

AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* (1st ed. 2016).

2016, Cambridge, MA, MIT Press

ISBN: 9780262035019

Price: \$29.95

Page Length: 264 Pages

Keywords: Digital Marketplace, End User License Agreement (EULA), Personal Property Rights, Intellectual Property

Reviewed by Conor McSweeney

Journal of High Technology Law

Suffolk University Law School

Evolving Personal Property Rights in a Digital World

When we say that personal property rights are being eroded or eliminated in the digital marketplace, we mean that rights to use, to control, to keep, and to transfer purchases—physical and digital—are being plucked from the bundle of rights purchasers have historically enjoyed and given instead to IP rights holders. That in turn means that those rights holders are given greater control over how each of us consume media, use our devices, interact with our friends and family, spend our money, and live our lives.¹

Aaron Perzanowski and Jason Schultz's *The End of Ownership: Personal Property in the Digital Economy* summarizes the current state of personal property rights in the digital marketplace and proposes several recommendations to make digital media transactions more consumer friendly. Perzanowski and Schultz wrote this book with the intention of educating and informing consumers on the evolution of the law as it relates to consumer transactions for digital content like music, movies, books, and software that are downloaded online instead of purchased in physical form at the local brick and mortar store. The book's central theme is that the traditional personal property rights we used to enjoy have been diminished in the digital marketplace because of a vast array of strategies employed by corporate actors. Intellectual

¹ See AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* 23 (1st ed. 2016).

Property (IP) rights holders no longer rely upon just the established intellectual property law, but extend their control through implementation of contract law principles via the end user license agreement (EULA) and new technologies like Digital Rights Management (DRM).

Aaron Perzanowski is a Professor of Law at Case Western Reserve University School of Law in Cleveland, Ohio and teaches courses in intellectual property, telecommunications and innovation. Jason Schultz is a Professor of Clinical Law at New York University School of Law and is the Director of its Technology Law and Policy Clinic. Both authors obtained their law degrees from the University of California, Berkley, School of Law, with Schultz obtaining his *juris doctor* in 2000, six years ahead of Perzanowski. Perzanowski and Schultz are both well-published in legal journals in the areas of intellectual property law, big data and the internet of things (IOT), but this is the first book published by either author. Perzanowski has another book he is preparing to publish in February 2017, called *Creativity Without Law: Challenging the Assumptions of Intellectual Property*², co-authored with Kate Darling, a MIT Media Lab research specialist, on the role intellectual property law plays in human creativity.

Intellectual property law, the law of personal property, contract law and consumer law dominate the landscape of this book as the authors lay out how these areas of law are intertwined in the modern transaction of purchasing digital content through an online platform. Perzanowski and Schultz begin with an initial overview of how traditional personal property rights worked when consumers purchased physical media, in order to convey to the reader shortly thereafter how the consumer has lost access to these rights in the digital marketplace. The first in-depth legal concept discussed is the exhaustion principle, which the authors describe as “the notion that an IP rights holder relinquishes some control over a product once it sells or gives that product to

² See AARON PERZANOWSKI & KATE DARLING, CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY (1st ed. 2017).

a new owner.”³ Discussion of this topic goes to the very heart of the book’s core message in describing how IP rights holders are more assertive in the digital marketplace in protecting their products and have designed tools, implemented new contractual methods, and won judicial and legislative victories, that allow them to prohibit the post-sale transfer of their products.

Next, the authors discuss the evolution of digital media transactions over the Internet since the early 2000’s, with the establishment of the Apple iTunes Music Store that emerged in the wake of illegal download web sites like Napster representing a particularly critical event. Perzanowski and Schultz also argue that the transition to the cloud to store digital content, instead of downloading directly to a consumer’s hard drive, was another major development in the digital marketplace transaction. Then, the authors discuss how subscription-based streaming applications like Netflix and Spotify represent the most recent development changing how we consume and possess rights to digital media. Consumers are cozying up to this idea that they do not need to own all of the media content they wish to consume, when they can rent access to vast libraries of on-demand content. Perzanowski and Schultz express fear that these subscription-based streaming options do not adequately pressure IP rights holders to minimize the control they exert, while also further eroding the consumer’s relationship with ownership.

In the next two chapters, the authors dive into some of their most compelling arguments. First they point out that the fine print in your digital media purchases most often includes a EULA, declaring that you do not actually own the song or movie you just bought. The IP rights holder, working in conjunction with the marketplace platform, have colluded to deny you ownership rights and restrict any transfer to a third party, despite the consumer enjoying that freedom today to lend their favorite hardcover book to a friend. Embedded in this fine print, consumers are sacrificing long-protected consumer rights established in judicial precedent and

³ See Perzanowski & Schultz, *supra* note 1, at 25.

commercial practice without even realizing what they are giving up when they select “I Agree” on the click-wrap EULA. Perzanowski and Schultz then dive into how our online transactions use language like “Buy Now” or “Purchase,” but consumers are not actually obtaining ownership rights following the transaction. The authors argue this is actually a deceptive practice since the IP rights holders are not actually selling the products, but are licensing them. They propose a very simple and straightforward solution to this problem in asserting that the Federal Trade Commission (FTC) should take action against these deceptive practices in order to compel the online platforms represent more accurately what the consumer is purchasing.

The first few chapters are very informative and are presented in a very clear and persuasive structure that maximizes the potency of their arguments. However, after making their most compelling arguments, the authors get sidetracked exploring the concept of libraries of the future and the concern that digital media may render libraries obsolete. The libraries are an interesting topic to consider, but they would have been better off discussed in the conclusion as an additional negative outcome rather than a topic worth sixteen pages of text. The next chapter on DRM technologies emerging in the wake of early failures to keep Video Cassette Recorders (VCRs) out of the marketplace in the 1980’s helps the book pick up steam again. It would have made more sense for this chapter to follow chronologically after the discussion of the lie of “Buy Now.” The authors are very persuasive in their dystopian reflection on the pervasiveness of DRM technologies embedded in our digital media and how software code regulates our use of regular consumer behavior.

The last two sections before the conclusion focused on the IOT market and how new technologies are embracing the licensing approach, as well as the role patent rights play in protecting IP rights holders in the digital marketplace. The IOT chapter fits well within the

overall thesis, particularly with respect to the software licensed in automobiles. Perzanowski and Schultz discuss how modern day cars are essentially computers that move on the highway as opposed to a mechanical piece of equipment. Restrictions imposed by car companies to prevent unauthorized people from attempting to fix any issues with the software is another over-exertion of control in today's digital economy that the authors are right to call out and criticize.

The authors present a strong overall argument that consumers are experiencing a loss in ownership rights in the digital economy, which subjects consumers to potential exploitation and other disadvantages. They convey their argument clearly and logically and the book is not overwhelming in legalese so as to distract the reader from their main points. This book would fit in well as required reading for any law course regarding intellectual property or internet law, but any interested person could pick it up at their local bookstore and follow along with the subject matter. Perzanowski and Schultz's discussions of the law and practical realities of the current state of affairs are very descriptive and easy to follow, but the sections on the libraries of the future and the explanation concerning overreach by patent holders felt a little out of place. The book could have been nearly forty less pages and flowed in a much more concise and cogent manner if the authors removed these two sections. In addition, the authors bring up the concept of the block chain and how it could serve as potential solution for rights holders to give up some of their control just a few pages before the end of the book, when it may have benefitted from a more detailed explanation earlier-on.

After reading this book, the reader gets a sense there is a potential backlash coming to the extensive overreach committed by corporations in exerting excessive control over digital consumer transactions. Its likely that consumers will eventually smarten up and flock to those retailers that offer ownership rights as part of the bargain, and eventually the corporations will

have to relinquish some of the control again. I probably diverge from the authors where I believe that the shift will be market-driven as more information (including access to publications like this book) becomes available to consumers regarding this still relatively new Internet ecosystem. While the authors assert that tweaks to the legislation and enforcement by regulators like the FTC will lead the pushback against these corporate strategies. Either way, hopefully the end-result is the same and consumers are able to regain more control over their possessions purchased in the digital marketplace, or else we run the risk of corporate interests further infringing upon our rights moving forward.