68: Book Review - The End of Ownership (Sheehan)

By Kerry Sheehan
In *The End of Ownership: Personal Property in the Digital Age*, Aaron Perzanowski and Jason Schultz walk us through a detailed and highly readable explanation of exactly how we’re losing our rights to own and control our media and devices, and what’s at stake for us individually and as a society. The authors carefully trace the technological changes and legal changes that have, they argue, eroded our rights to do as we please with our stuff. Among these changes are the shift towards cloud distribution and subscription models, expanding copyright and patent laws, Digital Rights Management (DRM), and use of End User License Agreements (EULAs) to assert all content is “licensed” rather than “owned.” And Perzanowski and Schultz present compelling evidence that many of us are unaware of what we’re giving up when we “buy” digital goods.

Ownership, as the authors explain, provides a lot of benefits. Most importantly, ownership of our stuff supports our individual autonomy, defined by the authors as our “sense of self-direction, that our behavior reflects our own preferences and choices rather than the dictates of some external authority.” It lets us choose what we do with the stuff that we buy – we can keep it, lend it, resell it, repair it, give it away, or modify it, without seeking anyone’s permission. Those rights have broader implications for society as a whole – when we can resell our stuff, we enable secondary and resale markets that help disseminate knowledge and technology, support intellectual privacy, and promote competition and user innovation. And they’re critical to the ability of libraries and archives to serve their missions – when a library owns the books or media in its collection, it can lend those books and media almost without restriction, and it generally will do so in a way that safeguards the intellectual privacy of its users.
These rights, long established for personal property, are safeguarded in part by copyright law’s “exhaustion doctrine.” As the authors make clear, that doctrine, which holds that some of a copyright holders’ rights to control what happens to a copy are “exhausted” when they sell the copy, is a necessary feature in copyright law’s effort to limit the powers granted to copyright holders so that overbroad copyright restrictions do not undermine the intended benefit to the public as a whole.

Throughout the book, Perzanowski and Schultz present a historical account of rights holder attempts to overcome exhaustion and exert more control over what people do with their media and devices. The authors describe book publishers’ hostile, “fearful” response to lending libraries in the 1930’s:

…a group of publishers hired PR pioneer Edward Bernays….to fight against used “dollar books” and the practice of book lending. Bernays decided to run a contest to “look for a pejorative word for the book borrower, the wretch who raised hell with book sales and deprived authors of earned royalties.”…Suggested names included “bookweevil,” ”libracide,” “booklooter,” “bookbum,” “culture vulture,” … with the winning entry being “booksneak.”

Publishers weren’t alone, the authors show that both record labels and Hollywood studios fought against the rise of secondary markets for music and home video rental, respectively. Hollywood fought a particularly aggressive battle against the VCR. In the end, the authors note, Hollywood continued to “resist[] the home video market,” at least until they gained more control over the distribution technology.

But while historically, overzealous rights holders may have been stymied to some extent by the law’s limitation of their rights, recent technological changes have made their quest a lot easier.

“In a little more than a decade,” the authors explain, we’ve seen dramatic changes in content distribution, from tangible copies, to digital downloads, to the cloud, and now, increasingly, to subscription services. These technological changes have precipitated corresponding changes in our abilities to own the works in our libraries. While, as the authors explain, copyright law has long relied on the existence of a physical copy to draw the lines between rights holders’ and copy owners’ respective rights, “[e]ach of these shifts in distribution technology has taken us another step away from the copy-centric vision at the heart of copyright law.” Unfortunately, the law hasn’t kept up: “Even as copies escape our possession and disappear from our experience, copyright law continues to insist that without them, we only have the rights copyright holders are kind enough to grant us.”

Perzanowski and Schultz point to End User License Agreements (EULAs), with their excessive length, one-sided, take-it-or-leave-it nature, complicated legalese, and relentless insistence that what you buy is only “licensed” to you (not “owned”), as a main culprit behind the decline of ownership. They provide some pretty standout examples — including EULAs that exceed the lengths of classic works of literature, and those that claim to prevent a startling array of activity. For the authors, these EULAs

... create private regulatory schemes that impose all manner of obligations and restrictions, often without meaningful notice, much less assent. And in the process, licenses effectively rewrite the balance between creators and the public that our IP laws are meant to maintain. They are an effort to redefine sales, which transfer ownership to the buyer, as something more like conditional grants of access.

And unfortunately, despite their departure from some of contract law’s core principles, some courts have permitted their enforcement, “so long as the license recites the proper incantations.”
The authors are at their most poetic in their criticism of Digital Rights Management (DRM) and Section 1201 of the DMCA, perhaps the worst scourges of ownership in the book. As they point out, even in the absence of restrictive EULA terms, DRM embeds rights holders’ control directly into our technologies themselves – in our cars, our toys, our insulin pumps and heart monitors. Comparing it to Ray Bradbury’s Farenheit 451, they explain:

While not nearly as dramatic as flamethrowers and fighting robot dogs, the unilateral right to enforce such restrictions through DRM exerts many of the types of social control Bradbury feared. Reading, listening, and watching become contingent and surveilled. That system dramatically shifts power and autonomy away from individuals in favor of retailers and rights holders, allowing for enforcement without anything approaching due process.

As Perzanowski and Schultz explain, these shifts aren’t just about our relationship to our stuff. They recalibrate the relationship between rights holders and consumers on a broad scale:

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. Cast in these terms, it is clear that there is a looming conflict between the respective rights of consumers and IP rights holders.

The authors repeatedly remind us that who makes the decision between what is owned and what is licensed is crucial – both on the individual and societal scale. When we allow companies to define when we can own our stuff, through EULAs or Digital Rights Management, we shift crucially important decisions about how our society should work away from legislatures, courts, and public processes, to private entities with little incentive to serve our interests. And, when we don’t know exactly what we give up when we “buy” digital goods, we’re not making an informed choice. Further, when we opt for mere access over ownership, our choices have broader societal effects. The more we shift to licensing and subscription models, the more it may become harder for those who would rather own their stuff to exercise that option – stores close, companies shift distribution models, and some works disappear from the market.

In the end, Perzanowski and Schultz leave us with a thread of hope that we still might see a future for ownership of digital goods. They believe that at least some courts and policy makers, and “[p]erhaps more importantly, readers, listeners, and tinkerers – ordinary people – are expressing their own reluctance to accept ownership as an artifact of some bygone predigital era.” And they provide a set of arguments and reform proposals to martial in the fight to save ownership before it’s too late. They lay out an array of technological and legal strategies to reduce deceptive practices, curb abusive EULAs, and, reform copyright law. The most thoroughly developed of these proposes a legislative restructuring of copyright exhaustion in a flexible, multi-factor format, in part modeled on the United States’ fair use doctrine. It’s a good idea, and it would probably work. But (and the authors acknowledge this) even modest attempts at reform have failed to garner the necessary support in Congress to move forward. A more ambitious proposal, like this one, seems at least unlikely in the near term.

Overall, the End of Ownership is a deeply concerning exposition of how we’re losing valuable rights. The questions it raises about whether and how we can preserve the benefits of ownership in the digital age will likely continue to be relevant even as technology, and the law, evolve. Most critically, it asks us to rethink who we want making the decisions that shape how we live our lives. While the book tackles complex issues in law and technology, it does so in a way that’s
accessible and interesting both for lawyers and laypersons alike. The book’s ample real world examples of everything from disappearing e-book libraries, to tractors, dolls, and medical devices resistant to their owners’ control bring home both the impact of abstract legal doctrines and the urgency of their reform.

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