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Eric Hinkes

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ACCESS CONTROLS IN THE DIGITAL ERA AND THE FAIR USE/FIRST SALE DOCTRINES

Eric Matthew Hinkes†

Abstract

Each sale of an iTunes track means that a copy of music has been distributed that cannot be legally resold, edited, excerpted, or otherwise sampled by that user. This scenario has been repeated over 2.5 billion times since the inception of the iTunes Music Store. Much like software sales, consumers are now purchasing licenses to "access" the work instead of the content, given that access to these works is controlled by Digital Rights Management (DRM) schemes bolstered by the Digital Millennium Copyright Act (DMCA). In enacting §1201(a) of the DMCA, Congress effectively created an additional exclusive right for content providers: controlling access to a work.

† Associate, Intellectual Property Media Technology Group, McDermott Will & Emery LLP, Washington, D.C.
I. INTRODUCTION

"iTunes really competes with piracy, not with the other services. Piracy is the big enemy. Buying music online legally is good karma." – Steve Jobs, CEO of Apple Computer

Pirating a copyrighted work is not what it used to be: it is easier. Before xerography and bits-and-bytes, there was handwriting. If you wanted another copy of a book, you handwrote yourself one. Furthermore, distributing that handwritten copy required a physical act of bringing it from one place to another. All in all, this was an extremely laborious process. Unprotected digital works are not subject to such encumbrances. Digitized (unprotected) copyrighted material can now be spread far and wide over the Internet. Copyright owners are understandably concerned by the fact that each copy of a digital work is as good as the last one, and is not subject to the same material degradation as a cassette or record. Finally, digital works are compact and easily archived compared to their traditional physical counterparts. The days of the rogue printing press are gone. We are now in the digital age of piracy.

The best starting point for exploring the effects of digital content on copyright law and copyright owners is examining the most successful implementation of digitally protected downloadable content to date: Apple’s iTunes Music Store ("iTunes"). iTunes offers a library of over 4 million songs from the 4 major labels as well as hundreds of independent labels. Able to run equally well on both Macs and PC’s, the service has boasted over an 84% market share, is available in 22 countries, and has sold more than two and one half billion songs. Individual tracks can be purchased for 99 cents, while complete albums begin at $9.99. The growth rate of iTunes sales has been nothing short of astonishing. As of October 12, 2005, iTunes had surpassed 500 million music downloads since its initial launch in April 2003, and was averaging 1.8 million song downloads per day.


for its 10 million registered users. On February 23, 2006, Apple reported that iTunes downloads had reached a total of 1 billion songs. Less than a year later, on January 9, 2007, Apple reported that iTunes downloads had reached 2 billion.

Apple's downloadable music is encoded in the open standard Advanced Audio Coding (AAC) format at 128 kbps, and it incorporates a proprietary Digital Rights Management System (DRM) called FairPlay. Apple restricts users to downloading one unique copy of a purchased song, but allows them to transfer the song to an unlimited number of iPods. The DRM also prevents more than seven identical burns of a purchased music playlist. Because Apple does not officially license FairPlay, it is a proprietary standard only supported through Apple on the iPod or the iTunes program.

Through iTunes, Apple is able to regulate what consumers do with their purchased music by using a technologically implemented combination of copyright law and contractual provisions. The thoroughness of Apple's control, however, derives from the unique contract/copyright interaction in concert with DRM. Copyright Law contains exceptions that allow consumers who purchase copies of works a potentially greater amount of freedom than these contractual license agreements. As a prime example of this new era, Apple is navigating uncharted waters, and iTunes will serve as a basis for discussion regarding the effect of access controls on fair use and its

10. Id.
11. See Apple.com, Steve Jobs: Thoughts on Music, http://www.apple.com/hotnews/thoughtsonmusic/ (last visited Apr. 25, 2007) (stating “[a]pple has concluded that if it licenses FairPlay to others, it can no longer guarantee to protect the music it licenses from the big four music companies.”).
close relative the first sale doctrine, as well as the preservation of content in the digital era.

II. THE FAIR USE AND THE FAIR SALE DOCTRINES IN COPYRIGHT LAW

In an official report, the United States Copyright Office mentioned that future technologies and events could have "serious consequences for the operation of the first sale doctrine" that might require legislative attention at some later date. Ultimately, a "wait and see" approach was suggested to see how the market matured.

Under Copyright law, copyright owners enjoy six exclusive rights: reproduction, preparation of derivative works, distribution, public performance, public display, and digital transmission performance. In order to engage in any of these exclusive rights, a person must request and receive permission from the copyright owner. The first sale doctrine, as codified in Section 109 of the Copyright Act, limits a copyright owner's distribution right in that he can only exploit the copyrighted work up to the point of the first sale. The goal of the first sale doctrine was to balance copyright owners' exclusive rights with the public's right to enjoy and exchange copyrighted material for the public benefit. It encourages and allows the dissemination of copyrighted works, much like the "fair use" doctrine is designed to encourage and allow parody and criticism. The concepts of fair use and the first sale doctrine are interrelated: without access to the work, one cannot effectively utilize it for either purpose.

The first sale doctrine allows the owner of a lawfully obtained copyrighted work to "sell or otherwise dispose of the possession of that copy" without the permission of the copyright owner. This entitles wholesalers to sell copies to retailers, libraries to lend copies to patrons, and persons who have lawfully acquired copies of works

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13. Id.
to give them to friends or family. Many parties are able to benefit, as the copyright owner's exclusive distribution right no longer applies to a particular copy once it has been sold for the first time. By creating secondary market channels, the first sale doctrine has enabled transactions to occur outside the normal chains of commerce. It is through these transactions that these works remain accessible to the public even if the copyright holder ceases production or distribution of the work.

The first sale doctrine developed out of a judicially created principle based on the goal of reducing encumbrances on restraints of alienation of tangible property. The U.S. Supreme Court upheld this principle in *Bobbs-Merrill Co. v. Straus*. In *Bobbs-Merrill* the Supreme Court held that a copyright owner could not restrict the work in the resale market by imposing mandatory price schemes. The plaintiff copyright owner placed a notice inside the book: "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as infringement of the copyright." The defendant sold the book at a price of 89 cents. Shortly after this case, Congress codified the first sale doctrine in Section 27 of the 1909 Copyright Act.

This doctrine is currently codified in 17 U.S.C. §109 of the Copyright Act, which explains that lawful ownership of an item is not the same as owning the copyright. The owner of the item can lend, resell, give away, and/or destroy the copyrighted item, but is not granted the right to copy the item in its entirety. The transfer of the copy does not include the transfer of the item's copyright, whether digital or tangible in nature. However, the first sale doctrine has never allowed someone who owns a particular copy to make further copies of it without the permission of the copyright owner because a copyright owner's most fundamental right - to make reproductions of his work - applies even after its first sale.

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21. See id. at 350-51.
22. Id. at 341.
23. Id.
27. Id.
This "right" is very relevant in regards to iTunes downloads. In downloading the music, you have agreed to certain terms of use under the iTunes Store Terms of Sale. This is not the same as purchasing a CD, which is traditionally protected under copyright law. There is no way to resell music that you buy from iTunes legally, due to a combination of contract law and DRM technology bolstered by the Digital Millennium Copyright Act (DMCA). The iTunes Terms of Service (ToS) specifically state that purchased, DRM'ed, music is for "personal, non-commercial use," and that users are only "entitled to export, burn... or copy Products solely for personal, noncommercial use."

The consumer purchases not a copy of the work, but only a license to "access" the work. In enacting §1201(a) of the DMCA, Congress effectively created an additional exclusive right for content providers: controlling access to a work.

III. LET'S MAKE A DEAL

In partnering with Apple, the music industry has clearly decided that the best way to navigate the digital minefield is to incorporate technologically implemented contract law in selling downloadable music, rather than to simply rely on copyright law, as is done in traditional channel sales of content on physical media. Contract law allows copyright holders a greater degree of control over digital content. In the cases of iTunes, users agree to a click-wrap contract, indicating the number of computers on which the music can reside, the number of times it can be burned, the number of portable music devices on which it can be loaded, along with other terms and conditions that control the user experience to an exacting degree. Apple requires that a user agree to all of the terms in its iTunes software license agreement.

Contract law can effectively displace what copyright law considers a permissible range of activities with authored material.

29. See Apple's iTunes Music Store: Terms of Service, supra note 9, at § 9(b).
31. See Apple.com, iTunes Music Store: Terms of Service, supra note 9, at § 9(b). More recently, iTunes has also begun to sell movies. The notable limitation of the DRM in this case is that while the movie can be played on an unlimited number of authorized iPods, burning of purchased content to disc for playback, a feature available for purchased music, is prohibited.
Apple’s iTunes’ terms of use permit purchased music to be copied onto up to five computers. The contractual arrangement between Apple and the consumer creates a permissible use enclave that would otherwise be occupied by an exclusive right under copyright law. Normally, a copyright owner would be able to sue an individual for engaging in such copying activity, but Apple is able to grant such exclusive and non-exclusive rights to its end users through its negotiated arrangement with the record labels. The combination of contractual usage agreements and DRM bolstered by the DMCA effectively allows Apple to specify permitted and prohibited uses of the content. Apple goes to great lengths to state that a user must agree “not to attempt to, or to assist another person to, circumvent, reverse engineer, decompile, disassemble, or otherwise tamper with any of the security components related to such Usage Rules for any reason whatsoever.” Apple also states that its users “agree not to modify, rent, lease, loan, sell, distribute, or create derivative works” from downloaded songs, making it clear contractually that the licensee has no digital first sale right. Unlike a secondary market in which copyright owners are no longer able to effectively control the dissemination of their works, Apple explains that it retains the “right to change, suspend, remove, or disable access . . . at any time without notice.” It can readily do so if necessary at the speed of a mouse-click. Because Apple is able to limit what users do with their purchased songs through a technologically implemented contract, the range of end user activities resides in a defined bubble. Furthermore, Apple is effectively pioneering a protected content distribution system model that could eventually function without competitive interference from secondary source retail channels.

While much more durable than traditional audiocassettes, CD’s have a definite physical lifespan and are subject to physical wear-and-tear from use. Digital files don’t similarly degrade but are subject to

32. Id. at § 9(b).
33. Id. at § 8(b).
34. Id. at § 13(b).
36. See Apple’s iTunes Music Store: Terms of Service, supra note 9, at § 13(b).
accidental deletion, corruption, and obsolescence. The file's playback quality is maintained from the first copy to the last. When combined with the ease of copying a digital file, content providers' concerns about maintaining new sales in the digital era are apparent and legitimate. However, when users buy an iTunes song, they can only use an iPod or the iTunes program to access the protected content, unless the music is burned to CD by the user, and even then, the number of unique "playlist burns" may be limited to seven.38 These restrictions prevent users from engaging in the resale or rampant illegal distribution of downloaded iTunes songs,39 perhaps to the detriment of the existing service. The iTunes click-wrap license renders the first sale doctrine, applicable to tangible media, inapplicable here by reducing the user of the downloaded copyrighted music work from an owner to a mere possessor.40

While Apple is in a position to benefit both from contract and copyright law, contract law is primarily limited to restitution through monetary damages. Copyright law provides a much stronger set of remedies: injunctive relief, criminal penalties, and the option of statutory damages or defendant's profits plus actual damages.41 In the case of contracts, monetary damages are more likely to be minimal, unless a breaching user engages in large-scale copying or distribution. Users might even breach contracts to make fair use of protected works for satirical or parody purposes since they could face only nominal damages.42 Contracts are nevertheless uniquely advantageous if enforceable, as they are able to create protected enclaves of permissible activities within a copyright framework. This enables parties to assign or waive protections and defenses normally associated under traditional copyright doctrine. Apple's utilization of contract law, when combined with the protection that DRM receives under the DMCA, leaves the content providers confident that Apple can exercise a high level of control over the distribution and use of copyrighted content on their behalf. DRM effectively adds an element

39. See supra note 8 and adjoining text.
41. See 17 U.S.C §§ 501-505, 509.
of predictability to usage that is not possible with physical media and reins in the potential massive piracy that can occur with unprotected digital content.

IV. DRM WITHIN THE DMCA

DRM is different from security measures used to protect electronic transactions. While hacking into one electronic transaction doesn’t necessarily compromise the others, hacking a DRM scheme threatens the protections on every article utilizing that scheme that has been sold up to that point. Anti-circumvention provisions are necessary because DRM can’t protect itself, and it is also expensive to continuously reengineer. Jon Johansen has been one of the most prolific DRM hackers. Mr. Johansen is living proof of the challenge that DRM faces. Perhaps the DMCA is the right law at the right time and reflects Congress’ acknowledgment that while it is not possible to build a perfect mousetrap, it is possible to legally prevent individuals from tricking the mousetrap. The DMCA acts in this way to bolster the effectiveness and integrity of DRM schemes in the face of these hackers’ proficiency and ease by which their “burglar tools” can be distributed to others.

DRM functions like a speed governor, cutting the fuel off to an engine at a certain highway speed. To deter the removal of the “governor” by unauthorized “mechanics,” the DMCA contains strict anti-circumvention provisions bolstered by significant penalties. The DMCA, as codified, prohibits circumventing DRM designed to prevent someone from gaining access to a work, trafficking in devices that can circumvent such access controls, and trafficking in

3. Iain Thomson, Norwegian court clears ‘DVD Jon’, Jan. 8, 2003, http://www.vnunet.com/articles/print/2121179 (stating that the DeCss hacking program was capable of breaking the encryption used by DVDs in general, not one specific copy). See also Robert C. Piasentin, Unlawful? Innovative? Unstoppable?: A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom and Canada, 14 INT’L J.L. & INFO. TECH. 195, 225 (2006) (stating “once the original DRM [system] is hacked, any works which were protected under that system will become vulnerable to being copied or shared by anyone with access to the hacking technology.”).

4. See So Sue Me: Jon Lech Johansen's Blog, About Me, http://nanocrew.net/about (last visited May 13, 2007). Jon has hacked Apple’s Fairplay DRM for iTunes twice, reverse engineered the unique user keys Apple attached to the downloaded music to enable stripping of the DRM, hacked Apple’s wireless encryption for its AirTunes service, and has even reverse engineered cryptography contained in the iTunes program itself when Apple attempted to forcibly upgrade its users to a newer and supposedly more secure version of the program. Id.

circumvention devices in order to protect the copyright holder’s exclusive copying and distribution rights.\textsuperscript{46} A device is covered under the DMCA if it is primarily designed for, has limited commercially significant purposes aside from, or is marketed for, circumvention.\textsuperscript{47} Furthermore, the traditional fair use defense to infringement does not apply to DMCA offenses.\textsuperscript{48}

Access control provisions under the DMCA mean that the statute can be used to enforce controlled access and uses of copyrighted works. As an example, Apple’s iPod is the only device capable of playing FairPlay DRM’ed purchased music from the iTunes service. This is accomplished through a very refined hardware-software interaction and programmed digital safeguards. Apple also controls the ability to authorize additional computers for iTunes purchased music through a back-end infrastructure, accessed through the iTunes program interface. This enables Apple to monitor how the works are being used, but it also allows Apple to meticulously and predictably control present and future access for non-compliance with its terms of use.\textsuperscript{49} Apple’s DRM prevents direct dissemination of the purchased music from user to user, as well as over the Internet. Simply loaning iTunes purchased music to a friend for playback would require the user to give his Apple ID and Password to authorize the computer to play. The friend would then have access to the user’s credit card information and be able to purchase additional music, which functions as an effective deterrent. Content providers are willing to distribute their media through iTunes because users’ actions are predictably limited to a defined realm of possibilities, because of DRM, and as I’ve shown here, for other reasons as well.

Apple is also able to contractually exclude exemptions contained in the DMCA because the iTunes Terms of Service displace them. One such example is the narrow exemption in the DMCA that exists for reverse engineering: The scientific method of taking something apart in order to figure out how it works.\textsuperscript{50} “As long as it is a fair use and performed exclusively to enable two computer programs to communicate with each other (‘interoperability’), circumvention is


\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} See Apple’s iTunes Music Store: Terms of Service, supra note 9, at §§ 14(a)-(b).

allowed."\textsuperscript{51} Also, both trafficking bans under the DMCA can be avoided if devices are distributed only for the purpose of achieving interoperability.\textsuperscript{52} While such activities may be narrowly permitted under the DMCA, the iTunes Terms of Use explicitly prohibit all reverse engineering activities.\textsuperscript{53} In the iTunes context, Apple is specifically concerned about the reverse engineering of its DRM scheme and hardware/software interaction.\textsuperscript{54} It will be interesting to see the effect of Apple’s announcement that they will be offering DRM-free music from EMI on iTunes’ Terms of Service and if other content providers follow EMI’s move.\textsuperscript{55}

In conjunction with contract law, the DMCA bolsters Apple’s FairPlay DRM system in 3 distinct ways. First, the DMCA enumerates specific penalties for trafficking in tools that would circumvent FairPlay. Prior to the DMCA, traffickers of such devices were not liable as long as their devices were “capable of substantial non-infringing uses.”\textsuperscript{56} The DMCA, however, has created causes of action regardless of whether these tools have infringing or non-infringing uses.\textsuperscript{57}

Secondly, the DMCA would treat FairPlay as an access control and a copy control. The iPod is the only device designed to decrypt the FairPlay DRM, which falls within the realm of an access control. This allows Apple to regulate reverse engineering activities despite the narrow exemptions permitted under the DMCA. FairPlay also limits the number of unique playlist copies to seven CD burns, such that it functions as a copy control.\textsuperscript{58} This dual treatment under the DMCA bolsters the overall integrity of the system.

Lastly, the DMCA enables Apple to be a party to suits that are normally reserved for copyright owners because it allows “[a]ny person injured by a violation of section 1201 or 1202 [to] bring a civil action in an appropriate United States district court for such violation."\textsuperscript{59} Traditional infringement actions are limited to copyright holders,\textsuperscript{60} but both Apple and copyright holders can bring DMCA

\begin{flushright}
51. Fisher, supra note 35, at 37 (internal citation omitted).
52. Id.
53. See Apple’s iTunes Music Store: Terms of Service, supra note 9, at § 8(b).
54. See Apple.com, Steve Jobs: Thoughts on Music, supra note 11.
55. See supra note 8 and adjoining text.
57. See supra notes 46-48 and adjoining text.
58. See Apple’s iTunes Music Store: Terms of Service, supra note 9, at § 9(b).
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suits. The DMCA functions to protect the implementation of the Fairplay system, providing a strong deterrent against compromising the DRM, aside from the contractually enforced provisions of the system. By arguably preventing reverse engineering of the DRM, the DMCA maintains the iPod as the sole compatible device.⁶¹

V. DOES THE FIRST SALE DOCTRINE APPLY TO DIGITAL COPIES?

The “Double Dutch Bus” incident tested the waters as to the industry’s reaction to the resale of digital music. George Hotelling placed a purchased iTunes song on eBay (“Double Dutch Bus”).⁶² eBay moved to block it, maintaining that it violated its “Downloadable Media Policy”, which prohibits the listing of items or products to be delivered electronically through the Internet.⁶³ Arguments have been made that this conduct should have been protected under the first sale doctrine, which makes no real distinction between digital and non-digital works.⁶⁴

Opponents of the doctrine’s applicability to digital works maintain that transmitting a digitized work requires making a copy of the original, which is in direct violation of a right reserved to copyright owners, the right of reproduction – a right to which the first sale exception isn’t applicable.⁶⁵ Also, the doctrine has been argued to not apply to digital works, given that the user isn’t transmitting his “particular” copy.⁶⁶ Because the original copy remains on the user’s computer while the duplicate copy is sent to the recipient, a secondary copy is in fact being made that is entirely separate from the primary copy. Lastly, they maintain that the rapid digitization of content could upset the balance that the doctrine provides between vibrant trade and copyright owners’ rights to exploit their works.⁶⁷

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⁶¹. See Tony Smith, Apple iPod Out of Tune With Real’s Harmony, THE REGISTER: SCI/TECH NEWS FOR THE WORLD, Dec. 15, 2004, http://www.theregister.co.uk/2004/12/15/apple_vs_real/. Real tried to implement a mechanism (“Harmony”) by which music purchased from its music store would play on the iPod. Apple’s response was to tweak its player software to prevent this music from being compatible. Id.


⁶⁶. Id. at 14.

⁶⁷. Id. at 15.
Proponents of the first sale doctrine’s applicability to digital works argue that the Copyright Act should not be interpreted so narrowly as to be inapplicable to the situation in which a non-particular digital copy is transferred by means of a digital network. Additionally, the doctrine has been argued to focus on the scope of the property interest being transferred, rather than "the nature of the land or chattel that is the object of the property interest." Some proponents have argued then that a digital copy should not therefore be denied coverage under the first sale doctrine, even if contracted away as in Apple’s case. In response, opponents would rebut this argument on the grounds that there is no effective way to ensure that the sender would delete his copy once sold.

VI. THE CONCEPT OF FAIR USE

The Copyright Act grants authors control of the reproduction, public performance, display, and distribution, along with a monopoly on the creation of derivative works. The concept of fair use functions as a safety valve on this monopoly. Copyright law seeks to promote the production and distribution of creative works by conferring property rights on authors. The concept of fair use serves to mediate between these property rights and the constitutional rights of public access and free speech embodied in the First Amendment, based on the belief that the public is entitled to freely use portions of copyrighted materials for purposes of commentary and criticism. Fair use also serves an important social function by allowing for the use of parts of creative works provided that the incorporation is made for a limited and "transformative" purpose such as to comment upon them, through criticism or parody. The concept has evolved with

68. Id.
73. Id.
74. Campbell v. Acuff-Rose Music, Inc., 10 U.S. 569, 579 ("Suffice it to say now that parody has an obvious claim to transformative value, . . . It can provide social benefit, by
technology on a case-specific basis, mediating the capabilities of new technologies and constraints of copyright law. In the case of criticism, fair use principles allow a subsequent author to reproduce and incorporate the copyrighted work in the process of commenting or critiquing it. The fair use doctrine in this case relies on the fact that the public benefits from subsequent review and discussion of copyrighted works. A parody on the other hand is a work that satirizes the copyrighted work for comic effect. Courts have acknowledged that making a parody necessitates taking copyrighted elements from the original work so as to conjure up the original in the mind of the viewer/reader. In conducting a fair use analysis, Courts use a four-factor test: (1) the purpose and character of the subsequent use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use upon the potential market. More important than the courtroom test, however, is the real world applicability of fair use.

The Supreme Court’s ruling in Sony that home taping ("time-shifting") of a free television program constituted fair use was a landmark case. The Sony Court’s decision is that much more important because when recording a television program, the program is recorded in its entirety for entirely consumptive reasons, without a transformative return of the work to the marketplace. The judicial analysis undertaken by the Court resulted in an evolution of the fair use doctrine to accommodate VCR technology. While the state of DRM technology was more primitive at that time, there were already efforts by the motion picture studios to control video content. In Sony, the motion picture studios argued to the Court that Sony should build a sensor into every VCR that would detect "no copy" signals

shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use....

75. 17 U.S.C. § 107 (2000) ("The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").


that would be embedded into television broadcasts, thereby enabling copyright owners to mark their movies as "not for copying."\(^{81}\)

Fair use is an imprecise concept that has evolved over time, even though it is outlined through the four-factor test. The Digital Millennium Copyright Act (DMCA) is a significant amendment to copyright law, and has created a new category of copyright violations that make it illegal to circumvent access controls on digital content and devices.\(^{82}\) By utilizing digital locks to protect copyrighted materials, content providers are able to carefully control who can access, use, and/or copy their digital works and under what circumstances, measures arguably necessary to prevent potentially massive digital piracy. Consumer rights organizations have argued that the DMCA moves away from Sony's fair use principles, an argument that content holders dispute. Given the wild success of the iTunes model, the issue doesn't seem to concern the user base in general.

Historically, judicial review of fair use has served to mediate the resulting tension between the constraints of copyright and the capabilities of new technologies. As new technologies developed, courts generally have had the first opportunity to apply copyright law to them with Congress lagging behind. This keeps the public, technologists, and copyright owners from having to approach Congress for a legislative solution for each new technology that is developed. Fair use under normal circumstances is accomplished without permission of the copyright owner, but if an issue arises with regards to the "fairness" of the use, court intervention to resolve the dispute is available. Some interest groups have argued that if the new opportunities for fair use are prevented at the outset by a provider's DRM, the circumvention of which is unlawful under the DMCA, the concept of fair use as it relates to satirical, parody, or commentary works, is a moot point. In response, the content providers could point to all the advantages that digital media provides, one being consumer choice for the delivery of media is at an all time high. Consumers can get their content through brick and mortar purchases, Internet purchases (of tangible media), mail subscriptions, Internet subscriptions, and finally Internet downloads. When one looks at market models that actually work, like iTunes, the usage rights are


actually quite generous and transparent to the normal user. Furthermore, the content providers argue that the range of activities, which these interest groups have called fair use, extend beyond its judicially defined scope.  

The DMCA provides an exemption for non-profit libraries, archives, and educational institutions to circumvent a system protecting a copyrighted work in order to make a determination of whether or not to acquire the work. However, this exemption applies only to those circumstances where accessing the work is not possible in another medium. The exemption also permits circumvention only for the limited time it takes the institution to make the decision whether or not to acquire the work. Libraries and other educational institutions claim that these rights management schemes give too much control to the copyright owner and can affect the public’s access to these works. Content providers respond that because digital works are easier to duplicate and distribute, these cost savings are passed onto the public.

VII. MARKET CHANNEL EFFECTS OF THE FIRST SALE DOCTRINE ON FAIR USE AND THE ROLE OF THE DMCA

Indeed, creativity wants to be paid. Copyright law provides incentives to authors to create works, and, as a result, maximizes public access to those works. The first sale doctrine has been an integral part of US copyright law for over a century, allowing those who buy copies of a copyrighted work to resell, rent, or lend those copies to others. It has also been primarily responsible for the legal development of used book and music stores, video rental stores, and even public libraries, which can lend CD’s to patrons. The application of the doctrine has increased the overall affordability of copies of works, primarily by creating secondary sale, rental, and lending markets that can offer consumers the product at a lower price than that charged by the copyright owner for the purchase of a new copy. It has also increased the overall availability of works by

83. As discussed in this paper, fair use is a doctrine that has been defined over time by a litany of cases.
85. See id. at § 1201(d)(2).
86. See id. at § 1201(d)(1)(A).
87. Reese, supra note 19, at 577.
88. Id. at 586, 588-90.
89. Id. at 586.
making it still possible to obtain access to a work when it goes out of
print or when a copyright owner decides to withdraw it from the
source.\textsuperscript{90} Furthermore, from a preservation aspect, a secondary market
could increase the likelihood that a copy or copies of the work will be
preserved over time.\textsuperscript{91}

It has been argued that the increased digital dissemination of
works in the form of DRM protected copies, including FairPlay
content from iTunes, would result in the existence of fewer freely
transferable copies of copyrighted works that can be distributed
through the secondary markets, but to place the blame squarely on the
DMCA is to misplace it. It's clear that consumers want the content
that the providers are selling: 2.5 Billion times over in the case of
iTunes. DRM makes it possible that there's a sale in the first place. In
the case of iTunes, consumers are clearly benefiting from
digitalization through savings in inventory, material, and distribution
costs. Critics that say that library activities may be stifled as a result
of the use of DRM protected works instead of traditional physical
copies are similarly missing the point. Using the music industry as a
model, consumers now have more choice than ever. There are
numerous choices for acquiring music online. The same could
eventually be true for libraries in the acquisition of their works.

Traditionally, the first sale doctrine forces copyright owners to
account for the secondary market in pricing the initial copy of a work,
as the secondary market can compete with the primary market. In the
absence of a secondary market, copyright owners are able to build in
a higher price for the first copy.\textsuperscript{92} This conundrum means that if
copyright owners charge more for a new copy of a work, then a used
copy of a work may become more attractive. Furthermore, as the
secondary market for a newly released work grows, competition from
other sources will force the price downward, as is evidenced by the
price of hardback book sales versus paperbacks. If every sale is a new
sale that cannot be resold, then no such market pressure exists. Even
so, the growth of DRM has resulted in many different vendors
jumping into the content marketplace. Perhaps resale is no longer

\textsuperscript{90} Id. at 594.

\textsuperscript{91} There is a counterargument that for some works, a monopoly increases access
because of the content provider's legal right to reproduce the work.

\textsuperscript{92} In response, the RIAA would argue that these higher prices are because the industry
loses 4.2 Billion Dollars per year due to piracy. The RIAA position is that "[c]onsumers ... lose
because the shortcut savings enjoyed by pirates drive up the costs of legitimate product for
everyone. RIAA.com, Anti-Piracy: Old As the Barbary Coast, New As the Internet,
important to the majority of consumers. The value of resale has arguably and legitimately been replaced by the convenience of purchasing the media on demand (iTunes) or even through subscribing to a service that provides unlimited access (Napster).

In 2001, The Copyright Office addressed this issue when it released its DMCA Section 104 Report. The Office stated that the use of technological protection measures (such as DRM) either had not yet become prevalent enough to significantly affect the first sale doctrine, and where these measures were in effect, the likelihood of a reduction of or elimination of a resale market for copies did not amount to interference with the operation of the first sale doctrine. In short, no legislative steps were suggested to accommodate the first sale doctrine in the digital world, but rather a "wait and see" approach was advanced. Given the burgeoning digital content market, it doesn't seem that consumers consider the ability to resell content important.

VIII. MAINTAINING AVAILABILITY AND ACCESS IN THE DIGITAL ERA

Interest groups have argued that the first sale doctrine could erode under the DMCA and thus have a significant effect on access in the digital era. They maintain that the first sale doctrine ensures that copies of a work would remain available to the public over a long period of time in a secondary market, even if a copyright owner ceases to make a work available to the primary market. Perhaps other, more successful works have eclipsed a particular work, or the author feels that times have changed. An author’s heirs may also refuse to allow any further sales, performance, or public display. In response, content providers would probably make the argument that no such demise would occur, and that instead, illegal reproduction has always been illegal.

Copyright owners discontinue a large number of books and recordings each year. One estimate suggested that 60% of all sound recordings are out of print. In 1999 alone, the vice chairman of

94. Id.
Barnes & Noble stated that 90,000 books went out of print. At some point, this becomes an economic decision, as there is insufficient demand to warrant the expense of printing, binding, storing, and marketing a sufficient quantity of the work to be profitable. However, "low demand" is not the same as "no demand." One can argue that digitization of a work can preserve it in the market place due to theoretically lower costs. Although eBooks have yet to score large scale market penetration due to unwieldy devices and the existence of multiple potentially incompatible media formats, it represents an idea whose time will eventually come. A digital market, much like the traditional secondary market, can ensure that even if demand falls below a profitable amount for the owner to continue sales, the public may still be able to access and derive benefit from the work.

Corporate entities have withdrawn copies of their works from the marketplace, especially in the cases where the works would now be offensive. This was the case in Silverman v. CBS Inc, in which CBS owned the copyright to "The Amos 'n' Andy Show." In response to complaints of the show's offensive content, CBS did not broadcast or allow the rebroadcast of any portions of the program in radio or television formats. What this meant was that people who wished to watch the show were unable to obtain access to the program through the copyright owner. As copyrights for works can last at least for the life of the author plus 70 years, it is even possible that works can be inaccessible for generations. Worldwide Church of God v. Philadelphia Church of God, Inc. offers another example of a corporate copyright owner suppressing a work. In Worldwide Church, 9 million copies of a book written shortly before its author's death were distributed to the public. Within a two-year period however, attitudes changed and the Worldwide Church of God determined that it "conveyed outdated views that were racist in nature." It then proceeded to destroy all copies of the work that it

96. Id.
97. See David Becker, Have e-books Turned a Page?, TECHREPUBLIC, Aug. 27, 2004 (stating that none of the ebook devices have yet made significant market penetration).
99. Id. at 42.
100. See Hannibal Travis, Building Universal Digital Libraries: An Agenda for Copyright Reform, 33 PEPP. L. REV. 761, 797 (2006) (noting that the current system can grant copyright even up to 150 years).
102. Id. at 1113.
103. Id.
retained in its possession and also stopped disseminating any additional copies.\textsuperscript{104}

In situations like the aforementioned, and assuming that not all copies have been bought up by the copyright owner, the first sale doctrine in traditional form preserves the public's access to the work through alternative channels. The purpose of copyright law is to encourage the creation and distribution of authored works to the public by providing essentially monopolistic incentives for doing so.\textsuperscript{105} The first sale doctrine in conjunction with fair use has provided an element of "peace of mind" as to the work's availability through the secondary market channels. Interest groups have been pushing for such assurances for digital works though it's not completely clear how this secondary market would work. The interests of consumers in having continued access to works is legitimate, and the concerns of copyright owners in retaining their authorship rights and reputations in light of changing times is also legitimate. The first sale doctrine has historically provided this balance, by preserving initial distribution rights with the copyright owners and encouraging at the same time alternative means for the public to access the work. Interest groups would argue that in a world that is moving towards digital distribution, this may become an increasingly difficult balance to preserve as more works are sold with DRM protection bolstered by the DMCA. In response, content providers could argue that maintaining this equal balance is no longer as essential as it once was given that consumers now have more choices than ever as to how they wish to acquire content.

Secondary market channels preserve works in a variety of formats: CD's, magnetic tapes, vinyl records, and even some 8-tracks. The secondary market has always let consumers lag behind the technological curve and yet still enjoy access to the historical formats, even though they might no longer be in production or officially distributed by the copyright owner. But the secondary market channels also may help to preserve the work itself over time. Disseminating multiple copies can help ensure the survival of a work in a variety of ways. Fires, earthquakes, and floods can affect all kinds of works. Thus, the more copies of works that exist, the more likely it is that a single copy will survive over time. If one assumes

\textsuperscript{104} Id.

that a single copy of a work (digital or physical) has a 1% chance of being destroyed in a given year, then after 200 years, the chance that this single copy will survive becomes 13%.\textsuperscript{106} But, if there were 100 copies in multiple places, each facing the same 1% chance of destruction, the odds that a copy will survive to the 200-year mark becomes 99.9999944%.\textsuperscript{107} Also, the range of the environments in which these copies are located means that it is more likely that at least some will endure conditions that will enable them to survive over time. Throughout history, "[t]he great concentrations of books, usually found in the centres of power, were the main victims of... destructive outbreaks, ruinous attacks, sackings and fires... In consequence, what has come to us is derived not from the great centers but from ‘marginal’ locations."\textsuperscript{108} Even if a work isn’t popular during its copyright term, it may still serve a significant historical purpose and as inspiration to contemporary authors. As an example, Martin Scorcese’s successful \textit{Gangs of New York} movie derived from an obscure book.\textsuperscript{109} In the case of digital works, they have been preserved in multiple different formats and are available through so many different channels, that long-term preservation is less of an issue. Furthermore, it’s easy for a content provider to create another digital copy of a work. The fact that digital works can be accessed remotely means that they might be stored in a more secure environment to begin with.

Aside from preservation, accessibility, and affordability, the mere fact that there is a resale market can further encourage the initial purchase of a work from a copyright holder in the first place. The environment in which the first sale doctrine functions is vastly different than at its inception, as digital networks and technological protection schemes become more prevalent and widespread. Interest groups have predicted that the rise of digital networks could result in fewer works being distributed to the public in the form of tangible copies, which would be easily transferable through secondary market channels. They might in fact be right, but does it matter? To analogize: “If a tree falls in the forest, does anyone care?” The Copyright Office believes that we can afford to wait and see.\textsuperscript{110}

\textsuperscript{106} See Reese, \textit{supra} note 19, at 605.
\textsuperscript{107} \textit{Id.} at 606.
\textsuperscript{108} \textit{Id.} at 605.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} Digital Millennium Copyright Study, \textit{supra} note 93, at § III(A).
IX. HIGH PRICE/LOW PRICE

Availability and price are intertwined, and digital distribution may be a double-edged sword. It increases the availability of copyrighted works while simultaneously increasing the cost of buying a used copy. Interest groups have argued that there's no guarantee that digital works will be more affordable than their tangible counterparts. What these interest groups fail to appreciate is that maintaining a viable retail channel system requires many intermediaries and that necessitates an increase from the wholesale price at each step in the distribution process, which direct digital distribution can effectively reduce or completely eliminate. Thus, digital distribution can potentially offer access to copyrighted works at a lower cost than the purchase of a retail copy, but the question is whether the work will be offered independent of being tethered to specific hardware, per use charges, or ongoing subscription fees, which can all bring elements of uncertainty as to future price and availability as compared to a tangible copy, which ensures access for the lifespan of the media or reader. Because consumers don't naturally purchase the same movie or music twice, further investigation is required to determine whether it has reduced the number of used physical copies in the secondary market, and raised the price of tangible media. What these action groups fail to appreciate is that the digital market now competes with tangible media. The public as a whole benefits from retail price competition when tangible copyrighted works are sold through multiple retailers and could similarly benefit from multiple competing digital retail channels.

X. HEAR TODAY/GONE TOMORROW

Historically, the first sale doctrine combined with a secondary market enables continued access to copyrighted works when the copyright owner decides to stop producing and selling additional copies of the work. But digitalization of content can actually reduce or even eliminate the issue of a work from going out of print in the first place. Digitalization can mean "books on demand" when a publisher finds the costs of storing physical copies prohibitive

111. Music prices remained relatively constant despite the advent of digital CD's over analog cassettes. iTunes also charges the same price as most music retailers, though the main advantage is that there is virtually no "shipping" time.

112. For example, content providers are in the midst of rolling out the HD-DVD format, which promises to provide greater clarity, capacity, and features.
because of low demand. The back-end costs of digitalization are arguably lower because only the digital file needs to be stored. A move to on-demand digital dissemination, however, means that a copyright owner’s decision to discontinue access to a work could be that much more rapid. It is comparably easier to remove a work from a digital database than it is to remove it from a secondary market. Thus, digital dissemination has not only the potential to eliminate unlawful access to a work, but lawful access as well.

In the case of tethered copies, if users are able to purchase works to download to their hard drive that are not encumbered by DRM restrictions, they can access those files even if and after the copyright owner takes them offline. In the case of technologically tethered copies, the owner can use that copy as long as he/she owns the original tethered equipment. These encumbrances prevent selling, renting, or even lending a tethered copy, all which are permissible under a traditional first sale doctrine. So even if a large number of people have purchased a digital work, these protection measures can ultimately result in the virtual disappearance of a work as quickly as it has spread. In the case of Apple’s iTunes, if Apple pulls the plug on its backend authorization infrastructure, users will no longer be able to transfer their music to and activate other authorized computers. They may in fact be required to repurchase their downloaded content in other media formats.

Paper has been used for hundreds if not thousands of years as a literary medium. Acid-free paper has further enhanced the longevity of such works. Once a book is printed on paper, preserving it doesn’t require much if any investment other than a dry shelf. However, in the case of digitized musical works, preservation can be quite costly, as it requires a continued investment in storage media and retrieval equipment on the part of end-users and content providers. Compared with paper, the lifespan of storage media is quite finite and the potential obsolescence of the equipment required to read the media is also a constant problem as technology evolves. Looking at the recent history of storage media illustrates the problem: 8-inch floppies were introduced in 1971; 5-1/4 inch floppies were

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115. Continued utilization of iTunes requires an investment in, at the very least, a computer and iPod.
introduced in 1976; 3-1/2 inch floppies were introduced in 1984, and have already been eliminated entirely from Apple Computer's machines.\textsuperscript{116} Content not transferred is content lost. Such movement to prevent loss due to obsolescence has been called "digital resuscitation" in the industry. BBC experienced this obsolescence with its Domesday Project in the 1980's in which the discs were only accessible through a proprietary computer system.\textsuperscript{117} The information archive was fortunately rescued but this example is demonstrative of not only the long-term problems of digital storage, but also what it means for continued public access to works. DVD's may last 100 years, but the real issue is whether anyone will know what a DVD is, and will anything play it. In comparison, future generations should be able to easily read the Domesday Book, which has survived on paper since 1086.\textsuperscript{118}

Now, owners of digital works will have to continuously migrate their collections to prevent them from being lost on obsolete media and platforms. These migrations, however, may run afoul of copyright law if not deemed to be fair use. This could put consumers in the awkward position of repurchasing content they already own on obsolete, unplayable, or degraded media. Libraries can rely on Section 108 of the 1976 Copyright Act, which permits libraries to make up to 3 copies of a work if the existing format in which the work is stored has become obsolete, and if an unused replacement cannot be obtained.\textsuperscript{119} While providing some relief, this measure is limited to libraries, and it only applies if the library already owns the work to begin with.\textsuperscript{120} Even so, the DMCA in its current form forbids any circumvention of digital methods to prevent reproduction. Therefore, in the event that large-scale DRM protected digitization grabs a market foothold, libraries are concerned about maintaining access to works.

\textsuperscript{118} See The Domesday Book Online, http://www.domesdaybook.co.uk/ ("The original Domesday Book has survived over 900 years of English history and is currently housed in a specially made chest at London's Public Record Office in Kew, London.").
\textsuperscript{120} See id.; Rebecca Bolin, Locking Down the Library: How Copyright, Contract, and Cybertrespass Block Internet Archiving, 29 HASTINGS COMM. & ENT. L.J. 1, 22 (2006).
XI. THE EFFECT OF FAIR USE ON ACCESS CONTROLS

The average individual accesses dozens of copyright protected works on a daily basis: on radio; television; the Internet. What has changed from the analog to the digital age is the ability of copyright holders to control access to their works on a more exacting basis through access controls. Copyright holders legitimately maintain that the digital realm is rife with the potential for piracy and mass infringement, and poses a unique and serious threat to their livelihood. Consumer advocacy groups have responded that while section 1201(c) of the DMCA states that the anti-circumvention provisions in the DMCA are intended neither to alter any rights, remedies, limitations, or defenses to copyright infringement, such as fair use, this isn’t necessarily the case in a real world implementation of the Act.\textsuperscript{121}

While it is more effective, less expensive, and less time consuming to forbid the trafficking of circumvention devices instead of instituting legal actions against each circumventer,\textsuperscript{122} consumer interest groups allege that the enactment of the DMCA has significantly shifted the balance of protection to the copyright holders, the result being that the fair use defense only allows users who already have legal access to a work to circumvent measures that protect rights controls.\textsuperscript{123} If a user circumvents access control measures, even for satirical/parody/commentary purposes under the principle of fair use, the user may in fact be in violation of § 1201(a)(1)(A), effectively meaning that lawful access must occur before fair use enters into play, if at all. And that’s the issue here: Is fair use a bygone concept in the digital era? Even more so, the anti-circumvention rule extends to all elements of the content, even those that are not copyrightable, so while unauthorized extraction of these portions would not violate copyright law, it would violate the DMCA.

Interest groups have argued that since DRM restrictions are backed by the force of law in the form of the DMCA, they pose a threat to the future of fair use. Basing their arguments on Sony, they maintain that if fair use is to continue to evolve as technology does, that DRM should make accommodations for consumer  

\textsuperscript{123} Given the costs of these formal lawsuits, the RIAA has rolled out a website through which accused infringers can settle suits made against them online. See P2PLawsuits.com, http://www.p2plawsuits.com/P2P_00_Home.aspx (last visited May 13, 2007).
experimentation and activities. They maintain that fair use activities can be difficult to anticipate even in light of current technology, and argue that time shifting was difficult to imagine in the era before VCR's: What began with a fair use ruling for time shifting in *Sony* resulted in the widespread adoption of the VCR, which has now evolved into the DVR (Digital Video Recorder). While the VCR may have increased piracy in the short term, they maintain that it also opened new markets for "back catalog" films, leading to a net overall gain. Interest groups have argued that the same would be true for music. What these interest groups don’t appreciate and account for in their arguments are the differences between the markets. First, it’s unclear what back-catalog of music would develop that doesn’t already exist. Secondly, the effects of piracy on the movie industry are greater than that on the record industry. This is due to the fact that a movie company invests a greater amount of capital into each movie than a record company invests into each record. Also, while each DVD usually only contains one movie, there can be upwards of 15 individual works on a CD. This means that in the case of music, the "pirates sail in a larger sea," and their potential effect on the overall market could be less as a result.

The anti-circumvention provisions of the DMCA have an effect on the traditional defenses raised in copyright law such as fair use, even though Section 1201(c)(1) states that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use . . . ." This is because the anti-circumvention prohibitions are separate and distinct from copyright infringement. Individuals can therefore be found liable for circumventing an access control measure even if the use falls within the scope of traditional fair use activities like a parody, satire, or

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126. *RIAA.com, Anti-Piracy: Old As the Barbary Coast, New As the Internet*, supra note 92 ("Eighty-five percent of recordings released don’t even generate enough revenue to cover their costs. Record companies depend heavily on the profitable fifteen percent of recordings to subsidize the less profitable types of music, to cover the costs of developing new artists, and to keep their businesses operational. The thieves often don’t focus on the eighty-five-percent; they go straight to the top and steal the gold.").
128. See, e.g., *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1197 (Fed. Cir. 2004) ("[C]ircumvention is not a new form of infringement but rather a new violation prohibiting actions or products that facilitate infringement . . . . ").
commentary. Interest groups argue that DRM bolstered by the DMCA makes the copyright holder the arbiter of the range of activities that constitute fair use of their work due to the fact that the integrity of these digital limits are bolstered by the force of law. As the content marketplace continues to become more digitized, these groups have argued DRM access controls will "creep" into collections of works that not only contain limited portions of copyrighted material, but also contain substantial portions from the public domain as well, in the form of "thin copyrights." Thus, protecting these works with access control mechanisms bolstered by the DMCA could give copyright owners significant control over works that may not be copyrightable. However, it's apparent that the market has great faith in the digital media movement. It has absolutely exploded within the last decade and will continue to provide what consumers seek. Perhaps these groups fail to appreciate the inherent market risks of the digital era on content providers, and take the availability of the content for which they seek fair use, for granted.

XII. JUDICIAL EFFECTS ON FAIR USE

On June 27, 2005 the Supreme Court issued its unanimous decision in MGM v. Grokster, vacating the 9th Circuit's holding, on the grounds that the lower court had misinterpreted the Supreme Court's Sony decision.\textsuperscript{129} Under the Court's ruling, Grokster could be liable for infringement that occurred through the use of their product or "device."\textsuperscript{130} The Ninth Circuit reached beyond Sony, which stated that as long as a device had a substantial non-infringing use, manufacturers of such devices could not be held liable for their potentially illegal uses in violation of copyright.\textsuperscript{131} The Supreme Court in Sony stated that instead of exploring all the potential uses of a device, a court only needs to decide whether a significant number of possible uses for a device would be non-infringing.\textsuperscript{132} The Grokster Court seemed to articulate in its holding the requirement that these non-infringing uses instead be the primary function of the device for a manufacturer to avoid liability. The Sony Court did not address the other potentially infringing uses for the VCR, such as "the transfer of tapes to other persons, the use of home-recorded tapes for public

\textsuperscript{129} MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 934 (2005)
\textsuperscript{131} Grokster, 545 U.S. at 915.
\textsuperscript{132} Sony, 464 U.S. at 442.
performances, or the copying of programs transmitted on pay or cable television systems” in its analysis.133

In Grokster, the Supreme Court articulated that the “safe-harbor” would not protect makers of a technology who induce their customers to break copyright.134 This is interesting, because Sony, like Grokster, advertised the potentially illegal uses of its technology such as the ability to “time shift” recordings.135 The Supreme Court’s rationale was that Grokster could be found liable for contributory copyright infringement despite its product’s potentially lawful uses, since the distributors knew that their software was used primarily to download copyrighted works and the evidence demonstrated that the distributors intended that their software be used for copyright infringement purposes.136 The distinction here was that the Sony safe-harbor only applied to multiple purpose devices that did not have the sole function of infringing copyrights. Grokster, as a device, served a singular purpose according to the Court, designed to encourage infringing activity, rather than one that could merely be used for infringing activity like a VCR.137 Therefore, Grokster could not claim that its online service fell within the enumerated category of fair use deemed permissible in Sony. Grokster’s business model clearly depended on inducing infringement to sell advertising to users.138 The occurrence of massive infringing activity was Grokster’s lifeblood, and that use was not shielded by the limited liability concept that arose in Sony.139 Another key difference that may have contributed to the difference between the holdings in Sony and Grokster is that the VCRs in Sony were analog devices, which limited both the quantity and quality of any infringing copies made. Digital infringement has the potential to be massive, while preserving the “bit for bit” quality of the original. So while the concept of Sony survives, Grokster modified and clarified it to contend with the inherent risks of these new technologies.

133. Id. at 780.
134. Grokster, 545 U.S. at 936-37.
137. Grokster, 545 U.S. at 933 (describing MGM’s assertion that 90% of the works that were available on the Grokster network were copyrighted).
138. Id. at 939-40.
139. See supra, note 137 and parenthetical.
XIII. STRONG MEASURES

The traditional notion of copyright protection has strengthened significantly in the digital era. Two developments within the last decade have changed the landscape substantially. The Sonny Bono Copyright Extension Act of 1998 extended copyright protection in the United States to 70 years after the author's death. The following day, the DMCA was signed into law, amending Title 17 of the US Code to further extend the reach of copyright to authored works in the digital realm.1 While copyright serves to protect the rights of authors, it arguably serves a more important second purpose as enumerated in the Constitution, "[t]o promote the Progress of Science and useful Arts." 1

Leading up to the Sonny Bono Act and DMCA is a judicial and legislative history that worked to define and preserve fair use activities, but these efforts were better suited to the pre-digital era. In Sony, the Supreme Court held that recording a television show for "time shifted" purposes was a legal use of the content. While it is legal to lend a physical book to a colleague, it's possible that DRM backed by the DMCA on electronic books can make such lending impossible. While excising content from a CD was permissible under traditional notions of fair use such as satire, parody, or commentary, it may be no longer legal to do so if circumvention of the DRM scheme is required in the process. Interest groups have responded with arguments that even before Congress outlawed circumvention technologies it was still unlawful to engage in the

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141. Devon Thurtle, A Proposed Quick Fix To the DMCA Overprotection Problem That Even a Content Provider Could Love . . . or at Least Live With, 28 SEATTLE U. L. REV. 1057, 1071 (2005).
142. Feist Publi'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work . . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."). (citations omitted).
145. Eliot Van Buskirk, Consumers fight back against new protected CDs, CNET REVIEWS, Jan. 18, 2002, http://reviews.cnet.com/4520-6450_7-5020808-1.html (fearing that the DMCA gives the record companies the ability to block what was once a traditional fair use in making copies of CDs).
stealing of music.\textsuperscript{146} Thus, these interest groups have argued that illegal copying activities can still be prevented without the DMCA even if circumvention technologies are allowed: "We could just as well ask how we prevent other crimes such as jaywalking, tax fraud, or even murder. Society prevents dangerous activities by passing laws that make such activities illegal and by punishing people who break the laws."\textsuperscript{147} However, these interest groups, again, fail to appreciate the necessity of DRM in preserving marketplace incentives for content providers given the speed with which piracy can occur in the digital era.

Interest groups have also argued that the reverse engineering exemption in §1201(f) is inadequate because reverse engineering has other legitimate uses beyond strict interoperability that are not allowed by the DMCA. More specifically, reverse engineering efforts to build a competitive product that circumvents protections in the process are not permitted.\textsuperscript{148} Additionally, "interoperability" is narrowly defined by the DMCA as meaning "the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged[,]"\textsuperscript{149} which excludes other legitimate types of interoperability such as Application Programming Interface (API) level replacements for computer libraries. The DMCA also only exempts reverse engineering for computer programs, not for network protocols or hardware devices.\textsuperscript{150}

Finally, section 1201(f) provides a reverse engineering exemption, but sections 1201(a)(2) and 1201(b) clearly prohibit the act of providing technologies that are "primarily designed for the purpose of circumventing protection."\textsuperscript{151} To some therefore, the DMCA appears to contradict itself: Even though a narrow reverse engineering exemption exists, the language makes it illegal to manufacture the tools that would enable one to utilize the exemption in the first place.

Consumer advocacy groups point to the role of the DMCA in the DeCSS case, in which the MPAA sued programmers who shared

\textsuperscript{146} Columbia Pictures Inds., Inc. v. Landa, 974 F. Supp. 1, 16 (1997) (stating that illegally duplicated videocassettes of movies was infringement of Plaintiff’s copyrights).


\textsuperscript{149} Id. at § 1201(f)(4).

\textsuperscript{150} Id. at § 1201(f).

\textsuperscript{151} See id. at §§ 1201(a)(2), (b), (f).
developed code that provided interoperability with DVD encoding, arguing that this was exactly the type of reverse engineering supposedly protected by the DMCA’s exemption.

XIV. THE EFFECT OF THE DMCA ON SONY AND ITS PROGENY

Consumer rights groups are concerned that the landmark ruling in Sony Corp. v. Universal City Studios, Inc., is at risk of being legislatively brushed aside by the DMCA. The Sony case dealt with fair use copying of television broadcasts onto videotapes, but technology has marched on since. The Sony opinion states that it is only effective in the absence of legislative intent with respect to copying, which means: "[i]n a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." The DMCA, enacted substantially later than Sony, pays homage to the case since it refers to the copying capabilities of "analog videocassette recorders." The DMCA effectively closes the loopholes under Sony, but rights groups argue that it has done so clumsily, proscribing areas of technology that could possibly be used for non-infringing purposes. The critical portion of the Sony ruling was that a technology with a "substantial non-infringing use" would not be considered a technology that could make the manufacturer a contributory infringer. The DMCA closes that loophole by eliminating trafficking in and the possession of copying technology that can circumvent access controls for a protected work.

153. Id.
155. Id. at 417.
156. Id. at 431.
159. See general discussion supra.
Some cases since *Sony* are of particular interest given the Court’s treatment of the DMCA and Fair Use:

- In *Universal City Studios v. Corley*, plaintiffs sued an individual who hacked the Content Scrambling System (CSS) for DVDs and created a program that would allow users to play DVD’s on Linux machines. The Court held that even though the DMCA reverse-engineering for computer system interoperability exception was applicable to this technology, the fact that it circumvented an access control meant that the 1201(a) provision remained enforceable because the same circumvention technique could be used by a non-Linux user as well on a copyright protected work, and thus, the exception was overcome.

- In *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, the Court held that a manufacturer of a DVD copying program was in violation of the DMCA (17 U.S.C. §1201(a)(2)) because it contained a portion designed for DRM circumvention. The most interesting portion of the Court’s holding was that the Court established that the right to copy does not guarantee the right to make a good quality copy. The court stated that although non-digital means for copying existed, and that these methods would in fact result in a poor reproduction of the original content, it did not consider the quality of these copies as a relevant factor in its fair use analysis.

**XV. RENEWABLE DRM**

DRM already lets content providers exact a significant amount of control on individuals and what kind of activities they can engage in with respect to the provider’s content. “Renewable DRM,” however, can be changed by content providers “on the fly” with a firmware or software upgrade for an even higher level of control, which is sometimes necessary when a hacker has cracked the DRM scheme. Microsoft’s Media Center PC was a significant advance, able to record television programs to its hard drive and then able to burn

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165. See *id.*
copies of the programs to disc.\textsuperscript{166} Individuals engaged in regular recording of several of HBO's series, including "The Sopranos."\textsuperscript{167} After some time on the market, HBO then triggered a flag marker in its content's DRM that prevented the Media Center Software from burning copies of the program.\textsuperscript{168} In some cases, upgrades are pushed to users, which they must install in order for them to continue to utilize these devices or newly released ones. Apple Computer's iTunes program originally permitted customers to make 10 copies of identical playlists until April 2004, when it was subsequently reduced to 7 copies through an iTunes program update.\textsuperscript{169} As new iPods and features have been released, Apple has required users to upgrade to later versions of iTunes that may also contain more robust DRM alongside new features. Similarly, iTunes 4.0 enabled Internet music sharing, but the 4.0.1 update replaced this to only allow local, same-network sharing.\textsuperscript{170}

Digital Video Recorders (DVRs) also contain DRM technologies that enable providers to control content and even archival activity on the devices. At one point, HBO announced that it would disable the long term archiving of the show "Six Feet Under," expiring saved shows from the devices in a matter of weeks.\textsuperscript{171} While content providers naturally follow similar patterns in releasing material: 1) Movies, 2) DVD/Cable, the control that these providers have over the consumer experience is significantly greater. Simply put: videotapes don't expire, but they grow obsolete and deteriorate. Also, the videotapes don't have "renewable DRM" and are not subject to the direct control of the copyright holder when they are outside of the playback unit, unlike content that is stored directly on a DVR device. These interest groups argue that in a modern digital world, because users don't actually have their "hands on" the content, these users may no longer be able to engage in traditional time shifting as outlined in Sony because of the nature of DRM protections in


\textsuperscript{168} \textit{Id.} at 12-13.

\textsuperscript{169} \textit{Id.} at 13.

\textsuperscript{170}\textit{Id.}

\textsuperscript{171} \textit{Id.}
conjunction with how digital works are distributed. Their concern is that these protections could also extend to works in the public domain as well which one may use without cost or permission. Because DRM can be applied to public domain works in the same manner as it is applied to copyrighted works, these groups have argued that the DMCA's interaction with DRM could potentially create a pseudo-copyright for works that might not even be entitled traditional copyright protection under § 106.

XVI. "I'M FROM THE GOVERNMENT AND I'M HERE TO HELP"¹⁷²

The United States House and Senate committee reports indicate that the DMCA may be exceeding its originally intended breadth.¹⁷³ In the Senate Report, the Senate stated that the original purpose of the Act was to deal with mass infringement activities over the Internet and networks.¹⁷⁴ An often referred to portion of the House Report in DMCA cases is the following: "[t]he act of neutralizing a technological protection measure by a copyright holder to control access to the work is the electronic equivalent of entering unlawfully inside a locked room with the goal to obtain a copy of the book."¹⁷⁵ However, it's been argued that the act of circumventing a copy or access control for a fair use is like removing a padlock that a private citizen has arbitrarily put on the entrance to a public park.¹⁷⁶

Interest groups are concerned that the Sony decision is being effectively obsolesced with increasingly capable digital devices that are replacing the VCR's to which the original holding applied. The upcoming issue is therefore the permissible activities that will remain in a DRM'ed world under the DMCA for new technology. Consumer groups like the EFF would have us imagine a scenario in which analog formats have gone the way of "leaded" gasoline, with consumers entirely subject to the actions of digital content providers who will dictate what constitutes a fair use of the work and in what methods it can be accessed. I find this highly unlikely due to the continued existence of the Domesday Book. The iTunes Music store,

¹⁷² Marie Cocco, A Contempt of Their Own, THE WASHINGTON POST WRITERS GROUP, Mar. 8, 2007, http://www.postwritersgroup.com/archives/cocc0308.html (recalling President Ronald Reagan's famous quip, "The nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.'").
¹⁷³ Schwartz, supra note 157, at 116-17.
¹⁷⁴ Schwartz, supra note 157, at 116.
¹⁷⁵ Schwartz, supra note 157, at 119.
¹⁷⁶ Id.
which has become wildly popular in the few years it has been operational represents a successful implementation of a digital fair use doctrine. Although it contractually and technologically enforces a fair use arrangement for its purchased content that is more limited than traditional fair use, the iTunes DRM still allows the consumer to engage in a defined "fair use" bubble that anticipates a habitual consumer's fair use activities, while preventing mass piracy from occurring. Consumer groups point out that the while the Supreme Court's holding in *Campbell v. Acuff-Rose Music*\(^{177}\) permitted parody, satire, and sampling activities, the iTunes Store's relatively lenient terms of service state that users "agree not to modify, rent, lease, loan, sell, distribute, or create derivative works" from downloaded songs.\(^{178}\) That aside, Apple's success shows that achieving a proper balance on DRM can enable continued growth in the digital realm.

Congress has begun to address the DMCA in recent years, but as I'll explain, not always for the better. On January 7, 2003, Representative Rick Boucher introduced the Digital Media Consumers' Rights Act of 2003, which exempted any person "acting solely in furtherance of scientific research into technological protection measures" from the restrictions of §1201 of the DMCA.\(^{179}\) It also exempted from the purview of the DMCA both non-infringing circumvention activities and activities that involved trafficking products "capable of enabling significant non-infringing use of a copyrighted work."\(^{180}\) This bill was ultimately sent to subcommittee for hearings on May 12, 2004 but has since stalled.\(^{181}\)

Representative Zoe Lofgren also introduced a bill on March 4, 2003 entitled the "Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003."\(^{182}\) This bill would have amended Title 17 to:

1. include analog or digital transmissions of a copyrighted work within fair use protections; 2. provide that it is not a copyright infringement for a person who lawfully obtains or receives a transmission of a digital work to reproduce, store, adapt, or access

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178. See Apple's iTunes Music Store: Terms of Service, *supra* note 9, at § 13(a).
180. *Id.* at § 5(b).
it for archival purposes or to transfer it to a preferred digital media device in order to effect a non-public performance or display; [3] allow the owner of a particular copy of a digital work to sell or otherwise dispose of the work by means of a transmission to a single recipient, provided the owner does not retain his or her copy in a retrievable format and the work is sold or otherwise disposed of in its original format; and [4] permit circumvention of copyright encryption technology if it is necessary to enable a non-infringing use and the copyright owner fails to make publicly available the necessary means for circumvention without additional cost or burden to a person who has lawfully obtained a copy or phonorecord or a work, or lawfully received a transmission of it.\textsuperscript{183}

This represented an attempt at creating a digital first sale doctrine, but it never left the Subcommittee on Courts, the Internet, and Intellectual Property.\textsuperscript{184} If enacted, the BALANCE Act would have allowed a user to circumvent these controls to engage in non-infringing use of the work only if the copyright holder has not made publicly available the necessary means to permit the non-infringing uses without additional cost or burden to users.\textsuperscript{185} Congress took notice from the holding in \textit{Sony} that the law of copyright is a "difficult balance between the interests of authors . . . in the control and exploitations of their writings . . . on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand . . . .\"\textsuperscript{186} Copyright seeks to encourage and reward creative efforts by securing a fair return for an author's labor.\textsuperscript{187} At the same time, Courts have acknowledged that "some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts . . . .'\"\textsuperscript{188} Although the Copyright Act has necessarily evolved over time to accommodate new developments in technology, even as far back as the player pianos,

\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{See} \textit{Science \\& Intellectual Property in the Public Interest, Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, American Association for the Advancement of Science,} (noting that the current status of the bill is that it is still in subcommittee), http://sippi.aaas.org/ipissues/legislation/?res_id=48 (last visited Apr. 18, 2007).
\textsuperscript{185} \textit{Id.}
\textsuperscript{187} \textit{Twentieth Century Music Corp v. Aiken,} 422 U.S. 151, 156 (1975).
which preceded the Copyright Act of 1909, content providers have argued that the unique characteristics of digital technology and the Internet’s distribution mechanisms pose a legitimate threat to copyright holders. The DMCA was thus enacted to provide a legal framework to support the integrity of access and rights controls designed to contend with the threat. The BALANCE Act explained that:

[c]ontrary to the intent of Congress, Section 1201 of Title 17, United States Code, has been interpreted to prohibit all users—even lawful ones—from circumventing technical restrictions for any reason. As a result, the lawful consumer cannot legally circumvent technological restrictions, even if he or she is simply trying to exercise a fair use or to utilize a work on a different media device.

Congresswoman Lofgren, the author of the proposed BALANCE Act, argued that it was necessary to restore the traditional balance between copyright holders and society, and punish digital pirates without treating every consumer as one. What the Congresswoman fails to appreciate is that the DMCA might in fact be necessary to ensure a stable content rich marketplace in the first place given the free-for-all that occurred under Napster in its first incarnation.

Not to be deterred, Representative Boucher even reintroduced his proposed Digital Media Consumers Rights Act of 2003 in the form of H.R. 1201: the “Digital Media Consumer Rights Act of 2005,” through which Title 17 U.S.C §1201 would have been amended to exempt from its circumvention prohibitions persons acting solely in furtherance of scientific research into those technological measures. Specifically, H.R. 1201 would have amended §1201(c) so that it would not have been a violation of copyright law, but rather fair use to: (1) “circumvent a technological measure in order to obtain access to a work for purposes of making non-infringing use of the work;” or (2) “manufacture or distribute a hardware or software product capable of substantial non-infringing

189. See Skyla Mitchell, Reforming Section 115: Escape From the Byzantine World of Mechanical Licensing, 24 CARDOZO ARTS & ENT. L.J. 1239, 1241-42 (2007) (noting that the debate about player piano roll reproduction spurred Congress to amend the Copyright Act for “mechanical reproductions”).

190. Balance Act of 2003, supra note 182. This bill was reintroduced by Rep. Lofgren as H.R. 4536, 109th Cong. (2005), but ultimately met the same end.

191. See id.

uses except in instances of direct infringement.”

The last major action with respect to H.R. 1201 was its referral on March 22, 2005 to the House Subcommittee on Commerce, Trade and Consumer Protection in which it subsequently stalled.

Although it could keep trying, perhaps Congress should remain neutral in this matter and let the market decide. Senator Sam Brownback’s proposed “Consumers, Schools, and Libraries Digital Rights Management Awareness Act,” introduced in 2003, would have banned the sale or importation of DRM-enabled content unless it followed specific government regulations regarding making it available for resale or charitable donation. Senator Ron Wyden’s “Digital Consumer Right to Know Act” would have required a producer or distributor of copyrighted digital content to disclose the nature of restrictions that limited the ability a purchaser to play, copy, transmit, or transfer such content on, to, or between devices commonly used with respect to that type of content. It would have required oversight by the Federal Trade Commission to ensure disclosure of DRM limitations on: (1) recording for later viewing or listening; (2) the reasonable and noncommercial use of legally acquired audio or video content; (3) making backup copies of legally acquired content subject to accidental damage, erasure, or destruction; (4) using limited excerpts of legally acquired content; and (5) engaging in the secondhand transfer or sale of legally acquired content. Even the Digital Media Consumer’s Rights Act of 2005 would have established a series of regulations that would have resulted in oversight by the Federal Trade Commission. These proposed regulations included prohibiting selling or advertising a CD unless its packaging described “minimum... requirements for playback or recordability on a personal computer,” “any restrictions on the number of times song files may be downloaded to the hard drive of a personal computer,” and “the applicable return policy for consumers who find that the prerecorded digital music disc product

193. Id.
197. Id.
does not play properly . . . ." Governmental compulsory licensing schemes have also been proposed, in which the government would compensate artists for making their works available by increasing the federal income tax as well as that which would be levied on related goods and services. The amount of compensation would be based on the type of use that was made and tracked by digital signature.

These proposed schemes all share one common outcome: They will turn one of the least regulated industries into one of the most regulated. The comparatively lightly regulated information technology industry represents about eight percent of the United States’ Gross Domestic Product, but about twenty-nine percent of its growth. Injecting government into the mix could cause a "wet blanket" effect on a thriving market, and raise the costs incurred by consumers and providers significantly. Economist David Friedman has concluded that when the government, as opposed to private actors, performs a function, it costs two to three times as much. Of even more concern is the fact that another permanent regulatory infrastructure would arise like the Copyright Office, and like it, become the target of special interests and lobbying efforts. Taking the decision making process from the mind of the consumer and putting it with the government defeats the purpose and efficiency of the free market.

iTunes has been so successful because the DRM terms are transparent to the habitual consumer and unlikely to be reached through normal user activities. Other schemes have not been so successful. Circuit City’s DIVX venture, which resembled a modified pay-as-you-go/pay-per-view model, spectacularly flopped with

199. Id. at § 3.


202. Id. at 324 (citing DAVID FRIEDMAN, MACHINERY OF FREEDOM, GUIDE TO A RADICAL CAPITALISM 30-95 (1973)).

203. See Apple's iTunes Music Store: Terms of Service, supra note 9, at § 9(b) (iTunes customers are explicitly authorized: to "use the Products on five Apple-authorized devices at any one time . . . export, burn . . . or copy Products solely for personal, noncommercial use . . . burn an audio playlist up to seven times . . . [and] to store Products from up to five different Accounts on certain devices, such as an iPod, at a time.").
consumers.\textsuperscript{204} DIVX allowed the consumer to make an initial movie purchase for as low as $4.49, which allowed him/her to watch the movie as many times as they wanted within a 48 hour viewing period.\textsuperscript{205} In order to watch the film again after that initial period, the viewer had to reactivate the viewing period with the DIVX computer and pay a subsequent fee.\textsuperscript{206} In other words, the player was tied in to the phone line and a credit card number to view the movie. In addition, DIVX discs could only be viewed on the player that it was activated on – one could not take the movie to a friend’s house to watch it.\textsuperscript{207} Lastly, regular DVD players could not even play a DIVX movie.\textsuperscript{208} Not much media attention has been paid to the Napster 2.0 subscription model either, and there must be a reason why iTunes peaked at an 84% market share and the iPod has a 75% market share.\textsuperscript{209} All one has to do is look at the terms of service with regards to the DRM of failed (or failing) business models. Napster’s DRM is renewable on a monthly basis subject to the user’s payment.\textsuperscript{210} If the consumer misses a payment or cancels the service, his/her “subscribed” music becomes unplayable.\textsuperscript{211} Most recently, Microsoft’s Zune wireless media player, released in November 2006 to a lukewarm reception, uses the Windows Media DRM (WMDRM) scheme, which is completely proprietary to Microsoft\textsuperscript{212} and represents an attempt by Microsoft to control both the device and music service like Apple. However, unlike Apple, Microsoft finds itself in the position of already licensing its “PlaysForSure” DRM scheme to other device manufacturers and content providers that the

\begin{footnotesize}
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\item[205.] \textit{Id.}
\item[206.] \textit{Id.}
\item[208.] \textit{Id.}
\item[211.] See \textit{id.}
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Zune does not support.\textsuperscript{213} As a result, anyone who purchased music from Microsoft’s MSN Music service (shuttered in November of 2006)\textsuperscript{214} who starts buying from Zune will need to get to get a new Zune device, and their existing music won’t go with them. On the other hand if they go to a competing music service, such as Real’s Rhapsody, new music they purchase likely won’t work on devices they currently own either, but at least a new Rhapsody compatible device will also allow them to play their old content. Microsoft has made it abundantly clear that it “will not be performing compatibility testing for non-Zune devices, and . . . will not make changes to [its] software to ensure compatibility with non-Zune devices.”\textsuperscript{215} In fact, one of the device’s most touted features: “squirting” (wireless music sharing) is crippled by another DRM scheme called “3-day-or-3-play.”\textsuperscript{216} The DRM only allows for music files to be played a maximum of three times on the device, and this feature expires after three days whether they are played or not.\textsuperscript{217} In fact, playing one minute of the song or half the song, whichever is shorter, counts as “one play” and this assumes that the songs can be shared in the first place, as observers have documented that about 40% of the most popular Zune store downloads are flagged as non-shareable.\textsuperscript{218} Needless to say, the Zune platform has not performed well in the marketplace.\textsuperscript{219}

XVII. WHERE DOES IT LEAVE US?

The South Huntington Library on Long Island, New York has 10 iPod Shuffles in its collection, and it uses them to loan out digital

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\textsuperscript{214} See id. \\
\textsuperscript{217} \textit{See} Wikipedia Online Dictionary, “3-day-or-3-play”, http://en.wikipedia.org/wiki/3-day-or-3-play (last visited Apr. 8, 2007). \\
\textsuperscript{219} Using NPD Group’s Zune sales data (that 29,000 units were sold for the month of January 2007) and Microsoft’s Nov. 13, 2006 press release (that the Zune would be available at nearly 30,000 retailers), bloggers have extrapolated that Microsoft only sold one Zune per store. Zune Sales: ONE Per Store?, Metroxing, Mar. 19, 2007, http://metroxing.blogspot.com/2007/03/zune-sales-one-per-store_19.html.
\end{flushright}
audio book titles purchased from iTunes, which is, perhaps, a sign of things to come. The iTunes system has been an unparalleled success, and I believe that we are merely in the infancy of a digital distribution revolution. Once again, law finds itself catching up to technology, and each sale of an iTunes track means that a copy of music has been distributed that cannot be legally resold, edited, excerpted, or otherwise sampled by that user. However, we have to ask ourselves: with everything that iTunes and its competing services offer, is that so bad? The content provider’s defense is legitimate, and in the case of record companies, what they are trying to do is ensure a legitimate and accountable first sale of the music to a customer. The labels do not make money on used record sales, and they also arguably lose money from rampant piracy, which has been made much easier in the digital era. Apple’s apparently found a market balance without specific government intervention where the wants of consumers match the needs of the content providers. Apple says the following regarding its purchased music files on its iTunes website: “What you buy is yours to keep.” The way things stand now, that is how they will stay. Ultimately, the market will determine what level of karma it needs.


221. “Illegal” is not the same as “impossible.” Purchased iTunes music can be burned to a CD and then re-ripped in an unprotected format of the user’s choice. This is a relatively easy, but time consuming trick. The FairPlay DRM is stripped from the burned content through this process, yet the specific song playlist that was burned can only be done so for a total of 7 times per the program’s limitations, which remain intact.