The Manufactured Piracy:

Server Shutdowns, Revoked Purchases, and the Legal Case for Game Preservation

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Abstract

Publishers sell games and digital media with the vocabulary of ownership. Customers click a button labeled buy, pay a one time price, and receive a confirmation that speaks of their purchases and their library. Later, the vocabulary reverses. Servers are switched off and the product stops working. Licensing arrangements change and purchased titles are deleted from customer libraries without refund. And when customers or archivists act to keep what was sold to them running, the industry supplies the label for their conduct: piracy.

This Article argues that the label inverts the law. Under the covenant and condition analysis of *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, a customer who breaches terms of use commits a contract violation, not copyright infringement, unless the term breached is a condition on one of the copyright owner's exclusive rights. Under the logic of *Davidson & Associates v. Jung*, what makes a community server unlawful is circumvention of access controls combined with the enabling of unauthorized copies; a server that authenticates lawful copies and circumvents nothing commits neither wrong. The first sale doctrine and section 117 protect the owner of a copy, and the licensed rather than sold characterization that defeats those protections under *Vernor v. Autodesk, Inc.* is a drafting choice made by the seller, in an instrument the buyer never negotiates, contradicted by the seller's own marketing vocabulary at the point of sale.

The Article makes three contributions. First, it separates the preservation question from the piracy frame, showing that post-shutdown continuation of play maps onto breach of covenant, not infringement, in the ordinary case. Second, it treats the licensed rather than sold

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characterization as an instrument to be tested against the realities of the transaction and against disclosure statutes such as California Assembly Bill 2426, rather than as a fact about the product. Third, it evaluates the emerging end of life proposals, including the Stop Killing Games initiative and California Assembly Bill 1921, as the modest regulatory completion of promises the sellers themselves made at the point of sale.

Keywords: game preservation, digital ownership, first sale, section 109, section 117, *MDY v. Blizzard*, *Davidson v. Jung*, *Vernor v. Autodesk*, section 1201, DMCA exemptions, abandoned games, Stop Killing Games, end of life obligations, consumer protection, buy button.

Contents

I. Introduction: Selling with One Word, Revoking with Another

A. Three Vignettes

In December 2023, PlayStation customers received notice that television content they had purchased, the seller's word, would be removed from their video libraries because of changed licensing arrangements with content providers. No refunds accompanied the removals.[1] After public reaction, the removal was announced as no longer occurring.[2] In 2026, the pattern repeated: customers were informed that previously purchased StudioCanal titles would be removed from their libraries effective September 1, 2026, again citing content licensing arrangements, again without refund.[3]

The second vignette is the online game whose servers are switched off. The customer paid a one time price for the product. The publisher later decommissions the authentication or matchmaking servers the product requires, and the product becomes permanently inoperable, not because the customer's copy changed, but because the seller withdrew a component the customer was never told was severable from the purchase.

The third vignette is what happens when someone tries to fix the second. Community developers reverse engineer the handshake a dead server once performed, stand up a replacement, and let owners of lawful copies keep playing the product they paid for. The industry's word for this conduct, deployed in takedown letters, in policy submissions, and in legislative testimony, is piracy.

1. Notice from Sony Interactive Entertainment to PlayStation Store customers regarding Discovery content (Dec. 2023). Contemporaneous reporting citation to be pinned on the citation verification pass.

2. Sony Interactive Entertainment, updated customer notice (Dec. 2023) (stating the Discovery removal was no longer occurring). To be pinned on the citation verification pass.

3. Louis Rossmann, video commentary documenting the StudioCanal removal notice (YouTube, June 2026) (transcript on file with author). Exact video title, publication date, and URL to be pinned on the citation verification pass.

B. The Claim

This Article's claim is that the label runs backwards. The customer who keeps playing a game she paid for after the seller turns off the lights is not the party whose conduct fits uneasily with copyright's architecture. In the ordinary case her conduct is, at most, breach of a contractual covenant, and the community infrastructure that enables it is lawful under the very cases the industry cites. Meanwhile, the seller's conduct, marketing with the vocabulary of sale while drafting the vocabulary of license, revoking paid access without refund, and branding preservation as theft, is the conduct that consumer protection law, contract doctrine, and now disclosure legislation increasingly condemn.[4]

The word piracy performs work in this debate precisely because it imports violations, unauthorized reproduction and distribution of protected works, that the conduct at issue does not involve. The task of this Article is to take the label apart and examine what remains.

C. Roadmap

Part II examines what the customer bought: the vocabulary of sale at the point of purchase, the licensed rather than sold characterization that surfaces afterward, and the ownership protections, first sale and section 117, that the characterization is drafted to defeat. Part III states what copyright actually forbids after servers go dark, using the covenant and condition analysis of *MDY* and the limits marked by *Davidson*. Part IV addresses the anti-circumvention overlay of section 1201, including the preservation exemptions and their premises limits. Part V evaluates the emerging end of life proposals. Part VI answers objections. Part VII concludes.

4. *See infra* Parts II, V.

II. What the Customer Bought

A. The Vocabulary of Sale

Digital storefronts sell with the language of ownership. The button says buy. The receipt says purchased. The interface says your library. Empirical work has documented what any ordinary speaker of English would predict: a substantial share of consumers who click a button labeled buy now believe they own what they bought, including the rights to keep it, lend it, and use it on their own terms.[5] The vocabulary is not accidental. Sellers choose the words that close sales, and the words that close sales are the words of ownership.[6]

The reversal arrives in the terms of service, often deep in the document, where defined terms strip the transactional words of their ordinary meaning. One major storefront's terms provide that use of the words own, ownership, purchase, sale, sold, sell, rent, or buy in the agreement or in connection with content does not mean or imply any transfer of ownership of any content, data, or software, or any intellectual property rights.[7] The customer is sold a purchase at the button and a revocable permission at the definitions section, and only the seller drafted both.

B. Licensed, Not Sold: The Characterization as Drafting

The legal significance of that drafting is supplied by *Vernor v. Autodesk, Inc.*, in which the Ninth Circuit held that a software user is a licensee rather than an owner of a copy where the copyright owner specifies that the user is granted a license, significantly restricts the user's ability to transfer the software, and imposes notable use restrictions.[8] Each of the three factors is satisfied by the seller's own drafting. The test asks, in substance, whether the instrument the seller wrote

5. Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We "Buy Now"*, 165 U. Pa. L. Rev. 315 (2017); *see also* AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY (2016).

6. *See* Perzanowski & Hoofnagle, *supra* note 5 (survey of nearly 1,300 consumers finding widespread belief that "buy now" conveys ownership rights, and willingness to pay more for those rights).

7. Terms of service definitional provision, on file with author; exact instrument and section to be pinned on the citation verification pass.

8. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010) (holding that a user is a licensee where the copyright owner specifies a license, significantly restricts transfer, and imposes notable use restrictions).

calls the transaction a license and restricts it like one. A characterization that the seller can confer on the transaction unilaterally, in a document presented after the buy button and never negotiated, is not a fact about the product. It is a choice about which body of law the seller would prefer to inhabit, made by the party the choice benefits.

This Article does not ask a court to overrule *Vernor*. It asks that the characterization be tested rather than recited. Where the seller's conduct at the point of sale, a one time price, the word buy, a persistent library, marketing that promises the product rather than a term of access, speaks the language of sale, the definitional reversal buried in the terms is precisely the kind of contradiction that consumer protection law exists to police, and it is the contradiction that disclosure legislation has now begun to address by statute.[9]

C. First Sale and Section 117: What Ownership of a Copy Preserves

The stakes of the characterization are the ownership protections it defeats. Under the first sale doctrine, the owner of a particular copy lawfully made is entitled, notwithstanding the copyright owner's distribution right, to sell or otherwise dispose of that copy.[10] Under section 117, the owner of a copy of a computer program may make or authorize the making of another copy or adaptation where doing so is an essential step in the utilization of the program in conjunction with a machine, and may make archival copies.[11]

Both protections attach to the owner of a copy. The licensed rather than sold characterization severs them at the root: the customer who is deemed a licensee owns nothing to which section 109 or section 117 can attach. The consequence for preservation is direct. The copy sitting on the customer's drive, paid for at a price indistinguishable from a sale, carries none of the self-help rights Congress attached to ownership, because the seller drafted ownership away after taking the sale price.[12] The doctrinal architecture is coherent only if the characterization is

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9. *See infra* Part II.D.
10. 17 U.S.C. § 109(a).
11. *Id.* § 117(a).
12. *Vernor*, 621 F.3d at 1111.

honest. Where it contradicts the transaction the seller actually marketed, the architecture is being operated as a trap.

D. Disclosure Duties: California Assembly Bill 2426

California has legislated against the trap directly. Assembly Bill 2426, enacted in 2024, prohibits sellers of digital goods from advertising or offering those goods with terms such as buy or purchase unless the seller either provides the buyer a copy that can be permanently downloaded and used offline or conspicuously discloses, at the point of sale, that the transaction conveys a license and that access may be revoked.[13] The statute's premise is the argument of this Part: the buy button makes a representation, the definitions section contradicts it, and the law's response is to force the contradiction into the open at the moment it matters.[14]

The disclosure duty matters for preservation in a second way. A seller that elects the disclosure path has conceded, conspicuously and at the point of sale, that what it sells is terminable access. A seller that elects the permanent download path has armed its customers with copies to which ownership protections can attach. Either election narrows the space in which a publisher can simultaneously collect sale prices and deny that anything was sold.

III. What Copyright Actually Forbids After the Servers Go Dark

A. Covenant Versus Condition: MDY

The doctrinal engine of this Part is the Ninth Circuit's analysis in *MDY Industries, LLC v. Blizzard Entertainment, Inc.* The court held that for a licensee's violation of a license term to constitute copyright infringement rather than mere breach of contract, the term must be a condition limiting the scope of the license, and there must be a nexus between the condition

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13. Cal. Assemb. B. 2426 (2023–2024 Reg. Sess.) (enacted 2024; effective Jan. 1, 2025). Codified section and chaptering details to be pinned on the citation verification pass.

14. *See* Cal. Assemb. B. 2426, *supra* note 13.

and the licensor's exclusive rights under section 106.[15] Terms of use are, in the ordinary case, covenants. The player who violates one is a contract breacher, exposed to contract remedies, and nothing more.[16] The infringement label attaches only where the violated term conditions the license on conduct that implicates reproduction, adaptation, distribution, public performance, or display.

Apply that to the customer who keeps playing after shutdown. Her copy was lawfully acquired. Running the program loads it into memory in exactly the way the license contemplated when the seller's own servers performed the handshake. Connecting to a replacement server violates, at most, a term of service restricting the environments in which the product may be used, a covenant governing conduct, not a condition on a section 106 right. Under *MDY*'s own rule, the remedy for that violation lies in contract, against a counterparty who has, in the shutdown case, already withdrawn its own performance.[17]

B. The Limits: Davidson and the Two Wrongs

The industry's strongest authority is *Davidson & Associates v. Jung*, in which the Eighth Circuit held against the developers of a server emulator that replicated Battle.net.[18] *Davidson* is routinely cited as if it condemned community servers as such. It did not. The emulator in *Davidson* failed because of two features: it circumvented the authentication measures that controlled access to Battle.net mode, defeating the interoperability defense of section 1201(f), and it enabled play with unauthorized copies, because the replacement server did not and could not validate the CD keys that the authentic service checked.[19]

15. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010), *as amended* (Feb. 17, 2011) (requiring "a nexus between the condition and the licensor's exclusive rights of copyright" for a licensee's breach to constitute infringement). Reporter star pages for the quoted holding to be pinned on the proof pass.

16. *See Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999) (a nonexclusive licensor ordinarily "may sue only for breach of contract" unless the licensee acts outside the scope of the license).

17. *MDY Indus.*, 629 F.3d 928 ("WoW players do not commit copyright infringement by using Glider in violation of the ToU.").

18. *Davidson & Assocs. v. Jung*, 422 F.3d 630, 641–42 (8th Cir. 2005) (setting out the four requirements of the § 1201(f) interoperability defense and holding the defense unavailable where the circumvention constitutes infringement).

19. *Id.* at 642 ("As a result, unauthorized copies of the Blizzard games were freely played on bnetd.org servers.").

Read for its logic rather than its outcome, *Davidson* marks the boundary this Article defends. What made the server unlawful was circumvention plus the enabling of unauthorized copies. A community server that performs authentication of lawful copies, that circumvents no technological protection measure because the publisher's measure was the server itself and the publisher removed it, and that hosts no protected content of its own, commits neither of *Davidson*'s wrongs. The case the industry cites for the piracy label is, on its own reasoning, a checklist that well built preservation infrastructure passes.[20]

C. Applying the Line: Authorized Ecosystems and Continuation

The line drawn above is not hypothetical; parts of the industry already live on the lawful side of it. At least one of the best selling games in history has operated for over a decade with a publisher authorized ecosystem of community hosted servers, in which third parties run the server software, administer their own communities, and even charge for access, under license terms that permit exactly this.[21] The existence of that ecosystem is an admission against the security and control arguments examined in Part VI: community hosting is not inherently infringing, not inherently unsafe, and not inherently destructive of the publisher's business. It is a mode of operation publishers permit when it suits them and prosecute rhetorically when it does not.

The continuation case differs from the authorized case in only one respect: the publisher's consent. That difference is real, and it sounds in contract. What it does not do, under *MDY*, is transmute breach into infringement, and what it cannot do, under *Davidson*, is make unlawful a server that circumvents nothing and enables no unauthorized copy. The publisher that shut down the only authentication service and then invokes copyright against those who built a replacement is asking the law to treat its own withdrawal of performance as the customer's violation.

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20. *Davidson* does not address an emulator that validates keys and blocks unauthorized copies; its holding is confined to circumvention that "constitutes infringement." *Id.* at 641–42.

21. Publisher end user license agreement provisions authorizing community hosted servers (Minecraft). Exact instrument, version, and provisions to be pinned on the citation verification pass. Sales rank characterization to be sourced on the same pass.

IV. The Anti-Circumvention Overlay

A. Section 1201 and the Preservation Exemptions

Section 1201(a)(1) prohibits circumventing a technological measure that effectively controls access to a protected work,[22] and the trafficking provisions reach tools primarily designed for circumvention.[23] Because some preservation work requires defeating authentication checks that no longer have a server to talk to, section 1201 is the second doctrinal overlay on the shutdown problem, independent of infringement.

The Librarian of Congress has repeatedly acknowledged the preservation problem in the triennial rulemaking. The current regulatory exemptions permit circumvention of access controls on lawfully acquired video games for which outside server support has been discontinued, to allow continued individual play and to allow preservation by eligible libraries, archives, and museums, subject to conditions including that preservation access occur on the institution's premises.[24] The exemptions are an official recognition that abandonment is real, that continued play of a lawfully acquired copy is a noninfringing use worth protecting, and that the statute would otherwise criminalize the cure.

B. The Premises Wall

The exemptions also mark how narrow the officially sanctioned cure remains. In the most recent completed rulemaking cycle, the Register recommended against expanding the preservation exemption to permit off premises, remote access to preserved games, and the request was denied.[25] The result is a preservation regime in which a game can be lawfully preserved and lawfully played, provided the player travels to the building. For a medium whose cultural life

22. 17 U.S.C. § 1201(a)(1)(A).

23. *Id.* § 1201(a)(2), (b)(1).

24. 37 C.F.R. § 201.40. Regulatory text currency to be confirmed against the eCFR, including amendment history, on the citation verification pass.

25. U.S. Copyright Office, Section 1201 Rulemaking, Ninth Triennial Proceeding, Recommendation of the Register of Copyrights (Oct. 2024) (declining to recommend expansion of the video game preservation exemption to off premises access). Exact document title and pin cites to be confirmed on the citation verification pass.

is networked, the premises wall preserves the artifact while extinguishing the experience, and it concentrates the loss on those least able to travel to it.

C. Severity Without a Nexus

The severity of the anti-circumvention regime frames the stakes. The Second Circuit has held that the *Sony* substantial noninfringing use defense does not apply to a section 1201 trafficking claim,[26] and the Ninth Circuit has held that section 1201(a) liability requires no nexus to copyright infringement at all.[27] Willful commercial violation is a federal crime.[28] The practical meaning for preservation is that the strictest liability regime in the Copyright Act, per se, criminally enforceable, and indifferent to whether any infringement occurs, is the one that sits between a lawful owner and the continued use of the copy she paid for, unless a triennially renewed regulation says otherwise. The piracy label attaches, in public discourse, to conduct Congress has been repeatedly persuaded to exempt precisely because it is noninfringing.

V. The Policy Vehicle: End of Life Obligations

A. Stop Killing Games

Consumer response to the shutdown pattern has organized under the Stop Killing Games banner, most prominently in a European Citizens' Initiative that crossed the one million signature threshold in 2025, obligating a formal response from the European Commission.[29] The initiative's core demand is an end of life obligation: publishers that sell games requiring publisher

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26. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (holding that § 1201(c)(1) does not import fair use into the anti-trafficking analysis because the statute "does not concern itself with the use of those materials after circumvention has occurred"). Star pages to be pinned on the proof pass.

27. *MDY Indus.*, 629 F.3d 928 (declining "to adopt an infringement nexus requirement" as "contrary to the plain language of the statute," and refusing to follow *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004)).

28. 17 U.S.C. § 1204(a)(1).

29. European Citizens' Initiative, Stop Destroying Videogames (signature threshold reached 2025). Registration number, final signature count, and Commission response status to be pinned on the citation verification pass.

operated components must, at end of support, leave the product in a reasonably functional state, whether by patching out the server requirement, releasing server binaries, or otherwise.

B. California Assembly Bill 1921

In California, Assembly Bill 1921 is the domestic vehicle addressing the same pattern.[30] Whatever its final form, the bill's significance for this Article is structural: it treats the shutdown problem as a consumer protection problem located at the point of sale and at end of life, rather than as a copyright problem located in the conduct of preservationists. That relocation is correct, and Parts II through IV supply the doctrinal reasons why.

C. Disclosure or Continuity: The Modest Ask

The regulatory ask, reduced to its logic, is a disjunction the sellers control. Either disclose, conspicuously and at the point of sale, that the transaction is terminable access, the path Assembly Bill 2426 already compels in California,[31] or provide continuity at end of life, by offline patch, server release, or license to the community that will do the work without being sued for it. Neither branch expands copyright, touches the publisher's exclusive rights, or forces any publisher to operate anything forever. Both branches enforce the vocabulary the seller chose at the moment it chose to collect a sale price. A seller that objects to both branches is asking to keep the conversion rate of the word buy while bearing none of the word's meaning.

VI. Objections

A. The Piracy Frame

The first objection is the label itself: community servers and preserved copies are piracy. The answer of Parts III and IV is doctrinal. Piracy, as copyright uses the concept, is unauthorized reproduction and distribution of protected works. A replacement server hosts no protected

30. Cal. Assemb. B. 1921 (2025–2026 Reg. Sess.). Bill status, operative text, and committee history to be pinned on the citation verification pass; industry testimony against the bill is addressed in Part VI.

31. *See supra* Part II.D.

content; it performs a handshake. A lawfully acquired copy, run by its purchaser, reproduces nothing beyond the ephemeral copying the license always contemplated. The conduct fits breach of covenant, and sometimes not even that. Retaining the piracy label for it requires importing violations the conduct does not contain, which is why the label does its work in press releases and legislative testimony rather than in complaints.[32]

B. Security and Cheating

The second objection is that community servers cannot maintain the security, anti-cheat, and content moderation standards of official infrastructure. Post shutdown, the objection answers itself: there is no official infrastructure left to protect, and the comparison is between imperfect community play and no play at all. Pre shutdown, the authorized ecosystems described in Part III.C demonstrate that publishers themselves treat community hosting as compatible with a healthy product when it serves them. The security objection is an argument about implementation quality, addressable by the terms of an end of life release; it is not an argument that continuation is unlawful.

C. Games as Services

The third objection is categorical: modern games are services, and services end. Some are, and this Article's argument does not reach the honest subscription, sold as a term of access, priced as one, and disclosed as one. The argument reaches the product sold at a one time price under the vocabulary of ownership, whose service dependency was neither priced nor disclosed as a term. The seller cannot have the transaction both ways, a sale at the register and a service in the courtroom. Assembly Bill 2426's disjunction, disclose or deliver, is nothing more than a demand that the seller pick a characterization and live in it.[33]

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32. *See supra* Parts III–IV.

33. *See supra* Part II.D.

D. Who Bears the Loss

The final objection is implicit in the industry's cost benefit framing: shutdowns are efficient, and the losses are trivial. The record of Part I says otherwise, and the losses do not fall evenly. Purchasers lose paid for goods without refund.[34] Archives and scholars lose access to a medium's history except through the premises wall of Part IV.B. And the customers least able to route around a revocation, those for whom digital distribution was the accessible channel in the first place, including customers whose disabilities make physical media, travel to preservation premises, or technical self-help impractical, absorb the loss whole. A doctrine that tells the customer to keep a physical fallback assumes a customer who could use one. The differential burden belongs in any unconscionability analysis of the instruments examined in Part II, and in any legislative record supporting the obligations examined in Part V.

VII. Conclusion

The shutdown pattern is a three act structure. The seller sells with the vocabulary of ownership. The seller revokes with the vocabulary of license. And when the customer or the archivist acts to keep what was paid for, the seller supplies the vocabulary of crime. Each act depends on the audience forgetting the previous one.

The law, read without the labels, does not cooperate.[35] *MDY* places post shutdown continuation in contract, not copyright. *Davidson*, read for its logic, marks a boundary that careful preservation infrastructure does not cross. First sale and section 117 show what the licensed rather than sold characterization is drafted to destroy, and *Vernor* shows who does the drafting. The triennial exemptions concede that continued play of abandoned games is noninfringing, while the premises wall shows how grudging the concession remains. Corley and *MDY* show that the harshest regime in the title stands between owners and their copies without

34. *See* Perzanowski & Hoofnagle, *supra* note 5 (consumers pay more when they believe they are acquiring ownership rights).

35. *See supra* Parts II–IV.

requiring any infringement at all. And Assembly Bill 2426 shows the direction of legislative travel: toward forcing the seller's two vocabularies into the same sentence, at the point of sale, where the customer can finally read them together.

The piracy was never in the preservation. It was in the sale.