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Nine Years and Still Waiting: While Congress Continues to Hold Off on Amending Copyright Law for the Digital Age, Commercial Industry Has Largely Moved On

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NINE YEARS AND STILL WAITING: WHILE CONGRESS CONTINUES TO HOLD OFF ON AMENDING COPYRIGHT LAW FOR THE DIGITAL AGE, COMMERCIAL INDUSTRY HAS LARGELY MOVED ON

I. INTRODUCTION

For nearly 220 years, the United States' copyright laws have been protecting the interests of those who develop creative works while also ensuring that society as a whole is able to benefit from those works.\(^1\) Additionally, for about the first 200 years, relatively little changed apart from the periodic lengthening of the copyright protection term for rights holders, and a widening of the range of protected works.\(^2\) Since the end of the Twentieth Century, however, there have been several additions made to enhance rights holders' protection in light of the creation of the Internet and start of the digital age.\(^3\) These recent changes to copyright law have acted primarily to further widen the scope of protected works and fill gaps. However, there can only be so much expansion before the balance of interests intended by the Copyright Act is skewed and the system stops working.\(^4\)

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1. See United States Copyright Office, A Brief History and Introduction, INFORMATION CIRCULAR, http://www.copyright.gov/circs/circ1a.html (listing several notable dates in United States copyright law history, including first copyright law enacted in May 1790).

2. See id. (noting major changes to copyright law since 1790). For instance, in February 1831, copyright law was revised to include music under the protected works and the term for protection was extended from fourteen years after creation to twenty-eight years and added a fourteen year renewal privilege. See id. In 1865, photographs were added to protected works. See id. The second general revision of the Copyright Act in 1870 added works of art and reserved the right to create derivative works to authors. See id. The renewal privilege was extended to twenty-eight years in 1909 under the third general revision. See id. Movies were added in 1912. See id. Sound recordings were added in 1972 and in 1978 the term became the author's life plus 50 years. See id.

3. See id. (describing major changes made to copyright law beginning in 1984). Between 1984 and today, several noteworthy acts have been passed in response to pressures created by the digital age that find their home in our copyright laws. See id. Some of the more impactful acts include the Semiconductor Chip Protection Act, Computer Software Rental Amendments Act, Visual Arts Rights Act, Digital Audio Home Recording Act, Copyright Royalty Tribunal Reform Act, No Electronic Theft Act, and Digital Millennium Copyright Act. See id.


(637)
Before the digital age, existing copyright law and the relative difficulty of producing infringing copies was enough to protect rights holders' interests, but the introduction of the Internet has allowed for quick, easy, and far-reaching dissemination of large quantities of copyrighted works. Suddenly, millions of consumers gained the ability to trade copyrighted information online, quickly and without cost. Copyright law was unable to match the new technology to prevent piracy and copyright holders needed a solution.

between copyright law and technology as it relates to rights holders and protection of their works). While technological progress first appeared to rights holders as a threat to their control over their creative works, it has become a possible means of exploiting works and thereby increasing their value. See id. Consider the introduction of "reprographic technology" (photocopiers) and video recorders, for example. See id. at 722-25 (discussing how video recorders were first thought of as devices for illegally copying material, but now are used to reproduce artistic works with profits going to artist). In both instances, copyright holders felt certain this meant the end of the publishing and film industry, respectively. See id. Instead, in each case copyright law was enhanced to give authors fair compensation for reproduction rights. See id. For video recorders, "as long as the digital process remained linked to material devices, such as the hard disk and the MP3 player, the attitude of copyright law regarding technology could evolve . . . and could lead to the inclusion of new technology into new forms of economic use of the work." Id. at 725. "When digital technology met the Internet, however, this mechanism jammed." Id. That is, because the Internet provides a new means of exchanging copyrighted works rather than a new method of reproducing, or copying, those works, it is no longer enough to simply expand the scope of copyright law. See id. Once more, restrictions that try to limit distribution by limiting use have thus far had a disproportionate negative impact on the interests of the public in accessing, using and disposing of copyrighted works in an effective and cost efficient manner. See id.

5. See Habtamu Abie, Frontiers of DRM Knowledge and Technology, INT'L J. COMPUTER SCI. & NETWORK SECURITY Jan. 2007, at 216 (discussing present ease of creating and sharing digital copies). Copying in the "traditional physical world" was not economically viable and large scale copying was controllable to an extent by legal measures. See id. (explaining how cost of creating numerous copies of videos or books before digitization of media was costly and more heavily prosecuted). Digital information, on the other hand, "can be copied and distributed with ease and little expense." Id. "While this makes life easier for law-abiding citizens, it also facilitates misuse, mass piracy, and the IPR." Id. Additionally, one commentator noted: Gone are the days where a copyright owner could successfully eradicate piracy by focusing his efforts on shutting down renegade printing presses that were already scarce due to the time, expense and skill they required to operate. Now, every person with a computer has the ability to pirate copyrighted works in his living room and transmit them anywhere in the world at the touch of a key.

Victor Calaba, Quibbles 'n Bits: Making a Digital First Sale Doctrine Feasible, 9 MICH. TELECOMM. & TECH. L. REV. 1, 9 (2002).

6. See Abie, supra note 5 (noting effect of technology on transmission of copyrighted works).

In response, Digital Rights Management ("DRM") software and the Digital Millennium Copyright Act ("DMCA") were created.\(^8\)

Having foreseen that the combination of DRM and the DMCA, which prohibits circumvention of DRM technologies embedded in digital works, might limit the alienability of those works, Congress included in the text of the DCMA a required review of its effects on copyright law.\(^9\) One of the primary goals of this inquiry was to determine whether Congress should consider adding a digital first sale doctrine to supplement the existing first sale doctrine.\(^10\) The existing doctrine holds that once a copyrighted holder sells a copyrighted item, unless special restrictions apply, such as addition bargained-for contract provisions, the purchaser may transfer or dispose of the item without interference from the copyright holder.\(^11\) Additionally, Congress was interested in the effects that DRM places on the fair use of copyrighted works because many forms of DRM restrict multiple non-infringing uses, especially in instances where digital files are tethered to a particular device.\(^12\)

The outcome of the review was a recommendation that Congress growing access to the Internet at broadband speeds formed a 'perfect storm'" for allowing Internet piracy).

8. See id. (noting how response of digital media copyright holders to “crisis of confidence” regarding future value of copyrights in light of mass piracy was to “deploy technological protection measures” and lobby Congress to adopt legislation preventing circumvention of these measures).

9. See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 104, 112 Stat. 2860, 2876 (describing required evaluation of effect caused by DMCA amendments). Section 104 of the statute required the Register of Copyrights and Assistant Secretary for Communications and Information to evaluate “the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 (first sale doctrine) and 117 (limitation on exclusive rights for computer programs; only allowing a copy to be made on one’s personal computer for the purposes of running the software) of title 17, United States Code” and report back to Congress “not later than 24 months after the date of the enactment of this Act . . . .” Id.

10. See id. (mentioning primary goal of Congress’s required review as whether to revise existing first sale doctrine).


12. See Armstrong, supra note 7, at 51 (noting that DRM and DMCA sometimes “result in a curtailment of consumers’ ability to engage in lawful fair uses of digital copyrighted works”).
take a “wait and see” approach. It has been nearly nine years since the report was published and Congress is still waiting for what it considers the right time to update our copyright laws. Meanwhile, the use of DRM to prevent digital piracy has been largely ineffective and the marketplace is developing its own solutions as Congress continues to drag its feet.

Part II of this Comment continues with an examination of the history of copyright law including the first sale doctrine and fair use exceptions to copyright holders’ rights and the effect of more re-

The DCMA Section 104 Report discusses tethering as the method whereby DRM encryption software is embedded in digital files and the only way to view or change those files is to use devices containing the proper decryption software. See U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (“104 REPORT”), at xxvii, 76 (2001), http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf (discussing practice of tethering digital copies to certain devices). One opponent of DRM analogizes DRM tethering software that limits the devices on which content can be viewed to buying a book from Borders that can only be read using an IKEA light bulb and kept on an IKEA bookshelf. See Finlo Rohrer, Are We Due a Wave of Book Piracy?, BBC NEWS MAG., Oct. 19, 2009, http://news.bbc.co.uk/2/hi/ uk_news/magazine/8514092.stm (quoting Cory Doctorow, novelist and co-editor of blog on Boing Boing, who believes DRM “represents a blind alley for authors and publishers, and risks alienating readers.”).

13. See R. Anthony Reese, The First Sale Doctrine in the Era of Digital Networks, 44 B.C. L. REV. 577, 583 (2003) (noting Congress’s conclusion that no current significant effect on sections 109 or 117 of Title 17 have yet occurred that warrant any action); see also 104 REPORT at xxvii, 76 (discussing practice of tethering digital copies and adding that “should this practice become widespread, it could have serious consequences for the operation of the first sale doctrine); see id. at xx (stating that “no convincing evidence of present-day problems” exists, but that “Congress may wish to address these concerns should they materialize.”).


15. See infra notes 108, 127, Part III(A)(1), (2) (discussing still high levels of digital piracy and ways in which companies have still managed to make money).

One scholarly article examines the relationship between the emergence of new technologies that effect copyright law and the period of time that passes before Congress or the courts create a workable solution. See generally Ben Depoorter, Technology and Uncertainty: The Shaping Effect on Copyright Law, 157 U. PENN. L. REV. 1831 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1420059## (discussing delay in legal remedies to copyright issues created by technology as result of uncertainty of such technologies’ lasting effects). The thrust of the article is that with each new technology affecting copyright law, there is some level of uncertainty regarding the long-term outcome or effect the technology will have on the law, which leads to legislative delay, and Congress must weigh the costs associated with legislating where effects are uncertain against the present cost of trying to enforce or work around existing copyright law. See id. at 1832-37. In dissecting this process, the author notes that “copyright law is in an existential crisis” and that attempts to reverse file sharing and copyright circumvention have failed, but that Congress has done little to quell the ongoing turmoil. See id. Further, empirical evidence shows the average delay in some resolution to be about 7.2 years. See id. at 1843 (evidencing average delay from introduction of new technology to congressional response).
cent amendments. Part III looks at how the music, publishing, and film industries have reacted to and adapted to changes necessitated by the advent of the Internet and ever-growing popularity of digital media. Finally, Part IV concludes with a brief examination of the potential future of the various online media industries and suggests a lingering need for more legislative control.

II. DEVELOPMENT OF COPYRIGHT LAW

A. The United States Constitution and the Copyright Act

The United States Constitution addresses copyright law in Article I, Section 8.16 This section of the Constitution grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries."17 In Twentieth Century Music Corp. v. Aiken, the Supreme Court interpreted this clause as an attempt by the Constitution to strike "a balance of competing claims upon the public interest."18 The issues raised in Aiken concerned the copyright holder's interest in controlling and profiting from her creation, versus the public's interest in using and reproducing the creation.19 The Court noted that while the immediate effect of having a limited copyright duration is to ensure a fair return for the creative labor of the initial producer, the ultimate aim is to stimulate creativity for the general public good—that is, to provide an incentive for individuals to create things that may benefit everyone.20 Historically, the Supreme Court has favored the interpretation that copyrights are more for the benefit of the public than the authors of creative works.21

16. See U.S. Const. art. I, § 8, cl. 8 (referring to section of United States constitution relating to copyright law).
17. Id.
18. 422 U.S. 151, 156 (1975).
19. See id. (discussing competing interests over copyright protection regulation). Aiken, who was the owner of a fast-food restaurant, would play music for customers over speakers that were attached to a radio located in the restaurant. See id at 152-53. (recounting defendant's alleged illegal conduct). Two of the songs played were licensed to a local radio station by the copyright holders who later sued Aiken for "infring[ing] their exclusive rights to 'perform' their copyrighted works in public for profit." Id. at 153. Ultimately, the Supreme Court held that playing a radio station to the public did not constitute a violation of copyright law based on precedent and equity. See id. at 162-64.
20. See id. (discussing purpose for having minimum copyright duration).
21. See id. (contending that copyrights exist more for public benefit than for rights holders). In 1932, while referring to the temporary monopoly created by copyright law for authors of creative works, the Supreme Court stated that "[t]he sole interest of the United States and the primary object in conferring the monop-
The length of copyright protection has increased dramatically since the Copyright Act’s passage in 1790.\(^{22}\) The initial term for a copyright provided in the nation’s first copyright act was fourteen years—renewable for another fourteen years if the author survived the first term.\(^{23}\) Since then, the length has increased incrementally and, as of 1998, runs from the time of its creation to seventy years after the creator’s death.\(^{24}\)

During the copyright period, rights holders have several exclusive rights in their original works.\(^{25}\) A copyright holder has the exclusive right to do the following: (1) replicate works; (2) create new works based largely on the original work; (3) distribute copies to non-copyright holders or licensees through a sale, rent lease, lending, or other agreement, and, in the case of audio or visual works, the right to (4) perform works publicly; (5) display works publicly; or (6) perform works publicly by means of digital audio transmission.\(^{26}\) Because these rights are exclusively reserved for copyright holders, any use of such a work during the period of copyright without permission would be illegal.

\(^{22}\) See Fox Film Corp. v. Doyle, 286 U.S. 123, 127 (1932).


\(^{24}\) See Copyright Act of 1790, Act of May 31, 1790, 1 Stat. 124 (providing duration of copyright for known solitary author).

\(^{25}\) See 17 U.S.C.S. § 302(a) (establishing current duration of copyright for known solitary author). In the 1831 Act, Congress expanded the federal copyright term to forty-two years (twenty-eight years from publication, renewable for an additional fourteen years). See Eldred, 537 U.S. at 194 (discussing history of copyright duration extensions). Then, in the 1909 Act, Congress expanded the term to fifty-six years (twenty-eight years from publication, renewable for an additional twenty-eight years). See id. Congress changed the method for computation in the 1976 Act—copyright protection would run from the time of its creation, not publication, and last until fifty years after the author’s death. See id. at 194-95.

In 2003, the most recent extension was challenged in Eldred v. Ashcroft on the basis that Congress lacked the authority to pass legislation altering copyright duration under the Constitution’s Copyright Clause. See Eldred, 537 U.S. at 186 (discussing history of United States copyright law and constitutionality of augmenting length of coverage). The Supreme Court found this extension to be within Congress’s constitutional authority. See id. at 193-94. The Court rejected the petitioners’ challenge to the constitutionality of the Copyright Term Extension Act (“CTEA”) on the grounds that the term “limited” does not mean that a time, once set, becomes fixed; rather, it only means that there must be a definite term. See id. at 199-200. Further, following a rational basis standard of review, the Court held that it is up to Congress to decide the appropriate length of time and that this law shall be upheld “against the backdrop of Congress’s previous exercises of its authority under the Copyright Clause.” See id. at 194, 204-05.

B. Changes to Digital Ownership Rights

1. Audio Home Recording Act of 1992

In response to the recording industry's concerns about copyright infringement, Congress passed the Audio Home Recording Act of 1992 ("AHRA") as a compromise between the interests of the recording industry and those of consumers. Congress passed the AHRA to address concerns that there would be an explosion of consumer electronic devices capable of reproducing audio recordings with a sound quality similar to the original record. The key provisions of the AHRA (1) require that digital audio recording devices contain systems that prevent multiple copies; (2) establish a royalty to be paid to the recording industry for each sale of a new digital audio recording device; and, (3) provide a safe harbor for consumer personal use. One significant problem, however, is that many devices fall outside the scope of the AHRA, which is limited to "digital audio recording devices." Thus, devices such as computer hard drives that may be used to create many copies of copyrighted digital material are not included. "It is clear from the language of the AHRA, and subsequent judicial interpretations of the statute, that Congress did not anticipate . . . that the [Serial Copy Management System, which was meant to prevent devices from being able to produce multiple copies in devices,] would be inadequate to contain the impending home digital recording explosion that was galvanized by the Internet." Congress's next move to address this inadequacy was to pass the Digital Millennium Copyright Act of 1998.

28. See Holden, supra note 8 at 20 (mentioning passage of AHRA and main proponents).
30. See id. at 5-6 (describing key provisions of AHRA).
31. See id. at 6 (pointing out major limitation that AHRA applies to digital audio recording devices only).
32. See id. (noting that "[b]ecause computers are not digital audio recording devices, they are not required to comply with Serial Copy Management System requirement" of AHRA).
33. Id.
34. For a discussion of the Digital Millennium Copyright Act, see infra notes 35-39 and accompanying text.
2. Digital Millennium Copyright Act of 1998

Congress enacted the Digital Millennium Copyright Act ("DMCA") in 1998 to address some of the inadequacies of the AHRA, and to expand protection for copyright holders in light of the growing digitization of copyrighted works. Rights holders feared that greater digitization might encourage individuals to make illegal copies by circumventing DRM technologies. One of the key provisions of the DMCA "forbids circumvention of technical measures copyright owners use to protect access to their works." Another forbids the manufacture or distribution of any technology designed with the primary purpose being to circumvent or remove access controls. Unfortunately, the DMCA still seems to fall short of as it does not distinguish circumvention made for non-infringing self-use from circumvention done specifically for infringement purposes, which is a key issue for determining ultimate liability.


36. See id. (explaining concern held by copyright holders).

37. See id. (describing anti-circumvention provision—§1201(a)(1)(A)).

38. See id. (describing provision against manufacture or distribution of technology designed to circumvent access controls—§1201(a)(2)).

39. See Holden, supra note 8, at 6 (mentioning DMCA's failure to create exception to anti-circumvention provisions for legal, fair uses).

A closely related issue was raised prior to the DMCA's creation in Sony Corporation of America v. Universal City Studios where the Court held that while the primary purpose of a recording device may have facilitated copyright infringement by reproducing television shows, liability ultimately rests on the primary use of the device as determined by the proportion of infringing versus non-infringing use. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 492-500 (1984) (discussing difference in interpretation of relevant copyright law from Court of Appeals and applying new interpretation to previously relied upon reasons). The Court noted that since Sony's Betamax technology could be used for reasons other than reproducing and sharing copyrighted television shows, such as merely time-shifting for later viewing, determining whether the primary purpose of the device was to infringe copyrights requires a look at whether a majority of the use was infringing or non-infringing with regard to any copyrighted material. See id. The reasoning should essentially be the same for devices meant to circumvent copyright protection technologies—that is, the primary purpose of the device should only be considered to infringe upon copyrights where a majority of the use of the device is infringing—but Congress has decided not to make a distinction and the courts "must take the Copyright Act as [they] find it." Id. at 500 (internal quotation marks and punctuation omitted).
C. Major Limitations to Copyright Law

1. The First Sale Doctrine

One important limitation on the exclusive rights enjoyed by copyright holders is the first sale doctrine. The first sale doctrine provides that “once the holder of an intellectual property right ‘consents to the sale of particular copies . . . of his work, he may not thereafter exercise the distribution right with respect to [those] copies.’” The first sale doctrine can be traced back to the 1908 Supreme Court ruling in Bobbs-Merrill Co. v. Straus. In Bobbs-Merrill Co., the defendant purchased copies of a book titled “The Castaway” to resell at the retail level. Printed in the book below the copyright statement was a notice which stated that selling the book for less than one dollar constituted copyright infringement. The defendant sold some books for less than one dollar and the plaintiffs filed suit. The Supreme Court upheld the circuit court’s dismissal of the action, holding that because there was no explicit or implied agreement between the parties and because the main purpose of the statute is to protect the copyright holder’s “right to multiply and sell his production,” the copyright holder had no control over the buyer’s disposition of the lawfully purchased product.

The statutory basis for the first sale doctrine can be found in section 109(a) of the Copyright Act, which was codified in the 1976 version of the Act. The first sentence of this section states that “[n]otwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”

41. See Holden supra note 8, at 4 (discussing first sale doctrine as major limitation to copyright law).
44. See id. at 341 (discussing facts leading to case).
45. See id. (describing key element of defendant’s argument).
46. See id. at 341-42 (describing defendant’s allegedly unlawful action).
47. See id. at 350-51 (detailing case holding based on language and purpose of statute).
49. Id. This language is similar to the second clause of Section 27 of the 1909 Act, which provided that “nothing in this title shall be deemed to forbid, prevent or restrict the transfer of any copy of a copyrighted work, the possession of which...
A lawful purchaser of a copyrighted work does not, however, inherit all the rights of the copyright holder. For instance, the owner of a legal copy of a work is still subject to the limitation on distribution of derivative works unless the copyright is sold along with the work.\textsuperscript{50} In \textit{Mirage Editions, Inc. v. Albuquerque A.R.T. Co.}, the defendant purchased artwork prints and glued the prints onto ceramic tiles that were then sold in the retail market.\textsuperscript{51} The Ninth Circuit held that the first sale doctrine could not be used to avoid liability for infringement where the purchaser of a copyrighted work, who did not purchase the copyright itself, used the work to produce derivative works that were distributed for commercial gain.\textsuperscript{52}

Section 109(b) of the Copyright Act of 1976 also provides an exception to the first sale doctrine for copyright owners who wish to "prevent the unauthorized commercial rental of computer programs and sound recordings" through rentals, leases, or lending.\textsuperscript{53}

[Note: The text above contains legal citations and exceptions that are not fully transcribed here.]
Section 109(b) is meant to prevent infringement of a copyright owner's reproduction right by disallowing subsequent purchasers to "rent" copies that can easily be copied because of their digital form.54

Many argue that the greatest limitation on the first sale doctrine is supplied by the anti-circumvention provisions of the DMCA.55 Section 103 makes it unlawful for individuals to circumvent or by-pass technologies used by copyright holders to prevent improper access and copying of their works.56 This provision extends to individuals who provide tools or methods meant to circumvent such technologies—that is, it is also unlawful for an individual to develop and distribute any device or technology primarily used to get past copyright protections.57

When Congress enacted the DMCA in 1998, it required the Register of Copyrights and the Assistant Secretary for Communications and Information to jointly evaluate the effect of the DMCA on copyright law with a partial emphasis on the first sale doctrine.58 This was due to the vast amount of digital media that started to become widely available in the 1990s.59 The joint committee considered numerous arguments for and against developing a digital

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54. See 104 Report supra note 12, at 24 (explaining purpose of provision limiting copy owner's right to rent, lease or lend phonorecords, music, and software). The limitation regarding sound recordings and the musical works recorded in them was added by the Record Rental Amendment of 1984. See id. Later, in the Computer Software Rental Amendments Act of 1990, Congress extended the same coverage to computer programs. See id.

55. See id. at 34 (relating commentators' opinions that DMCA's anti-circumvention provision stifles first sale doctrine's use).

56. See id. at 3-4 (discussing primary function of section 1201 of Title 17).

57. See id. (explaining primary function of section 1201 of Title 17).

58. See Digital Millennium Copyright Act of 1998 ("DMCA"), Pub. L. No. 105-304, § 104 (discussing requirement to produce report on effect of DMCA on copyright law). Section 104 requires that the Register of Copyrights and the Assistant Secretary for Communications and Information evaluate the effect of the DMCA on sections 109 and 117 of the United States Code and report to Congress within twenty-four months following the DMCA's enactment. See id. In addition to reporting on the effect of the statute, the committee must include any recommendations. See id.

59. See id. (explaining purpose of legislation).
first sale doctrine pursuant to a request for public comment, but ultimately decided not to make any changes to copyright law. Proponents for expanding current copyright law to include a digital first sale doctrine argue that the entire premise of the first sale doctrine is to allow alienability of property, and legislation such as the DMCA precisely limits alienability by protecting technologies that restrict certain fair uses and disposition. Opponents of the possible expansion of the first sale doctrine mainly argue that the first sale doctrine was designed to apply to tangible objects only. They argue that allowing digital objects would not just broaden the scope of the doctrine, but expand the purchaser’s rights at the expense of the copyright holder. While the committee acknowledged the concerns voiced by proponents of expanding the law, public libraries being one example, ultimately, it held there was not enough convincing evidence of problems to warrant expansion at that time.

60. See 104 REPORT, supra note 12, at xx (discussing decision to not expand Copyright Act’s section 109). “Given the relative infancy of digital rights management, it is premature to consider any legislative change at this time.” Id. at xvii.

61. See 104 REPORT, supra note 12, at 45-46 (discussing policy argument made by supporters of expanding copyright law regarding purpose of first sale doctrine). These commentators argue that the first sale doctrine has “promoted economic growth and creativity.” Id. at 46. They also argue that technologies exist to “guarantee that when a user transmits the work, the source copy is deleted.” Id. (internal quotation marks omitted). In other words, the threat of numerous digital copies, which has led to the use of technologies that allow certain works to only be accessible from particular devices, does not exist since the sender’s copy or previous owner’s copy would be immediately deleted upon making another digital copy. See id. (explaining policy argument for expanding first sale doctrine).

62. See id. at 47-48 (arguing that first sale doctrine should not be expanded because it was never meant to apply to intangible media).

63. See id. (discussing objections to expanding first sale doctrine to cover digital media). “[T]he requested changes do not merely update the long-standing first sale doctrine to accommodate new technology, but expand the first sale doctrine well beyond its previous scope.” Id. at 47. These opponents also noted that the disposition of goods under the first sale doctrine was previously “limited by geography and the gradual degradation of books and analog tapes[,]” whereas now unprotected digital material can be sent anywhere the Internet reaches without any damage to the content. Id. at 48. Finally, they argue that the technology referred to by the proponents of expanding the first sale doctrine “remains ineffective and prohibitively expensive” such that there is little demand for such technology in the marketplace. See id. (describing prohibitive costs of new technology that would reduce impact on consumers’ ownership rights).

64. See id., at xx-xxi (expressing decision to keep copyright law unchanged; at least until more convincing evidence is presented to justify expansion of first sale doctrine’s scope).
2. *Fair Use Doctrine*

Another significant limitation to copyright law is the provision allowing for fair use of creative works.\(^{65}\) The provisions of section 107 of the Copyright Act hold that the "fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [section 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."\(^{66}\) In other words, certain uses of copyrighted works have been specifically permitted by Congress and have thus been named fair uses. In order to determine whether use of a work is fair, the statute provides a non-exclusive list of factors to be considered: (1) "the purpose and character of the use;" (2) "the nature of the copyrighted work;" (3) "the amount and substantiality of the portion used" relative to the entire work; and (4) "the effect of the use upon the potential market for or value of the copyrighted work."\(^{67}\)

Although a consumer is ordinarily permitted to make fair use of copyrighted works, when those works are in a digital format, technological measures, such as DRM software, can prevent certain uses that are generally considered fair.\(^{68}\) Some users will find ways of getting around these technological impediments, yet those users risk violating the anti-circumvention provisions of the DMCA.\(^{69}\)

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65. See Holden *supra* note 8 at 4 (discussing fair use provision as major limitation to copyright law).
67. *Id.*
68. See Armstrong, *supra* note 7 at 50-54 (introducing range of issues present when consumers try to make fair use of digital copyrighted products).
69. See *id.* at 51 (noting possibility of being charged with violating DMCA anti-circumvention provisions for by-passing certain technological measures). For a further discussion of the anti-circumvention provision of the DMCA, see *supra* notes 58-57 and accompanying text.
III. EVOLUTION OF COPYRIGHT HOLDER AND CONSUMER RIGHTS WITHOUT LEGISLATIVE INTERVENTION

A. Effect on the Music Industry

1. DRM is “Sorta” Dead

   Since early 2009, nearly all music sold online has been without DRM software. In fact, in July 2009, Jonathan Lamy, chief spokesman for the Recording Industry Association of America (“RIAA”), made a comment to a reporter that “[t]here is virtually no DRM on music anymore, at least on download services . . . .” Several companies selling music online, like MSN Music and Yahoo Music Unlimited, have shut down their ‘license authentication servers’ which allow customers to play their digital DRM-laden music. Shortly

70. See Mark Gibbs, DRM’s Slow Death, Sorta, NETWORK WORLD, July 31, 2009, available at http://www.networkworld.com/columnists/2009/073109-backspin.html (discussing lack of DRM on downloadable music). While DRM appears to be dead and gone for online music downloads, the author of this article takes a brief look at remaining other digital media that continue to widely use DRM, such as movies, television, and digital books. See id. Thus, while DRM is “dead” when it comes to music, it is only “sorta” dead in light of the entire digital media market because it still lives in other forms of digital media. See id.

71. See id. (discussing decline of DRM software on downloadable music).

72. See id. (quoting chief RIAA spokesman regarding DRM attached to music). The RIAA is a trade group that represents the United States recording industry. See RIAA, Who We Are, http://www.riaa.com/aboutus.php (describing RIAA and its goals). Its goal is to support and promote its members’ “creative and financial vitality.” See id. The websites notes that 85% of all music created and/or distributed in United States comes from members of the RIAA.

73. See Jacqui Cheng, DRM Sucks Redux: Microsoft to Nuke MSN Music DRM Keys, ARSTECHNICA.COM, Apr. 22, 2008, http://arstechnica.com/microsoft/news/2008/04/drm-sucks-redux-microsoft-to-nuke-msn-music-drm-keys.ars (discussing MSN’s move to shut down its DRM authentication servers). In early 2008, Microsoft decided to close its music store at the end of August and create a new store, Zune, which offers both DRM and DRM-free music for purchase. See id. The news of this move created quite a stir since it meant that any music downloaded that was not burned onto a CD or DVD would become unusable once the servers where shut down—DRM opponents point to this as a “painful reminder that DRM ultimately severely limits your rights.” See id. In fact, Microsoft agreed to continue to authenticate tracks through 2011 to appease customers who had bought this music. See Jeremy Kirk, Yahoo: Burn Your DRM’d Tracks to CD Now, PC WORLD, July 25, 2008, http://www.pcworld.com/businesscenter/article/148925/yahoo_burn_your_drmmed_tracks_to_cd_now.html (discussing Microsoft’s extension of time period for authenticating DRM-laden music previously purchased).

See id. (discussing Yahoo’s move to shut down its DRM servers). In mid 2008, Yahoo announced that it was following behind Microsoft and announced that it too would be shutting down its DRM servers in September. See id. After catching significant flack from customer and the media, Yahoo tried to make peace. See Shane Sinnott, Yahoo Shuts Down DRM Servers Today, Reimburses Customers, EXCLAIM News, Sept. 30, 2008, http://www.exclaim.ca/articles/generalticlesynopsfullart.aspx?csid1=115&csid2=844&fid1=33987 (discussing Yahoo’s reimbursement to customers who are no longer able to play their DRM-laden music). Instead of extending the deadline like Microsoft, however, Yahoo offered to give coupons or
thereafter, Wal-Mart made an announcement similar to that of MSN and Yahoo—that it would be shutting down its DRM authentication servers—but reversed this decision after a flurry of negative consumer feedback.\textsuperscript{74} Some companies like Rhapsody, which is now teamed up with Yahoo and Amazon, were already selling music without DRM.\textsuperscript{75} Even iTunes, which had always sold music loaded with its “FairPlay” DRM software, has removed all DRM from its database of over ten million songs.\textsuperscript{76} While events like Amazon’s remote deletion of two George Orwell books from readers’ Kindle devices\textsuperscript{77} prove that DRM is not completely dead, it at least appears to be dead in the eyes of the music industry.\textsuperscript{78}

The claim that DRM on music is dead holds true not just for music sold online, but also largely for music sold on CDs, which continue to account for a much larger share of the music market.\textsuperscript{79} In April 2006, a Judicial Panel on Multidistrict Litigation consoli-

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\textsuperscript{74} See Antone Gonsalves, Wal-Mart Reverses Decision To Shut Down Digital Music DRM Servers, INFO. WK., Oct. 10, 2008, http://www.informationweek.com/news/personal_tech/drm/showArticle.jhtml?articleID=211100223 (discussing Wal-Mart’s decision to keep its DRM servers running for now). In September 2008, Wal-Mart made a move similar to that of Microsoft and Yahoo by announcing that its authentication servers would be shut down in October. See id. Like the others, Wal-Mart received much criticism and decided, for the time being, to keep the servers running for the time being. See id.

\textsuperscript{75} See Kirk supra note 73 (discussing Yahoo’s partnership with Rhapsody to sell unrestricted music). Amazon and Best Buy also sell digital music online that is DRM-free. See also Gonsalves, supra note 74 (listing other vendors that sell DRM-free music online).

\textsuperscript{76} See Apple.com, Changes Coming to the iTunes Store, Jan. 6, 2009, http://www.apple.com/pr/library/2009/01/06itunes.html (noting Apple’s announcement that by March 2009 all of its ten million songs would be offered DRM-free). This came after all four major music labels—Universal Music Group, Sony BMG, Warner Music Group and EMI (which control about 70% of available music)—along with thousands of independent labels decided to offer their music in a DRM-free format that Apple is calling iTunes Plus. See id. (discussing what brought about change in Apple’s DRM policy).

\textsuperscript{77} For a discussion of the Amazon Kindle book deletion, see infra notes 168-183 and accompanying text.

\textsuperscript{78} See Gibbs, supra note 70 (discussing state of DRM in music and other forms of digital entertainment).

\textsuperscript{79} See Chloe Albanesius, A Quarter of All U.S. Music is Bought from iTunes, PC MAG, Aug. 18, 2009, http://www.pcmag.com/article2/0,2817,2551729,00.asp (comparing sales of CDs to online music and market share of downloadable music as between online music vendors). Although the rise in digital music sales has been surging over the past few years—jumping from 20% of all music sold in 2007 to 35% of all music sold as of the first half of 2009—CD purchases still account for 65% of all music sold. See id. If digital music sales continue to grow by 15% to 20% per year, however, then “digital music sales will nearly equal CD sales by the
dated eleven actions from four districts against Sony BMG for its allegedly wrongful inclusion of DRM software on millions of consumers’ CDs.\(^{80}\) To curb music piracy, Sony had included copy-protection software, called XCP, on nearly five million CDs that automatically installed itself onto users’ computers.\(^{81}\) The software exposed users to greater risk of getting computer viruses and infringed on consumers’ rights.\(^{82}\) Following the media frenzy and lawsuits, Sony recalled the CDs in November 2005 and reached a tentative settlement agreement in December 2005 that, among other things, required Sony to abandon use of the problematic XCP software.\(^{83}\)

The four big record companies that supply most music people listen to were preventing online music vendors from offering DRM-free music.\(^{84}\) To obtain licenses from music companies—which all-

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82. See id. (discussing major concern regarding use of Sony’s DRM software).

83. See id. (reporting on decision to settle lawsuit); see also Jeremy Kirk, Sony BMG XCP Settlement Looms, MACWORLD, Jan. 10, 2006, http://www.macworld.co.uk/news/index.cfm?NewsID=13550&page=1&pagePos=2 (providing tentative settlement provisions). In addition, consumers were given the opportunity to exchange the albums for ones without any DRM, download MP3 copies of the albums, receive $7.50 plus a free album download, or receive three free album downloads. See id. Finally, for those whose computers received viruses, Sony was to provide a suitable fix. See id. The settlement was made final in late May. See Wes Phillips, Sony BMG Root Kit Settlement Approved, STEREOPHILE, May 28, 2006, http://www.stereophile.com/news/052906settlement/ (discussing judge’s approval of December settlement agreement). Unfortunately for Sony, the settlement continued to grow through December 2006 as the company agreed to pay over $4.25 million to thirty-nine states and the District of Columbia just two days after paying $1.5 million to Texas and California for suits filed by those states’ attorney generals. See Wes Phillips, Sony BMG Settlement Grows Even Larger, STEREOPHILE, Dec. 23, 2006, http://www.stereophile.com/news/122506settle/ (discussing expansion of Sony BMG settlement with individual states as claimants).

84. See Steve Jobs, Thoughts on Music, APPLE.COM, Feb. 6, 2007, http://www.apple.com/hotnews/thoughtsonmusic/ (discussing reasons for DRM-laden music structure at Apple). In a lengthy post on February 6, 2007, Steve Jobs spoke to consumers about Apple’s position regarding DRM on music. See id. (discussing Apple’s position on DRM). Jobs explained why Apple only offers music with DRM, offering supporting evidence to show that the average iPod contains 97% music purchased \textit{without} DRM and discusses alternatives to DRM. See id. (defending Apple’s position). Jobs acknowledges that having no DRM on music anywhere “... is clearly the best alternative for consumers, and Apple would embrace it in a heart beat...” If the big four music companies would” allow it. \textit{Id}. In fact, Jobs explains how he sees virtually no benefit for the music companies by selling DRM-
allowed distribution of their music to customers—vendors had to agree to protect the music from being illegally copied.\textsuperscript{85} The solution was to create DRM systems that package the music file inside of encrypted software that can only be played from devices with the proper decryption software—this process is known as tethering.\textsuperscript{86} Despite these efforts, music companies have realized for several years that these DRM systems do little to nothing to stop piracy.\textsuperscript{87} As Apple CEO Steve Jobs noted, somewhat sarcastically, in a letter posted online for consumers in early 2007, "there are many smart people in the world, some with a lot of time on their hands, who love to discover... and publish a way for everyone to get free (and stolen) music."\textsuperscript{88} Finally, in early 2008, the last of the big four music companies announced it would stop using DRM software.\textsuperscript{89}

2. \textit{Reduction in Lawsuits for Illegal File-Sharing}

In addition to removing DRM from CDs and downloaded music, the RIAA has ceased its lengthy, broad-based end user litigation program.\textsuperscript{90} Between September 2003 and September 2008, the RIAA conducted a large-scale litigation campaign that included more than 30,000 lawsuits targeting individuals using peer-to-peer websites to illegally download copyrighted works including music, videos, audio books, digital books and documents, games, and computer programs.\textsuperscript{91} This was a drastic change from the RIAA's orig-
nal efforts aimed at going after file-sharing sites like Napster. The RIAA claims the campaign was largely a success because the primary goal was to promote a "general sense of awareness that file sharing copyrighted music without authorization is illegal." The RIAA reports that awareness about illegal file sharing more than doubled during its program. Two recent and notable lawsuits have undoubtedly contributed to this statistic as they demonstrate the possible consequences of digital piracy. In early 2009, a jury awarded $1.92 million, or $80,000 per song, in a verdict against the defendant in Capitol Records v. Thomas-Rasset. The defendant downloaded songs, equal in amount to about three CDs, from a peer-to-peer file-sharing website in 2005. A few months later, in Sony BMG Music Entertainment v. Tenenbaum, a twenty-five year old Boston University graduate student was sued for downloading thirty copyrighted songs without permission. The jury awarded the mu-

In general, peer-to-peer file sharing websites and programs work by either connecting users to a centralized server or connecting them directly to a network of other users. See Michael Suppappola, The End of the World as We Know It? The State of Decentralized Peer-To-Peer Technologies in the Wake of Metro-Goldwyn-Mayer Studios v. Grokster, 4 CONN. PUB. INT. L.J. 122, 124-129 (2004) (discussing how peer-to-peer file sharing works). Once connected, existing files on individuals' computers are either uploaded onto the central server from which other users can download them or files are downloaded, either as one complete file from one user or as several pieces of the same file from several different users, directly from the other users' computers. See id.

92. See id. (noting that RIAA's legal campaign against individual file-sharers is markedly different from its earlier approach that targeted sites which serve as platforms facilitating file-sharing).

93. See id. (internal quotations omitted) (discussing aim of lawsuit program); see also RIAA, supra note 90 (discussing aim of lawsuit program).

94. See Suppappola, supra note 91 (noting reported percentage increase in awareness of piracy's illegality and other effects of RIAA's litigation campaign). The RIAA reports that awareness of the illegality of downloading music without permission surged from 35% to 72% during and following its litigation program. See id.

95. For a discussion of two recent lawsuits aimed at deterring illegal file-sharing in which large damages were awarded, see infra notes 96-101 and accompanying text.


97. See Nate Anderson, Thomas verdict: willful infringement, $1.92 million penalty, ARSTECHNICA.COM, June 18, 2009, http://arstechnica.com/tech-policy/news/2009/06/jammie-thomas-retrial-verdict.ars (noting that jury award for record companies based on Thomas-Rasset's willful infringement). In total, defendant was said to have downloaded and shared approximately thirty songs. See id.

98. See generally Sony BMG Music Entertainment v. Tenenbaum, 2009 WL 1651338 (D.R.I. Jun 10, 2009) (displaying lawsuit where defendant was sued by RIAA for downloading songs and jury awarded plaintiffs substantial damages, though still far below statutory maximums); see also W. David Gardner, Pirate Bay's
sic companies $22,500 per song, or $675,000. The purpose of having such high damage awards imposed on individual defendants appears to be more symbolic of the RIAA’s desire to curb piracy than to recoup lost profits from illegal downloaders since a majority of suits settle for between $3,000 and $5,000. Alternatively, if a defendant fails to respond to complaints, a default judgment is as-


99. See id. (discussing amount of statutory damage award assessed against Tenenbaum). Section 504(c) of Title 17 of the United States Code provides the range of statutory damages that can be collected as a remedy in lieu of actual damages for each infringement. 17 U.S.C.S. § 504(c). For ordinary infringement, an infringer is liable for anywhere between $750 and $30,000 per infringement. See id. at § 504(c)(1). Where the copyright owner sustains the burden of proving willful infringement and does so successfully, the court may award between $750 and $150,000 per infringement. See id. at § 504(c)(2).

100. See Nate Anderson, Ignoring RIAA lawsuits cheaper than going to trial, ARSTECHNICA.COM, Sept. 28, 2009, http://arstechnica.com/tech-policy/news/2009/09/ignoring-riaa-lawsuits-cheaper-than-going-to-trial.ars (comparing damage award against those who fought RIAA in court and typical settlement and default judgment amounts). In light of some of the obscenely high statutory damage awards, concerns have been raised about the fairness of these awards that are meant to be compensatory in cases where actual damages may be hard to determine. See, e.g., John Tehranian, Infringement Nation: Copyright Reform and the Law/Norm Gap, 2007 UTAH L. REV. 537, 543-48 (2007) (providing examples of ordinary acts performed by typical people on average day that might, under some interpretations of copyright law, be deemed infringing and result in daily liability exposure of $12.45 million per day or $4.54 billion annually, even without engaging in peer-to-peer file sharing); Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 WM. & MARY L. REV. (forthcoming 2009), 16-19, available at http://ssrn.com/abstract=1375604 (citing examples of cases in which statutory awards have been grossly excessive and inconsistent with guidance provided by Supreme Court precedent). The damage award assessed against Jammie Thomas-Rasset of $1.92 million came after the prior judge noted that the actual cost of the music downloaded was “less than $54.” See Capitol Records, 579 F. Supp. 2d at 1227 (noting extreme discrepancy between actual and punitive damages). Even more shocking, the district court judge vacated the prior judgment awarding the music companies $222,000 because he felt the award was “unprecedented and oppressive,” stating that “damages that are more than one hundred times the cost of the works would serve as a sufficient deterrent.” Id. at 1227-28.

With an award-to-harm ratio of about 36,000:1, such a result would almost definitely be found unconstitutional, at least by Justices Stevens and Kennedy. See generally N. Am., Inc. v. Gore, 517 U.S. 559, 580-81 (1999) and State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003) (discussing constitutional limits on punitive damage awards). Recall, Justice Stevens wrote the opinion of the court in Gore, and Justice Kennedy wrote the opinion of the court in Campbell, wherein each justice stated that an award-to-harm ration of 10:1 or higher would be pushing the limits of constitutional due process. See Gore, 517 U.S. at 580-81 and Campbell, 538 U.S. at 425 (holding that excessive punitive damage awards more than ten times greater than actual harm suffered may not be constitutional).
sessed against the defendant for the minimum statutory damage amount of $750 per infringement.  

Although, the RIAA claims that its litigation campaign increased awareness of music piracy and halted the rise in the number of households engaging in piracy, the RIAA admits there has been *no subsequent decline in piracy.* Further, the RIAA’s statistics fail to show the fact that the volume of downloads among the households downloading pirated music has increased by twenty-three percent over about the same time period. The International Federation of the Phonographic Industry (“IFPI”) has estimated that about ninety-five percent of all music downloaded globally is unlicensed. It appears the reduction in RIAA lawsuits may have less to do with having accomplished its goals and more to do with the realization that piracy is not declining, suggesting to the RIAA that its resources could be better utilized elsewhere.

101. See Anderson, *supra* note 100 (comparing damage award against those who fought RIAA in court and typical settlement and default judgment amounts).

102. See RIAA, For Students Doing Reports, *supra* note 90 (noting partial success of RIAA litigation campaign through increased awareness about piracy and stalled growth in number of households downloading illegally). On the RIAA’s website, it reports that “[s]ince 2004, the percentage of Internet-connected households that have downloaded music from [illegal peer-to-peer file-sharing websites] is essentially flat.” *Id.*


104. See IFPI, Mission, http://www.ifpi.org/content/section_about/index.html (discussing IFPI’s mission and structure). The IFPI represents around 1,400 record companies across seventy-two countries and its mission is to “promote the value of recorded music;” “safeguard the rights of record producers;” and “expand the commercial uses of recorded music.” *See id.* See also IFPI publishes Digital Music Report 2009, INT’L. FED’N. PHONOGRAPHIC INDUS., Jan. 16, 2009, http://www.ifpi.org/content/section_resources/dmr2009.html (summarizing findings of annual international market report regarding expansion of digital music sales and state of illegal music downloads). The IFPI’s statistic that ninety-five percent of downloaded music is unlicensed is based on “collating separate studies in [sixteen] countries over a three-year period.” *Id.*

105. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits, WALL ST. J.*, Dec. 19, 2008, http://online.wsj.com/article/SB122966038836021137.html (mentioning RIAA lawsuits have been criticized as ineffective and resulted in alienating customers by suing individuals seemingly indiscriminately). In addition to feelings of alienating customers and only moderate effectiveness in stemming file-sharing, the figures show that the lawsuit settlements do not cover the cost required to fight so many individual battles. *See id.*
3. Making Money without Selling DRM-Laden Music

a. Treat free music as a marketing cost

Having stopped selling music with DRM, members of the music industry have been searching for new ways to make a profit.106 One commentator believes musicians may have to rely on their songs mainly as a means of promoting themselves, rather than a source of profit.107 Instead of selling CDs, musicians should focus on making money from live performances, selling ringtones, merchandising, and licensing the right to play their music for TV, film, and videogames.108 Because there is no indication that copyright holders will soon change their business models from focusing on selling CDs and digital music to selling-out concerts and merchandise, some groups are trying to collect more money from vendors.109 One option suggested by some industry groups is collective licensing, whereby a nominal fee would be attached to an existing product or service.110 Last year, Time Warner proposed that there be a fee attached to Internet users' monthly bill in exchange for unrestricted access to DRM-free music.111 More recently, a Cana-
adian non-profit agency, named the Canadian Private Copying Collective, began advocating a levy against products capable of recording and playing sound recordings, such as mp3 players.\textsuperscript{112} The proposal calls for a progressive tax that would be added to the sale of each digital music device, whereby the level of taxation rises or falls with the device's storage capacity.\textsuperscript{115} While no such plan has yet been adopted, consumer rights organizations like the Electronic Frontier Foundation ("EFF") have been promoting a voluntary collective licensing option for years.\textsuperscript{114}

b. Collective licensing alternative: national subscription service

The EFF touts several advantages of creating voluntary collective licensing systems over a Time Warner-like involuntary licensing fee.\textsuperscript{115} First, artists and rights holders would get paid handsomely without having to force all Internet users to pay for a service that only some will use.\textsuperscript{116} As of 2008, annual music industry revenues were estimated at about $9 billion.\textsuperscript{117} According to the EFF, if most of the sixty million Americans who have been using file sharing software are charged $5 a month, then the result would be an additional $3 billion in revenue annually.\textsuperscript{118} Further, as more users switch from buying CDs to signing up for this pseudo-subscription

\begin{itemize}
  \item \textsuperscript{112} See Gustin, iPod tax, supra note 110 (discussing Canadian proposal to apply tax to digital music device sales).
  \item \textsuperscript{113} See id. (explaining pricing scheme based on storage capacity).
  \item \textsuperscript{114} See Fred von Lohmann, A Better Way Forward: Voluntary Collective Licensing of Music File Sharing, ELEC. FRONTIER FOUND., Apr. 30, 2008, http://www.eff.org/files/eff-a-better-way-forward.pdf, at 1-2 ("Since 2003, EFF has championed an alternative approach that gets artists paid while making file sharing legal: voluntary collective licensing"). Much like the plan proposed by Warner Music, the concept involves the music industry forming several "collecting societies" that would offer file-sharing music fans legal downloads in exchange for a regular payment that could be bundled with the fee paid to Internet Service Provider. See id. Unlike the Warner Music plan, however, this would not be a tax since only those interested in downloading music would pay for the service. See id. at 2-3.
  \item \textsuperscript{115} For a discussion of the alleged benefits of a voluntary licensing model over Time Warner's proposed involuntary model, see supra note 110 and accompanying text.
  \item \textsuperscript{116} See von Lohmann, supra note 114, at 2-5 (discussing monetary benefit to artists and rights holders, and methods of how to ensure users pay).
  \item \textsuperscript{117} See id. at 2 (noting current estimated industry revenue).
  \item \textsuperscript{118} See id. at 2 (highlighting potential profitability if most file sharing Americans were to join this service). In addition to potentially providing one-third more annual revenue for music groups, the EFF's plan notes that the revenue stream would have a consistent flow which is generally favorable in business. See id. (discussing EFF's generation of constant revenue stream).
\end{itemize}
service, retailers get to save on costs associated with manufacturing, storing, distributing, advertising, shipping, and selling the CDs.\(^{119}\)

Second, government involvement would be very low since copyright law could remain unchanged and prices would be set by the market.\(^{120}\) Third, music file-sharing would become legal because users would have permission in advance.\(^{121}\) Fourth, customers would benefit from new investment in digital music technologies and services.\(^{122}\) Fifth, music listeners would have an enormous selection of music from which to choose whenever they please.\(^{123}\) Finally, artists would not be required to sign with a major record label to get their songs distributed and get paid.\(^{124}\) The EFF reports that, "So long as [musicians’] songs are being shared among fans, they will be paid."\(^{125}\) The EFF’s proposal includes responses to potential issues anticipated with implementing such a system.\(^{126}\) Finally, the EFF maintains that its proposal offers a unique solution, but similar designs have been implemented with little success.\(^{127}\)

\(^{119}\) See id. (describing cost saving benefit of this service). Since the EFF’s plan involves making deals with various existing entities like internet service providers and colleges to include the subscription cost in services already being provided, the additional infrastructure and administration costs would be very low. See id.

\(^{120}\) See id. at 3 (describing minimal need for government involvement in new service).

\(^{121}\) See id. (mentioning benefit of engaging in legitimate file sharing). Legal file-sharing would reduce the amount of litigation, which is often a lengthy and costly endeavor for all parties involved. See id.

\(^{122}\) See id. (establishing benefit of technological advancement as service providers compete to provide better service rather than focusing on stopping illegal file sharing).

\(^{123}\) See id. (noting how agreements among multiple record companies would create music library larger than any existing today).

\(^{124}\) See id. (describing how each artist would have equal opportunity to have their music heard and get paid accordingly). Trying to get signed with a major record label would not be necessary to achieve wide distribution of music so newer artists could focus more attention on increasing their fan base. See id.

\(^{125}\) Id.

\(^{126}\) See id. at 4-6 (discussing issues concerning implementation of EFF’s proposed voluntary collective licensing system). The EFF’s proposed system would address potential antitrust concerns, how to divide revenue, ensuring that file-sharers pay for service, and effect on future of existing music vendors.

\(^{127}\) See Brad Stone, Still Hoping to Sell Music by the Month, N.Y. TIMES, Oct. 14, 2009, available at http://www.nytimes.com/2009/10/14/technology/internet/14music.html (noting that “[t]he idea of selling monthly subscriptions to a vast catalog of online music has met with only limited success.”). The creators of an early peer-to-peer file-sharing program named Kazaa have launched a start-up called “Rdio,” which intends to “reinvent a concept pioneered earlier this decade by Rhapsody . . . and the tamed version of Napster . . . .” Id. Though, as one commentator notes, with 95% of online downloads being illegal and CD sales declining year after year, “solutions need to be found.” See Ray Kane, Spotify: The Next Great Music Service?, AM. SONGWRITER, Oct. 16, 2009, http://www.americansong-
c. Ad-based revenue generation

One online music provider, Spotify, which is not yet available in the United States, operates using an advertising-based music service.\textsuperscript{128} Spotify users have access to all songs for free and copyright owners are paid from advertising revenue.\textsuperscript{129} There is also a premium option where users can pay a monthly subscription fee and receive music commercial free, as well as stream it onto mobile devices, and make a certain number of downloads per month.\textsuperscript{130} Spotify hopes to bring its service to the United States early next year, but it will likely follow a slightly different format as the big music companies are hesitant to offer the music free, preferring instead to make it an entirely subscription-based service.\textsuperscript{131} Similarly, Pandora is a popular online radio website based in the United States that receives its revenue from a mix of advertising and music sales.\textsuperscript{132} These two websites represent just a fraction of the number of online radio stations that threaten to replace traditional FM tuners in the years to come.\textsuperscript{133} One of the most recent and innovative ap-

\textsuperscript{128} See Kane, supra note 127 (considering whether Spotify will become as popular as it hopes to become). Spotify is currently only available in the United Kingdom, Sweden, Norway, Finland, France and Spain because of disagreements concerning licensing terms with the big four music companies; see also Spotify, Frequently Asked Questions, http://www.spotify.com/en/help/faq/ (answering commonly asked questions regarding Spotify's operations).

\textsuperscript{129} See Kane, supra note 127 (discussing music offering and payment scheme).

\textsuperscript{130} See id. (discussing Spotify premium option for paying customers); see also Spotify, Frequently Asked Questions, supra note 128 (listing usage options for premium customers).

\textsuperscript{131} See Stone, supra note 127 (quoting Thomas Hesse, president of global digital business at Sony Music as saying, "We like Spotify as our partner in Europe, but we would like them to move more toward a paid subscription environment" before licensing sales within United States).


\textsuperscript{133} See Eric Taub, Internet Radio Stations are the New Wave, N.Y. TIMES, Dec. 30, 2009, http://www.nytimes.com/2009/12/31/technology/personaltech/31basics.html (discussing prevalence of online radio stations that offer access to thousands of stations wherever Internet is available and users have computers, smart-phones, or stand-alone receivers); see also Stephen Williams, Pandora by the Dashboard Light, N.Y. TIMES, Dec. 11, 2009, http://wheels.blogs.nytimes.com/2009/12/11/pandora-by-the-dashboard-light/ (reporting on Pandora’s chief technology officer’s announcement that his company is working with automakers to integrate its service into vehicle consoles so drivers can stream music without having to plug their smart-phones into their vehicles’ audio line-in jacks).
proaches to ad-based revenue generation is being taken by FreeAllMusic.com, which has been described as “iTunes meets Hulu” by the company’s chief executive officer. This approach allows users to download and share music for free as long as they first watch a fifteen to thirty second advertisement.

d. Performance fees for downloads

Songwriters, composers, and music publishers are currently lobbying Congress to pass a law requiring performance fees to be paid on downloaded and streaming media, such as music, TV shows, and movie clips, as a way of getting a bit more revenue from their creative works. The American Society of Composers, Authors, and Publishers (“ASCAP”), Broadcast Music Inc., and other performing-rights groups are demanding that iTunes and other digital media vendors pay a performance fee whenever their works are downloaded and played. Present licensing agreements exclude compensation to these groups for downloads of music they have played a part in producing. Instead, they only get a cut of the cost associated with traditional public performances, such as when a song is broadcast on the radio or played on TV. There is


135. See id. (describing operation and progress of new music download website). As of late December 2009, two of the four major record labels had signed with the service and plan to provide their entire digital song collection. See id. Also, six advertisers had already signed-on, including Coca-Cola, Warner Brothers Television, and Zappos.com. See id. (establishing advertising interests in new website). Use of the FreeAllMusic service is presently restricted to individuals who have requested access on the website and wait for an email with log-in information. See FreeAllMusic.com, Welcome Page, http://www.freeallmusic.com/beta/welcome (stating that interested users must request invitation to try service).

A similar concept had been employed in 2008 by SpiralFrog, which was a failure. See Newman, supra note 134 (discussing failure of similar online music venture, SpiralFrog). Experts interviewed believe the differences, such as commercials instead of banner ads and no DRM, will prove the difference between SpiralFrog’s failure and FreeAllMusic’s hopeful success. See id.


137. See id. (stating conditions upon which performance fee would be due).

138. See id. (explaining current lack of compensation for downloaded works.)

139. See id. (detailing that compensation is limited to public performances).
debate, however, surrounding whether a download can be considered a “performance.”\textsuperscript{140} A judge for the Southern District of New York held that downloading music from a website was not a performance.\textsuperscript{141} The judge did hold, however, that streaming music was a performance.\textsuperscript{142} The ASCAP has filed an appeal on this issue to be heard sometime in 2010.\textsuperscript{143}

e. Performance fees for radio

Lobbying efforts by musicians have been successful in convincing Congress to propose legislation that will increase revenues by requiring radio stations to pay fees for performances.\textsuperscript{144} The proposed law is called the Performance Rights Act.\textsuperscript{145} For years our copyright law has been such that only songwriters, not recording artists, are compensated when their music is played over the radio.\textsuperscript{146} Therefore, while the music we enjoy is derived from the efforts of two creative artists, the songwriter and performer, only the former is being paid royalties.\textsuperscript{147} Because there is a property right in the sound recording, the argument is that artists should also get compensated, just as artists are compensated when their music is played on the Internet or satellite radio.\textsuperscript{148} The Senate Ju-

\textsuperscript{140} See id. (debating whether downloads are performances like broadcasting songs on TV are performances, even where songs are only heard as background music).

\textsuperscript{141} See Sandoval, supra note 136 (summarizing district court case holding that downloading media is not equivalent to public performance).

\textsuperscript{142} See id. (adding that while downloading is not equal to performing, streaming content online does constitute performing).

\textsuperscript{143} See id. (noting that appealed decision is pending).


\textsuperscript{145} See Performance Rights Act, S.379, 111th Cong. (2009) (displaying text of bill); see also Senate Judiciary Committee, supra note 144 (naming bill that is to go before entire Senate); Performance Rights Act, H.R. 848, 111th Cong. (2009), available at http://www.govtrack.us/congress/bill.xpd?bill=h111-848 (showing status of bill through Congress).


\textsuperscript{147} See Senate Judiciary Committee, supra note 144 (noting that only one of two participants in creating music is being paid under current system).

\textsuperscript{148} See Senate Judiciary Committee, supra note 144 (explaining that performing artists should be paid for radio performances just like they are for Internet and satellite radio performances, regardless of whether artists derive promotional value from radio play). The Performance Rights Act provides the option of a nominal
diciary Committee just released its version of the proposed Performance Rights Act on October 16, 2009 and now awaits a vote by the entire Senate.\textsuperscript{149} The House Judiciary Committee approved a similar version of the bill in May 2009 and a vote by the full House is still pending.\textsuperscript{150} While there is no way to know exactly what the final version of the bill will contain, it is sure to include at least some provisions requiring radio stations to pay artists without harming songwriters.\textsuperscript{151}

4. Preventing Illegal File-Sharing without DRM

a. European three-strikes laws

In a forceful effort to prevent illegal file-sharing in Europe, some countries—notably France and the United Kingdom—have proposed legislation that would employ technological measures other than DRM to stop illegal activity.\textsuperscript{152} Although the bills are not identical, each works in roughly the same way: alleged illegal file-sharers would receive an email warning, followed by a letter, and finally lose their Internet connection for up to a year if found guilty.\textsuperscript{153} An early version of France’s bill was struck down as un-


\textsuperscript{150} See id. (noting wait for full House of Representatives to vote regarding Performing Rights Act).

\textsuperscript{151} See id. (reasserting provision of bill requiring some compensation for artists that does not have negative effect on songwriters).


\textsuperscript{153} See Nate Anderson, French Anti-P2P Law Toughest in the World, ARST\textsuperscript{21}TECHNICA.COM, Mar. 10, 2009, http://arstechnica.com/tech-policy/news/2009/03/french-anti-p2p-law-toughest-in-the-world.ars (discussing introduction of France’s anti-piracy legislation and key provisions into political sphere). The French bill goes by many names, including “Création et Internet” and “Loi Olivennes” after Denis Olivennes, who headed the group that came up with the plan. See id. Although, the most common name seems to be “HADOPI,” which stands for the High Authority for the Distribution of Works and the Protection of Rights on the Internet (in French: La Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet). See Danny O’Brien, The Struggles of France’s Three Strikes Law, ELEC. FRONTIER FOUND., May 9, 2009, http://www.eff.org/deep-
constitutional because it allowed the government to issue sanctions without judicial review, but once those provisions were revised to give a judge the authority to hear alleged copyright infringement cases, the bill was passed.154 In the United Kingdom, politicians have tabled their version of the three-strikes legislation.155 Due to the fact that people living together often share internet access and that internet access can be gained by any savvy hacker within range of a wireless signal, some believe enforcing such a law would prove futile.156

b. Three-strikes laws in the United States

Plans to send a series of warnings and ultimately restrict Internet connectivity are supposedly underway in the United States, too, but without government involvement to date.157 Following the RIAA's decision to abandon its lawsuit campaign in 2008, it en-

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154. See Martens, supra note 152 (discussing conflicts regarding earlier versions of France's bill and eventual compromise). The approved version of the bill gives a judge control of whether or not a person will have their Internet cut off, be fined or be jailed. See id. Addressing a potential concern that a user other than the person registered to computer's Internet Protocol address (IP address) could be charged for illegal file-sharing, the bill will potentially hold such users liable for negligence and face a month-long suspension of Internet service. See id.


156. See id. (noting that "it is relatively easy for determined file-sharers to mask their identity or their activity to avoid detection"). Labour Party member, Tom Watson believes that finding these individuals and disconnecting their Internet will be "futile." See id. In a publicity stunt aimed at proving the potential ineffectiveness of the United Kingdom three-strikes law, the United Kingdom-based Internet service provider, TalkTalk, hired a technical expert to drive along a particular stretch of road in England and identify vulnerable networks. See Nate Anderson, ISP Filches Open WiFi in Fight against Three-Strikes Law, ARSTECHNICA.COM, OCT. 16, 2009, http://arstechnica.com/tech-policy/news/2009/10/isp-filches-open-wifi-in-fight-against-three-strikes-law.ars (demonstrating fatal flaw in legislation intended to punish illegal file-sharers by restricting Internet access). Within a couple hours, TalkTalk's expert had found twenty-three WiFi networks, where over one-third were vulnerable to "WiFi hijacking"—resulting in illegal downloads that would be attributed to the wireless Internet owner. See id.

157. See McBride & Smith, supra note 105 (discussing RIAA's plan to limit users' Internet connectivity in lieu of filing individual lawsuits). In lieu of continuing its relatively ineffective (illegal file-sharing is still rising) and often poorly-viewed (RIAA received bad press for suing "several single mothers, a dead person, and a 13-year-old girl") lawsuit campaign, the RIAA has decided to try and team-up with ISPs to reduce illegal file-sharers' Internet access. See id.
engaged in talks with Internet service providers ("ISPs") in hopes of striking agreements whereby the ISPs will limit, or throttle, the connectivity of users suspected of illegal file-sharing. 158 There has been little news of any agreements which is not surprising given that the Federal Communications Commission declared that Comcast's throttling of BitTorrent traffic last year was unlawful. 159 Further, both AT&T and Comcast later stated that they have no intention of disconnecting any users' Internet access without a court order, despite the standard user agreement provision giving ISPs the right to limit or terminate service to those engaged in illegal activity. 160

158. See id. (discussing RIAA's plan to work with ISPs to limit Internet piracy to stop illegal file sharing).

159. See Declan McCullagh, FCC formally rules Comcast's throttling of BitTorrent was illegal, CNET.com, Aug. 1, 2008, http://news.cnet.com/8301-13578_3-10004508-38.html (summarizing FCC's ruling against Comcast for blocking connectivity for BitTorrent users). This marks the "first time that any U.S. broadband provider has ever been found to violate Net neutrality rules." Id. It is worth noting that Comcast claims the measures to slow BitTorrent were necessary to prevent its network from being overrun, and not because it was looking to reduce illegal file-sharing. See id. (explaining reason for throttling connectivity in order to protect against illegal filesharing). This decision was appealed to the United States Court of Appeals for the District of Columbia since Comcast claims that the FCC did not have proper authority to declare Comcast's actions unlawful. See Matthew Lasar, FCC: Congress Said We Could Spank Comcast for P2P Blocking, ARSTECHNICA.COM, Sept. 23, 2009, http://arstechnica.com/tech-policy/news/2009/09/fcc-congress-said-we-could-spank-comcast-for-p2p-blocking.ars (discussing Comcast's appeal regarding FCC decision calling P2P throttling unlawful). The FCC claims, however, that it did have implied authority under previous grants of Congress and that its decision only required Comcast to inform users of its practices—it did not fine Comcast or require it to change its practices as it had already voluntarily stopped throttling BitTorrent. See id. BitTorrent is a popular peer-2-peer program with an installed base of over 160 million clients worldwide that allows users to share large amounts of information stored on their computers over the Internet for free. See BitTorrent, Company Overview, http://www.bittorrent.com/company/overview (describing BitTorrent's service and features).

160. See Greg Sandoval, AT&T exec: ISP will never terminate service on RIAA's word, CNET.com, Mar. 25, 2009, http://news.cnet.com/8301-1023_3-10204514-93.html?tag=mcnol;title (discussing AT&T's and Comcast's refusal to suspend service based solely on RIAA's word). A senior executive vice president with AT&T stated that "[w]e're not a finder of fact and under no circumstances would we ever suspend or terminate service based on an allegation from a third party," meaning the RIAA. Id. (internal quotation marks omitted). Similarly, a spokesperson for Comcast said it has "no plans to test a so-called three-strikes-and-you're-out policy." Id. (internal quotation marks omitted). Apparently other large ISPs, such as Mediacom Communications, are less hesitant to terminate service. See Christina Stiehl, Downloading media illegally has its price, THEMANEATER.COM, Oct. 20, 2009, http://www.themaneater.com/stories/2009/10/20/downloading-media-illegally-has-its-price/ (reporting how article's author and her roommates had their Internet service shut off by Mediacom after two notices about copyrighted material that was illegally downloaded by her roommates). Mediacom is the eighth largest cable television company in the United States, focused on serving smaller cities and towns. See Mediacom, Corporate Overview, http://phx.corporate-ir.net/
Comcast received another hit in the final days of 2009 when a proposed $16 million settlement of a class action lawsuit arising out of its alleged unlawful disruption of users' internet connections when trying to access certain peer-to-peer websites was sent to a judge for approval.161

c. Informed P2P User Act

In one of the first targeted, government-led moves to regulate file sharing, Congressional Representative and Chairman of the House Committee on Oversight & Government Reform, Edolphus Towns, announced his plan to introduce legislation to ban all peer-to-peer software from government and contractor computers and networks.162 In his closing remarks at a hearing on "Inadvertent File Sharing Over Peer-to-Peer Networks: How it Endangers Citizens and Jeopardizes National Security," Congressman Towns stated:

From what we heard today, it is clear that private citizens, businesses, and the government continue to be victims of unintentional and illicit file sharing . . . . For our sensitive government information, the risk is too great to ignore. I am planning to introduce a bill to ban this type of insecure, open network, peer-to-peer software from all government and contractor computers and networks.163

Congressman Towns' speech was fueled by debate regarding the Informed P2P User Act, which was very recently passed by the House Energy and Commerce Committee.164 The impetus behind


162. See Matthew Lasar, Congressmen calls for P2P ban after sensitive data leaks, ARSTECHNICA.COM, July 29, 2009, http://arstechnica.com/security/news/2009/07/congress-wants-ban-on-p2p-software-for-government-computers.ars (articulating Con-gressman Towns' plan to introduce legislation to ban P2P software from government machines). Representative Towns opened the hearing by stating that he was "done with letting the industry solve the problem" of peer-to-peer software. Id.


164. See Informed P2P User Act, H.R. 1319, 111th Cong. (1st Sess. 2009), available at http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h1319; see also Nate
the Informed P2P User Act arose out of concerns that sensitive data is being surreptitiously uploaded and shared online via peer-to-peer software programs. 165 The key provisions of this bill include a requirement that all peer-to-peer programs (1) provide, immediately before installation, “conspicuous notice that the program allows files on the protected computer to be available for searching and copying to another computer” and obtain consent to install; and (2) immediately before activation of “a file sharing function of the program,” programs must provide “conspicuous notice of which files are to be made available to another computer” and obtain consent to proceed. 166 While the bill is silent on piracy, one commentator believes this may simply be the first step toward more significant regulation of peer-to-peer software. 167

B. Potential Effect on Publishing Industry

1. Concerns Regarding Digital Books

On July 17th, in a startling display of irony, Amazon.com (“Amazon”) remotely deleted copies of George Orwell’s “1984” and “Animal Farm” from readers’ Kindle devices without warning after learning that the electronic publisher of these works did not have


166. See id. (examining Informed P2P User Act’s key provisions). Any violation of the act’s provisions will be treated as a violation of “a rule defining an unfair or deceptive act or practice prescribed under the Federal Trade Commission Act.” Id.

proper rights to them. Jeffrey Bezos, the company’s founder and chief executive officer, promptly issued an apology along with free, legal copies of the books and a promise that Amazon will never again remotely delete books. Despite the apology and promise, critics remain unsettled about the surreptitious deletion and the legal issues involved.

168. See Brad Stone, Amazon Erases Two Classics from Kindle. (One is ‘1984.’), N.Y. TIMES, July 18, 2009, at B1 (reporting remote deletion of electronic books from customers’ devices). When Amazon learned from the rights holder of “1984” and “Animal Farm” that the digital copies being distributed online by MobileReference were illegal, Amazon immediately deleted the copies from customers’ Kindles without first informing the owners and refunded the money paid. See id. (explaining Amazon’s e-book deletion). A week later, Amazon issued an apology. For a discussion on Jeff Bezos’ apology, see infra note 169 and accompanying text. To help smooth things over further, on Sept. 5, 2009 Amazon offered all users affected by the remote deletion free copies of the books for their Kindles, $30 of store credit, or a $30 check. See Miguel Helft, Amazon.com Offers to Replace Copies of Orwell Books It Deleted, N.Y. TIMES, Sept. 5, 2009, at B2, available at http://www.nytimes.com/2009/09/05/technology/companies/05amazon.html (discussing further offer to soothe upset customers). All new Kindles are connected to Amazon’s “Whispernet,” which allows users to wirelessly search and download content over a standard cellular connection. It also gives Amazon the ability to delete content on Kindles. See id.; see also Kindle Features, http://www.amazon.com/gp/product/B00154JDAI/ref=srv_kinh_0 (discussing Kindle’s wireless capabilities).

The Amazon Kindle is a wireless reading device measuring 7.5” x 5.3” x 0.7” and weighs less than 11 ounces. See Kindle Product Description, http://www.amazon.com/Kindle-Amazons-Original-Wireless-generation/dp/B000F173MA (describing Kindle characteristics). The Kindle allows users to buy, store, and view over 200 digital books, magazines, newspapers, and blogs on a high-resolution black-and-white display for less than half the cost of print copies. See id. The specially-formatted digital files can only be viewed on the device and are wirelessly transmitted and updated to devices at no additional cost to users. See id. The device includes a full keyboard that allows users to make notes in the ‘digital margins.’ See id. Kindles retail for about $260. See id.

169. See Posting of Jeffrey Bezos.Kindle Community Post, http://www.amazon.com/tag/kindle/forum/ref=cm_cd_ef_tft_tp?_encoding=UTF8&ecdForum=Fx1D7SY3BVSESG&ecdThread=Tx1FXQPSF67X1IU&dispType=tagsDetail (July 23, 2009 12:16 PM PDT) (relaying apology by Amazon founder and chief executive officer). Mr. Bezos stated that the way his company “handled” the illegally sold copies was “stupid, thoughtless, and painfully out of line with [their] principles.” Id. He vowed that the company will never again delete content from readers’ devices. See id.

170. See David L. Ulin, Kindling Concerns; What Does It Mean for Society When Amazon Can Zap Information Out of Our E-Books?, BALT. SUN, Aug. 3, 2009, at 13A (discussing concern over possibility of censorship in response to Amazon’s remote deletion of e-books). Some critics fear that Amazon and similar companies, which have the power to control digital print, may exercise that power in the form of censorship—restricting, deleting or rewriting unfavorable portions of text, much like “Big Brother” in Orwell’s novel, “1984.” See id.; see also Helft, supra note 168 (describing unease over centralized control over certain digital products). One disgruntled customer, a high school student named Justin Gawronski, who was using his Kindle for a book report on “1984,” lost all the notes taken in the digital margins and sued in late July, claiming that Amazon did not have the right to delete lawfully purchased digital content. See Alexandra Sage, Amazon settles Kindle lawsuit over ‘1984’ copy, REUTERS, Oct. 2, 2009, http://www.reuters.com/article/
Critics have espoused three primary concerns with current copyright law in response to Amazon’s actions. First, critics are concerned with the issue of what it means to “own” a digital book, which relates back to the discussion on the first sale doctrine.\textsuperscript{171} Whereas a physical book, once purchased from the rights holder, can be possessed indefinitely, re-sold, lent or borrowed without legal consequences or concern that the book can be taken-back, digital books hold none of these rights.\textsuperscript{172} In effect, “[o]wning an e-book is more akin to licensing a piece of software: access comes with fine-print terms of service, and often [DRM] software to ensure that [purchasers] abide by the rules.”\textsuperscript{173} The right of an owner of a physical copy of a work to legally re-sell or lend that same copy without first obtaining permission from the copyright owner is granted by way of the first sale doctrine, which states that a copyright owner’s control over a particular copy or a work are transferred to the purchaser.\textsuperscript{174} Thus, critics are again proposing the

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Friedman: Nine Years and Still Waiting: While Congress Continues to Hold Of
NINE YEARS AND STILL WAITING 669

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technologyNews/idUSTRE59151X20091002 (discussing settlement regarding suit over lost book notes from Amazon’s remote Kindle book deletion). The suit settled on Sept. 25th for $150,000, which will be donated to a charitable organization. See id.

171. See Geoffrey A. Fowler, Buyer’s E-Morse: ‘Owning’ Digital Books, Wall St. J., July 23, 2009, at A11 (discussing critical reaction to Amazon’s remote book deletion). What consumers are really buying is a license, revocable at any time for any reason. See id. (discussing how customers are actually purchasing licenses, not e-books). Although, experts are divided on whether Amazon broke its own contract with consumers by removing the Orwell e-books. The fine print in the company’s terms of service gives consumer the “right to keep a permanent copy” of purchased titles, but also reserves Amazon’s “right to modify, suspend, or discontinue the service at any time.”

Id.

172. See id. (describing difference in rights between “analog-era ownership” and digital ownership); see also Amazon Kindle: License Agreement and Terms of Use, http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=200144530 (listing Amazon Kindle terms of use regarding Amazon’s ability to take back any licensed electronic book).


174. See 104 REPORT, supra note 12 at 19 (establishing function and statutory basis of first sale doctrine). The beginning of section 109(a) of the Copyright Act provides: “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C.S. § 109(a).
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creation of a digital first sale doctrine to govern the disposition of legally obtained digital media, such as e-books.175

Second, critics are concerned about censorship.176 The argument by some individuals is that if Amazon has the ability to remotely delete sold e-books, then it can also alter individual lines of text or choose to recall books that it deems to be inappropriate.177 This threat of digital book burning and censorship has some talking about the need for new laws that clearly define digital ownership.178

Third, as products like books, music, and movies become increasingly purchased online, some are concerned about privacy of personal information.179 Many digital media providers’ privacy pol-

175. See 104 REPORT, supra note 12 at 44-48 (describing possible need to expand first sale doctrine to cover digital realm).
177. See Fowler, supra note 171 (considering possibility for deletion or censorship of e-books). Harvard Law Professor, Jonathan Zittrain, has remarked that using digital media presents a “new prospect for control” that regulators and litigants will surely notice. See Helft, supra note 168 (discussing possible future use of remote control over digital media). Zittrain postulates that litigants in defamation cases or government regulators may demand that material they find offensive to be remotely altered or removed from the public entirely. See id. (expressing concern over possibility of remote text alteration or deletion by publishers).
178. See id. (stressing need for legislation to remedy current ownership issues).

See Hugh D’Andrade, Don’t Let Google Close the Book on Reader Privacy, ELEC. FRONTIER Found., July 23, 2009, http://www.eff.org/deeplinks/2009/07/take-action-dont-let-google (discussing present lack of privacy given to users of Google Books and other online book providers). The EFF, along with the American Civil Liberties Union of Northern California and Samuelson Clinic at University of Cali-
acies allow online venders to save browsing and purchasing information as well as other personal details like your address and phone number.180 Depending on the terms of the privacy policy, this information may later be compiled into a customer profile and used for marketing purposes or sold to third parties.181 This threat is becoming increasingly real as more companies turn to "cloud computing" to make their products more flexible and accessible.182 Again, experts recommend legislative action to clearly identify the ownership and privacy rights of digital media consumers.183

The problem with passing legislation, however, is that increasing customers' ownership rights over digital media would make copyrighted creative works more freely transferrable and the possibility of copyright infringement could possibly increase, which

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180. See D'Andrade, supra note 179 (expressing concern over lack of privacy regarding Google Book's reader policy privacy).

181. See id. (describing potential threat to security of personal identities).

182. See Michael Hiltzik, Microsoft's Grip on Users is Being Lost in the Cloud, L.A. TIMES, Sept. 3, 2009, at B1, available at http://articles.latimes.com/2009/sep/03/business/f-hiltzik3 (explaining cloud computing). Cloud computing is a buzz word that was introduced by the software industry several years ago to describe new software that exists solely online—suspended in cyberspace much like a cloud suspending in mid-air. See id. While cloud computing is not necessarily a new term, over the past few years the definition has expanded from referring almost exclusively to online software to include a whole range of online services that can be accessed from anywhere and house a great deal of personal and financial data for millions of users. See Eric Knorr & Galen Gruman, What Cloud Computing Really Means, INFOWORLD, Apr. 7, 2008, http://www.infoworld.com/d/cloud-computing/what-cloud-computing-really-means-031?page=0,0 (analyzing various evolving definitions of cloud computing). This has caused some concern because as more information is stored in cyberspace, users have more at risk of hackers gaining access to any of these information stores. See id.

183. See Fowler supra note 171 at A11 (emphasizing need for legislation to define digital privacy rights to establish consistent norms among consumer product providers). In describing the current legal landscape of digital books, Harvard Law professor Lawrence Lessig noted that "the law gives radically more control to the company than the system ought to . . . " and that "the freedoms and privacy that you got in physical space you have to fight for in cyberspace." Id.
would have a direct negative impact on revenue generated by those works. Despite awareness of the fate of DRM within the music industry, the world’s most popular e-reader, Amazon’s Kindle, still uses DRM to tether books to their devices, and even that may soon change. Toward the end of December 2009, at least one hacker claimed to have cracked Amazon’s DRM and made available copies of his program that purportedly converts Amazon’s .azw format e-books into more accessible formats, like Adobe’s protected document format (“.pdf”), which can then be transferred to and viewed on any computer or e-reader.

Although the digital music boom began years ago, its impact continues to expand and the digital book boom is just now taking-off and will likely be followed shortly by the movie industry. With newspaper and blog titles like, *Why E-Books are Hot and Getting Hotter*, *Battle of the E-Books Heats Up*, and *Get Ready for the E-Reader Rumble of 2010*, there is no denying that interest in e-books is swelling.

184. See Abie, supra note 5 (describing effect of easily accessible and reproducible digital information on copyright holders’ revenue).


186. See Robb, supra note 173 (reporting on claim that Amazon’s Kindle DRM has been hacked). On December 17, 2009, a hacker that goes by the screen name “I?CABBAGES” posted a method for converting Amazon’s .azw e-book files for computers into another format that can be imported to another device. See Kirk, supra 173 (discussing first reported hack of Amazon’s e-book format). Then on December 23, 2009, a user of an Israeli hacking site posted a program that strips Amazon e-books of their DRM, allowing them to be viewed on any computer or competing e-reader. For a discussion of Internet post on Israeli website where user claims to have cracked Amazon’s DRM, see Robb, supra note 173 and accompanying text.


Where there were just two e-book readers a few years ago—the Amazon Kindle and Sony Reader—there will be over half a dozen new readers available in the market by mid 2010. Recently, book-selling giant, Barnes & Noble has announced their own e-reader and the rumored tablet from Apple, named the iPad, was announced in January 2010. Publishers are just as cognizant of the changing landscape as those who manufacture the e-reading devices.

for_the_ereader_rumble_of_2010.html (introducing several new e-book readers being released between now and early next year).

189. See Priya Ganapathi, E-Book Reader Roundup: Samsung’s Papyrus Joins the Crowd, WIRED, Mar. 25, 2009, http://www.wired.com/gadgetlab/2009/03/samsungs-new-e/ (reviewing new and existing e-book readers available); see also Newman, supra note 188 (discussing soon to be released e-book readers). In addition to the Amazon Kindle and Sony Reader, consumes have the Samsung Papyrus, iRex iLiad, Fujitsu Flepia, Hanlin eReader, Foxit eSlick Reader, Plastic Logic Reader, Interread Cool-er Reader, and Asus E-Reader to look forward to in 2010. See id. (listing and commenting on many new e-readers becoming available).

Also, Amazon intends to make an even bigger splash with the release of its international Kindle, which features expanded wireless connectivity that allows it to work overseas. See Archibald Preuschat, Kindle Looks to Europe, WALL ST. J., Oct. 14, 2009, http://online.wsj.com/article/SB1000142405274870410720474471110330426026.html?mod=WSJ_hpp_MIDDLENexttoWhatsNewsForth (discussing introduction of Amazon Kindle with international wireless connectivity in Europe). Amazon hopes this move will make the reader more attractive to frequent international flyers as well as European customers who can now use the Kindle without needing to plug the device into a computer to download and update content. See id. (discussing Amazon’s hope that international wireless will visibly boost e-reader sales in Europe and other countries).


191. See, e.g., Motoko Rich, New E-Book Company to Focus on Older Titles, N.Y. TIMES, Oct. 13, 2009, http://www.nytimes.com/2009/10/14/books/14fried.html?ref=arts (relaying former president of publishing giant HarperCollins’ plan to take advantage of e-book’s popularity by reviving and marketing older book titles in electronic form); see also Murad Ahmed, Google Takes on Amazon with Online E-Book Store, TIMES ONLINE, Oct. 16, 2009, http://technology.timesonline.co.uk/tol/news/tech_and_web/article 6877700.ece (describing Google’s new e-book store that opens in 2010, which it hopes will swallow significant share of Amazon’s market share). Like Google, former HarperCollins president, Jane Friedman, realizes that “[e]lectronic ‘is going to be the center of the universe’” for books as it is with music and hopes to get a piece of the action by marketing older titles that she hopes to revive. See Rich, supra note 191 (explaining publishing executive’s view on direction of publishing industry). As for Google, it plans to open an online e-book store offering over 500,000 copyrighted works in partnership with publishers,
Some of the factors offered as explanations for why e-books have gained so much popularity are that technology now allows the screen reading experience to rival paper, users enjoy the convenience of having many books in one portable device, the book selection is continually growing, and prices on readers and content falling.192

The Kindle was not the first e-reader, but it is the only one to be backed by one of the world’s largest book retailers.193 Further, now that Kindle is available in many countries overseas, trepidation regarding the potential for piracy is rising—besides, the Apple iPod was not the first portable digital music player, but its mass appeal likely fanned the flames of digital piracy.194 Perhaps now that the Kindle and other e-book readers are becoming mainstream, there will be a repeat of what happened with the music industry.195 In the United States alone, there are reports of e-book piracy growing “exponentially.”196 Authors such as J.K. Rowling, Stephen King, and John Grisham have all had illegal copies of their works posted on-

which the company is calling Goggle Editions. See Ahmed, supra note 191 (discussing Google’s forceful efforts to enter e-book market). Google’s latest venture is in addition to its existing Google Books project where the company has already scanned and digitized about ten million out-of-print and non-copyrighted books for anyone to search and view online. See id. (describing Google’s existing e-book venture).

192. See Coker, supra note 188 (describing several reasons for why e-books have gained so much in popularity among Americans).


194. See id. (suggesting that iPods’ popularity “gave many otherwise law-abiding customers another reason” to download music illegally and that it may happen again with e-books due to Kindle’s international release).

195. See id. (suggesting that Kindle’s international debut may take e-readers mainstream and trigger another wave of digital piracy).

line, susceptible to illegal downloading. Unfortunately it is still too early to tell what will happen with e-books and how publishers will manage their growing piracy problem. At least one publisher has conceded that “any revenue lost to piracy may just be a necessary evil.”

C. Potential Effect on Film Industry

Trying to avoid the same troubles as the music industry, the movie industry is now looking to online business models. Studios are already seeing dramatic declines in sales compared to just a year ago. Piracy is likely to blame as file-sharing sites show record numbers of downloads. As a result, several companies are considering online subscription services like some of the music providers. Many others allow users to view content online free of

197. See Rich, supra note 196 (naming best-selling authors who have had their books illegally copied and distributed online and suggesting that these authors represent beginning of inevitable piracy).


199. See Alex Dobuzinskis, Hollywood Warming to Internet as DVDs Begin to Fade, REUTERS, Oct. 1, 2009, http://www.reuters.com/article/televisionNews/idUSTRE59068S20091001?pageNumber=1&virtualBrandChannel=11604 (discussing Hollywood’s interest in offering more products online to remain competitive). “I don’t think that studios are looking at online to save the home entertainment business, but I think they want to avoid what happened to the music business and try to come up with alternative modes of distribution before physical media goes away.” See id. (quoting Stephen Prough, founder of Salem Partners, which specializes in investment banking for films).

200. See Dobuzinskis, supra note 199 (noting that DVD and Blu-ray sales fell by 13.5% in first half of 2009, making it harder for movie studios to finance films).

201. See, e.g., Dave Itzkoff, ‘Avatar’ Commandeers Film Piracy Record, N.Y. TIMES, Jan. 5, 2010, http://carpetbagger.blogs.nytimes.com/2010/01/05/avatar-commandeers-film-piracy-record (reporting on record number of illegal downloads of blockbuster movie ‘Avatar’). One tracking firm has shown that “Avatar” was illegally downloaded 500,000 times in the first two days of the film’s release in theaters, and 980,000 times in the first week. See id. Another recent popular film, the “Twilight” sequel “New Moon,” was pirated 610,000 in its first week. See id.

202. See, e.g., Netflix, Frequently Asked Questions, http://www.netflix.com/HowItWorks (explaining how Netflix customers sign up to pay monthly dues in exchange for unlimited movie rentals that can be streamed to customers’ computers or televisions directly). Netflix CEO, Reed Hastings, recently noted that many subscribers are “switching to lower-priced plans that allow only one DVD to be out at a time, but still offer unlimited streaming.” See Paul Suarez, Are DVDs Nearing the End?, PC WORLD, Oct. 11, 2009, http://www.pcworld.com/article/173460/are_dvds_nearing_the_end.html?loomnia_ow=0:s:0:a41:826:16:c0.086328:b282 41590:20 (discussing change in Netflix subscribers’ plan options toward more online viewing and fewer physical DVD rentals). In fact, according to Price-waterhouseCoopers (“PWC”), online subscription rentals are expected to nearly double over the next five years. See Dobuzinskis, supra note 199 (noting PWC’s
charge in exchange for watching commercials that cannot be skipped. A larger profit is available for movie companies from online stores than their traditional brick-and-mortar counterparts with higher overhead costs; studios that are able to catch the wave early and ride out the transition from physical to digital will realize economic success.

D. Possible Change in Software Licensing Norms

One of the arguments against making a digital first sale doctrine is that the majority of digital media sold today is really just licensed. Therefore, if consumers are actually just paying for licenses, then they do not really “own” the digital content, and they cannot legally sell it under the first sale doctrine. This idea is common in the software industry and has served as an example for

expectation that online movie rentals will double in five years, increasing to nine percent of North American film entertainment sector). Blockbuster has a similar service that allows users to rent downloads, which come with software limiting their use during the rental period, rather than stream content like Netflix. See Blockbuster, Downloads, http://www.blockbuster.com/download/howItWorks (explaining how Blockbuster allows customers to buy or rent downloads that can be stored for up to 30 days and watched as many times as desired within 24-hours after “play” has been pressed).

203. See Motion Picture Association of America, Get Movies & TV Shows, http://www.mpaa.org/piracy_LegalOpt.asp (listing over forty websites offering free streaming media; including such stations as Disney, Cartoon Network, Fox, Discovery Channel, NBC, and USA).

204. See Dobuzinskis, supra note 199 (noting that, according to Adams Media Research, “studios get more than 70 percent of the price of an online rental at websites such as iTunes, compared with a third of that price in a store”). Also, additional revenues are anticipated from stronger advertising efforts that can be targeted more specifically based on what customers chose to view. See id. (discussing potential for greater direct Internet marketing through recording individual viewing habits). “For instance, customers who show a preference for science fiction become marketing targets for other sci-fi content.” Id.


[L]icenses historically were used to augment the protection of ideas and expressions otherwise difficult to protect under intellectual property law. Recently, however, the use of private legislation to circumvent and frustrate public legislation has expanded, due to the success of software licenses, and now owners of many types of intellectual property are relying on private legislation, rather than public legislation, to regulate users’ rights in their chattels.

Id.

206. See id. at 94 (discussing how calling transfers licenses as opposed to sales allows copyright holders to circumvent publicly-legislated restrictions, such as first sale doctrine and fair use since licenses also purport to restrict uses in addition to disposition of goods).
other industries to later follow. The terms "click wrap" and "shrink wrap" license agreements come from the notion that almost all software requires a user to accept the terms of the "End User License Agreement" before opening the shrink wrap over the box or clicking install and running the software on their computers. While lawsuits regarding the validity of these agreements often arise in court, they are rarely successful; one court, however, has recently held that a software license effectively transferred ownership rights at sale.

In *Vernon v. Autodesk, Inc.*, the Western District of Washington granted summary judgment in favor of the plaintiff who desired to prevent the defendant, a software manufacturer, from interfering with his attempts to sell copies of its very expensive AutoCAD software that he purchased from an architecture firm through eBay. Despite visible license agreement terms stating that the software may not be transferred without the defendant's permission and that "[t]itle and copyrights to the Software and accompanying materials and any copies made by you remain with Autodesk," the court decided that the terms of the license agreement as a whole conferred ownership of those copies to the plaintiff, which he was then lawfully able to resell.

The *Vernon* opinion notes the willingness of several other courts to construe some licenses as conveying ownership, too. If

207. See id. at 100 (noting that "software expedited the expansion of the use of private legislation" and that "once the [licensing] model of the software industry proved profitable and beneficial, other industries began to adopt [licensing models]").

208. See id. (mentioning development of terms such as "shrink wrap" and "click wrap" that define software license agreements).


211. See id. at *1-*6 (discussing case facts and action being tried). The plaintiff made his living by selling items on eBay, the popular Internet marketplace, and had twice been delayed by DMCA-specified takedown notices sent to eBay by defendant when it discovered what plaintiff was doing. Id. at *2-*3. In fact, the second takedown notice resulted in the plaintiff having his eBay account closed for one month. See id. (discussing Autodesk's second attempt to remove Vernon's product from eBay).

212. See *Vernon*, 2009 U.S. Dist. LEXIS 90906 at *11, *16-*28 (discussing agreement terms suggesting license and considering all other terms to determine this transaction's nature).

213. See id. at *47 (stating that other "courts across the nation have issued rulings that adopt and reject the equivalent of the parties' positions here"). In other words, the court is saying that on similar facts, some courts have favored copyright holder and others have favored consumers. See id. The court calls this cluster of decisions a "cacophony." Id. Thus, it would probably be imprudent at
this becomes a trend, then it may become even more prevalent for movies, books, and music due to their non-digital ancestors' long history of being sold outright, unlike software, which has almost always been distributed as licenses rather than wholly owned copies.

IV. Concluding Remarks

Consumers prefer greater rights when it comes to digital products they purchase. It is also clear that the digital media industry, though not entirely willingly, is moving toward using only open digital formats that neither restrict nor monitor usage, and it has done so largely without government involvement. Finally, while the common law regarding digital media rights over the past twenty-five years does not appear to have favored one side over the other (i.e. copyright holders over consumers or vice versa), there are cases that indicate a judicial willingness to expand consumer rights over digital media.214 Such cases include Vernon and the Second Circuit's recent holding in Cable News Network, Inc. v. CSC Holdings, Inc.215

In Cable News Network, plaintiff sued defendant following an announcement that defendant was offering Remote Storage DVRs that allowed users to record content without having a stand-alone DVR at home.216 Ultimately, the court rejected the notion that the act of storing shows for customers was creating an illegal copy and ruled in favor of defendant, reversing the district court decision.217

Following the Kindle e-book deletion fiasco, the American Lawyer publication asked George Borkowski, the co-chair of law firm Venable’s intellectual property litigation group, to give his

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214. Compare Depoorter, supra note 15, at 1856 (“[J]udges may not always feel comfortable providing a final judgment” and that “courts may defer judgment on the copyright status of new technology [by] . . . “decid[ing] a dispute while reserving judgment on the broader issue.”) with Vernon, 2009 U.S. Dist. LEXIS 90906 (providing greater protection to consumer rights over those of digital media) and Cable News Network, 536 F.3d 121, 140 (2d Cir. 2008) (holding that Digital Video Recorders (“DVRs”), used to record shows for later viewing, that were stored and maintained off-site—that is, stored and maintained by company outside of users' homes rather than by users directly in their homes—did not violate content providers' copyrights).

215. 536 F.3d 121 (2d Cir. 2008). For a discussion of the Vernon case, see supra notes 209-213 and accompanying text.

216. See Cable News Network, 536 F.3d at 125-24 (announcing new Remote Storage DVR system and comparing them to traditional DVR systems).

217. See id. at 140 (ruling on case, reversing district court decision, and lifting injunction against defendant).
opinion on the incident. When asked what kinds of legal issues society is likely to face regarding ownership of e-books, Borkowiski answered that "there's often a business solution that makes legal resolution unnecessary because the rights holders are happy with the arrangement so you never reach the difficult legal issues." While this appears to have been the case with the music industry, it is still too early to tell how things will turn out for the other digital media industries.

Though current industry actions suggest that e-books and movies are paying attention to the music industry's mistake of waiting too long to transition to business models fit for the digital age, there is still good reason for legislative involvement. As suggested by the Legal Director for the Electronic Frontier Foundation, Cindy Cohen, "people are going to get uncomfortable with applying . . . software licensing model[s] to all sorts of things in their lives that they used to just own." And for now, as e-books continue to grow in popularity, it looks as though the publishing industry is headed the same way as the music industry; and the potential harm suffered could be even greater than that borne by musicians. Unlike musicians who can potentially distribute their work for free like the band Nine Inch Nails and still make a good living by selling out concerts and licensing works for film, authors are unlikely to have tens of thousands of screaming fans lining up to hear them read their newest book aloud. Therefore, "[l]ike so many other problems created by the interaction of copyright law with a new


219. See Heintz, supra note 218 (quoting Venable attorney's answer to possible legal issues that will result from Amazon's e-book deletion).

220. See Fowler, supra note 171 (quoting electronic rights attorney's prediction regarding future consumer acceptance of licensing agreements in place of actual ownership protected by principles such as first sale doctrine).

221. See Stross, supra note 196 (noting early signs that digital books are going to become subject of piracy like music, except musicians have broader business models that provide greater flexibility).

222. See id. (comparing musicians to authors with regard to generating revenue if it were such that all digital works were being given away by copyright holders for free).
technology, '[t]here can be no really satisfactory solution to the problem. . . until Congress acts.'"\(^{223}\)

\(\text{Matthew Friedman}\)

\(^{223}\) Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 500 (1984) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 167 (1975) (dissenting opinion)).

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