

# Pre-Owned Games

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## Abstract:

The market in second-hand or pre-owned games is made possible by provisions in copyright law that allow the purchasers of copyrighted works to give or sell their copy to others. Pre-owned games are a contentious issue for game developers and publishers who see them as damaging to the sales and revenue generated by new games.

The sale of second-hand or pre-owned games affects the relationships between game developers, publishers and players. Players are concerned about their rights to sell the games they own, either to receive a discount at retailers who accept second-hand games or to give or sell their games to others privately. Developers and publishers have concerns about the effect pre-owned games have on new game sales and its potential impact on future investment in game development. Publishers contribute funding and distribution support to developers, who create the games publishers release onto the market. Revenue from new game sales is divided between publishers and developers. Publishers and developers do not receive any revenue from pre-owned game sales, either privately between individuals or through a retailer. Pre-owned games present two sets of ethical problems: whether publishers and developers should attempt to limit the market for pre-owned games and restrict the rights of players to sell or trade-in their games; and whether players should choose to purchase new games instead of cheaper pre-owned copies.

## The First Sale Principle

A market for pre-owned games is made possible by the first sale principle in copyright law, which permits those who have legally obtained a copy of a copyrighted work to give, sell, or lend that copy to someone else.<sup>1</sup> The term 'first sale principle' comes from US copyright law, and while there is no explicit statement of this principle in international intellectual property law, similar provisions (often called the rule of exhaustion, as the copyright holder's rights over copies are exhausted by their purchase) exist in copyright laws around the world.<sup>2</sup> This principle prevents copyright holders from controlling the sale of copies of their works after their initial sale. It allows copies of copyrighted works to be treated like any other possession that can be sold, borrowed, or given away by their owner.<sup>3</sup> It enables lending libraries and second-hand markets to exist in copyrighted works,

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1 Lothar Determann and Aaron Xavier Fellmeth, "Don't Judge a Sale by Its License: Software Transfers Under the First Sale Doctrine in the United States and the European Community," *University of San Francisco Law Review* 36, no. 1 (Fall 2001): 7.

2 For a brief overview of the rule of exhaustion in European copyright law and how it affects digital content (such as games), see Severine Dusollier, "The Relations Between Copyright Law and Consumer's Rights from a European Perspective" (European Parliament, November 10, 2010), <http://papers.ssrn.com/abstract=2127736>. Article 6 of the World Copyright Treaty of 1996 states that it is up to the individual states bound by this agreement to decide whether the rights of the copyright holder are exhausted after the initial sale of copies of their work. See World Intellectual Property Organization, "WIPO Copyright Treaty," December 20, 1996, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=295166](http://www.wipo.int/treaties/en/text.jsp?file_id=295166).

3 Hugh Breakey, *Intellectual Liberty: Natural Rights and Intellectual Property* (Surrey: Ashgate Publishing, 2012), 49.

such as books, musical recordings, and art. Second-hand (or secondary) markets in copyrighted works allow purchasers to trade in them, increasing the number of potential suppliers for a particular work and ideally lowering its price through greater competition. It also helps to protect the availability of a particular work if the copyright holder later withdraws it from sale.<sup>4</sup>

## Competition between New and Pre-Owned Games

Like any commodity, controlling the availability (or *scarcity*) of games allows sellers to influence the amount of money they can make from selling them. If publishers are the only source of a particular game they can determine its price and how much of a profit they can make on each sale. Pre-owned games are substitute goods for new games as they can fulfil the same consumer demand. As the physical condition of a game's physical media (disks, box and manuals) is usually peripheral to the play value of the game itself, the physical wear and tear that pre-owned games may have compared to new ones is often of little concern to players.<sup>5</sup> If the play value of pre-owned games is identical to that of new copies of that game, they are perfect substitutes for most players. The entry of pre-owned games into the market creates more competition by increasing supply of games onto the market from a greater variety of vendors. This reduces the publisher's control over a game's price as they can be undercut by suppliers of pre-owned copies of that game. Removing the copyright holder's control over the price of copies of her work after their initial sale is one of the intended purposes of the first sale principle.

Pre-owned games are a profitable business for game retailers. The international games retailer GameStop (who operate stores in North America, Europe, Australia, and New Zealand) states in its 2012 annual report that sales of pre-owned games comprised 27.4% (US\$2,430.5 million) of its net sales and 48.1% (US\$1,170 million) of its gross profit, compared to the 40.3% (US\$3,582 million) of net sales and 21.9% (US\$786 million) of gross profit from new games.<sup>6</sup> Retailers make higher profits from selling pre-owned games than they do selling new ones, and developers and publishers do not receive any of the revenue gained from pre-owned game sales.<sup>7</sup> Publishers would prefer new games to be differentiated from pre-owned copies so that pre-owned games are imperfect substitutes for new games. This would encourage new game sales (as this differentiation gives an incentive for paying more for a new copy) and reduce competition from pre-owned copies of the same game. Differentiation may occur by adding value to the physical materials distributed with the game (such as limited 'special editions' that include collectables related to the game) or by making various game features available only to the original purchaser of a game. New games may have special codes (or 'online passes') included within their packaging that allow players to download additional content for the game or to access multiplayer features.<sup>8</sup> These codes can only be used once. Players of pre-owned copies may have to purchase this additional game content as downloadable content (DLC) from the game's publishers.<sup>9</sup>

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4 Ruth Anthony Reese, "The First Sale Doctrine in the Era of Digital Networks," *Boston College Law Review* 44, no. 2 (2003): 592.

5 A game's play value can be thought of as its' intrinsic value to players: the experience gained from playing a particular game. It is the game's *use* value, as opposed to its' *exchange* (or market) value, which is how much someone is willing to pay for it in a market.

6 GameStop Corporation, "2012 Annual Report," 2013, 37, <http://phx.corporate-ir.net/phoenix.zhtml?c=130125&p=irol-reportsannual>.

7 Andrew W. Eichner, "Game Over, Insert Coin to Continue: Entering a New Era of Video Game Intellectual Property Enforcement," *IDEA: The Intellectual Property Law Review* 53, no. 1 (2013): 114–116.

8 *Ibid.*, 118–119.

9 Tom Ivan, "Sony, EA Combat Second Hand Game Sales," *Edge Online*, February 18, 2010, <http://www.edge->

The secondary market for games can also be restricted by publishers who use online services to distribute their games. Games utilising online game services, such as Steam, Xbox Live, and PlayStation Network, either require players to purchase them directly via the service (bypassing the use of a physical copy entirely) or require physical copies of games to be registered with an account for that service.<sup>10</sup> Like games that include codes for downloading additional content, new physical copies of such games include a code that must be registered with the appropriate online service. Registering this code adds access to the game to that user's account with that service.<sup>11</sup> As a particular code can only be registered once, anyone who acquires that code afterwards is unable to use it. Anyone acquiring a second-hand copy of such a game will need to acquire a new code to register it with the online service. The pre-owned game is no longer a substitute for a new one as it has no play value without a new code to register it with.<sup>12</sup> Unless the online service allows games to be transferred between accounts, selling or transferring the game to someone else requires giving the receiver of the second-hand game the details of the user account that the game is registered with. As online game services often include additional features, personal information and any other games the user has registered, access to these services is often worth more to players than the value of any particular game, making them unwilling to trade away access to these accounts. The design and features of online services determine what rights users have over the content users access through them.<sup>13</sup> Online services allow publishers to effectively bypass the first sale principle and prevent pre-owned games from competing in the market with new ones.<sup>14</sup> Making a game's play value dependent on access to an online service creates a dependence between that game's players and that service. If the service is disrupted or shut down by the game's publisher, the play value of the games depending on it are lost. The hardware and software of online services, and increasingly game devices themselves, control how games are played and used (and even whether they can be played at all).<sup>15</sup>

## The Argument against Buying Pre-Owned Games

Developers and publishers acknowledge that these measures are unpopular with players, and defend them by claiming that reduced sales due to competition by pre-owned games harms game development by removing some of the incentives to invest in developing new games. The initial sales numbers and revenue gained from the sale of new games is used to judge a game's success and the funding available to developers. Developers may face financial difficulties or closure if their

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[online.com/news/sony-ea-combat-second-hand-game-sales/](http://online.com/news/sony-ea-combat-second-hand-game-sales/).

10 Eichner, "Game Over, Insert Coin to Continue," 124–126; Valve Corporation, "Welcome to Steam," *Steam*, 2013, <http://store.steampowered.com/about/>; Microsoft Corporation, "Xbox Live," 2013, <http://xbox.com/live/>; Sony Computer Entertainment, "PlayStation Network," 2013, <http://us.playstation.com/psn/index.htm>.

11 Ivan, "Sony, EA Combat Second Hand Game Sales."

12 Edge Staff, "Why Microsoft Is Killing the Second-hand Game Market," *Edge Online*, February 7, 2013, <http://www.edge-online.com/features/why-microsoft-is-killing-the-second-hand-game-market/>.

13 For instance, the Federation of German Consumer Organisations (VZVB) is bringing legal action against Valve Corporation as Valve's Steam online games service does not allow its users to resell games that use this service. See Loek Essers, "Valve Sued in Germany over Game Ownership," *PC Advisor*, January 31, 2013, <http://www.pcadvisor.co.uk/news/game/3423715/valve-sued-in-germany-over-game-ownership/>.

14 Eichner, "Game Over, Insert Coin to Continue," 125–126.

15 Lawrence Lessig, *Code: Version 2.0* (New York: Basic Books, 2006), 3–6. An awareness of this contributed to the public backlash against some of the proposed features of Microsoft's Xbox One game console that were intended to control the use of pre-owned games. See Edge Staff, "Why Microsoft Is Killing the Second-hand Game Market"; Chris Kohler, "Xbox One Proves It: Don't Mess With Used Games," *Wired*, June 19, 2013, <http://www.wired.com/gamelife/2013/06/xbox-one-used-games-drm/>.

games do not meet their sales targets.<sup>16</sup> The type of games developed and funded may also be affected as publishers seeking a more reliable return on their investment may fund games that are less likely to be traded in (for instance, games that do not have a definite ending).<sup>17</sup> Development funding may also be directed towards games that are frequently updated or replaced, such as sports games with annual editions or franchises with frequent instalments that supersede previous ones.<sup>18</sup>

As publishers and developers do not receive revenue from pre-owned game sales, they are particularly concerned with where and how pre-owned games are marketed. Game retailers often buy and sell second-hand games, and offer discounts on new games in return for trading in old ones. New and pre-owned games may be available in the same store, further heightening the market competition between them.<sup>19</sup> Pre-owned games directly compete with new copies if both have the same play value to players and both are affordable. However, such competition between new and pre-owned games may not necessarily reduce new game sales. Pre-owned games may themselves be traded in with a retailer for credit towards purchasing a new game.<sup>20</sup> The ability to sell or trade in a game later may encourage players to purchase new games with the knowledge that they can recoup some of the purchase cost later.<sup>21</sup> The lower price of pre-owned games compared to new ones may attract buyers who cannot afford the cost of buying a new copy. The relatively high cost of games compared to other forms of entertainment is frequently mentioned as a reason for purchasing pre-owned games.<sup>22</sup>

The argument that players should choose to purchase new copies of a game instead of a second-hand one is often presented in consequentialist terms. If players want more new games to be developed and published, they should purchase new games to encourage their production. Buying pre-owned games does not encourage new development as the revenue from their sale goes to the pre-owned game vendor rather than those involved in producing the game.<sup>23</sup> This argument claims there is more than just the play value of new games for players: players benefit from both the play value of the game itself and from knowing that they have rewarded the developers and publishers of games they enjoy. Purchasing pre-owned games, although they provide the same play value for players, do not offer this ability for players to reward developers and publishers for their work in producing the game.

## Defending Pre-Owned Games

The argument that purchasing new games rewards their developers and encourages new development only holds for cases where pre-owned games are in direct competition with new games. If the game is out-of-print (no longer sold by the publisher), purchasing second-hand copies

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16 Lee Perry, "The Developers' View on Preowned: Why Game Players Must Support Their Hobby," *Edge Online*, June 21, 2013, <http://www.edge-online.com/features/the-developers-view-on-preowned-why-game-players-must-support-their-hobby/>.

17 Nathan Brown, "Braben: Pre-owned 'Killing Singleplayer Games'," *Edge Online*, March 20, 2012, <http://www.edge-online.com/news/braben-pre-owned-killing-singleplayer-games/>.

18 The annual release of a new *Call of Duty* game is just one highly-visible example of this.

19 Similar concerns have been raised by producers of other copyrighted works that are available second-hand. See Reese, "The First Sale Doctrine in the Era of Digital Networks," 590 n46.

20 Chris Kohler, "GameStop the ScapeGoat: Why Used Games Debate Isn't So Simple," *Wired*, August 27, 2010, <http://www.wired.com/gamelife/2010/08/used-games/>.

21 Nicole F. Velasquez, Hannah Newman, and Scott Miller, "The Impact Of A Secondary Market On Video Game Purchase Intentions," *Review of Business Information Systems* 16, no. 3 (2012): 106.

22 Kohler, "GameStop the ScapeGoat"; Perry, "The Developers' View on Preowned: Why Game Players Must Support Their Hobby."

23 Perry, "The Developers' View on Preowned: Why Game Players Must Support Their Hobby."

does not raise this concern. This highlights a problem with broad restrictions and limitations on the sale and use of pre-owned games: if new copies of a particular game are unavailable, purchasing a second-hand copy is the only legal way to obtain that game's play value. The sale of pre-owned copies of out-of-print and obsolete games is the only way of making them available for players who do not want to acquire illegitimate pirated copies of those games. This brings us back to the first sale principle in copyright law, and its purpose in limiting the control of creators of copyrighted works after their initial release. If creators could prevent the resale of their works after they have been published, it would allow them to make certain works unavailable to others, effectively suppressing them.<sup>24</sup> A pre-owned games market, and the ability to trade and play games that are out-of-print or no longer supported by publishers or developers allows players to gain a better understanding of the history of games and how changes in tastes and technology have shaped the development of this form of entertainment.

The sale of pre-owned games is part of the larger issue of Digital Rights Management (DRM), which raises concerns about the rights users should have over the hardware and software they use, and whether restrictions on users' actions are defensible.<sup>25</sup> The limitations developers and publishers place on games to prevent their resale or transfer restrict the rights that users of other copyrighted works typically enjoy under the first sale principle. Players will have less control and fewer rights over the games they play than other possessions they own. Requiring players to access an online service to purchase, register and play games makes players dependent on the operation of these services, and dependent on the security of these services to keep any personal information given to these services secure.<sup>26</sup> Players risk losing their right to keep, sell, or trade the games they pay for and control over how and where they play these games. Requiring online services to allow users to transfer access to games to other accounts would be an important step towards protecting these rights. While players should keep in mind the potential benefits of rewarding developers by purchasing new copies of their games, developers and publishers should not undermine the rights of those who enjoy their creations.

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24 Reese, "The First Sale Doctrine in the Era of Digital Networks," 595–602.

25 Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (Cambridge, Massachusetts: The MIT Press, 2007), 50–64.

26 The PlayStation Network suffered a significant security breach in April 2011. See K. Sangani, "Sony Security Laid Bare," *Engineering & Technology* 6, no. 8 (September 2011): 74–76.

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