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# The Creation of an “Access Right” in the Ninth Circuit’s Digital Copyright Jurisprudence

## INTRODUCTION

In early 2011, a new motion-picture streaming service called Zediva quietly debuted, hoping to exploit a perceived loophole in the federal copyright law.<sup>1</sup> The service offered to play movies over the Internet, streaming them directly from lawfully acquired DVDs it had assigned to each customer.<sup>2</sup> Zediva therefore maintained that it was renting those DVDs to its customers rather than “performing” them, as copyright law generally understands on-demand or streaming services to do.<sup>3</sup> Accordingly, Zediva argued that its use did not infringe,<sup>4</sup> and it elected not to acquire the public-performance licenses that copyright law generally requires for such services.<sup>5</sup> The motion-picture studios, their paying, online licensees, and the U.S. District Court for the Central District of California, however, were not amused by this clever legal argument.<sup>6</sup> Zediva was enjoined from operation within four months of its launch.<sup>7</sup>

Digital reproduction and performance pose difficult analytical questions in the context of copyright-infringement litigation. The Zediva case is among the latest in a series of cases<sup>8</sup> that demonstrate copyright law’s strained applicability to the digital distribution of media content. This tension may stem from the fact that American copyright law traces its basic

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<sup>1</sup> See Ryan Singel, *Streaming Movie Service Zediva Pays Hollywood \$1.8M, Shuts Down*, WIRED.COM: THREAT LEVEL BLOG (Oct. 31, 2011 8:18 PM), <http://www.wired.com/threatlevel/2011/10/streaming-movie-service-zediva-pays-hollywood-1-8m-shuts-down/>.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*; Warner Bros. Entm’t Inc. v. WTV Sys., Inc., 824 F. Supp. 2d 1003, 1007 (C.D. Cal. 2011).

<sup>4</sup> See *infra* text accompanying note 37. There was no allegation that Zediva was reproducing the DVDs.

<sup>5</sup> Warner Bros., 824 F. Supp. 2d at 1005-08.

<sup>6</sup> *Id.* at 1013 n.9 (“Defendants’ competition with Plaintiffs’ licensees is direct and intentional.”).

<sup>7</sup> *Id.* at 1015.

<sup>8</sup> See *infra* notes 52-62 and accompanying text.

contours to England during the early days of the printing press,<sup>9</sup> as well as the fact that liability for infringement under the Copyright Act<sup>10</sup> arises principally from the reproduction, distribution, or public performance<sup>11</sup> of creative works that have been “fixed in any tangible medium.”<sup>12</sup> As a result, content owners have increasingly called upon the courts to stretch the traditional rules as digital distribution technologies continue to shift the focus of litigation away from culpability and incentives and toward the threshold questions of whether a copy has been made or a public performance rendered.<sup>13</sup>

Two recent lines of cases in the Ninth Circuit provide digital content owners a more coherent cause of action, which represents an alternative to reproduction- and performance-based infringement claims.<sup>14</sup> Under these cases, the ability to control *access* is added to the copyright holder’s existing exclusive rights under the Copyright Act’s liability provision, 17 U.S.C. § 106.

In the first line of cases, the Ninth Circuit in *MDY Industries v. Blizzard Entertainment, Inc.* conclusively took sides in a decade-long split among the Courts of Appeals over the proper construction of the 1998 Digital Millennium Copyright Act’s (DMCA) anticircumvention provisions.<sup>15</sup> During the past decade or so, copyright-protected media such as software, movies, e-books, and song downloads have been commonly distributed in digital form under virtual lock and key.<sup>16</sup> Accordingly, when the DMCA was enacted, it included three related provisions that made it unlawful to circumvent such measures without authority, to market technologies designed for that purpose, or to facilitate infringement.<sup>17</sup> Following the statute’s enactment, however, leading cases in

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<sup>9</sup> See DAN HUNTER, *THE OXFORD INTRODUCTIONS TO U.S. LAW: INTELLECTUAL PROPERTY* 8-9 (2012).

<sup>10</sup> 17 U.S.C. §§ 101-122 (2006).

<sup>11</sup> *Id.* § 106. This operative section also attaches prima facie infringement liability for the creation of certain derivative works, the public display of certain visual works, and the digital transmission of audio works.

<sup>12</sup> *Id.* § 102.

<sup>13</sup> See *infra* notes 52-64 and accompanying text.

<sup>14</sup> See *infra* note 29 and accompanying text.

<sup>15</sup> *MDY Indus. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 943-52 (9th Cir. 2010) (construing 17 U.S.C. §§ 1201-1205).

<sup>16</sup> Such protections are referred to in the legislative history of the DMCA, and the cases applying it, as “technological protective measures.” See *infra* note 93 and accompanying text.

<sup>17</sup> See 17 U.S.C. § 1201(a)(1), (a)(2) & (b)(1). To “circumvent” means to descramble, decrypt, or otherwise “avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner . . . .” *Id.* § 1201(a)(3)(A); see also *infra* note 119.

the Second Circuit and Federal Circuit disagreed about whether liability should attach under the DMCA when the act of circumvention is unconnected to an act of infringement under the Copyright Act.<sup>18</sup> Against this background, the *MDY* decision made clear that unauthorized circumvention is a new cause of action protecting copyrighted works, not simply a prophylactic measure intended to discourage digital infringement.

*MDY* was significant because disagreements about the DMCA’s proper relationship to infringement ran deep. Arguments against this kind of new intellectual property right governing access date back to the legislative bargaining that preceded the DMCA’s enactment in 1998.<sup>19</sup> As early as 2001, one critic observed that the DMCA “[sought] for the first time to . . . make noncommercial and noninfringing behavior illegal on the theory that it will help prevent piracy.”<sup>20</sup>

Anticircumvention decisions spanning the decade that followed have been defined by the wide variety of circumstances where § 1201 has been applied. Leading cases concern DVDs, garage-door openers (GDOs) and the online game World of Warcraft (WoW).<sup>21</sup> Each litigation, moreover, is attended by a menagerie of interested amicus parties. These parties include commercial content providers who seek to capitalize on new technology, on the one hand, and an alliance of academics, content creators, consumer advocates, and commercial interests, on the other hand, who fear that broadly construed anticircumvention laws will erode traditional limits on copyright protection that they view as necessary to protect consumers and derivative artists.<sup>22</sup>

A second line of cases clarified (at least indirectly) when DMCA liability would come into play. Because DMCA liability attaches only when access is unauthorized,<sup>23</sup> its usefulness to plaintiffs who have placed an expressive work on the market depends on the kinds of uses those plaintiffs may deem

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<sup>18</sup> Compare *Universal City Studios v. Corley*, 273 F.3d 429, 443-44 (2d Cir. 2001) (allowing DMCA liability absent showing of infringement), with *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004) (predicating DMCA liability on a “nexus” to an act of infringement).

<sup>19</sup> For a detailed legislative history of the DMCA, see generally JESSICA LITMAN, *DIGITAL COPYRIGHT* 122-50 (2001).

<sup>20</sup> *Id.* at 145.

<sup>21</sup> See *Corley*, 273 F.3d at 435 (DVDs); *Chamberlain*, 381 F.3d at 1183 (GDOs); *MDY Indus. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 934-35 (9th Cir. 2010) (WoW).

<sup>22</sup> See, e.g., *infra* note 139.

<sup>23</sup> See 17 U.S.C. § 1201(a)(3)(A) (2006).

unauthorized.<sup>24</sup> As a general matter, downstream control of an expressive work is disfavored.<sup>25</sup> But in *Apple Inc. v. Psystar Corp.*,<sup>26</sup> decided less than a year after *MDY*, the Ninth Circuit rejected challenges to the software industry's "ubiquitous" license-based distribution model.<sup>27</sup> The court refused to invalidate a contractual restraint on the use of Apple's software because it found that the restraint did not constrain competition and thus implicate the doctrine of copyright misuse (as Psystar argued it did).<sup>28</sup> In other words, the court confirmed that Apple was entitled to contractually alienate a customized set of entitlements to access or use its software in whatever way Apple thought best.

Read together, these two lines of cases validate a contractual and statutory ordering that allows efficient, tailored, access-based digital content transactions, and they protect that mechanism with a copyright-based cause of action that avoids the tortured analysis required by infringement claims like those brought in the Zediva case. The resulting legal regime reflects a heretofore theoretical vision of the copyright law that has been termed an "access right," proposed by scholars who posit that online-content consumers increasingly care about experiencing works rather than owning copies of them.<sup>29</sup> As consumer content moves to the "cloud,"<sup>30</sup> where the distinction between a copy and a performance is more likely to be invisible to the consumer, this access-based approach to protecting creative works provides an alternative to traditional infringement claims that is both more workable and better suited to the digital marketplace.<sup>31</sup> As this happens, the reach of

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<sup>24</sup> See *infra* note 171 and accompanying text.

<sup>25</sup> See *infra* note 244 and accompanying text.

<sup>26</sup> *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150 (9th Cir. 2011). The court relied heavily on its prior decision in *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010). See *Psystar*, 658 F.3d at 1155-59.

<sup>27</sup> *Psystar*, 658 F.3d at 1155, 1159; see also *infra* Part I.B.

<sup>28</sup> *Psystar*, 658 F.3d at 1159-60.

<sup>29</sup> See generally, e.g., ZOHAR EFRONI, ACCESS-RIGHT: THE FUTURE OF DIGITAL COPYRIGHT LAW (2011) (presenting a detailed positive and normative analysis of the right); Jane C. Ginsburg, *Essay: From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC'Y U.S.A. 113, 115-16 (2003) (providing a prediction about the trend toward an access right in existing law following the enactment of the DMCA). The term is used in this note as Professors Ginsburg and Efroni use it: to mean the *exclusive* right enjoyed by copyright holders, as opposed to a right of access on the part of content consumers.

<sup>30</sup> "The general idea of the 'cloud' is to store your media on the internet so you can access it from any device anywhere, as opposed to leaving it on a hard drive." Brian X. Chen, *From iCloud to Dropbox: 5 Cloud Services Compared*, WIRED.COM: GADGET LAB (June 20, 2011, 3:05 PM), <http://www.wired.com/gadgetlab/2011/06/cloud-services-compared/>.

<sup>31</sup> See *infra* notes 184-87 and accompanying text.

the DMCA must be tempered by the same kinds of limitations that have traditionally shaped § 106 infringement liability.<sup>32</sup>

The descriptive aim of this note is twofold. Part I examines *Psystar* and *MDY* in the broader context of digital copyright infringement jurisprudence, focusing on these cases’ impact in extending legal relief to a category of conduct I will call *unauthorized noninfringing use* in a variety of content markets. Part II posits that as the physical situs of a digital copy becomes increasingly invisible to the consumer, *Psystar* and *MDY* can be read together as a successful attempt to moot the most difficult interpretive questions about infringement while providing an alternative regime of protection like the one contemplated by the “access right” literature. As a normative matter, this part will urge plaintiffs and courts to embrace this cause of action in the digital context but to preserve traditional infringement liability for those factual settings where it remains coherent. Finally, Part III examines common concerns raised by an access-protection regime and calls for legitimizing limits on the statutory monopoly that the DMCA grants over expressive works. It finds them in *Psystar*’s recognition of the nascent copyright misuse doctrine, and calls for further judicial development of that doctrine.

## I. BACKGROUND

### A. *The Evolution of Digital Copyright*

No author is obliged to place her work into the marketplace, but copyright law is concerned with the limitations that may be placed on it once it is there.<sup>33</sup> In the United States, copyright law is governed by the Copyright Act of 1976.<sup>34</sup> The Act finds its constitutional support in the Progress Clause, which empowers Congress “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .”<sup>35</sup> Liability for infringement under the Copyright Act is governed by § 106,

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<sup>32</sup> See, e.g., Ginsburg, *supra* note 29, at 125 (“Even granting that an access right is a Good Thing, is it nonetheless too much of one, at least as implemented by the DMCA?”).

<sup>33</sup> Randal C. Picker, *Fair Use v. Fair Access*, 31 COLUM. J.L. & ARTS 603, 605-06 (2008).

<sup>34</sup> 17 U.S.C. §§ 101-122 (2006).

<sup>35</sup> U.S. CONST. art. I, § 8, cl. 8.

which grants to the owner of a copyright<sup>36</sup> the exclusive right “(1) to *reproduce* the copyrighted work . . . ; (3) to *distribute copies* or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; [and] (4) . . . to *perform* the copyrighted work publicly . . . .”<sup>37</sup> Perhaps equally as important, these grants of exclusivity are limited in scope by other provisions of the Act. Under § 107, a variety of conduct that would otherwise be infringing under § 106 constitutes “fair use” and is exempted from liability.<sup>38</sup> Under § 109, which codifies the “first sale doctrine,” once a copy of a work is lawfully acquired, its further sale or transfer cannot be restrained by the copyright owner.<sup>39</sup> This tension between the Act’s exclusive rights and its statutory exclusions forms the contours of what has been called a “bargain” between authors and a public that “trades certain freedoms [to use the work] in exchange for more public works to enjoy.”<sup>40</sup>

Against this statutory background, copyright has continued to evolve to keep pace with media distribution technologies.<sup>41</sup> Under the 1976 Copyright Act, copyright protection was explicitly extended to works that require the assistance of a machine (such as a turntable or DVD player) to experience.<sup>42</sup> In more recent decades, photocopiers and

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<sup>36</sup> The owner of a copyright might be the author of an expressive work or her assignee. See 17 U.S.C. § 201.

<sup>37</sup> *Id.* § 106 (emphasis added). The remaining exclusive rights granted include: “(2) to prepare derivative works . . . ; (5) . . . to display the copyrighted work publicly; and (6) . . . to perform the copyrighted work publicly by means of a digital audio transmission.” Notably, possessing and accessing a work without authorization are absent from the list of conduct proscribed by the statute.

<sup>38</sup> *Id.* § 107; see also Picker, *supra* note 33, at 605 (emphasizing that fair use provides an affirmative defense to otherwise infringing conduct, rather than “some broad ‘right’ to fair use”).

<sup>39</sup> 17 U.S.C. § 109 (“[T]he 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.”) (codifying the doctrine established in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908)).

<sup>40</sup> Richard Stallman, *Reevaluating Copyright: The Public Must Prevail*, 75 OR. L. REV. 291, 292 (1996) (adding skeptically that “in practice, usually publishers take over the authors’ part of the bargain”). The Supreme Court has held that “[t]he rights of a . . . copyright holder are part of a ‘carefully crafted bargain’ . . . .” *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (refusing to extend trademark protection to content of documentary film series after the expiration of its copyright).

<sup>41</sup> See HUNTER, *supra* note 9, at 48-49; Ginsburg, *supra* note 29, at 114-16.

<sup>42</sup> 17 U.S.C. § 101 (defining “[c]opies” as “material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”); see also, generally, JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL

magnetic media, such as audio- and video-cassette tapes, made home *reproduction* of copyright-protected works accessible to the average consumer.<sup>43</sup> The U.S. Supreme Court's *Magna Carta* for consumer reproduction was the "Betamax case,"<sup>44</sup> in which television-studio plaintiffs alleged that Sony was liable for contributory infringement when it marketed and sold Betamax home-video recorders that facilitated reproduction of their broadcasts.<sup>45</sup> The Court held that a manufacturer of a consumer recording device capable of "substantial noninfringing uses" is exempt from vicarious infringement liability even if the device may also be used by third parties to make infringing reproductions.<sup>46</sup> The Court then held that consumer use of a VCR to "time-shift" a television broadcast by reproducing it onto a VHS tape to watch later constitutes a noninfringing "fair use" of a copyright-protected work.<sup>47</sup> Because fair use is legally considered noninfringing, the Court held that the substantial-noninfringing-use requirement was met on the facts before it.<sup>48</sup>

The home reproduction of the 1980s has since gone online, raising more and harder questions. Famously, for example, the Supreme Court distinguished the Betamax case in the context of internet file-sharing networks designed specifically to profit from users' infringement.<sup>49</sup> In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, the Court held that, unlike the *Sony* defendants, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."<sup>50</sup> The Court also noted evidence that the software-based reproduction technology at issue,

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INFORMATION ECONOMY 24-27 (2d ed. 2006) (describing "Legal Responses to New Technologies" culminating in the 1976 Copyright Act).

<sup>43</sup> See Ginsburg, *supra* note 29, at 114 (observing that "perhaps the most significant post-printing press technological event for copyright law was the development of mass market audio- and then video-copying devices, because these devices enabled end-users to create physical copies out of previously ephemeral radio and television transmissions.").

<sup>44</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); see, e.g., Peter S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 COLUM. J.L. & ARTS 375, 376 (2009) (citing, among others, Professors Randall Picker, Jessica Litman, and Pamela Samuelson).

<sup>45</sup> *Sony Corp.*, 464 U.S. at 419-20.

<sup>46</sup> *Id.* at 442.

<sup>47</sup> *Id.* at 453-55 (applying 17 U.S.C. § 107).

<sup>48</sup> *Id.*

<sup>49</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 918 (2005) (reversing summary judgment in favor of defendant peer-to-peer file-sharing website).

<sup>50</sup> *Id.* at 919.



unlike a Betamax, was capable of facilitating infringement on a “gigantic scale.”<sup>51</sup>

Copyright infringement cases in the digital era can be distinguished not only by malice or scale but also by analytical formalism. In the on-demand broadcast and streaming contexts, recent infringement case law has hinged on the ontological question of whether and what kind of electronic copies of a work exist on the defendant’s server. By way of example, the success of a content owner’s attempt to enforce reproduction and performance rights in digitally recorded works can turn on factual details as nuanced as whether a defendant broadcaster employs a single “master copy” in the transmission of on-demand programming.<sup>52</sup> This analysis, grounded in the language of the Copyright Act, means that the method an intermediary uses to store its works will impact its liability for infringement. Unsurprisingly, jurisdictional splits regarding the specifics have emerged.

In *Cartoon Network LP v. CSC Holdings, Inc.*,<sup>53</sup> the Second Circuit examined defendant Cablevision’s “RS-DVR” system, which customers could use to record and play back the plaintiffs’ television broadcasts from a remote server.<sup>54</sup> Content providers sought to recover on theories of direct infringement.<sup>55</sup> The court held that Cablevision’s customer-initiated transmissions of customer-made copies of such broadcasts were not performances to the public.<sup>56</sup>

The court accepted Cablevision’s argument that “because each RS–DVR transmission is made using a single unique copy of a work . . . that can be decoded exclusively by that subscriber’s cable box, only one subscriber is capable of receiving any given

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<sup>51</sup> *Id.* at 940.

<sup>52</sup> *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 649 (S.D.N.Y. 2011).

<sup>53</sup> 536 F.3d 121 (2d Cir. 2008).

<sup>54</sup> *Id.* at 124.

<sup>55</sup> *Id.* (“Critically for our analysis here, plaintiffs alleged theories only of direct infringement, not contributory infringement . . . .”); *see also id.* at 139-40 (emphasizing that its holding did not “generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies” because vicarious liability might still attach).

<sup>56</sup> *Id.* at 134. The court also held that Cablevision’s (approximately) one-second buffering of the plaintiffs’ broadcast transmission was “transitory,” that is, not a fixation of sufficient duration to constitute unauthorized copying. *Id.* at 129-30. As to the copies that were made on Cablevision’s RS-DVR servers when customers recorded a show, the court held that Cablevision’s conduct (unlike that of its customers) lacked the volitional element of direct infringement. *Id.* at 131-32.

RS–DVR transmission.”<sup>57</sup> This meant that its transmission was not made to the public under the “transmit clause” of § 101,<sup>58</sup> which, the court noted, “directs us to consider the potential audience of a given transmission.”<sup>59</sup> The court then held that “because the RS–DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, . . . the universe of people capable of receiving an RS–DVR transmission is the single subscriber whose self-made copy is used to create that transmission.”<sup>60</sup>

In *Capitol Records, Inc. v. MP3Tunes, L.L.C.*, the U.S. District Court for the Southern District of New York followed and refined *Cartoon Network* when it held that a “virtual locker” service provider was not directly liable for infringement on the basis of a public performance because it “d[id] not use a ‘master copy’ to store or play back songs stored in its lockers”<sup>61</sup> but, rather, “use[d] a standard data compression algorithm that eliminate[d] redundant digital data.”<sup>62</sup>

But in the *Zediva* case, in contrast, the U.S. District Court for the Central District of California held that the defendant streaming service was publicly performing the works it played back to customers from individual DVDs (which it had purchased).<sup>63</sup> The court held that these transmissions were “to the public’ because the relationship between Defendants . . . and the audience . . . is a commercial, ‘public’ relationship regardless of where the viewing takes place.”<sup>64</sup>

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<sup>57</sup> *Id.* at 135.

<sup>58</sup> 17 U.S.C. § 101 (“To perform or display a work ‘publicly’ means (1) to perform or display it . . . or (2) to transmit or otherwise communicate a performance or display of the work . . . to the public . . .”). This definitional clause governs liability via § 106.

<sup>59</sup> *Cartoon Network*, 536 F.3d at 135.

<sup>60</sup> *Id.* at 137. As Jeffrey Malkan explains the case,

[t]he studios needed to convince the court that RS-DVR is a type of [video on demand, or VOD] and hence subject to their public performance right. The challenge that Cablevision faced was . . . to convince the court that[, unlike VOD,] RS-DVR would not give rise to public performances because each RS-DVR transmission would emanate from a distinct copy.

Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 OR. L. REV. 505, 522 (2010).

<sup>61</sup> *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 650 (S.D.N.Y. 2011).

<sup>62</sup> *Id.*

<sup>63</sup> *Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1010 (C.D. Cal. 2011).

<sup>64</sup> *Id.*; see also *id.* at 1011-12 & n.7. The court relied on *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991). That case was disagreed with and distinguished by *Cartoon Network*, the decision on which *MP3Tunes* relied.

Infringement analysis in the context of computer software is more complex yet, since the individual use of most software *requires* temporary duplication of the work into the computer's random access memory (RAM).<sup>65</sup> Thus, theoretically, each use of a particular copy of a software program temporarily creates another copy, implicating the reproduction right of § 106.<sup>66</sup> In response to this idiosyncrasy, Congress enacted the "essential step" defense, under which a user may avoid liability during routine use of the software.<sup>67</sup> But Congress afforded protection only to RAM copies made by *owners* of a copy of the copyrighted program, leaving unprotected those made by a software licensee.<sup>68</sup> As a result, the question of whether a software copyright has been infringed by routine use becomes simply the question of whether the defendant owned or has licensed the copy of the software and, if licensed, whether the defendant's use was contractually authorized.

In sum, the marriage of digital content distribution and traditional copyright law gives rise to a set of interpretive questions that have shifted the focus of copyright litigation from the culpability of the defendant's conduct or the incentives animating the copyright bargain<sup>69</sup> to the technological formalism of reproduction and performance. Moreover, the application of the RAM copy doctrine has given rise to legal standards that differ on the basis of a technological quirk. To begin explaining how the Ninth Circuit has enacted a viable alternative premised on access, the next sections will examine that court's recent decisions governing technological protective measures (TPMs) and software license agreements (SLAs) in the context of DVDs, GDOs, and WoW.<sup>70</sup>

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<sup>65</sup> See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993).

<sup>66</sup> See *id.* at 518 (holding that "[defendant's] loading of copyrighted software into RAM creates a 'copy' of that software in violation of the Copyright Act").

<sup>67</sup> 17 U.S.C. § 117(a) (2006) (Notwithstanding § 106, it is permissible for "the owner of a copy of a computer program to make . . . another copy or adaptation of that computer program provided . . . that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner . . .").

<sup>68</sup> *Id.*; see also *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1109-10 (9th Cir. 2010) (explaining *MAI Systems* and emphasizing that under § 117, licensees are *not* entitled to the exception).

<sup>69</sup> See *supra* note 40 and accompanying text.

<sup>70</sup> See *supra* note 21.

### B. *The Licensing Cases*

Computer software transactions generally do not involve the purchase of a copy of certain software but rather the purchase of a license to use a copy of the software.<sup>71</sup> The terms of the license, of course, set forth the permissible uses of the copy. At the most basic level, the transaction is not unique to digital media. In video stores and libraries, a fee is paid (or perhaps a borrower has paid taxes) in exchange for the right to take possession of a tangible copy of a work. Appurtenant to the right to possess this chattel, it is understood, is a more or less unfettered right to access and enjoy the creative work recorded thereon. Also accompanying the copy is the right to make fair use reproductions, performances, and the like. The terms of the rental as well as personal property law place limits on possession of the copy; copyright law places extrinsic limits on the use of the work.

Software makers, in particular, like distributing their work under license because the RAM copy doctrine makes each unauthorized use a prima facie infringement; this means that downstream control can be enforced by contract, although consumers have resisted such control. In *Vernor v. Autodesk, Inc.*, defendant Timothy Vernor (acting privately) purchased unused, sealed CD-ROM copies of plaintiff Autodesk’s design software from an Autodesk customer and resold them through an online-auction website.<sup>72</sup> The court found that the software product at issue had been distributed pursuant to a software license agreement that barred resale.<sup>73</sup> This carried two legal consequences: Vernor had infringed the plaintiff’s exclusive distribution right and, at the same time, had contributed to his customers’ infringement of its exclusive reproduction right by making RAM copies when they used the software.<sup>74</sup> Had Vernor, his supplier, and his customers all owned the software he resold, he would have been protected from all such liability by affirmative defenses.<sup>75</sup> But the court articulated his trouble with useful clarity:

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<sup>71</sup> Brief of Amicus Curiae Business Software Alliance in Support of Appellees and Cross-Appellants Blizzard Entertainment, Inc. and Vivendi Games, Inc. Seeking Affirmance at 20-28, *MDY Indus. v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010) (Nos. 09-15932 & 09-16044), 2009 WL 5538916.

<sup>72</sup> *Vernor*, 621 F.3d at 1103.

<sup>73</sup> *Id.* at 1103-04.

<sup>74</sup> *Id.*

<sup>75</sup> See *supra* notes 39, 67 and accompanying text.

The exclusive distribution right is limited by the *first sale doctrine*, an affirmative defense to copyright infringement that allows owners of copies of copyrighted works to resell those copies. The exclusive reproduction right is limited within the software context by the *essential step defense*, another affirmative defense to copyright infringement . . . Both of these affirmative defenses are unavailable to those who are only licensed to use their copies of copyrighted works.<sup>76</sup>

Liability of both forms thus hinged on whether Vernor's supplier had, itself, purchased or licensed the software in the first place.<sup>77</sup> Vernor argued that his supplier owned its copies because, essentially, the characteristics of Autodesk's initial transaction were those of a sale.<sup>78</sup> Distilling its own and other relevant precedent, the court established "three considerations that . . . determine whether a software user is a licensee, rather than an owner of a copy."<sup>79</sup> The resulting test asks whether the copyright owner "(1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions."<sup>80</sup> The court held that Vernor's supplier had been a licensee, and that he and his customers were not entitled to the first sale or essential step defenses.<sup>81</sup>

Neither the district court nor the Ninth Circuit in *Vernor* reached the question of whether Autodesk's SLA constituted copyright misuse.<sup>82</sup> That question was taken up again in *Psystar*.<sup>83</sup> In that case, the defendant computer manufacturer purchased unopened DVD copies of Apple's "OS X" operating system software,<sup>84</sup> installed it on competing hardware products, and sold it to consumers in violation of the Apple SLA.<sup>85</sup> Psystar

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<sup>76</sup> *Vernor*, 621 F.3d at 1107.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1113-14.

<sup>79</sup> *Id.* at 1110.

<sup>80</sup> *Id.* at 1111.

<sup>81</sup> *Id.* at 1116.

<sup>82</sup> *Id.* at 1115-16.

<sup>83</sup> *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150 (9th Cir. 2011).

<sup>84</sup> The medium on which the software was delivered (and thus, necessarily, the distinction between Apple's DVD and Autodesk's CD-ROM) was immaterial to these cases. The *Psystar* court, for example, found that "buyers of that DVD purchased the disc. They knew, however, they were not buying the software. Apple's SLA clearly explained this." 658 F.3d at 1159.

<sup>85</sup> *Id.* at 1153. Defendant Psystar provided an unopened copy of the Apple software with each system sold, allowing it (like the similarly creative Zediva defendants) to maintain that it had purchased a copy. *Id.* In fact, the computer was running on an altered version of the Apple software which circumvented Apple's technological self-defense mechanism. *Id.* Private users appear still to embrace the use of OS X in this manner. See generally *OSx86 Project*, INSANELYMAC, <http://www.insanelymac.com/forum/forum/85-osx86-project/> (last visited Nov. 2, 2012).

did not appeal the lower court’s finding of prima facie infringement but argued that Apple’s claim was barred by the misuse doctrine,<sup>86</sup> which the court described as a judge-made affirmative defense to § 106 liability aimed at “preventing holders of copyrights from leveraging their limited monopoly to allow them control over areas outside the monopoly.”<sup>87</sup>

Applying *Vernor*, the court held that § 109 did not preserve the right of customers to resell software that had been licensed rather than sold, and that the distinction between sales and licenses was “well established.”<sup>88</sup> The court examined the development of copyright misuse and held that it should be applied “sparingly” and only in situations where license terms restricted the use or development of competing products.<sup>89</sup> Otherwise, under “firmly rooted” principles of copyright law—such as those governing theatrical film prints—copies could be licensed and the terms of those licenses “may reasonably restrict” a licensee’s use.<sup>90</sup> The court held that the license restrictions at bar were not of the kind that would trigger copyright misuse.<sup>91</sup> This holding’s negative implications—that is, the scope of restrictions that *do* constitute copyright misuse—remain to be determined.<sup>92</sup> This note argues that this unsettled copyright misuse doctrine is the key to the coherence of the Ninth Circuit’s anticircumvention jurisprudence. We turn next, however, to the DMCA and its various judicial constructions.

### C. *The Circuit Split over Anticircumvention*

#### 1. The Digital Millennium Copyright Act

The DMCA contains three operative provisions concerned with circumvention of technological protective measures.<sup>93</sup> Under

<sup>86</sup> *Psystar*, 658 F.3d at 1152.

<sup>87</sup> *Id.* at 1157 (internal quotation marks omitted).

<sup>88</sup> *Id.* at 1156.

<sup>89</sup> *Id.* at 1157.

<sup>90</sup> *Id.* at 1159.

<sup>91</sup> *Id.* at 1160 (holding that “Apple’s SLA . . . represents the legitimate exercise of a copyright holder’s right to conditionally transfer works of authorship, and does not constitute copyright misuse.”).

<sup>92</sup> See Petition for Writ of Certiorari, *Psystar*, 658 F.3d 1150 (No. 11-812), available at 2011 WL 6934738, at \*9 (Dec. 27, 2011). Certiorari was denied. 132 S. Ct. 2374 (2012).

<sup>93</sup> The term “technological protective measures” appears in the legislative history, but not the text, of the DMCA. See 17 U.S.C. § 1201 (2006); *MDY Indus. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 947 (9th Cir. 2010) (citing S. REP. NO. 105-190, at 12 (1998)). TPM are also “commonly referred to as digital rights management (DRM).” Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 902-03 (2011).

the first, § 1201(a)(1), “No person shall circumvent a technological measure that effectively *controls access* to a work protected under this title.”<sup>94</sup> Moreover, under § 1201(a)(2), “No person shall . . . *traffic* in any technology . . . that . . . is primarily designed or produced for the purpose of circumventing” the same.<sup>95</sup> These paired provisions target the same species of circumvention by creating liability for the act of circumvention itself and for trafficking in a facilitating technology, respectively. The third operative anticircumvention provision, § 1201(b)(1), targets conduct bearing a subtle, yet important, difference:

No person shall . . . traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively *protects a right of a copyright owner* under this title in a work or a portion thereof . . .<sup>96</sup>

On its face, therefore, § 1201 has distinct provisions targeting access, on one hand, and copying (or perhaps performance), on the other.

When the DMCA was enacted, the known universe of TPMs included copy-protection technologies that did not impact access, as well as access-protection measures.<sup>97</sup> Scholars have assumed that copy-protection technologies were the focus of § 1201(b) because to “protect[] a right of a copyright owner” in large part means, it can be argued, to prevent copying.<sup>98</sup> Courts have agreed,<sup>99</sup> reasoning also that because Congress intended § 1201(b) to target only technologies that can (or do) facilitate § 106 violations, an additional statutory prohibition on the

<sup>94</sup> 17 U.S.C. § 1201(a)(1)(A) (emphasis added).

<sup>95</sup> *Id.* § 1201(a)(2)(A) (emphasis added).

<sup>96</sup> *Id.* § 1201(b)(1)(A) (emphasis added).

<sup>97</sup> See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 534-35 (1999). For the purposes of this note, measures that only restrict copying will be referred to as copy-protection.

<sup>98</sup> See, e.g., LITMAN, *supra* note 19, at 136 & n.18; see also *id.* at 143-44 (noting that § 1201(b), concerned with copy-protection technology, “did not prohibit individual consumers’ circumvention of copy-protection technology—that is, measures that prevent infringement of the copyright in a work. Individuals may still, if their purpose is otherwise lawful, devise a trick to defeat Macrovision, [a technology] which seeks to prevent copying of commercial videotapes”).

<sup>99</sup> See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001) (explaining that “the focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright” (citing S. REP. NO. 105-190, at 11-12 (1998))).

underlying act would have been redundant.<sup>100</sup> For these reasons, § 1201(b) is not generally viewed as having created a new kind of right for copyright owners. In contrast, it was the interpretation of § 1201(a)—the access provision—that drove DMCA litigation for more than a decade. The next section turns to its first judicial construction.

## 2. The Second Circuit’s Interpretation of § 1201(a) in *Corley*

While the former has been the provision principally in dispute, the distinction in language between § 1201(a) and 1201(b) remains central to the debate over the DMCA’s relationship to infringement. The twin provisions of § 1201(a) are concerned with protective measures that “control access to a work,” while § 1201(b) is concerned with protective measures that “protect the rights of a copyright owner.”<sup>101</sup> These provisions did not have to wait long for judicial construction. In 2001, a group of motion-picture studios filed suit against Eric Corley, the publisher of a software-industry magazine, alleging that he had violated the DMCA by trafficking in a circumvention technology when he published the source code for a controversial decryption program devised by a Norwegian hacker.<sup>102</sup> The program’s operation was surprisingly mundane. The DVD format was governed by a licensing body made up of movie studios, electronics companies, and other stakeholders.<sup>103</sup> An encryption technology called CSS ensured that commercially produced DVDs would play back only on licensed devices like store-bought DVD players and computers running approved software.<sup>104</sup> The circumvention technology at issue, a computer program aptly called DeCSS, allowed home users to remove this encryption.<sup>105</sup> To be clear, this was not a copy-protection technology; in fact, DVDs encrypted with CSS could readily be duplicated using commercially available equipment

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<sup>100</sup> See, e.g., *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1195 (Fed. Cir. 2004) (citing S. REP. NO. 105-90 at 12 (1998)) (conceding that within the four corners of the statute, “[t]he prohibition in 1201(a)(1) [was] necessary because prior to [the DMCA], the conduct of circumvention was never before made unlawful. The device limitation in 1201(a)(2) enforces this new prohibition in conduct. The copyright law has long forbidden copyright infringements, so no new prohibition was necessary. The device limitation in 1201(b) enforces the longstanding prohibitions on infringements” (third alteration in original)).

<sup>101</sup> 17 U.S.C. § 1201(a)-(b) (emphasis added).

<sup>102</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435-39 (2d Cir. 2001).

<sup>103</sup> *Id.* at 436-37.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 437-38.



with their encryption intact.<sup>106</sup> Thus, CSS was *not* effective self-help against duplication or public performance, the actions which § 106 prohibits. In other words, all DeCSS did was to allow DVDs to be privately viewed on unlicensed platforms like laptop computers.<sup>107</sup> Corley reprinted the code for DeCSS on his web site, giving rise to the suit.<sup>108</sup> Although there was no evidence in the record that the software in question had been used to facilitate infringement, it was clear that content providers feared the worst.<sup>109</sup>

Corley and his company argued that “an individual who buys a DVD has the ‘authority of the copyright owner’ to view the DVD, and therefore is exempted from the DMCA pursuant to § 1201(a)(3)(A) when the buyer circumvents an encryption technology in order to view the DVD on a competing platform . . . .”<sup>110</sup> The Second Circuit rejected this argument and held that the DMCA more narrowly “exempts from liability those who would ‘decrypt’ an encrypted DVD with the authority of a copyright owner, not those who would ‘view’ a DVD with the authority of a copyright owner.”<sup>111</sup> In effect, this confirmed that the DMCA conferred a new right of exclusion; alongside the right to exclude others from reproducing and performing works, copyright owners now had the means to place content into the market with mutually supportive technological and legal controls on its private use.

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<sup>106</sup> See WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 166-67 (2009).

<sup>107</sup> *Corley*, 273 F.3d at 437-38.

<sup>108</sup> *Id.* at 439-40.

<sup>109</sup> *Id.* at 442 (adopting lower court’s finding that “DeCSS was harming the [content providers], not only because they were now exposed to the possibility of piracy and therefore were obliged to develop costly new safeguards for DVDs, but also because, even if there was only indirect evidence that DeCSS availability actually facilitated DVD piracy, the threat of piracy was very real, particularly as Internet transmission speeds continue to increase” (footnote omitted)).

<sup>110</sup> *Id.* at 444.

<sup>111</sup> *Id.*

### 3. The Federal Circuit’s Interpretation in the “Durable Goods” Cases<sup>112</sup>

In *Corley*, the Second Circuit was clear that anticircumvention created a new right of content creators to control access, reaching conduct well beyond the scope of § 106. Several years later, in a somewhat different context, the Federal Circuit disagreed. In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*,<sup>113</sup> a manufacturer of garage-door openers alleged that a competitor had violated the DMCA by marketing a universal remote. The remote was allegedly programmed to bypass a simple antitheft code in the electronics that ran the plaintiff’s product.<sup>114</sup> In doing so, it allegedly accessed the plaintiff’s copyright-protected software.<sup>115</sup> The *Chamberlain* court expressed concern that a construction of the DMCA expansive enough to reach such facts would allow durable goods manufacturers to use copyright law to limit the interoperability of their products with those of competitors.<sup>116</sup> “In other words, [plaintiff’s] construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies—a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit.”<sup>117</sup> The court then held that liability under the anticircumvention provisions required a “nexus” to a violation of § 106.<sup>118</sup> In the technical sense, this statement was dicta, because the court’s only necessary holding was that the use at issue was not,

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<sup>112</sup> This popular label for *Chamberlain* and its companion cases seems to have been coined in Daniel C. Higgs, Note, *Lexmark International, Inc. v. Static Control Components, Inc. & Chamberlain Group, Inc. v. Skylink Technologies, Inc.: The DMCA and Durable Goods Aftermarkets*, 19 BERKELEY TECH. L.J. 59 (2004), although the origins of the phrase are difficult to reconstruct and attribution may also be due elsewhere; see also Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1, 15 (2008) (discussed *infra*).

<sup>113</sup> 381 F.3d 1178 (Fed. Cir. 2004).

<sup>114</sup> *Id.* at 1191.

<sup>115</sup> *Id.* at 1186. The protection measure at issue used an encryption system designed principally to prevent burglary. Its technical function is inapposite to this discussion; it is sufficient for these purposes to note that the court found that it was a TPM.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1201 (citations omitted). The court did not discuss the contours of the doctrine.

<sup>118</sup> *Id.* at 1204. The scope and contours of the required “nexus” were left somewhat open-ended and have since been debated. See generally, e.g., Zoe Argento, *Interpreting Chamberlain’s “Reasonable Relation” Between Access and Infringement in the Digital Mill*, 2008 B.C. INTELL. PROP. & TECH. F. 102902 (2008) (examining six possible definitions).

legally speaking, unauthorized.<sup>119</sup> The court held that Chamberlain Group, the plaintiff, had “failed to show not only the requisite lack of authorization, *but also* . . . the critical nexus between access and protection.”<sup>120</sup> The Federal Circuit thereby reached beyond the facts before it in order to confront *Corley* and effectively held that an unauthorized noninfringing use would remain beyond the reach of the DMCA.<sup>121</sup>

#### 4. Anticircumvention Meets Licensing in *MDY v. Blizzard*

In *MDY*, the plaintiff Blizzard Entertainment was the maker of the popular online game World of Warcraft.<sup>122</sup> The defendant programmer marketed a piece of software called Glider, which allowed players to advance through the game’s levels automatically, giving them a comparative advantage over other online players.<sup>123</sup> According to Blizzard’s allegations, the use of Glider by players gave rise to hundreds of thousands of complaints by honest players, which in turn imposed annual costs approaching one million dollars.<sup>124</sup> Blizzard therefore developed and deployed a protective technology known as Warden, which scanned user hard drives for signs of Glider and detected its use during online play.<sup>125</sup> MDY modified Glider to evade such detection.<sup>126</sup> Claiming that the sale of this modified version of Glider constituted trafficking in a circumvention

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<sup>119</sup> *Chamberlain Grp., Inc. v. Skylink Tech., Inc.*, 381 F.3d 1178, 1187-88, 1204 (Fed. Cir. 2004); *see* 17 U.S.C. § 1201(a)(3)(A) (2006) (“[T]o ‘circumvent a technological measure’ means to . . . avoid, bypass, remove, deactivate, or impair a technological measure, *without the authority of the copyright owner* . . .” (emphasis added)). Because the court found no evidence that Skylink’s customers were not authorized by Chamberlain to use universal remotes, the prima facie case under § 1201(a) would have been defeated even without a need to show a nexus to infringement.

<sup>120</sup> *Chamberlain*, 381 F.3d at 1204 (emphasis added).

<sup>121</sup> No other circuit has expressly adopted a “nexus” requirement, but other “durable goods” cases have found similar means by which to reject DMCA claims against unauthorized, noninfringing uses. *See generally* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004) (finding that printer manufacturer failed to make prima facie case of circumvention against competing toner manufacturer); *MGE UPS Sys., Inc. v. GE Consumer & Indus.*, 95 U.S.P.Q.2d 1632, 1635 (2010), *withdrawn and superseded on reh’g*, 622 F.3d 361 (5th Cir. 2010) (adopting *Chamberlain*’s approach in an opinion that was subsequently redrawn on other grounds). As the *MDY* court later noted, “[the] revised opinion [in *MGE*] avoids the issue by determining that MGE had not shown circumvention of its software protections. Notably, the revised opinion does not cite *Chamberlain*.” *MDY Indus. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 948 n.11 (9th Cir. 2010).

<sup>122</sup> *MDY*, 629 F.3d at 935.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 935-36.

<sup>125</sup> *Id.* at 936.

<sup>126</sup> *Id.*

technology, Blizzard alleged that MDY had violated § 106 of the Copyright Act and § 1201(a)(2) and 1201(b)(1) of the DMCA.<sup>127</sup>

The Ninth Circuit first addressed Blizzard’s claim that selling Glider constituted contributory copyright infringement.<sup>128</sup> This depended on whether MDY’s customers, by using Glider, infringed Blizzard’s copyright in certain elements of the game in violation of § 106.<sup>129</sup> The parties did not dispute the fact that the act of installing and playing the game caused a RAM copy to be made, constituting a prima facie violation of § 106.<sup>130</sup> Thus, Blizzard argued, MDY was liable unless users were acting within the scope of a valid end-user license agreement (EULA), in which case the reproduction was authorized, or if they owned their copies, in which case they were entitled to the essential step defense.<sup>131</sup>

Thus, the three-part *Vernor* test was central to the question of infringement.<sup>132</sup> The court accepted Blizzard’s argument that its customers were licensees (and not owners) of the game software under *Vernor*.<sup>133</sup> This meant that MDY could not avail itself of the essential step defense and thus could avoid liability only if the use of Glider was within the scope of the EULA.<sup>134</sup> In a move that may have surprised both parties, however, the court found that although using Glider

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<sup>127</sup> *Id.* at 937.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 937-38 (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)) (“MDY is liable for vicarious infringement if it (1) has the right and ability to control Glider users’ putatively infringing activity and (2) derives a direct financial benefit from their activity. If Glider users directly infringe, MDY does not dispute that it satisfies the other elements of contributory and vicarious infringement.” (citation omitted)).

<sup>130</sup> *Id.* at 938.

<sup>131</sup> *Id.*; see also *supra* note 67 and accompanying text.

<sup>132</sup> *MDY*, 629 F.3d at 938; see also *supra* note 79 and accompanying text.

<sup>133</sup> Amici for both parties hotly contested the question of whether *Vernor* applied. See Brief of Amicus Curiae Public Knowledge in Support of Reversal at 1, *MDY*, 629 F.3d 928 (“If successful, Blizzard’s attempt to use a boilerplate ‘license’ to sidestep Congress’s carefully balanced consumer protections laid out in 17 U.S.C. § 117 will change a legal framework which protects lawful owners of copyrighted software into one which lets software developers subject users to copyright infringement penalties long after a lawful purchase has occurred.”). Amici speaking for the software industry urged the court to follow *Vernor* in viewing its customers as licensees. See, e.g., Brief of Amicus Curiae Business Software Alliance in Support of Appellees and Cross-Appellants Blizzard Entertainment, Inc. and Vivendi Games, Inc. Seeking Affirmance at 20-28, *MDY*, 629 F.3d 928 (explaining the benefits of its license-based distribution model to all market participants). It illustrates the complexity of stakeholder interests in a case like *MDY* that in other contexts, such as the calculation of music royalties, copyright owners have incentives to argue that a purely online transaction constitutes a sale. See, e.g., *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010).

<sup>134</sup> *MDY*, 629 F.3d at 939.

constituted a contractual violation, it was a violation of an independent contractual covenant and not of a license condition.<sup>135</sup> As such, the breach of the EULA in using Glider was not sufficiently connected to the licensor's exclusive rights under § 106 to give rise to infringement liability.<sup>136</sup> In other words, the court found that while the use of Glider to play World of Warcraft violates a player's contract with Blizzard, it is not an infringement of Blizzard's copyright. By so finding, the court placed Glider on a unique footing with respect to Blizzard's principal claim that using Glider constituted unlawful circumvention under the DMCA. Ironically, had Blizzard convinced the court that Glider users violated its copyright, the *Chamberlain* nexus question would never have been reached, since there is little question that an act of circumvention which actually facilitates infringement is punishable under the DMCA.<sup>137</sup> Instead, however, the court thought big. By applying *Vernor* but accepting MDY's covenant-condition distinction to support a finding of noninfringement, the court framed the facts as unauthorized noninfringing use.<sup>138</sup> It thus reached the central inquiry of *Chamberlain* (concerned with operating software) and *Corley* (concerned with entertainment media) in the context of consumer software.

The stakes in *MDY* thus reached beyond the facts at bar to address the legal validity of the *Chamberlain* nexus requirement, and the litigation drew the attention of amici accordingly.<sup>139</sup> Content providers were adamant that the DMCA be construed in a way that would "encourage copyright owners to make their works available for distribution, viewing and/or listening online and in new digital formats."<sup>140</sup> Studios, it was argued, had come to depend on a business model where access could be provided online in exchange for a payment:

Someone who circumvents access controls to watch those movies for free violates section 1201(a)(1)—even if circumvention does not facilitate copying because, for example, copy controls remain in

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<sup>135</sup> *Id.* at 939-41 (relying on principles of contract law).

<sup>136</sup> *Id.* at 941.

<sup>137</sup> See *supra* notes 97-100 and accompanying text.

<sup>138</sup> See generally *infra* Part II.B.

<sup>139</sup> Amicus briefs were filed in the case by the Business Software Alliance, the Software & Information Industry Association, Public Knowledge, and the Motion Picture Association of America. *Id.* at 934.

<sup>140</sup> Brief of Amicus Curiae Motion Picture Association of America, Inc. in Support of Appellee's Position Seeking Affirmance on Appeal (and Reversal on Appeal) at 3, *MDY*, 629 F.3d 928 (citing S. REP. NO. 105-190, at 2 (1998)).

place. The inability to infringe by copying or distributing makes no difference to such a circumventor, whose goal is simply to watch the movie for free. Yet, the harm to the copyright owner that this type of conduct causes is manifest.<sup>141</sup>

In reaching its decision, the court set forth a detailed construction of § 1201(a)(2) and (b)(1)<sup>142</sup> explicitly rejecting the Federal Circuit’s analysis in *Chamberlain*.<sup>143</sup> Acknowledging its appreciation for “the policy considerations expressed by the Federal Circuit . . .,” the court held that “a fair reading of the statute (supported by legislative history) indicates that Congress created a distinct anti-circumvention right under § 1201(a) without [*Chamberlain*’s] infringement nexus requirement.”<sup>144</sup>

Having rejected the nexus requirement, the court turned its attention to the facts of Blizzard’s DMCA claims. It found that in addition to the game’s source code and “discrete visual and audible components”<sup>145</sup> (that is, its library of character images, backgrounds, and sounds), Blizzard had rights of exclusion under copyright law in what the district court had called the “real-time experience of traveling through different [virtual] worlds . . . and encountering other players.”<sup>146</sup> The court held that a player’s use of Glider did circumvent a technological measure that effectively controlled access to this copyright-protected work.<sup>147</sup> In sum, the court found that while Glider did not infringe Blizzard’s copyrights, its use *was* unauthorized and within the reach of the DMCA.

## II. ACCESS RIGHT: FROM THEORY TO LAW

As discussed above,<sup>148</sup> under § 106 the owner of a copyright has the exclusive, alienable right to “reproduce the

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<sup>141</sup> *Id.* at 4.

<sup>142</sup> Blizzard had not brought claims against any individual user, and thus no claim was filed alleging direct (individual) circumvention under § 1201(a)(1); however, because the circumvention and trafficking provisions of § 1201(a) share operative language, the court’s analysis here is relevant to the application of § 1201(a)(1).

<sup>143</sup> *MDY*, 629 F.3d at 950-52.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 942.

<sup>146</sup> *Id.* at 942-43, 953 (quoting *MDY Indus. v. Blizzard Entm’t, Inc.*, 616 F. Supp. 2d 958 (D. Ariz. 2009)) (internal quotation marks omitted).

<sup>147</sup> *Id.* at 954-55. The court went on, however, to hold that Warden did not “effectively protect[] a right . . . under the Copyright Act.” *Id.* at 954 (internal quotation marks omitted). Because the use of Glider did not constitute copyright infringement, but merely a breach of contract, MDY could not be liable under § 1201(b)(1). *Id.*

<sup>148</sup> See *supra* Part I.A.

copyrighted work in copies or phonorecords.”<sup>149</sup> Essential to a finding of infringement liability under this provision is a new fixation—that is, the coming into existence of a new copy.<sup>150</sup> We have also seen that the owner of a copyright enjoys the exclusive right to publicly perform the work.<sup>151</sup> Liability for a violation of this exclusivity requires a determination that a work has been performed, as by digital transmission, and that the performance was made to the public.<sup>152</sup>

As markets for media content have moved online,<sup>153</sup> such factual determinations have become increasingly formalistic and more detached from a fulsome inquiry into the culpability of the infringement defendant’s conduct and incentive-based policy concerns.<sup>154</sup> Infringement liability can hinge on arcane details, such as whether a broadcaster employs distinct individual data files, a “master copy,” or a “standard data compression algorithm”;<sup>155</sup> whether streaming content buffers for more than a “transitory” period;<sup>156</sup> or whether multiple electronic copies of an on-demand transmission are stored centrally.<sup>157</sup> Most strangely, different rules govern identical conduct by an alleged infringer depending on whether a piece of software requires temporary RAM reproduction.<sup>158</sup> In short, the focus of infringement jurisprudence will likely continue to shift away from whether a particular instance of reproduction or performance should be discouraged on policy grounds, and toward the more difficult but

<sup>149</sup> 17 U.S.C. § 106(1) (2006). Of course, not *all* new fixations are infringing. See *supra* notes 39, 67 and accompanying text (discussing fair use and the essential step defense).

<sup>150</sup> See 17 U.S.C. § 101 (defining copies as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”).

<sup>151</sup> *Id.* § 106(4)-(6).

<sup>152</sup> See *supra* notes 52-62 and accompanying text.

<sup>153</sup> See *infra* notes 184-87 and accompanying text.

<sup>154</sup> See *supra* notes 52-62 and accompanying text.

<sup>155</sup> See, e.g., *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 650 (S.D.N.Y. 2011).

<sup>156</sup> See, e.g., *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 128-30 (2d Cir. 2008) (holding that recorded programming stored on a cable company’s servers was insufficiently “fixed” to constitute an infringing copy because it did not meet the Copyright Act’s durational requirement).

<sup>157</sup> See *supra* note 62 and accompanying text.

<sup>158</sup> See *supra* notes 65-68 and accompanying text; see, e.g., Ginsburg, *supra* note 29, at 114 (observing that “[d]igital media made the distinction [between copies and performances] even more dubious”); Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. 1067, 1069-70 (2010) (tracing the RAM copy doctrine from its inception through *Cartoon Network*, and proposing a rubric for establishing the existence of a copy).

formalistic question of whether an infringing copy or performance can be established in the first place.

The resulting difficulties were not unforeseen in academic circles, and the alternative that has been proposed was dubbed an “access right,” urged to be granted alongside—and appurtenant to—a copyright.<sup>159</sup> An access right is reflected in the Ninth Circuit’s copyright misuse and § 1201 cases, which validate and encourage the mutually supportive use of licensing and TPM. Traditional copyright law evolved to protect works in a tangible environment.<sup>160</sup> An access right, on the other hand, is more appropriate for new content markets where consumers engage in an efficient, tailored transaction for the right to experience a work.<sup>161</sup>

#### A. *The Access Right in Theory*

Professor Jane Ginsburg noticed in 2003 that, as a result of advances in digital content distribution technology, “the moment of the material copy may be passing,”<sup>162</sup> and that recognition of an access right—a “right to control the manner in which members of the public apprehend the work”—would become critical to the coherence of copyright law.<sup>163</sup> Taking up the same project, Professor Zohar Efroni’s 2010 book on the subject<sup>164</sup> examines the philosophical underpinnings of such a construct in detail, positing that anticircumvention laws represent a manifestation of an access right that is “neo-conservative” (that is, built upon existing laws)<sup>165</sup> and proposing instead a ground-up reinvention of copyright law in its image.<sup>166</sup>

This may have been the point of copyright law all along. As a threshold matter, as Ginsburg suggests, “in the digital environment, the ‘exclusive Right’ that the Constitution authorizes Congress to secure to authors is not only a ‘copy’-right, but an access right.”<sup>167</sup> She argues that “there should be nothing sacred about the eighteenth- or nineteenth-century classifications of rights . . . in a technological world that would

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<sup>159</sup> See *infra* notes 166-69 and accompanying text.

<sup>160</sup> See *supra* note 9 and accompanying text.

<sup>161</sup> See *infra* note 191 and accompanying text (discussing price discrimination benefits of an access right).

<sup>162</sup> Ginsburg, *supra* note 29, at 115.

<sup>163</sup> *Id.* at 120.

<sup>164</sup> EFRONI, *supra* note 29.

<sup>165</sup> *Id.* at 416.

<sup>166</sup> *Id.* at 479-80 (setting forth what the author calls the “Project”).

<sup>167</sup> Ginsburg, *supra* note 29, at 116 (emphasis added) (footnote omitted).



have been utterly inconceivable to eighteenth-century minds.”<sup>168</sup> This is because, as Ginsburg further observes, an access right “was implicit in the reproduction and distribution rights under copyright in the days before mass market copying devices. The copyright owner controlled access by choosing how to make the work available.”<sup>169</sup> She also notes that developments in copyright law that keep pace with new technology are nothing new. Congress, for example, established a digital performance right in sound recordings when it became clear that Internet transmission would provide both a means to create infringing copies and a market substitute in its own right.<sup>170</sup>

*B. Unauthorized Noninfringing Uses: How the Access Right Became Law*

The Ninth Circuit’s anticircumvention and licensing cases work together to create an access right because the anticircumvention cases establish that the DMCA predicates liability on the existence of an unauthorized use, and the licensing cases tell us what kinds of uses may legitimately be deemed unauthorized.<sup>171</sup> Technological protective measures, it thus appears, provide a legal trigger for the Ninth Circuit’s access right.<sup>172</sup>

In view of this interplay between license terms and TPM, the progression of the Ninth Circuit’s analysis in *MDY* suggests that the court took advantage of the defendant’s argument for noninfringement (and reliance on *Chamberlain*), using the dispute over online gaming as an opportunity to reject *Chamberlain* outright. Doing so then allowed the Ninth Circuit to establish a rule that would govern unauthorized

<sup>168</sup> *Id.* at 122 (emphasis omitted).

<sup>169</sup> *Id.* at 123 n.27 (citing Simon Olswang, *Accessright: An Evolutionary Path for Copyright in the Digital Era?*, 5 EIPR 215 (1995) (invoking the concept under European law)).

<sup>170</sup> *Id.* at 124-25.

<sup>171</sup> The combined effect argued here has not gone unnoticed by the academy, but it does not seem to have been widely commented upon. See, e.g., Reuven Ashtar, *Licensing as Digital Rights Management, from the Advent of the Web to the iPad*, 13 YALE J.L. & TECH. 141, 154 (2011) (observing that “[t]he TPM-licensing nexus is apparent in later DMCA case law, but has yet to be properly studied”).

<sup>172</sup> The role of TPM also extends to notice and self-help. To illustrate by analogy to personal property: I park my car (which, conveniently for my analogy, predates the DMCA) with its doors locked. This has three effects: (1) it gives the world notice of my exclusive claim, see Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) (“To the world: Keep off . . . .”); (2) it is, I hope, effective self-help; and (3) finally, like § 1201, it triggers liability on the part of a would-be thief who circumvents my locks.

noninfringing uses in a variety of commercial settings.<sup>173</sup> This may not be surprising in light of the *Chamberlain* court’s own lack of restraint in declaring unauthorized noninfringing uses exempt from liability.<sup>174</sup> The *MDY* court, it seems, simply struck back with an equally broad answer to the same unasked question. Arguably, this was a deliberate creation of a new right of exclusion intended to give legal force to the boundaries of a user license. Unquestionably, it created a means for content creators to take advantage of the efficiencies that tailored digital distribution transactions allow without risking absurd results under § 106.

The Ninth Circuit’s access right is what Professor Efroni would call “neo-conservative”<sup>175</sup> because under § 1201, a valid copyright remains a threshold requirement.<sup>176</sup> What copyright owners gain is the ability to alienate the entitlement to their works, by contract, with the legal protection of anticircumvention liability. The DMCA-based access right provides a cause of action that protects the access licensor, allowing a means to recover for violations of license terms without the increasingly technical reproduction and performance inquiries that attend infringement claims.<sup>177</sup>

On the other hand, none of this renders traditional infringement rules obsolete (as Professor Efroni would apparently prefer).<sup>178</sup> DMCA anticircumvention liability under any construction is—just like any of the exclusion rights conferred by § 106—never more than a right of exclusion appurtenant to the ownership of the copyright in the work.<sup>179</sup> As such, the subject matter and durational limits of copyright protection<sup>180</sup> remain threshold elements of access protection. Further, for as long as a market exists for tangible

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<sup>173</sup> See *supra* Part II.B. If the *MDY* court had principally been concerned with software—and the facts before it—it could have accepted the plaintiff’s argument that RAM copies made in violation of a license agreement are infringing and dispensed with its reliance on a covenant/condition distinction. Instead, the defendant’s pyrrhic victory on the question of infringement allowed the court to reach many situations in which unauthorized noninfringing access to media is controlled by TPM.

<sup>174</sup> See *supra* notes 119-20 and accompanying text.

<sup>175</sup> See *supra* note 165 and accompanying text.

<sup>176</sup> 17 U.S.C. § 1201(a) (2006) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” (emphasis added)).

<sup>177</sup> See *supra* notes 52-69 and accompanying text.

<sup>178</sup> See *supra* note 166 and accompanying text.

<sup>179</sup> See *supra* note 176 and accompanying text.

<sup>180</sup> See HUNTER, *supra* note 9, at 32-41 (explaining the subject matter eligibility requirement under 17 U.S.C. § 102); U.S. COPYRIGHT OFFICE, DURATION OF COPYRIGHT (Aug. 2011), available at <http://www.copyright.gov/circs/circ15a.pdf> (“The provisions of copyright law dealing with duration are complex.”).

reproductions, § 106 will have a place. As Professor Ginsburg observes, certain traditional media would continue to be produced and monetized via tangible copies in an access market.<sup>181</sup> In such circumstances, TPM may not be appropriate or desirable. Instead, there is no reason why §§ 106 and 109 should not continue to define the scope of uses that can permissibly be made of a lawfully acquired copy.

In each circumstance, plaintiffs can and should think strategically about the kind of claim that may be appropriate to a given set of facts. Where clear violations of the reproduction, distribution, and performance rights—even as to a purely digital copy—can be shown, infringement provides a familiar legal standard under which to seek relief. Where ontological questions blur the lines surrounding copies and performances, as in *Capitol Records*,<sup>182</sup> plaintiffs may instead choose to rely solely on the DMCA. Where claims and defenses rely on formalisms to allege reproduction or performance, courts themselves may reject infringement claims altogether in favor of the common law access right under *MDY* and *Psystar*.

### C. *Is an Access Right a Good Thing?*

Professor Ginsburg's prescient 2003 prescription for an access right imagined a "near-future" content marketplace where content would be experienced, not possessed.<sup>183</sup> It is clear that 2003's near future has arrived. It may therefore be instructive to briefly consider one recent marketplace initiative which—as Ginsburg predicted—proposes to allow users to transact for a set of tailored access entitlements in lieu of the right to possess a copy of a work or to experience a given performance.

A recently launched digital content format called UltraViolet, created by a consortium of content providers and electronics manufacturers, allows customers to assign content to a cloud-based "digital locker" of music and motion-picture works.<sup>184</sup> Reception has been warm, even from consumer

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<sup>181</sup> Ginsburg, *supra* note 29, at 116.

<sup>182</sup> *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 649 (S.D.N.Y. 2011); *see also supra* text accompanying notes 53-60.

<sup>183</sup> Ginsburg, *supra* note 29, at 116-17.

<sup>184</sup> *See* Marc Graser, *Sony, Uni, WB Set to Offer Films, TV for UV*, VARIETY (Oct. 10, 2011, 7:00 AM), <http://www.variety.com/article/VR1118044163>; Michael White et al., *Apple, Hollywood Studios Said to Discuss Movie Streaming Plan*, BLOOMBERG BUSINESSWEEK (Oct. 13, 2011, 12:52 AM), <http://www.bloomberg.com/news/2011-10-13/apple-hollywood-studios-discuss-movie-plan.html>. This consortium is similar in kind

advocates.<sup>185</sup> Once the right to include a certain work (in the “locker”) is purchased, the user is granted a package of entitlements to experience the work. These entitlements may include the right to possess a Blu-Ray optical disk, to view the work encoded on that disk, to download and store the same work from remote servers to a portable device, or to view an on-demand streaming performance of the work.<sup>186</sup> Although rights to a “digital locker” might be granted alongside the purchase of a tangible copy, they might also stand alone, independent of possession of any material fixed copy of the work.<sup>187</sup> In short, the UltraViolet consortium and others like it<sup>188</sup> seem to offer a package of rights in a certain work that exists independent of any fixed copy and strongly resembles the transaction contemplated by the access right.

Market-driven developments like UltraViolet raise the question of whether consumers will ultimately benefit. One prominent characteristic of an access-based market is its ability to unbundle rights like first sale, which are appurtenant to tangible copies, and to provide price discrimination among consumers with different preferences.<sup>189</sup> Randal Picker observes that by employing traditional infringement rules—specifically, the fair use exceptions—to define the set of rights that come appurtenant to (by his example) a music CD,

we are making a decision about the rights that we are bundling together. The nature of bundles is that everyone gets stuck buying the same set of rights. These bundles can be inefficiently large. Consumers would often be better off if instead we allowed rights to be unbundled, so that consumers could buy just those rights that they wanted . . . .<sup>190</sup>

Efroni similarly observes that “perhaps the most powerful reasoning in support of TPMs” concerns “opportunities

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to the DVD format licensing body which governed authorized uses in *Corley*. See *supra* notes 102-03 and accompanying text.

<sup>185</sup> See Nate Anderson, *Not so Moronic: DECE DRM Finally Coming Midyear*, ARS TECHNICA (Jan. 6, 2011, 6:23 PM), <http://arstechnica.com/tech-policy/news/2011/01/not-so-moronic-dece-drm-scheme-a-big-improvement.ars> (“For consumers, the benefits are clear: buy a movie with one DRM scheme and watch it on any device . . . . For the industry, the benefits are also clear: they won’t look like such morons.”).

<sup>186</sup> Presumably, the right to make “fair use” of the work is implicit, if not widely advertised.

<sup>187</sup> Theoretically, content providers would have the means to add additional rights to the menu: tickets to a cinema performance, the right to receive a replacement “hard” copy if one is damaged, and so on.

<sup>188</sup> See *supra* note 30.

<sup>189</sup> See Picker, *supra* note 33, at 604.

<sup>190</sup> *Id.*

for price discrimination,” which can “enhance the market values of works” while allowing users to “enjoy a greater quantity and variety of works priced in a way that better matches their usage needs, preferences, and payment capacity.”<sup>191</sup>

Even before technology allowed the access right to take shape in the law, content owners attempted to achieve the benefits of price discrimination by employing other means of downstream control. Picker observes that history reveals three tools for the job: legends (such as those unsuccessfully employed by the publisher plaintiffs in *Bobbs-Merrill Co. v. Straus*<sup>192</sup>), contracts, and technology.<sup>193</sup> In the market for digital content, price discrimination appeals to owners because it serves as a “particularly effective strategy to maximize revenues when the products or services show an increasing return on scale, when there are large fixed and sunk costs involved but low marginal costs, and when economics of scope are significant.”<sup>194</sup> In the digital context, TPM (as both self-help and grounds for anticircumvention liability) become critical because they limit opportunities for arbitrage.<sup>195</sup> Efroni acknowledges the consensus among economists that the overall social-welfare effects of price discrimination are ambiguous,<sup>196</sup>

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<sup>191</sup> EFRONI, *supra* note 29, at 404. There are three “degrees” of price discrimination. *Id.* at 406 (citing ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920)). The first, “merely a theoretical option,” occurs when goods are sold to each individual at the maximum price that they are willing to pay. *Id.* The second “allow[s] consumers to self-select between various options, thereby revealing their willingness to pay.” *Id.* at 407. This is the flavor of price discrimination most enabled by an access right. Third degree price discrimination occurs when goods are priced “according to assessments about the willingness to pay among the members of . . . more-or-less homogeneous groups.” *Id.* (citing HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS* 439-41 (2003) (“arguing third-degree price discrimination is actually an imperfect form of the first degree”). An example of third-degree discrimination occurs when “publishers discriminate between keen readers and price-sensitive readers who are willing to wait longer for the cheaper version to become available.” *Id.* at 408; *see also* Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 364-67 (2008) (explaining “sell-through” differential pricing in the home video rental market).

<sup>192</sup> *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *see also supra* note 39.

<sup>193</sup> Picker, *supra* note 33, at 606.

<sup>194</sup> EFRONI, *supra* note 29, at 407-08.

<sup>195</sup> *Id.* at 408 (also noting the capacity of DRM technologies to facilitate the collection and analysis of consumer preferences for marketing and other purposes).

<sup>196</sup> *Id.* at 408-09; *see also* William W. Fisher III, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. REV. 1, 22 (2007) (“The[] primary claim [of economists]—about which there is no longer significant controversy—is that it is impossible to say, in the abstract, whether price discrimination increases or decreases aggregate social welfare.”).

but, for the present, the industry and consumers appear to be embracing this model of content distribution.<sup>197</sup>

The Ninth Circuit’s access right provides a legal framework for this model, avoiding the strained factual analysis common to claims brought under § 106. Jeffrey Malkan argues, for example, that the individual remote copy which precluded public performance liability for Cablevision in *Cartoon Network* was dubious, insinuating that “[t]his contrivance makes one wonder whether there really will be a personal copy behind each RS-DVR transmission or whether, to the contrary, the concept of the personal copy serves Cablevision as a metaphor that actually signifies a prepaid right of access to performances of the work.”<sup>198</sup> He notes that three years later,

the Wall Street Journal speculated that the studios might eventually agree to allow Cablevision and others to forgo the storage of personal RS-DVR copies—the very condition upon which the Second Circuit had based its decision . . .—if Cablevision would put curbs on ad-skipping technology and allow the studios to refresh their ads on the programming.<sup>199</sup>

The Ninth Circuit’s access right—that is, its treatment of licensing and anticircumvention—refocuses the liability analysis on the conduct of the defendant and the copyright bargain. Conduct that invades the market incentive of the copyright holder can be proscribed, relieving plaintiffs of the need to resort to formalistic § 106 claims. Where a form of digital protection, such as a scrambled broadcast signal, restricts access to a copyrighted work, the act of circumventing it, like sneaking into a virtual movie theater, invades an access right.<sup>200</sup> Indeed, the *Blizzard* case itself demonstrates that the Ninth Circuit’s approach is not limited to protecting reproduction or performance rights: because Warden controlled access only to the “dynamic non-literal elements” of the game—in other words, live game play—the court’s § 1201(a) analysis did not pause to consider whether a copy of *that* specific work was ever copied onto a player’s computer, giving rise to even a colorable argument for infringement under § 106.<sup>201</sup>

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<sup>197</sup> See *supra* notes 184-87 and accompanying text.

<sup>198</sup> Malkan, *supra* note 60, at 527-28 (emphasis omitted) (footnote omitted).

<sup>199</sup> *Id.* at 527 n.82 (emphasis omitted).

<sup>200</sup> See, e.g., *Echostar Satellite LLC v. Viewtech, Inc.*, 98 U.S.P.Q.2d 1757 (S.D. Cal. 2011) (granting summary judgment for § 1201 plaintiff, a satellite television provider, where defendants facilitated unscrambling of a broadcast signal).

<sup>201</sup> *MDY Indus. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 953-54 (9th Cir. 2010) (holding that defendant’s circumvention technology allowed access to on-line game play).

## III. NECESSARY LIMITS

Despite the rhetoric often attending the licensing and anticircumvention cases in the broader context of the “copyright wars,”<sup>202</sup> the salient question is not whether an access right can be found in the Ninth Circuit’s law, or even whether such a regime is inherently desirable. The better question, which ought to concern stakeholders on both sides of the debate, is precisely *which* unauthorized noninfringing uses ought to be subject to an access right and, alternatively, which of these ought to be beyond the reach of an expanded copyright-like regime for policy reasons (like those supporting fair use). This part, therefore, aims to resolve the tension between *MDY* and *Chamberlain*, both of which staked out ambitious and uncompromising claims on the DMCA’s applicability to unauthorized noninfringing use.<sup>203</sup>

Scholars have long argued that certain affirmative defenses to infringement ought to be preserved as affirmative defenses to § 1201(a).<sup>204</sup> These are valid but incomplete arguments, since they tend not to address noninfringing use. It is important to remember that the Ninth Circuit’s approach to an access right has a built-in *prima facie* limit: because use that is authorized cannot violate the DMCA, a valid license provides a *prima facie* defense to anticircumvention liability. Anticircumvention laws, in short, can reach no further than valid license restrictions.<sup>205</sup> It might also be argued that anticircumvention and licensing have a symbiotic relationship. Licensing provides the necessary “unauthorized” element of DMCA liability, and TPM provide self-help, notice, and a legal prophylaxis for license restrictions.<sup>206</sup> The most complete approach to normative questions about the scope of an access right can thus be found in the licensing cases, which apply the doctrine of copyright misuse to sketch boundaries in surprising accord with the policy considerations that have animated copyright law all along.

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<sup>202</sup> See generally PATRY, *supra* note 106.

<sup>203</sup> It is the conflicting *policy*—if any—expressed in those cases that requires resolution in shaping an access right. Doctrinally, as well, the tension between *MDY* and *Chamberlain* has created difficulties for other courts. See *supra* note 121 (discussing the treatment of *Chamberlain* in other Circuits, including the Fifth Circuit’s withdrawal of its decision in *MGE*).

<sup>204</sup> See generally Armstrong, *supra* note 112; see also Ginsburg, *supra* note 29, at 125-31.

<sup>205</sup> See *supra* note 171 and accompanying text.

<sup>206</sup> See *supra* note 171.

A. *Affirmative Defenses: The Preservation of Fair Use Under an Access Right*

Fair use is a judge-made affirmative defense to copyright infringement that was codified in § 107 of the Copyright Act.<sup>207</sup> Under this doctrine, certain activities that require a user to duplicate, distribute, or reproduce protected works “such as criticism, comment, news reporting, teaching . . . , scholarship, or research” do not give rise to liability.<sup>208</sup> Thus, fair use defines the very contours of copyright liability by carving away at the exclusive rights granted by § 106, and its scope is among the central debates in copyright law.<sup>209</sup> Fair use is governed by a four-factor test<sup>210</sup> that, it has been argued, is principally concerned with permitting conduct that does not erode the creator’s incentive by creating a substitute for the work in the marketplace.<sup>211</sup>

The absence of the fair use defense under anticircumvention laws was an early concern of the DMCA’s critics, and this concern was echoed by early defendants faced with § 1201 liability.<sup>212</sup> The *Corley* court took a narrow view of the rights conferred by § 107 on prospective fair users, reasoning that the anticircumvention provisions did

not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting

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<sup>207</sup> 17 U.S.C. § 107 (2006).

<sup>208</sup> *Id.*

<sup>209</sup> *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (rejecting challenge to legislative extension of copyright duration under the “limited times” requirement, U.S. CONST. art. I, § 8, cl. 8, and the First Amendment).

<sup>210</sup> 17 U.S.C. § 107 (requiring courts to consider “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work”).

<sup>211</sup> *See HUNTER, supra* note 9, at 72 (citing *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)); *accord* 4-13 NIMMER ON COPYRIGHT § 13.05, at 13-198.2 (“If one looks to the fair use cases . . . this emerges as the most important, and indeed, central fair use factor.” (footnotes omitted)). This emphasis is most acute in the context of derivative works. *See HUNTER, supra* note 9, at 73 (noting that while market substitution “cuts directly against the incentive justification” for copyright protection, there is a judicial trend toward overprotection where derivative works are concerned); *Bambauer, supra* note 191, at 394 (noting that copyright law should “address creators’ primary fear of derivatives substituting for sales of the original”); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (famously extending the fair use defense to commercial parody).

<sup>212</sup> *See, e.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 458 (2d Cir. 2001) (rejecting the “extravagant claim” that the DMCA as applied to the dispute at bar “eliminates fair use”).



on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie. . . . Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique . . . .<sup>213</sup>

In other words, the court did not view § 107 as creating an entitlement to access a work in every circumstance where prima facie infringement would be justified by fair use.<sup>214</sup> To understand this approach, it is critical to remember that despite widespread imprecision in the term's use by scholars and judges,<sup>215</sup> a use of copyright-protected material cannot be a "fair use" unless it is also a prima facie violation of § 106.

But since many § 1201 violations *do* involve an otherwise infringing fair use,<sup>216</sup> the concern with § 1201's impact on fair use has provided a useful framework for a broader discussion about the scope of noninfringing uses that should be immune (the exercise that this note argues is the most critical to the legitimacy of an access right).

Randall Picker imagines three regimes for the interaction of fair use and access rules (by analogy to tangible media): a regime where the infringement defense and the legality of access are independent inquiries,<sup>217</sup> a regime where "we would take into account how access was obtained and limit

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<sup>213</sup> *Id.* at 459.

<sup>214</sup> *Id.* In a more basic illustration, Randall Picker explains that just because a copyrightable poem has been written on a piece of paper, "[t]hird parties have no right to access to the paper, no right to insist that I publish the work and somehow make it available to everyone." Picker, *supra* note 33, at 604; accord David R. Johnstone, *Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law*, 52 J. COPYRIGHT SOC'Y U.S.A. 345, 367 (2005) ("One searches the [copyright law] in vain for a cognizable 'copyduty' owed to users in conjunction with the fair use doctrine and policy." (citing Lawrence Lessig, *Life, Liberty, and the Pursuit of Copyright? Round 1: Opening Remarks*, ATL. ONLINE (Sept. 10, 1998), <http://www.theatlantic.com/unbound/forum/copyright/lessig1.htm>)). More to the point, fair use under § 107 had not been alleged by the appellants in *Corley*, see 273 F.3d at 459 ("Appellants do not claim to be making fair use of any copyrighted materials . . . ."), and would not be in subsequent leading cases. See, e.g., *MDY Indus. v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950 n.12 (9th Cir. 2010) ("Like the *Chamberlain* court, we need not and do not reach the relationship between fair use . . . and violations of § 1201. MDY has not claimed that Glider use is a 'fair use' of WoW's dynamic non-literal elements. Accordingly, we too leave open the question . . . ." (citation omitted)).

<sup>215</sup> See Johnstone, *supra* note 214, at 346-47; see also Picker, *supra* note 33, at 605 ("All [fair use] does is provide that certain uses that otherwise would be infringing will not be infringing, meaning that the remedies that copyright creates won't apply through copyright. This isn't some broad 'right' to fair use, though fair use is often addressed in those terms by many, including myself on past occasions.").

<sup>216</sup> See *infra* note 226 and accompanying text.

<sup>217</sup> Picker, *supra* note 33, at 610-11.

usual fair use because of the way in which access was obtained,”<sup>218</sup> and finally a regime where “the use would not be copyright infringement because it would be fair to trump the punishment that could attach to the method used to acquire access.”<sup>219</sup> Picker is “skeptical” about the third regime, because “burglars would go into blogging in a big way: steal stuff, be sure to take a book as well, and then blog a review of the book.”<sup>220</sup> This bricks-and-mortar illustration is as compelling as it is amusing, insofar as it responds to fair use as a complete defense to access violations, but Professor Timothy Armstrong has called for at least some leeway for fair users in the context of anticircumvention laws. Armstrong recently argued that a judge-made affirmative defense to § 1201, modeled on § 107, may provide an appropriate way to limit anticircumvention liability where public policy demands it.<sup>221</sup> For example, he argues that judges might consider the second of § 107’s four factors<sup>222</sup> to “usefully differentiate between circumvention aimed at . . . a creative, expressive work [e.g., the movies in *Corley*] . . . and circumvention that merely enables access to less expressive, more utilitarian works (as in *Chamberlain* . . .).”<sup>223</sup> Similarly, citing the first and fourth fair use factors, he urges courts to distinguish between cases in which circumvention “provide[s] a complete substitute for authorized purchases of an expressive work [as in *Corley*] . . . , and cases in which circumvention merely exposes a maker of consumer products to additional marketplace competition (as in *Chamberlain* . . .).”<sup>224</sup>

Armstrong suggests that courts may already have taken it upon themselves to import fair use principles into DMCA cases: “[C]ases like *Chamberlain* . . . do seem to draw upon matters of . . . policy . . . to give the DMCA quite a different reading than did cases like [*Corley*]. Perhaps the courts are silently thinking ‘fair circumvention’ thoughts, while outwardly preserving a facade of formalist orthodoxy . . . .”<sup>225</sup> Whether and to what extent acts of circumvention, undertaken to facilitate the “fair use” of protected works, ought to be excused from liability remains an open and important question. But this note

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<sup>218</sup> *Id.* at 611.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> See Armstrong, *supra* note 112, at 42-44.

<sup>222</sup> See *supra* note 210.

<sup>223</sup> Armstrong, *supra* note 112, at 45.

<sup>224</sup> *Id.* (footnote omitted).

<sup>225</sup> *Id.* at 50.

attempts to pick up where Professor Armstrong left off, because in attempting to define the appropriate contours of an access right, to end the inquiry there begs the question. It is important, instead, to recognize that a wide swath of previously lawful conduct would not be exempt from access protection under a fair use carve-out. In other words, the protection of fair uses does not overlap with the unauthorized noninfringing uses protected by the *Chamberlain* nexus.

Professor Armstrong does acknowledge “the problem of circumvention undertaken for noninfringing purposes,” but his illustrative hypothetical nevertheless describes a prima facie infringing fair use.<sup>226</sup> Thus, while acknowledging that traditional fair use defenses might not serve as the “outer boundary” of a fair circumvention defense,<sup>227</sup> Professor Armstrong admits that his normative proposition is “less ambitious” than any position attempting to define such a boundary.<sup>228</sup> As such, his normative proposal does not quite confront the full spectrum of newly unlawful activity that has concerned other scholars in the decade since *Corley* and that are the focus of this note.<sup>229</sup>

Ultimately, Armstrong’s prescription for a judge-made affirmative defense to § 1201(a) establishes a useful framework for limiting the scope of an access right, but his prescription more narrowly reflects that of the *Chamberlain* court. Indeed, relying on the legislative history of the DMCA, he argues at base that anticircumvention liability should be linked to infringement.<sup>230</sup> Two years hence, as we have seen, the Ninth Circuit has made clear that opponents of an access right will have no such luck.<sup>231</sup> As it stands, then, the question of which unauthorized noninfringing uses should be subject to an access right in light of copyright’s constitutional bargain<sup>232</sup> remains in need of attention.

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<sup>226</sup> *Id.* at 46-47 (supposing liability for the educational copying of a DVD).

<sup>227</sup> *Id.* at 47.

<sup>228</sup> *Id.*

<sup>229</sup> See, e.g., John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 76 (2011) (“[I]t is not just ‘fair uses’ of copyrighted works (i.e., violations of section 106 rights excused under the fair use doctrine) that the DMCA anti-circumvention provisions implicate. By keeping copyrighted works under a digital lock that limits their uses specifically to those for which rights holders provide approval, the DMCA anti-circumvention provisions also create liability for certain acts of possession and private use that did not run afoul of section 106 in the first place.”).

<sup>230</sup> Armstrong, *supra* note 112, at 47.

<sup>231</sup> See *supra* text accompanying note 15.

<sup>232</sup> See *supra* note 40 and accompanying text.

B. *Prima Facie Defenses: Which Noninfringing Uses May Owners “Unauthorize”?*

1. First Sale and Consumer Expectations

The search for an inherent (*prima facie*) limit to an access right begins with its focus on unauthorized noninfringing conduct. In other words, the scope of an access right is defined by the extent of noninfringing conduct that the copyright holder may deem unauthorized. Questions about the extent to which copyright owners may restrain alienation are not new, nor are they unique to the digital environment. Authors and publishers of tangible works once attempted to set resale prices by using “legends.”<sup>233</sup> Such downstream control of a lawfully acquired copy was quickly reined in by the first sale doctrine, however.<sup>234</sup> First sale has a number of well-recognized, inherent benefits that have prompted calls for its preservation in digital markets.<sup>235</sup> First, it “improves both the affordability and availability of copyrighted works by fostering secondary markets for lawful copies,” such as used bookstores.<sup>236</sup> It also “enables preservation of public access to works that are no longer available from the copyright owner”<sup>237</sup> and protects consumer privacy because “consumers can transfer works without permission of the copyright holder.”<sup>238</sup> Finally, “first sale promotes market efficiency and transactional clarity by protecting consumers from high information and transaction costs and deceptively complex limitations on the use of low-cost copyrighted goods.”<sup>239</sup> In other words, there is no need to haggle over the bundle of content-related rights appurtenant to a book. Instead, what you see is what you get.

First sale applies only to sold copies. Thus, to whatever extent licensing and anticircumvention rules provide alternatives to the sale of a copy, they erode the impact of the doctrine.

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<sup>233</sup> Picker, *supra* note 33, at 606 (explaining “legends”).

<sup>234</sup> See HUNTER, *supra* note 9, at 50-51; see also *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (establishing the doctrine); 17 U.S.C. § 109 (2006) (codifying same) (“[T]he owner of a particular copy . . . is entitled, *without the authority of the copyright owner*, to sell or otherwise dispose of the possession of that copy . . .” (emphasis added)).

<sup>235</sup> Perzanowski & Schultz, *supra* note 93, at 894-97.

<sup>236</sup> *Id.* at 894.

<sup>237</sup> *Id.* at 895.

<sup>238</sup> *Id.* at 896.

<sup>239</sup> *Id.* (predicting prohibitive transaction costs if “each physical copy of the latest Twilight novel or Lady Gaga CD came with a slightly different set of idiosyncratic copyright permissions” resulting in a “fragmented and confusing constellation of terms and restrictions”).

Increasingly, digital content is placed in the market and monetized with customized restraints on its use and subsequent transfer.<sup>240</sup> While its inherent advantages suggest that first sale may deserve some protection in this setting, the question becomes whether and when it should give way to alternatives. In short, whether first sale matters can more fundamentally be viewed as part of a broader inquiry: to what extent must consumer expectations be protected in a content transaction?<sup>241</sup>

Anecdotally, where new business models have been in phase with consumer expectations, they have been warmly embraced.<sup>242</sup> It is not surprising that disputes arise when a consumer transaction defies the reasonable expectations of a party. In *Corley*, for example, the circumvention technology in question was developed to allow content purchasers to exercise rights they believed themselves entitled to but which had been restricted by DRM.<sup>243</sup>

Nevertheless, consumer acquiescence in the erosion of first sale does not seem to placate its defenders. Some objections are theoretical: Public Knowledge, a nonprofit users' rights advocate and amicus for the defendant in *MDY*, emphasized that first sale "reflect[s] long-established common law principles, such as the disfavor shown to restraints on

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<sup>240</sup> See, e.g., *supra* notes 184-87 and accompanying text.

<sup>241</sup> First sale doctrine concerns the expectations of consumers as to their possessory rights in a tangible fixation of a work. The owner's rights as to the work appurtenant to ownership of that copy remained constrained by § 106. The buyer of a book, therefore, gains certain rights as to the book, and certain rights as to the work expressed therein, but neither set of rights is unlimited. See *supra* Part I.A.

<sup>242</sup> One practitioner has pointed out that unlike its less successful competitors, "iTunes has been so successful because the DRM terms are transparent to the habitual consumer and unlikely to be reached through normal user activities." Eric Matthew Hinkes, *Access Controls in the Digital Era and the Fair Use/First Sale Doctrines*, 23 SANTA CLARA COMPUTER & HIGH TECH L.J. 685, 723 (2007). Hinkes lauds this approach as a "market balance without specific government intervention where the wants of consumers match the needs of the content providers." *Id.* at 726; *but cf.* JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 3 (2008) (concluding that the iPhone, the now-ubiquitous Apple product, is "sterile" because users "are not allowed to add programs to the all-in-one device").

<sup>243</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001) (noting the defendant-appellants' argument that the "individual who buys a DVD has the 'authority of the copyright owner' to view the DVD, and therefore is exempted from the DMCA . . . when the buyer circumvents an encryption technology in order to view the DVD on a competing platform (such as Linux)"). It is also worth noting that as with the SLA at issue in *Psystar*, there had been no impact on the user's rights in the DVD itself. In fact, the technology had not even placed barriers in the way of duplication. The CSS encryption had simply placed limits on the manner in which the DVD's owner could access the expressive work encoded on the DVD. Because consumer distribution formats had never before been subject to format licensing, platform-specific playback was not a familiar limitation. See *id.* at 436-37 (explaining the movie industry's introduction of CSS in 1997).

alienation for personal property and equitable servitudes imposed on chattel.”<sup>244</sup> *Practical* objections to the transition from first sale to customized entitlements, on the other hand, are surprisingly strained. One otherwise well-reasoned criticism sounds the alarm by imagining the lost work of a legendary—but fictional—New Zealand cinema director released only on single-play DVD.<sup>245</sup> Nevertheless, the rights appurtenant to a tangible copy (first sale rights) have become enshrined in our expectations, and commentators concerned about the changes attending the digital marketplace seem most concerned about the disappearance of that familiar set of rights.<sup>246</sup> Something is indeed comforting about the notion that possessing a physical thing creates a set of access rights that are coterminous with physical property rights; this is an easily understood scope of entitlements. It is therefore no surprise that historically, as § 106 was applied to digital and then to intangible media,<sup>247</sup> there emerged no public enthusiasm for its retirement.<sup>248</sup>

But as it becomes increasingly difficult to perceive the situs of a copy, and as consumer desire for convenience drives content to the cloud, any insistence upon limiting content transactions to the contours of § 109 will prove futile and likely counterproductive. The results in *Vernor* and *Psystar* reflect this reality: customized, price-discriminatory access-based transactions are in, and first sale is out.<sup>249</sup> Therefore, what is

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<sup>244</sup> Brief of Amicus Curiae Public Knowledge in Support of Reversal, *supra* note 133, at 5 (citing *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908)). This argument, in the context of the dispute then at bar, was principally concerned with extending the “essential step” defense to software licensees. Ironically, the court *did* take infringement off the table for software end-user licensees, but only en route to an interpretation of § 1201(a) that would have equally strong implications for first sale. *See generally supra* Part I.C.4.

<sup>245</sup> JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 88 (2011). Such systems have existed, but have rarely gained market traction. *See, e.g.*, Margaret Kane, *Divx Dies—DVD the Big Winner*, ZDNET (June 16, 1999, 3:00 AM), <http://www.zdnet.com/news/divx-dies-dvd-the-big-winner/102560> (reporting that studios and consumers alike rejected Circuit City’s proprietary limited-play video disc offering).

<sup>246</sup> *See generally* Fred von Lohmann, *First Sale, Why It Matters, Why We’re Fighting for It*, ELECTRONIC FRONTIER FOUND. (Aug. 9, 2007), <https://www.eff.org/deeplinks/2007/08/first-sale-why-it-matters-why-were-fighting-it>.

<sup>247</sup> *See supra* Part I.A.

<sup>248</sup> In fact, after the passage of the DMCA, some legislators moved to protect legacy consumer expectations in the digital marketplace. *See* MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD 182-83 (2007) (discussing the proposed 2003 Digital Media Consumers’ Rights Act and Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act, neither of which won “support from the Congress as a whole”).

<sup>249</sup> *See supra* notes 81, 91 and accompanying text.

required is a principled approach to the protection of consumer expectations under *MDY* and *Psystar*.

One final word on first sale: owners and users who wish to recreate first sale transactions of digital media may do so. In the first instance, the bundle of sticks accompanying tangible media like DVDs and books is still fixed by *Bobbs-Merrill* and § 109.<sup>250</sup> In the realm of intangible distribution, in those situations where a transaction resembling first sale makes sense, it may survive simply because parties are at liberty to transact for it.<sup>251</sup> In contrast, where first sale does not reflect the appropriate scope of entitlements, the appropriate question should not be whether first sale is inherently necessary to a fair marketplace but instead should be simply how to protect expectations.<sup>252</sup>

## 2. Unauthorized Noninfringing Uses: Who Decides?

Under the combination of §§ 106 (exclusions), 107 (fair use), and 109 (first sale), the contours of permissible transactions involving a copyrighted work reflect the bargain between owners and the public, and aim to preserve the incentive to create and publish.<sup>253</sup> Within those boundaries, market forces determine what kinds of works will be created and on what terms they will be distributed.<sup>254</sup> The public thus (theoretically) determines the amount of available works both by participating in the market *and* by democratically adjusting the contours of the copyright law.

An unfettered access right would represent a regulatory framework in which more kinds of transactions are possible. It would provide ways to monetize creative works while avoiding the above-mentioned limits familiar in copyright law. Because

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<sup>250</sup> See *supra* note 237 and accompanying text.

<sup>251</sup> For an example of an *à la carte* digital rights transaction, see *supra* text accompanying note 186.

<sup>252</sup> There are, for example, valid concerns that consumers may disregard license terms they view as “unlikely to become relevant in their use of the product” which counsels “reducing contract length, simplifying and standardizing language, and developing ratings that would convey the essence of terms . . . .” Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts,”* 78 U. CHI. L. REV. 165, 168-69 (2011) (recommending consumer protections under EULAs as alternatives to compulsory disclosure); but see Michael P. Matesky, II, Note, *The Digital Millennium Copyright Act and Noninfringing Use: Can Mandatory Labeling of Digital Media Products Keep the Sky from Falling?*, 80 CHI.-KENT L. REV. 515, 532-38 (2005) (arguing that mandatory disclosure would protect consumer expectations).

<sup>253</sup> See *supra* note 33 and accompanying text.

<sup>254</sup> See *supra* note 191 (discussing second degree price discrimination).

the § 1201(a) tort, like that of § 106, thereby creates a statutory monopoly out of whole cloth, its scope must remain consistent with the Progress Clause. In exploring the proper boundaries of an access right, the previous sections acknowledged the need to make accommodations for transformative and other fair use, and asked whether first sale should be preserved (either because it reflects existing consumer expectations or because it inherently reflects the terms of the copyright bargain by enabling the existence of secondary markets, libraries, and the like). It was argued that consumer expectations will generally align with legal norms and that if first sale is important, it is for the latter reason.

Except to the extent that the availability of a digital “fig leaf” might lead to market scarcity of public domain works,<sup>255</sup> certain basic limitations on copyright *are* imported wholesale by the DMCA. The “limited times” and subject matter requirements of copyright are a threshold requirement for DMCA liability.<sup>256</sup> Moreover, the fact that contractual license terms govern anticircumvention liability means that fraud and unconscionability will continue to provide an outer boundary, providing additional good news for skeptics on the matter.<sup>257</sup>

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<sup>255</sup> See Ginsburg, *supra* note 29, at 126-27 (pointing out that public domain material might become eligible for § 1201 protection “so long as the information provider does not merely encrypt raw public domain documents or unoriginal listings of information, but instead packages the information with copyrightable trappings”); see also Pamela Samuelson, *The Constitutional Law of Intellectual Property After Eldred v. Ashcroft*, 50 J. COPYRIGHT SOC’Y U.S.A. 547, 568-73 (2003). This argument was noted but not decided in *Corley*. *Universal City Studios v. Corley*, 273 F.3d 429, 444-45 (2d Cir. 2001). It has been rejected by the Northern District of California. See *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002). This may be in part because, as Ginsburg seems to imply, an access right only impacts the availability of public domain material to the extent that it drives unprotected copies out of the marketplace: examining possible affirmative defenses to an access right, she argues that perhaps “[w]hen unprotected copies are no longer available, it should be permissible, once access to a copy of the work has been lawfully obtained, to circumvent any protection attached to the thin copyright veneer in order to access and copy the raw information.” Ginsburg, *supra* note 29, at 130 & n.54 (emphasis added) (drawing analogy to other provisions of § 1201 which permit circumvention necessary to create interoperable software). Professor Efroni points out that this concern is not unique to digital distribution, and simply requires additional scrutiny under an access right. See EFRONI, *supra* note 19 at 485-86. He suggests, for example, that a “strikingly disproportional” ratio of unprotected content within a “digital envelope” might trigger an affirmative defense. *Id.* at 509 n.97. Finally, as the *Corley* court suggested, fair use is only impacted by an access right when the right *kind* of access is not granted. See *supra* notes 213-14 and accompanying text.

<sup>256</sup> See *supra* note 180 and accompanying text.

<sup>257</sup> See Nancy S. Kim, *The Software Licensing Dilemma*, 2008 B.Y.U. L. REV. 1103, 1123-28 (2008).



The remaining question becomes whether (or which) additional exceptions to an access right are necessary to ensure that it reflects the bargain. One possible answer is that market participants are also political participants, and it seems reasonable to assume that the terms of a statutory monopoly, enacted by a representative legislature, are entitled to some presumption of inherent balance.<sup>258</sup> To assume so, however, would be to ignore the reality of the political distortions that attended the enactment of the DMCA.<sup>259</sup> This may be unavoidable. In their influential 2003 book, William Landes and Judge Richard Posner suggest that an asymmetry of value inherent in the expanded protection of creative works gives rise to a political distortion in which legislatures are more likely to protect the interests of content owners than of content users.<sup>260</sup> The alternative is to accept that judges are better positioned to enforce the bargain,<sup>261</sup> which would represent a return to copyright misuse as a *prima facie* judge-made limit on the Ninth Circuit's version of an access right.

C. *Psystar and Market Substitution: What Chamberlain Was Really About*

Accepting that the Ninth Circuit's licensing and anticircumvention cases created an access right, there exists a lingering need for clarity on the limits of this right as applied to unauthorized noninfringing uses. At first blush, *Chamberlain* seems to offer little in the way of clarity because the Federal Circuit's "nexus" requirement remains a doctrinal outlier.<sup>262</sup> It may

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<sup>258</sup> See Raymond T. Nimmer, *Information Wars and the Challenges of Content Protection in Digital Contexts*, 13 VAND. J. ENT. & TECH. L. 825, 855-56 (2011) ("In practice, the efficacy of both the DMCA restrictions and contract terms in supporting value in copyrighted works are subject to practical questions of enforceability and market acceptability. Access controls or contractual use restrictions that are generally unacceptable in the market will not long be sustainable. In addition, if unacceptable to the broader society, they may be unenforceable in fact. As with copyright itself, these legal regimes create important rights, but also are tools to shape social and market expectations and which shape them in turn.")

<sup>259</sup> See LITMAN, *supra* note 19, at 122-50.

<sup>260</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 403 (2003) (also noting "eddies" in this current where content owners are also derivative creators).

<sup>261</sup> See generally Armstrong, *supra* note 112 (arguing for a judge-made affirmative defense to DMCA liability). Judges may also be better able to reflect economic efficiencies than are legislatures. See LANDES & POSNER, *supra* note 260, at 417.

<sup>262</sup> See *supra* note 118 and accompanying text (discussing *Chamberlain*); see also *supra* note 121 and accompanying text (discussing the Fifth Circuit's avoidance of the question in *MGE*); but see *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 544 U.S. 923 (2005) (denying certiorari).

be, however, that clues to the proper scope and limits of the access right—that is, of copyright misuse—are hiding in plain sight within the superficial tension between *Chamberlain* and *MDY*. In other words, if the *MDY* court correctly disregarded the Federal Circuit’s infringement nexus, the question remains as to whether the outcome of *Chamberlain*—as a policy matter—was correct on its facts. The answer is probably yes: to whatever extent an unfettered access right makes sense in the context of online gaming and digital distribution of entertainment content,<sup>263</sup> even the *MDY* court itself acknowledged that the policy considerations expressed in *Chamberlain* were sound in the context of durable goods.<sup>264</sup>

What emerges in the anticircumvention jurisprudence is a false conflict. This may be true in part because the part of *Chamberlain* that was rejected was dicta.<sup>265</sup> But that observation does not tell the whole story, because, by failing to distinguish or confine *Chamberlain*, the *MDY* court left two important questions unresolved. First, what rule governs a durable goods case in the “Hollywood Circuit?”<sup>266</sup> Second, and more importantly, in what other situations should courts apply *Chamberlain*’s only necessary holding that, because of the need to limit copyright owners’ rights under their bargain with the public,<sup>267</sup> some uses of copyright-protected material are not within the discretion of the owner to “unauthorize” for the purposes of § 1201(a)?

The answer to the first question may surprise: *Chamberlain* would have come out the same way under a careful application of today’s Ninth Circuit law. The necessary part of *Chamberlain*’s holding was that despite the plaintiff’s ex post accusation of circumvention, the use at issue had not been expressly made unauthorized.<sup>268</sup> By presuming authorized access in the absence of an agreement to the contrary, the court exempted a broad category of operating software use from DMCA liability before even asking whether infringement had taken place (which it had not). That portion of the holding is

<sup>263</sup> About which reasonable minds can, and most certainly do, disagree.

<sup>264</sup> *MDY Indus., L.L.C. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 950 (9th Cir. 2010) (“While we appreciate the policy considerations expressed by the Federal Circuit in *Chamberlain*, we are unable to follow its approach because it is contrary to the plain language of the statute.”).

<sup>265</sup> See *supra* text accompanying note 119.

<sup>266</sup> *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kosinski, J., dissenting) (famously acknowledging the extent to which the Ninth Circuit must consider the pragmatic interests of the media content industries).

<sup>267</sup> See *supra* note 40 and accompanying text.

<sup>268</sup> *Chamberlain Grp., Inc. v. Skylink Tech., Inc.*, 381 F.3d 1178, 1187-88, 1204 (Fed. Cir. 2004).

not in tension with *MDY* and *Psystar*. In other words, the Ninth Circuit can readily adopt the principle that where copyright-protected software happens to be integral to a consumer electronic product, customers and competitors enjoy a presumption of de jure authority to use and market interoperable products. But if and when savvy manufacturers attempt to contract around this presumption, a more difficult question arises: what limit to place on the discretion of parties seeking to restrict such use by contract? Regrettably, the Ninth Circuit did not provide a clear road map in *Psystar*.<sup>269</sup> As a threshold matter, traditional doctrines of unconscionability and consumer fraud are once again the outer boundaries.<sup>270</sup> Such concerns are particularly acute in the context of “clickwrap” licensing and should guard the door to DMCA liability where a form of access is made unauthorized by adhesion, especially where consumer expectations may not align with the terms of the transaction.<sup>271</sup> We are left with the affirmative defense of copyright misuse, the contours of which have only begun to be defined. For the access right described (and cautiously advocated) herein to become a coherent addition to the United States’ copyright regime, courts should continue to give it shape.

#### CONCLUSION

This note posits that an access right has been created by the Ninth Circuit’s software-licensing and anticircumvention jurisprudence, and that this right is a necessary companion to copyright in a digital market where the exclusive rights of § 106 are often incoherent. In attempting to suggest necessary limits on this new right, the copyright misuse doctrine developed in *Psystar* is at the center of the inquiry. This doctrine requires additional clarity from the courts. In the meantime, perhaps a return to first principles is needed. The Progress Clause “secur[es]” to creators “the exclusive Right” to their work, but leaves the scope of that Right to the Congress and the common law.<sup>272</sup> In construing and applying the DMCA and the Copyright Act in a digital context, courts must therefore secure only those rights necessary “[t]o promote the

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<sup>269</sup> See Petition for Writ of Certiorari, *supra* note 92, at \*5-10 (attempting to distill a unifying principle governing copyright misuse among the Circuit Courts of Appeal).

<sup>270</sup> See *supra* note 257 and accompanying text.

<sup>271</sup> See *id.*

<sup>272</sup> U.S. CONST. art. I, § 8, cl. 8.

Progress of Science and useful Arts.”<sup>273</sup> This note argues that market substitution—the fourth fair use factor—may be the dispositive one.<sup>274</sup> In a price-discriminatory access market, every form of access can be bargained for. Courts shaping an access right, as ultimately delimited by the doctrine of copyright misuse, should thus consider whether the right in question would realistically impact the incentive to create. For the present, courts may need to feel their way through these issues. Did Chamberlain stop making garage-door openers in the face of competition from Skylink? It seems not.<sup>275</sup> But Apple’s incentives would surely change in the face of a legal requirement that OS X be interoperable with third-party hardware. Finally, would movie studios continue to offer DVDs if they were unable to control the platforms on which DVDs are played? That may be a surprisingly close question.<sup>276</sup> But it is the kind of question that will have to be asked if the Progress Clause is to continue to guide our intellectual property paradigm under an access right.

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<sup>273</sup> See Ginsburg, *supra* note 29, at 122 (noting that “the justifications offered by the Enlightenment-era framers of copyright policy should still guide us” in shaping an access right).

<sup>274</sup> See *supra* note 211 and accompanying text.

<sup>275</sup> See CHAMBERLAIN, <http://www.chamberlain.com/doityourself> (last visited Jan. 20, 2012).

<sup>276</sup> Interestingly, the defendants in *Corley* never argued copyright misuse. Even without relying on the analytic similarity to *Psystar*’s facts, it does not seem that confining digital media to a proprietary player would trigger the kinds of concerns that are expressed in *Psystar*. On the other hand, the reputational and quality control concerns expressed in *Psystar* were absent.

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