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# Restoring Public Access in the Wake of the Digital Millennium Copyright Act

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## **Restoring Public Access in the Wake of the Digital Millennium Copyright Act**

by Michael Duni

### **Introduction**

The Digital Millennium Copyright Act has expanded the rights of copyright owners while narrowing the rights of copyright users, and a more strict limitation should be placed on the duration of copyright monopoly to compensate for this change in order to restore access to the public. This article discusses the current trend of copyright owners using digital rights management that allow protections that exceed those the copyright owner has under the law.

First, the article will mention how one of digital media's greatest qualities, how fast it can move information, is also one of the most dangerous things about it. This danger created a need for digital rights management (DRM). The article will discuss what DRM is, and also some of the ways DRM can be used to limit the use of media files.

The article will then discuss the Fair Use exception. The fair use exception is a defense available for a defendant charged with copyright infringement. This exception recognizes that there are certain uses of media that, while infringing on the copyright, provide enough of a public benefit to be considered "fair use." The decision in *Sony v. Universal City Studios* will be discussed to illustrate how this defense is used and what factors the court considers before allowing this defense.

Then, a brief overview of two of the most critical sections of the Digital Millennium Copyright Act ("DMCA") will be given. This will to clarify what new protections the act has given copyright owners, and how the use of digital media is can be restricted. It is important to understand the difference between rights/copy protections and access protections.

Rights protections are aimed at protecting against duplication of copyrighted material while access protections are aimed at protecting against unauthorized users. The DMCA makes the circumvention of, or the manufacturing, trafficking, or sale of circumvention measures illegal. The fair use exception defense is generally not available under the DMCA, with one small exception.

After exploring how the DMCA works, the decision reached in *Real Networks v. DVD Copy Control Association* will be discussed. This decision starkly contrasts the decision in *Sony*. The impact that the DMCA has on the ability to raise fair use as a defense is demonstrated by this case. The discussion will illustrate just how narrow the fair use exception has become after the implementation of the DMCA.

Next, the article will explore the first sale doctrine and explain how digital protections affect it. The DMCA frustrates the right of first sale since removal of digital right management is prohibited by law. Digital rights management makes this limitation on the rights of the copyright owner useless to the public by facilitating licenses rather than sales. A license can restrict types of use that a transfer of ownership through a sale cannot.

The article will then show how digital rights management, which can exceed the protections available by law, shift value from the user back to the copyright owner. These digital protections sidestep established doctrine and provide more control and value to the copyright owner, thus excluding access to potential users. Copyright law should change make an adjustment to tip the scale in favor of the public in order to achieve a balance of interests. Reducing the duration for which copyright monopoly is granted is perhaps the easiest way to restore public access.

Finally, the net benefit approach will be discussed. The benefits on both the side of the copyright owner and copyright user, in light of how the DMCA has changed the landscape of copyright law in regards to digital media, will be considered and weighed against each other.

### **What is Digital Rights Management?**

Digital media has changed the way information is delivered, stored, and enjoyed. It can take on different forms –from being fixed in an optical disk, to being stored in a hard drive, to being streamed directly from the source. Digital media has exponentially increased the speed at which information travels. Therein lies the problem –digital media travels easily. Some may argue too easily. This is especially the case with digital downloads. While one is able to lend a DVD to a friend or a book to a colleague, one can only do so once per copy. That same person could share that same piece of media in its digital file format with hundreds or even thousands of people without even having to relinquish his/her own copy.<sup>1</sup> Since suing each infringer individually is impractical, this created a need for a way to manage copyright protected media.<sup>2</sup> This need gave birth to Digital Rights Management.

Digital Rights Management, also known as DRM, is a type of technology that comes in many different forms that have the same quality, which is, controlling access to a copyrighted material.<sup>3</sup> DRM functions by “establishing a copyright for a piece of content, managing the distribution of that copyrighted content and controlling what the consumer can do with that content once it has been distributed.”<sup>4</sup>

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<sup>1</sup> Julia Layton, *How Digital Rights Management Works*, available at <http://computer.howstuffworks.com/drm1.htm>.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 1.

DRM can be used on all types of media including music, movies, books, and video games, and software.<sup>5</sup> DRM can perform a variety of different functions. Examples of some of the functions DRM can perform are restricting access to a file, limiting the number of times a disc or file can be copied, limiting the number of times a program can be installed, or even requiring web-based permission before the user is allowed to access media.<sup>6</sup> DVDs, for example, contain CSS technology that prevents copying of discs while allowing playback on licensed DVD players.<sup>7</sup>

DRM that restricts access to a registered user can be embedded in downloaded media files to restrict access or prevent copying.<sup>8</sup> For a copyright owner, this type of digital protection is simple and effective. File sharing would not be harmful, as only the original user could access the file and any copy to be shared was useless.

Streaming media can also include DRM in the form of encryptions or digital watermarks.<sup>9</sup> This type of technology can prevent the media that is being streamed from being recorded. Streaming services can help to make sure that makes sure digital media does not travel so easily. Since the user only streams media, and does not download an actual file, there is virtually no danger of sharing the file. Unlike a book, CD, or DVD, there is nothing there for the user to share (not even a download).

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<sup>5</sup> *Id.* at 1.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Real Networks v. DVD Copy Control Ass'n, Inc.*, 641 F. Supp. 2d 913, 919 (N.D. Cal. 2009).

<sup>8</sup> Julia Layton, *How Digital Rights Management Works*, available at <http://computer.howstuffworks.com/drm1.htm>.

<sup>9</sup> *Id.* at 1

Perhaps, however, the pendulum has swung too far. When a user shared or sold one of his/her books, CDs, or DVDs it was perfectly legal.<sup>10</sup> Due to DRM embedded in media files and streaming services, the sharing or selling of purchased media not quite as simple as it used to be. The issue now is that the user is denied the same degree of access previously enjoyed with physical media. These protections now allow the copyright user to prohibit uses that would be considered fair use and are permitted under law.<sup>11</sup>

### Copyright Law's Fair Use Exception

Copyright law seeks to promote the public availability of creative works by creating incentives for copyright owners by allowing them to be rewarded for their efforts.<sup>12</sup> The private benefit enjoyed by copyright owners is what stimulates the creation of art, which is enjoyed by the public. Copyright law's goal is to achieve the optimal balance between providing incentives for artists/authors to create and maximizing public access to art.<sup>13</sup>

In cases where copyright infringement is established, the law allows for a Fair Use exception as a defense to the infringement action.<sup>14</sup> The law allows what would otherwise be considered infringement for purposes such as criticism, commentary, parody, news reporting, teaching, research, etc. The public benefits from these types of works, and so although it would otherwise be infringement, the law permits it.

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<sup>10</sup> See 17 U.S.C. § 109

<sup>11</sup> Julia Layton, *How Digital Rights Management Works*, available at <http://computer.howstuffworks.com/drml.htm>.

<sup>12</sup> *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 431 (U.S. 1984)

<sup>13</sup> *Id.*, at 431-432.

<sup>14</sup> See 17 U.S.C. § 107

The court considers four factors when a fair use defense is raised. These factors are: the purpose and character of the use (mainly to determine whether or not the infringement resulted in profit, or instead was for nonprofit/educational use), the nature of the copyrighted work (the extent in which the work is creative or factual –i.e. a purely creative work that is infringed upon is harder to defend against than a work that, while satisfying copyright requirements, contains mostly factual data), the amount and substantiality of the portion used in relation to the copyrighted work as a whole (considering both the amount of the plaintiffs work used by the defendant and the amount of the defendants work taken from the plaintiff –i.e. if almost an entire work is copied, or, on the other hand, if only a small portion of the work was copied, but it is the most important part of the work in substance), and the effect upon the potential market for, or value of, the copyrighted work.<sup>15</sup> The factors are all given consideration, but the effect upon the potential market form or value of, the copyrighted work is perhaps the most important factor to consider. If the resulting infringement results in a replacement for the original work, this would have a tremendous effect on the market for the original work, and a fair use defense would probably fail. If the resulting infringement does not affect the market for the original work, the fair use defense will have a much better chance at being successful. This was the case in *Sony v. Universal City Studios*.

In *Sony v. Universal City Studios*, the court allowed the fair use exception defense to be used. Sony had developed Betamax machines that allowed users to record TV shows onto a Betamax tape.<sup>16</sup> Sony was being sued vicariously for copyright infringement committed by Betamax users.<sup>17</sup> The focus of the court was on the preponderance of the evidence of the meaningful

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<sup>15</sup> See 17 U.S.C. § 107

<sup>16</sup> *Sony Corp.*, 464 U.S. at 422.

<sup>17</sup> *Id.* at 419.

likelihood of future harm. The court found that the plaintiffs failed to show that Betamax users using the machines to record and watch television programming at a later time would cause “any likelihood of nonminimal harm to the potential market for, or value of, their copyrighted works.”<sup>18</sup> This “time-shifting” was considered fair use and allowed under law. The court stated that, “the time-shifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter.”<sup>19</sup> Without the fair use exception, this would have been copyright infringement.

The fair use defense becomes harder to use with the introduction of the Digital Millennium Copyright Act (“DMCA”). The problem is that the DMCA generally does not allow the fair use exception (except for one narrow exception that would not apply to a manufacturer).<sup>20</sup> In effect, the DMCA empowers protections on digital media by making it illegal to circumvent or remove digital rights management copy protections that can prevent what is considered to be fair use.

### **The Digital Millennium Copyright Act**

The Digital Millennium Copyright Act was implemented in 1998 and it created “new grounds for liability in the context of the unauthorized access of copyrighted material.”<sup>21</sup> “The DMCA created new causes of action both for the circumvention of access controls in ways that

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<sup>18</sup> *Id.* at 456.

<sup>19</sup> *Id.* at 450.

<sup>20</sup> *Real Networks v. DVD Copy Control Ass’n, Inc.*, 641 F. Supp. 2d 913, 942 (N.D. Cal. 2009). (“While the DMCA provides for a limited ‘fair use’ exception for certain end users of copyrighted works, the exception does not apply to manufacturers or traffickers of the devices prohibited by 17 U.S.C. § 1201(a)(2).”)

<sup>21</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F. 3d 1178, 1194 (Fed. Cir. 2004)

facilitate copyright infringement and for trafficking in circumvention devices that facilitate copyright infringement.”<sup>22</sup>

In regards to digital media, the DMCA created new rights/copy protections under §1201(a) and access protections under §1201(b). Although these sections appear to be similar, they offer completely different protections. Rights protections are aimed at protecting against duplication of copyrighted material while access protections are aimed at protecting against unauthorized users.

### **17 U.S.C. §1201(a) of the DMCA –Access Protections**

Under §1201(a), the DMCA prohibits the circumvention or manufacturing, selling, or trafficking in circumvention measures to bypass technological protections that provide access to copyrighted works.<sup>23</sup> The act of circumvention and the act of manufacturing selling, or trafficking in circumvention measures to bypass technological protections that provide access to copyrighted works give rise to causes of action.

To hold a defendant liable for circumvention of DRM technology, the plaintiff must show that DRM is a “technological measure” that “effectively controls access” to a copyrighted work.<sup>24</sup> “A technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”<sup>25</sup>

Circumvention of a technological measure (such as DRM) “means to descramble a scrambled

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<sup>22</sup> *Real Networks*, 641 F. Supp. 2d 913, at 931.

<sup>23</sup> *See* 17 U.S.C. §§ 1201(a)

<sup>24</sup> *See Real Networks v. DVD Copy Control Ass’n, Inc.*, 641 F. Supp. 2d at 931.

<sup>25</sup> *Id.*, at 931.

work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”<sup>26</sup>

To hold a defendant liable for manufacturing, selling, or trafficking a circumvention measure, a plaintiff must show that a defendant’s product is either: “(a) primarily designed or produced for the purpose of circumventing technological measures that effectively controls access to a copyrighted work; (b) have only limited commercially significant purpose or use other than to circumvent such technological measures; or (c) marketed for use in circumventing such technological measures.”<sup>27</sup>

### **17 U.S.C. §1201(b) of the DMCA –Rights/Copy Protections**

Under §1201(b), the DMCA prohibits the manufacturing, trafficking, and selling of circumvention measures to bypass technological protections of ownership.<sup>28</sup> To hold a defendant liable for violation under §1201(b), the plaintiff must show that the DRM which is circumvented by the defendant’s product “effectively protects a right of a copyright owner under the DMCA.”<sup>29</sup> DRM, as defined by this section, “effectively protects the right of a copyright owner...if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.”<sup>30</sup> “Under the statute, a copy-control measure is “effective” if in the ordinary course of its operation, the measure “prevents, restricts, or otherwise limits the exercise of a right of a copyright owner.”<sup>31</sup>

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<sup>26</sup> 17 U.S.C. § 1201(a)(3)(A)

<sup>27</sup> *Real Networks v. DVD Copy Control Ass’n, Inc.*, 641 F. Supp. 2d at 932-933

<sup>28</sup> *See* 17 U.S.C. § 1201(b)

<sup>29</sup> 17 U.S.C. § 1201(b)(1)

<sup>30</sup> 17 U.S.C. § 1201(b)(2)(B)

<sup>31</sup> *Real Networks v. DVD Copy Control Ass’n, Inc.*, 641 F. Supp. 2d at 939.

## The Real Networks decision

A case that clearly lays out how the DMCA functions is the *Real Networks* case. In this case, Real Networks had manufactured and marketed a computer program that allowed the user to copy the content of DVDs to a hard drive as a backup copy or for playback at a later time.<sup>32</sup> Real Networks was then sued for copyright infringement, and for violating parts of the DMCA.

On its face, this seems very similar to the kind of function that Sony provided to users with its Betamax machines. Both products allowed the copying of copyrighted material for later viewing. One may think that the same fair use defense that Sony prevailed on would be available (Real Networks tried to argue this<sup>33</sup>). Due to the implementation of the DMCA, however, the decision in *Real Networks* did not mirror the *Sony* decision and Fair Use was not an available defense.

Real Networks' program, RealDVD, had to circumvent DRM technologies embedded in DVDs that prohibited copying or use in an unauthorized player.<sup>34</sup> Because RealDVD circumvented protections placed on DVDs in order to copy the content to a hard drive, the

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<sup>32</sup> *Id.*, at 924.

<sup>33</sup> *Id.* at 941.

<sup>34</sup> *Id.* at 919, 927-928. The Court mentions the types of DRM used on DVDs including CSS, ArccOS and RipGuard (“The CSS technology was specifically developed to create a secure system for the dissemination and playback of copyrighted content on DVDs, while preventing copying, so that consumers would be able to play all DVDs on all players...The CSS technology is, at its core, an encryption-based system that employs an algorithm configured by a set of security ‘keys’ to encrypt a DVD’s contents. CSS encrypts the content on DVDs, scrambles the video content and renders it unusable and unplayable to the user, unless and until the content is decrypted with CSS keys...ArccOS and RipGuard function primarily by inserting corrupted or ‘bad’ sectors on DVDs: intentional obstacles placed subversively in DVD data that cause ‘read’ errors when the sectors are read by a DVD drive so as to severely impede copying of the DVD.”).

§1201(a) DMCA was violated.<sup>35</sup> How the content would be used is irrelevant –once the plaintiff shows that protections were circumvented the defendant is liable.<sup>36</sup>

Real Networks was also found liable under §1201(b) of the DMCA. Real Networks first tried to argue that the copy protection technology on DVDs was not “effective” as defined in §1201(b) and, therefore, they could not be held liable. The court in *Real Networks* held a broad definition for what qualifies as an effective means of protections, stating that even a time penalty (where a DVD takes an excessive amount of time to copy) can be enough of a deterrent to be “effective.”<sup>37</sup>

RealDVD, in its copying process, deactivates or bypasses digital protections.<sup>38</sup> The court pointed to the legislative history of the DMCA, which indicated that section 1201(b)(1) was intended to outlaw the manufacturing, trafficking, and selling of technology that would “facilitate circumvention of technological protection measures for purposes of gaining access to a work.”<sup>39</sup>

It is important to note that this piece of the statute only targets the manufacturing, trafficking, and selling of such technology, but not an individual using this technology to circumvent technological protections. The Court stated that, “Congress did not intend to regulate the conduct of individual users with authorized access to copyrighted works, since their liability was controlled by the existing law of copyright infringement and fair use. In this sense, there is a ‘user exemption’ implicitly recognized in the DMCA for the fair use of copyrighted works.”<sup>40</sup>

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<sup>35</sup> *Id.* at 933.

<sup>36</sup> *Id.* at 934.

<sup>37</sup> *Id.* at 939.

<sup>38</sup> *Id.* at 919.

<sup>39</sup> *Id.* at 938.

<sup>40</sup> *Id.*, at 942.

This is a narrow exception in the DMCA that allows the fair use defense in a case where the individual user is permitted to circumvent access protections for purposes that qualify as fair use.<sup>41</sup>

The court, however, did not allow Real Networks to use this as a defense. The court directly addressed the *Sony* decision, and stated that, “*Sony* involved video cassette recorders in a pre-digital era and its ‘substantial noninfringing use’ reasoning has no application to DMCA claims.”<sup>42</sup>

The narrow Fair Use exception that is recognized by the DMCA was clarified as well, with the court stating that, “fair use is prohibited in the access-control provision of section (a) but not in the copy-control provision of section (b).”<sup>43</sup> The possibility of work being copied by an individual for fair use is noted, since the DMCA does not prohibit appropriate individual uses of circumvention devices.<sup>44</sup> Real Networks tried to claim that the RealDVD users thus have a right to make a copy of their DVDs, but the court, while recognizing a “user exemption” (where an individual who has gained authorized access and who may circumvent the protection measures), made it clear that this did not extend to manufacturers.<sup>45</sup>

This decision contrasts with what was decided in *Sony*. This is because, since the existence of the DMCA, copyright infringement is no longer required in order for there to be liability. If not for the DMCA, there would be no cause of action if the removal of DRM did not lead to copyright infringement. Now, all that is needed is a showing that there was circumvention of

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<sup>41</sup> *Id.*, at 942.

<sup>42</sup> *Id.* at 941.

<sup>43</sup> *Id.* at 942.

<sup>44</sup> *Id.* at 942.

<sup>45</sup> *Id.* at 942. (“So while it may be fair use for an individual consumer to store a backup copy of a personally-owned DVD on that individual’s computer, a federal law has nonetheless made it illegal to manufacture of traffic in a device or tool that permits a consumer to make such copies.”).

DRM which was related to a valid copyright interest. Liability under the DMCA is triggered as soon as DRM is circumvented. Fair use is not an applicable defense to the circumvention of DRM, or for the manufacturing of a product that does so. Since DVDs have DRM installed on them, which was a technology that did not exist when *Sony* was in court, more protection is afforded to the copyright owner.

### **The Doctrine of First Sale and Digital Media**

The law states that, once a copyright holder sells a piece of media, the person who it was sold to receives the right to sell otherwise transfer his/her copy.<sup>46</sup> This is known as the doctrine of first sale. “The Copyright Act confers several exclusive rights on copyright owners, including the exclusive rights to reproduce their works and to distribute their works by sale or rental. The exclusive distribution right is limited by the first sale doctrine, an affirmative defense to copyright infringement that allows owners of copies of copyrighted works to resell those copies.”<sup>47</sup> In effect, the copyright owner’s exclusive distribution right is exhausted after that first sale.<sup>48</sup> As this is a limitation on the copyright owner’s exclusive rights, when a person buys a piece of physical media to own, part of what comes with that purchase is the right to transfer it.

This established doctrine of law would seem to say then, that a person who purchases media from the copyright owner ought to have the right to sell it without consent from the copyright owner. There are a couple of problems with this scenario. One is that digital rights management may not allow for a transfer of ownership (i.e. selling, renting, lending, or giving away), and the DMCA makes it illegal to circumvent these protections to allow the transfer. Digital rights

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<sup>46</sup> See 17 U.S.C. § 109

<sup>47</sup> *Id.*, at 1106-1107.

<sup>48</sup> See *Vernor v. Autodesk, Inc.*, 621 F. 3d 1102, 1107, (9<sup>th</sup> Cir. 2010).

management can give the copyright owner control that exceeds the limitation placed on the exclusive rights of the copyright holder.<sup>49</sup> This means the same exact piece of media can be protected differently under the law depending on if it is in digital format, especially if the format is not physical. A limitation is now placed on the user, as the right of first sale can be rendered ineffective.

The second issue is that perhaps the “sale” was not really a sale and was just a license, in which case the first sale doctrine does not apply.<sup>50</sup> In *Vernor v. Autodesk, Inc.*, Vernor has purchased used copies of software and listed them on eBay to resell them.<sup>51</sup> The first step the court had to take was to determine whether or not Vernor was an owner or a licensee. Two factors were considered: “(1) whether the agreement was labeled a license and (2) whether the copyright owner retained title to the copy, required its return or destruction, forbade its duplication, or required the transferee to maintain possession of the copy for the agreement’s duration.”<sup>52</sup> After considering these factors, the court determined that “a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes notable use restrictions.”<sup>53</sup> Vernor was determined not to be an owner (the person he

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<sup>49</sup> Julia Layton, *How Digital Rights Management Works*, available at <http://computer.howstuffworks.com/drm1.htm>.

<sup>50</sup> *Vernor*, 621 F. 3d 1102 at 1107. (The Court notes the decision in *Bobbs-Merril Co. v. Straus*, 210 U.S. 339, (1908), but also states that, “The court noted that its decision solely applied to the rights of a copyright owner that distributed its work without a license agreement.”).

<sup>51</sup> *Id.*, at 1106.

<sup>52</sup> *Id.*, at 1109.

<sup>53</sup> *Id.*, at 1111.

bought them from was not an owner either, and so the doctrine of first sale did not apply to either Vernor or the person he bought it from) and the case was vacated and remanded.<sup>54</sup>

Without the ability to significantly restrict a user's ability to transfer software (or other media), it wouldn't be able to determine whether or not a transaction was a license. This is why the transfer of traditional, physical forms of media is allowed under the doctrine of first sale – because it is viewed as a sale. While the DMCA does not directly impair the first sale doctrine as it does with the fair use exception, the DMCA legally empowers the digital protections necessary to facilitate licenses rather than sales. Without a sale, the doctrine of first sale no longer applies.

### **A Proposed Change in Copyright Law**

Copyright law is a balancing of the rights of authors to enjoy exclusive rights to what they create and the rights of the public to information and ideas. Digital Rights Management is tipping the balance in favor of the copyright holders by eroding the Fair Use exception and the Doctrine of First Sale. Something needs to be done to level the playing field and restore access to the public that has been lost due to this new legal landscape.

It would be naïve to state that enactment of the DMCA was totally unjustified. “From its beginning, the law of copyright has developed in response to significant changes in technology.”<sup>55</sup> The change that happened with media, when converting from physical formats to digital downloads, is that it became exponentially easier to share. A copyright owner's right could be threatened much more easily, and on a larger scale. Protections for digital media were necessary as free file sharing on a large scale could destroy incentives for creativity, thus lowering the amount of creative works and depriving the public of that benefit. “The DMCA

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<sup>54</sup> *Id.*, at 1116.

<sup>55</sup> *Sony Corp.*, 464 U.S. at 430.

represents Congress' attempt at a balance to preserve ownership rights protection for companies and artists in the face of the modern reality of a digital world with an increasingly technologically-savvy population."<sup>56</sup>

Copyright monopoly "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."<sup>57</sup> The reward to the copyright owner, however, is a secondary consideration.<sup>58</sup> "The DMCA did not create a new property right...but it did clearly rebalance the competing interests of copyright owners against copyright users. In so doing, the DMCA tipped the balance toward copyright owners."<sup>59</sup>

It is clear that digital media protected by the DMCA has given copyright owners greater control of the exclusive rights of their works. Greater control and exclusive rights should result in a greater incentive to create. As they are allowed to enjoy this greater exclusive right, perhaps the duration of copyright monopoly needs to be shortened in order to allow the public to enjoy the right to information and ideas.

The DMCA has narrowed the scope of the fair use exception and first sale doctrine. The public is no longer able to benefit from these doctrines as was done in the past, but if copyright duration were shortened, the public would be able to sooner enjoy rights to access creative works. While the right to have access to creative works sooner does not replace the benefits taken away by the loss of the fair use exception and doctrine of first sale, it is, nonetheless, a

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<sup>56</sup> *Real Networks*, 641 F. Supp. 2d 913 at 944.

<sup>57</sup> *Sony Corp.*, 464 U.S. at 429.

<sup>58</sup> *Id.*, at 429. ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors. It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.").

<sup>59</sup> *Real Networks*, 641 F. Supp. 2d 913 at 943.

benefit for the public that can help to bring balance to the rights of copyright owners and access for users once again.

Furthermore, a shortened duration on copyright monopoly should not diminish a copyright owner's incentive to create. The length of copyright duration generally is seventy years after the death of the author.<sup>60</sup> For works made for hire there are two limits, ninety-five years from the year of the work's first publication or one hundred and twenty years from the year of its creation, and whichever comes first applies.<sup>61</sup> For joint works, copyright duration is seventy years after the death of the last surviving author. All of these durations are for a very long time.

As it stands, one could argue that a copyright owner does not need the duration to continue for seventy years after his/her death in order to have enough incentive to create.

This need for a long copyright monopoly is diminished by the greater rights afforded to copyright owners by digital media and the DMCA. The greater protections provided should create enough incentive to create to offset any incentive that is lost by shortening the duration of copyright monopoly. This is because the DMCA protects digital media to an extent where copyright owners should be able to capitalize on their creative works more quickly and efficiently than ever before. There should not be a need to maintain a copyright monopoly after the creator of the work has died (not that there necessarily is a need for this currently).

### **A New Balance of Rights and Access**

Without digital protections of some sort, copyright infringement could run rampant. While there would be a tremendous increase in public access, there will also be a tremendous decline in

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<sup>60</sup> See 17 U.S.C. § 302(a)

<sup>61</sup> See 17 U.S.C. § 302(c)

incentives to create. Digital protections and the DMCA work to maintain that incentive for copyright owners and to produce creative works in digital format.

The net benefits approach holds that “an increase in exclusive rights to intellectual property is justified only when the value of increased creativity resulting from increased incentives is greater than the value of the benefits lost from reduced access.”<sup>62</sup> On the other hand, “an increase in access to intellectual property is justified only when the value of the benefits resulting from increased access is greater than the value of the decreased creative activity resulting from decreased incentives.”<sup>63</sup>

As digital protections and the DMCA increase exclusive rights for the copyright owner, the value of increased activity resulting from increased incentives needs to be greater than the value of the benefits lost from reduced access in order for the change in law to be justified. The effects that the DMCA has on the balance of the incentive(s) for the copyright owner to create and the level of access the public enjoys needs to be taken into consideration in order to determine whether or not a change in copyright law is justified.

One of the effects of the DMCA is that the fair use defense is greatly impaired. Although the DMCA technically preserves a narrow fair use defense, it is arguably close to worthless. The interests of the copyright owners are much better protected against the rights of the copyright user due to the DMCA.

The DMCA has made the manufacturing of products that circumvent digital rights management illegal, even if that product could be used in ways considered to be fair use under copyright law.<sup>64</sup> Since products that facilitate circumvention of digital rights management is

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<sup>62</sup> See David Barnes, *The Incentives/Access Tradeoff*, 9 Nw. J. Tech. & Intell. Prop. 96, 122 (2010).

<sup>63</sup> *Id.*, at 122.

<sup>64</sup> See *Real Networks*, 641 F. Supp. 2d 913 at 942.

illegal, and manufacturers cannot escape liability, individual users must figure out how to circumvent digital rights management on their own if they wish to use the media for fair use purposes. For the average user, this is no easy task. Nonetheless, it is the only way to remove DRM while still preserving the right to use the fair use defense. If only few are equipped with the knowledge and/or tools to remove digital rights management on their own, then access to copyrighted works will decrease, as those who would have had access through fair use are now excluded.

The DMCA also has an effect on the incentive for copyright owners to create works in a digital downloadable format. Copyright owners should have even more incentive to create as media moves from physical format to digital download format. The DMCA provides incentives for copyright owners to embrace the digital download format by making it illegal to remove DRM, thus protecting the media from being wrongfully accessed or copied. The digital download format is great for artists who have the option to self-publish without having to incur costs of producing a physical good.<sup>65</sup>

Another benefit that digital downloads have over physical media is convenience. The copyright user enjoys the convenience of immediate delivery of media via download (with no shipping cost), and the convenience of not having to store physical media. While there is added convenience for the copyright user, the copyright owner enjoys this convenience as well –media for sale no longer has to be manufactured into a physical medium, and it no longer has to be

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<sup>65</sup> See Narasu Rebbapragada, *E-Book Prices Fuel Consumer Outrage*, May 25, (2011), available at [http://www.pcworld.com/article/228688/updated\\_ebook\\_prices\\_fuel\\_consumer\\_outrage.html](http://www.pcworld.com/article/228688/updated_ebook_prices_fuel_consumer_outrage.html) (Regarding how authors can self-publish at a more reasonable price, and cut out the middle man to make more of a profit.)

shipped or stored in a warehouse.<sup>66</sup> The benefit of convenience is enjoyed by all, and does not necessarily increase public access, so there is still nothing the public has gained to offset the greater rights enjoyed by the copyright owner.

By embracing the digital download format, copyright owners enjoy lower costs to deliver their product to the market.<sup>67</sup> This is demonstrated by e-books. “Experts agree that the cost of producing an e-book will never be as high as the print, paper, and binding costs of a print book. People expect price to trend with cost, and the production costs of most e-books are minimal,” close to pennies.<sup>68</sup>

While the costs of supplying an additional download trends ever closer to zero, overhead costs will decline on a per-unit basis as the downloadable media is purchased by additional users.<sup>69</sup> This means that for each subsequent download, the cost for copyright users to distribute their media declines ever closer to zero. Once the copyright user has recovered the initial cost of producing the media, the cost of distribution is so incredibly small that the money they will see on subsequent sales is virtually pure profit.

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<sup>66</sup> See Narasu Rebbapragada, *E-Book Prices Fuel Consumer Outrage*, May 25, (2011), available at [http://www.pcworld.com/article/228688/updated\\_ebook\\_prices\\_fuel\\_consumer\\_outrage.html](http://www.pcworld.com/article/228688/updated_ebook_prices_fuel_consumer_outrage.html) (“An e-book that costs the same as a printed book doesn’t feel right. No trees died to make it. No heavy machinery ran to print it. No planes flew to ship it. You might need to buy one of those new \$139 Barnes & Noble Nooks...to be able to read it. So why should you have to spend as much as you would for a heavy hardcover book to own it?”).

<sup>67</sup> Chris Anderson, in an interview recorded by Kai Ryssdal, *Cost of Digital Media So Cheap It’s Free*, Jul. 23, (2009), <http://www.marketplace.org/topics/tech/big-book/cost-digital-media-so-cheap-its-free>. (“digital stuff is not only cheap but getting cheaper. It’s tending toward zero. No it never quite gets to zero, but it gets so close to zero that you can pretty much ignore it. This is a unique quality of digital stuff.”).

<sup>68</sup> Narasu Rebbapragada, *E-Book Prices Fuel Consumer Outrage*, May 25, (2011), available at [http://www.pcworld.com/article/228688/updated\\_ebook\\_prices\\_fuel\\_consumer\\_outrage.html](http://www.pcworld.com/article/228688/updated_ebook_prices_fuel_consumer_outrage.html)

<sup>69</sup> See Motoko Rich, *Math of Publishing Meets the E-Book*, Feb. 28, (2010), available at <http://www.nytimes.com/2010/03/01/business/media/01ebooks.html?pagewanted=all>

Copyright users, on the other hand, are not seeing the savings on distribution costs on their end. The user is still paying about the same price for media, regardless of whether it's digital or physical. "While the marginal cost for selling an extra digital download is near zero, book publishers frequently price the digital versions only a few dollars below the hard-cover price."<sup>70</sup> E-books, in some cases, can even cost more than their hardcover or paperback counterparts.<sup>71</sup> The reason why "e-book prices don't reflect the normal laws of supply and demand or the current costs of producing a digital book"<sup>72</sup> could be to compensate for costs associated with distributing physical media and is unrelated to digital downloads. The problem with the industry is that many publishers are looking at the sale of an e-book as a lost sale of a hardcover.<sup>73</sup> Moving exclusively to a digital download format, a move that the DMCA helps to facilitate will reduce the cost to produce and should yield higher margins and hopefully a price more favorable to the user. This is not only true for the e-book industry, but it should hold true across all forms of media. A more favorable price for users would help to restore some of the public access that was lost since the enactment of the DMCA.

Another benefit enjoyed by the copyright owner that is facilitated by digital rights management and the DMCA is the ability to license, rather than sell, media. Licensed media can be subject to restrictions that "owned" media is not. License's media could have restrictions that

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<sup>70</sup> Charles Cooper, *So How Much Is A Fair Price to Pay for an E-book?*, Feb. 24, (2012), available at [http://news.cnet.com/8301-1023\\_3-57384046-93/so-how-much-is-a-fair-price-to-pay-for-an-e-book](http://news.cnet.com/8301-1023_3-57384046-93/so-how-much-is-a-fair-price-to-pay-for-an-e-book).

<sup>71</sup> Charles Cooper, *Go Feds! E-books Are Way Overpriced*, Mar. 09, (2012), available at [http://news.cnet.com/8301-1023\\_3-57393834-93/go-feds-e-books-are-way-overpriced](http://news.cnet.com/8301-1023_3-57393834-93/go-feds-e-books-are-way-overpriced).

<sup>72</sup> Narasu Rebbapragada, *E-Book Prices Fuel Consumer Outrage*, May 25, (2011), available at [http://www.pcworld.com/article/228688/updated\\_ebook\\_prices\\_fuel\\_consumer\\_outrage.html](http://www.pcworld.com/article/228688/updated_ebook_prices_fuel_consumer_outrage.html).

<sup>73</sup> *Id.*, at 1.

prevent transfer of ownership. Licensed media could also require the user to pay subscription fees, giving the copyright owner a more predictable revenue stream.

A copyright user is able to do this because without a sale that leads to ownership, the doctrine of first sale no longer applies. While the DMCA does not directly impair the first sale doctrine as it does with the fair use exception, the DMCA empowers the digital protections necessary to facilitate licenses rather than sales.

Even though a piece of media may be licensed, as long as it does not have digital rights management installed on it, the user will be able to transfer it as if it is an owned piece of property. How will consumers feel when they obtain a digital download format of a familiar good that contains digital rights management which, in reality, gives the good a different feel entirely? This trend has already started in the video game industry. For example, “every EA game sold for Xbox 360 and Playstation 3 now has anti-used-game components built in.”<sup>74</sup>

Licensing is becoming more popular, and “signs continue to point to a future in which games are no longer really yours to own, instead being just something you have a right to play –as long as you’re connected to the internet, have a unique ownership ID, and aren’t playing a used copy.”<sup>75</sup>

Users will no longer be able to sell, give away, or lend media the way the law previously allowed when buying a piece of media qualified as a sale rather than a license. This could be when the user will start to really feel like a licensee rather than an owner. The people who can no longer borrow, receive, or rent this type of media will be excluded. Licensing in the place of a sale works to reduce public access.

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<sup>74</sup> Jeff Bakalar, *Say Hello to the Brave New World of Console Gaming*, Mar. 30, (2012), available at [http://news.cnet.com/8301-17938\\_105-57407042-1/say-hello-to-the-brave-new-world-of-console-gaming](http://news.cnet.com/8301-17938_105-57407042-1/say-hello-to-the-brave-new-world-of-console-gaming).

<sup>75</sup> *Id.*, at 1.

Copyright users will see diminished value in media since the option to sell it is not there. “The idea of selling a game back has become such an integral part of the psychology of game buying. Customers feel much better about buying a brand-new \$60 game that turns out to be awful because they know there’s a safety net in place that will most likely get them at least half their money back –or more if they sell it in the right marketplace.”<sup>76</sup>

The loss of the right of first sale will not only affect individuals, but it will affect the entire market. With copyright users unable to sell and transfer ownership of their media, the market for used media will disappear. The secondary market creates a wider range of availability for the copyright user. It provides increased access to creative works, especially those no longer being distributed by the copyright owner. Public access will be limited as bargains for below-retail price are harder to come by and potential users are excluded.

For the copyright owner, this is a tremendous increase in benefits. In the video game industry, certain developers already fear the effect the used market will have on their ability to make a profit. Some even believe that the secondary market will cannibalize the industry, causing it to collapse.<sup>77</sup> “When developers and publishers alike are going to see that they can’t make a living out of producing games that are sold through retail channels, because of second-hand gaming, they will simply stop making these games.”<sup>78</sup> If the secondary market can have such a drastic effect on the industry that it removes incentive for copyright owners to continue to

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<sup>76</sup> *Id.*, at 1.

<sup>77</sup> Denis Dyack, in an interview recorded by James Brightman, *Pre-owned Increases Cost of Games, Cannibalizes Industry, Says Dyack*, Mar. 27, (2010), <http://www.gamesindustry.biz/articles/2012-03-27-pre-owned-increases-cost-of-games-cannibalizes-industry-says-dyack>.

<sup>78</sup> Guillaume de Fondaumiere, in an interview recorded by Dan Pearson, *Quantic Dream*, Sep. 12, (2011), <http://www.gamesindustry.biz/articles/2011-09-09-guillaume-de-fondaumiere>. (Speaking about the cost of the used game market).

create new media, then eliminating this industry should restore the incentive to create in a very big way.

The reason why the used market has such an impact on the market for new media is because it provides a perfectly good alternative to buying a new product. This is a market in direct competition with copyright owners. In certain cases, retailers do not need to reorder stock after a game is released and sells out because they can rely on profits from selling on the used market.<sup>79</sup>

A great example on how the secondary market affects developers is that Quantic Dream's Playstation 3 game, "Heavy Rain," sold two million units, but the consoles online trophy system revealed that "probably more than three million people bought this game and played it."<sup>80</sup> This could only happen if the game were selling or renting on the secondary market. The amount of royalties lost was estimated to be between €5 and €10 million.<sup>81</sup> This would not have happened if the secondary market did not exist.

If the secondary market were to disappear, the game industry could see an increase in profits and even recurring revenue.<sup>82</sup> Digital rights management, as protected by the DMCA, is

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<sup>79</sup> David Braben, in an interview recorded with Mike Rose, *The Future of Games with David Braben*, Mar. 19, (2012), [http://gamasutra.com/view/feature/135104/the\\_future\\_of\\_games\\_with\\_david\\_.php](http://gamasutra.com/view/feature/135104/the_future_of_games_with_david_.php). ("The real problem when you think about it brutally, if you look at just core gamer games, pre-owned has really killed core games. In some cases, it's killed them dead. I know publishers who have stopped games in development because most shops won't reorder stock after initial release, because they rely on the churn from the resales.").

<sup>80</sup> Guillaume de Fondaumiere, in an interview recorded by Dan Pearson, *Quantic Dream*, Sep. 12, (2011), <http://www.gamesindustry.biz/articles/2011-09-09-guillaume-de-fondaumiere>.

<sup>81</sup> *Id.*, at 1.

<sup>82</sup> Denis Dyack, in an interview recorded by James Brightman, *Pre-owned Increases Cost of Games, Cannibalizes Industry, Says Dyack*, Mar. 27, (2010), <http://www.gamesindustry.biz/articles/2012-03-27-pre-owned-increases-cost-of-games-cannibalizes-industry-says-dyack>. ("There used to be something in games for 20 years called a tail, where say you have a game called Warcraft that

what gives developers incentive to embrace the digital download format in order to recover profits that these industries are losing out to secondary markets. The secondary market is not just an obstacle for copyright owners in the video game industry, but is a market that siphons revenue from copyright owners across all forms of physical media –CDs, DVDs, Blu-Ray Discs, and Books. If copyright owners were to see the elimination of this market, they would have more opportunities to capitalize on their work.

Shortening the duration of copyright monopoly would restore public access that was lost due to the loss of benefit from the first sale doctrine. While the public could lose out on access provided on a secondary market through borrowing or renting, a shortened duration of copyright monopoly would allow the digital download to eventually be shared free of charge, and available for access to more people.

## **Conclusion**

While copyright owners have clearly been afforded more rights, the public has been deprived of benefits. Nonetheless, the protection provided by the DMCA is necessary to maintain incentive for creativity in a digital world. An increase in the rights of copyright owners can only be justified if the value of the resulting increase in creativity outweighed the value of the resulting decrease in public access, which is not the case. Shortening the duration of copyright monopoly may be the most logical adjustment to restore the balance in copyright law.

Shortening the length of copyright monopoly is perhaps the easiest way to enhance the public's ability to access creative works after the implementation of the DMCA. Since digital

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would sell for 10 years. Because there are no used games, you could actually sell a game for a long time, and get recurring revenue for quite a while. Recurring revenue is very key.”).

media and the DMCA give greater protections to copyright owners than ever before, especially with the ability to license media, the incentive for copyright owners to create will essentially be preserved since copyright owners will have more opportunity to profit off of their creations.

Copyright owners will still have strong incentive to create while allowing greater access to the public at the same time. Since incentive to create would likely not be diminished, and public access that was lost could be restored in the form of earlier access than previously allowed under law, shortening the duration of copyright monopoly is a solution that would be effective and justified.