301-13772_3-9948560-52.html.

¹⁷⁴ *Id.*

¹⁷⁵ *See, e.g., id.* (“‘We have always said we believe PS3 has a 10-year product life cycle,’ said Patrick Seybold, the director of corporate communications and social media for Sony Computer Entertainment America.”).

¹⁷⁶ *See* Prarthito Maity, *Xbox 720 vs. PlayStation 4: Who Stands Where, So Far*, INT’L BUS. TIMES (Apr. 3, 2012, 8:10 AM), <http://www.ibtimes.com/articles/323284/20120403/xbox-720-playstation-4-microsoft-sony-specifications.htm> (“Rumors about both the Xbox 720 and PlayStation 4 are making rounds on the Internet with several blogs and websites dedicated to them and their specifications.”). Because Nintendo has not been an active participant in the physical media versus digital distribution debate, this Section primarily focuses on the PlayStation 4 and Xbox 720.

¹⁷⁷ Video game systems often go through a number of codenames before they are released. For instance, the PlayStation 4 also goes by the codename “Orbis” and Xbox 720 also goes by “Durango.” *See* Lisa Eadicicco, *Wii U Release Date: Price May Be Nearly Twice the Production Cost, More Focus on Downloadable Content*, INT’L BUS. TIMES (Apr. 9, 2012, 11:36 AM), <http://www.ibtimes.com/articles/325575/20120409/wii-u-release-date-2012-price-specs.htm> (“Microsoft will be launching its successor to the Xbox 360, which is rumored to be called the Xbox 720, and Sony is working on its PlayStation 4, known internally as ‘Orbis.’”); Jane McEntegart, *Xbox “720” “Durango” Rumored to Have No Disc Drive*, TOM’S GUIDE (Mar. 10, 2012, 2:00 PM), <http://www.tomsguide.com/us/Xbox-720-Durango-No-Disk-Drive-Optical-Drive,news-14427.html>. For the sake of consistency, I will refer to

suggest that the PlayStation 4 will make video games available to consumers in one of two forms: as a physical Blu-Ray Disc or as a PlayStation Network download.¹⁷⁸ This type of hybrid model would allow gamers access to physical copies of games, but would also allow Sony to continue incentivizing players to make the transition to digital distribution. The current generation is already moving in this direction, with many recent games being available for download simultaneously with the release of the physical copies of the game.¹⁷⁹

Rumors surrounding the Xbox 720's design indicate an even more aggressive model for digital distribution, with early reports suggesting that "Microsoft is going to abandon disc-based games for its next console,"¹⁸⁰ resulting in a download-only machine.¹⁸¹ As noted above in Part III.B, increased digital distribution will limit the number of physical video game copies that enter the used game market and will eliminate the opportunity for individual gamers to lend or resell their video games. There are, however, limitations to a download-only design that may hinder its implementation in the next generation of hardware. A significant hurdle is the fact that access to broadband Internet is not yet universal.¹⁸² Additionally, "[w]hile many gamers . . . live in areas where it can be hard to find a spot that is not within range of a Wi-Fi connec-

Microsoft's next-generation system as the Xbox 720 and Sony's next-generation system as the PlayStation 4.

¹⁷⁸ Luke Plunkett, *The Next PlayStation is Called Orbis, Sources Say. Here are the Details.*, KOTAKU (Mar. 28, 2012, 10:30 AM), <http://kotaku.com/5896996/the-next-playstation-is-called-orbis-sources-say-here-are-the-details>.

¹⁷⁹ See, e.g., Michael McWhertor, *Sony Makes Aggressive Push for 'PSN Day 1 Digital' Releases on PlayStation Store*, POLYGON (Sept. 25, 2012), <http://www.polygon.com/gaming/2012/9/25/3406146/sony-makes-aggressive-push-for-psn-day-1-digital-releases-on-ps3> (discussing simultaneous digital and physical releases of blockbusters Resident Evil 6, Assassin's Creed 3, and NBA 2K13).

¹⁸⁰ Dan Pearson, *Rumour: Microsoft Abandoning Discs for Next-Gen*, GAMESINDUSTRY (Mar. 9, 2012, 10:07 AM), <http://www.gamesindustry.biz/articles/2012-03-09-rumour-microsoft-abandoning-discs-for-next-gen>.

¹⁸¹ *Id.*

¹⁸² Chris Pereira, *Next Xbox Rumored to Lack a Disc Drive, but Is That so Shocking?*, IUP.COM (Mar. 9, 2012), <http://www.iup.com/news/next-xbox-lack-disc-drive>. For a helpful set of maps showing broadband Internet distribution across the United States see *National Broadband Map*, NAT'L TELECOMM. & INFO. ADMIN., <http://www.broadbandmap.gov> (last visited Apr. 10, 2012). As of early 2011, "5–10[%] of Americans lack broadband access at speeds that support a basic set of applications[,] . . . 36[%] lack access to wireless service," and about "68[%] of households in the U.S. have broadband access." See Chloe Albanesius, *Are You Being Served? National Broadband Map Going Live Today*, PC MAG. (Feb. 17, 2011), <http://www.pcmag.com/article2/0,2817,2380525,00.asp>.

tion, . . . broadband penetration is not what some believe it to be.”¹⁸³ Further complicating matters, “[a] digital-only system would also present a problem for broadband users who are saddled with a bandwidth cap, something that is becoming increasingly common.”¹⁸⁴ These types of limitations may impede a platform based entirely around digital distribution.

Even if a model based entirely on digital distribution is unrealistic, next generation hardware could be designed to include other features that specifically obstruct the continued distribution of used video games. One rumored model would essentially advance the online pass system so that it becomes a uniform and universal practice used across all video game software in the next generation.¹⁸⁵ The PlayStation 4, for example, may have an inherent restricting process for gamers who purchase a physical copy of the game:

If you buy the disc, it must be locked to a single [PlayStation Network] account, after which you can play the game, save the whole thing to your [hard disk drive], or peg it as ‘downloaded’ in your account history and be free to download it at a later date.¹⁸⁶

After linking a video game to a gamer’s personalized account, the software would lose almost all value to any subsequent owner.¹⁸⁷ While it remains unclear what restrictions would be implemented on the software, some speculate that “used games will be limited to a trial mode or some other form of content restriction, with consumers having to pay a fee to unlock/register the full game.”¹⁸⁸ Although this model would not eliminate entirely the market for used video games, it would nevertheless enable the game industry to substantially restrict used game sales, and it would “appeas[e] major publishers who would no longer have to implement their own haphazard approaches to ‘online passes.’”¹⁸⁹

Though much of the information included in this section is speculative, the possibilities discussed are not unrealistic when one considers the vast expansion of technology and what technology the next generation of video game hardware will bring. Even if only some of these changes are included in the next cycle of consoles, it is clear that the industry has an interest in further limiting the control that individuals have over game software and in taking steps to

¹⁸³ Pereira, *supra* note 182.

¹⁸⁴ *Id.*

¹⁸⁵ Plunkett, *supra* note 178.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

restrict the used game market. As the gaming industry develops newer technologies, gamers and retailers should expect to see continued efforts to attain these goals.

IV. CONCLUSION

The past decade has brought extensive change to the enforcement mechanisms for safeguarding intellectual property rights associated with video game software. Technological developments and new distribution tactics, such as online passes and digital distribution, have allowed the game industry to bring an entirely novel approach to business. The result has mainly been to the detriment of video game consumers and used game retailers. These changes have restricted the ability of both gamers and retailers to use and distribute copies of video games beyond the original purchase of a new copy of the software. The market for used video games has been particularly affected and will likely remain a target of attack from the video game industry until it is completely abolished.

Additionally, starting with *Vernor v. Autodesk* in 2010, the game industry has been the benefactor of a series of important legal decisions that bolster game companies' ability to control intellectual property at the expense of gamers and retailers. In light of the monumental change that video game software is only licensed and not owned, game companies have been given the opportunity to include substantial restrictions on intellectual property rights through licensing agreements that most gamers will never read. These licensing agreements also have the opportunity to hurt used game retailers like GameStop by preventing the resale of used video games. While it appears that the full impact of these cases has yet to be realized, they are significant indicators of the growing enforcement power that game companies have over their intellectual property.

The combination of technological advancements, new distribution tactics, and growing support from the legal system is changing the very nature of the video game industry and the relationships between game companies, consumers, and retailers. These factors indicate a growing trend that is placing more and more enforcement power in the hands of the game industry. Such developments could pose a serious threat to used video games and could significantly alter the nature of video game intellectual property enforcement in the future.