

## Fair Use Since the Digital Millennium Copyright Act of 1998<sup>1</sup>

### I. Fair Use, Technical and Non-Technical

Fair use, as lawyers know it, is one of the most litigated and least predictable aspects of U.S. copyright law. It is a narrower category than the class of activities that do not infringe copyright, though many people may think of “fair use” in that broader sense. What is technically fair use, that is, fair use under §107 of the Copyright Act, is determined on a case-specific, context-sensitive basis by applying general principles. It is potentially expansive, lacking any categorical exclusion – commercial copying, wholesale copying, copying of highly expressive works, and anything else can in appropriate circumstances be fair use. But that very expansiveness makes it uncertain; sometimes, maybe most of the time, commercial copying, wholesale copying, and copying of highly expressive works will *not* be fair use.

Courts generally apply the four-factor test set out in the Copyright Act, which requires an assessment of the purpose of the use, including whether it is commercial or noncommercial and whether it transforms the original with new meaning or content, as a critical review or parody does. Along with the purpose of the use, courts consider the nature of the copied work (published/unpublished, factual/fictional, with greater protection against copying given to the latter in each pair), the amount copied, and the effect of the allegedly fair use on the market for the copyright owner’s works. As these

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<sup>1</sup> Thanks to Julie Cohen and Zachary Schrag for helpful comments.

somewhat vague and incommensurable considerations suggest, fair use under the statute is notoriously uncertain.<sup>2</sup>

Libraries, understandably, have sought greater certainty in blanket exceptions written into the Copyright Act. Such exceptions, which form part of what many nonlawyers would think of as fair use in the more general sense, are extremely complicated and rigid. Libraries benefit from both technical and non-technical fair use, but a risk-averse institution is easily drawn to the specific exemptions. Such exemptions offer security even while they constrain action, especially in new and emerging activities that Congress has not yet addressed.

This paper will examine current fair use doctrine and how it interacts with library practices and new restrictions on technology imposed by the Digital Millennium Copyright Act (DMCA). Statutory fair use is becoming less useful to libraries, through a mix of changes in copyright doctrine, contractual provisions, and technological change. At the same time, statutory exceptions have not taken up the slack. There are no perfect solutions; compromise with copyright owners and some degrees of freedom for experimentation are probably the best we can hope for.

#### A. Overview: New Options, New Legal Issues

Changes in copyright law, technology, and culture have combined to alter the ways in which libraries and their patrons acquire and use information. History suggests that many difficulties lie ahead in adapting to the new regime. When technological changes enabled new methods of communication, they also enabled new methods of

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<sup>2</sup> See, e.g., Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. Rev. 87, 133 (2004).

government surveillance: Inventors quickly followed the telephone with the wiretap. Law struggled to respond to these changes, trying to implement the Fourth Amendment's prohibition on warrantless searches and seizures to a context its drafters never anticipated. From one perspective, a wiretap did not infringe on any individual rights, because the ability to have a conversation with someone who was not physically in the same location was not previously part of a citizen's rights. From another, ultimately more persuasive perspective, however, a wiretap allowed the government to listen in on an ordinary conversation between people who considered themselves to be talking in private, given that the telephone changed how private conversations were conducted.

In the case of search and seizure law, courts and commentators struggled to redefine the interest in privacy behind the Fourth Amendment; where physical presence and private conversation were always coterminous before, they could now be separated, and courts had to decide which was crucial in determining whether a warrant would be required for a wiretap.<sup>3</sup> Similarly, changes in technology and social practices that enable previously unimaginable levels of private copying require us to rethink old principles. Private copying used to be just that – private, unobjectionable, nobody else's business. But the scale of computer- and network-assisted private copying is so much greater that it may make a difference in kind, as far as the health of the copyright industries is concerned. Do we need to distinguish the study (where the computer is) from the living room (where the VCR is) to determine whether private copying is acceptable? Or will both kinds of copying stand or fall together?

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<sup>3</sup> See, e.g., Sonia K. Katyal, *The New Surveillance*, 54 CASE WESTERN RESERVE L. REV. 297, 305-06 (2003).

One major risk in periods of change is that our justifications for drawing the line between prohibited and permitted new activities may then be applied to older, previously uncontested situations, throwing their legality into doubt.<sup>4</sup> In the Fourth Amendment context, abandoning a focus on the physical integrity of the home in order to protect reasonable expectations of privacy ultimately led courts to discount the value of physical integrity where they found that there was no reasonable expectation of privacy, for example when people discarded their trash or left their blinds open enough that police officers could peer through.

In the realm of copyright, with millions of people trading music and movies in the privacy of their homes with no expectation of profit, neither the individualized, private nature of particular instances of copying nor the lack of money changing hands may suffice to insulate a copier from liability. Yet libraries' activities traditionally are also free to patrons and small-scale as to individual patrons and works, but large in the aggregate.<sup>5</sup> Thus, the kind of analysis required to find Napster liable for contributory copyright infringement may also make libraries much more vulnerable.

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<sup>4</sup> Cf. Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. Cin. L. REV. 1181, 1194 (1988) (“Whenever some preexisting rule is to have a new application added to its coverage, the question arises, or ought to arise, about the effect of the new application on the old rule. More particularly, any new application potentially affects the strength of the preexisting rule, even and perhaps especially with respect to that rule’s earlier applications.... Suppose, for example, that there is a rule allowing any person convicted for the first time of a misdemeanor to be paroled, as a matter of right, after six months imprisonment. And then suppose the rule is extended to cover felonies as well as misdemeanors. Faced now with the possibility that first time murderers, arsonists, rapists, and kidnappers will be paroled after six months, the rule is much more likely to be repealed, with a loss of the presumably desirable policy adopted by the original unamended rule.”) (footnote omitted).

<sup>5</sup> See, e.g., *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (upholding copying of entire articles by library for research purposes as fair use despite wide-scale copying in aggregate), *aff’d* by an equally divided Court, 420 U.S. 376 (1975).

Specifically, the *Napster* court, building on other recent cases, held that Napster users were making “commercial” use of freely traded music files because they got for free something for which they would ordinarily have to pay<sup>6</sup> – much like a library patron who checks out a book or prints out an article from the *New York Times*. The *Napster* district court also ruled that the sender of a file was not engaged in a “personal” use even if the recipient was, a conclusion the court of appeals also found not clearly erroneous.<sup>7</sup> Thus, libraries whose activities allow patrons to make personal copies may not be able to claim the same protections that patrons could in a direct lawsuit, a conclusion consistent with the results in cases of copy shops successfully sued for making course packets for college students.<sup>8</sup>

The *Napster* court also used its finding of commercial use to presume harm to the copyright owner’s legitimate market.<sup>9</sup> Given the wide scale of the aggregate copying at issue, the copyright owner’s claim of harm has strong intuitive appeal. And harm to the copyright owner’s market leads nearly inexorably to rejection of a fair use claim.<sup>10</sup>

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<sup>6</sup> See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000), *aff’d in relevant part*, 239 F.3d 1004, 1015 (9<sup>th</sup> Cir. 2001).

<sup>7</sup> See *id.*

<sup>8</sup> See, e.g., *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6<sup>th</sup> Cir. 1996) (en banc).

<sup>9</sup> See *Napster*, 239 F.3d at 1015. Although the Supreme Court rejected such a presumption in its most recent fair use case, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584-85 (1994), the Ninth Circuit applied it nonetheless, as did the Sixth Circuit in the *Princeton University Press* case. Both courts implicitly relied on *Campbell*’s statement that a presumption of market harm was inappropriate in “a case involving something beyond mere duplication for commercial purposes,” 510 U.S. at 591; many library-based activities will involve “mere duplication,” so libraries may reasonably fear that their activities will be presumed to cause market harm in the same way as Napster users’.

<sup>10</sup> See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985) (effect on the market is “undoubtedly the single most important element of fair use”).

If private, free-to-the-user copying is not necessarily fair, then, what is fair use today? As courts have become more concerned with technologies that allow rapid, nearly costless distribution of exact copies, they have also become more concerned with attempts by copyright owners to suppress dissenting or critical views. Thus, while it has become harder to establish a fair use merely because it is personal, private or small-scale – because nothing in the digital age reliably stays personal, private or small-scale – it has become easier to defend a use that is “transformative”: one that takes portions of a copyrighted work and changes it in some way, through parody or commentary.<sup>11</sup>

The paradigm case is one that attracted a fair amount of media attention: the Margaret Mitchell Estate sued Houghton Mifflin for publishing Alice Randall’s *The Wind Done Gone*.<sup>12</sup> Author Alice Randall retold the story of Margaret Mitchell’s *Gone with the Wind* with new characters and new interpretations of events in response to the racism of the original, thereby creating a derivative work. In reversing the district court’s grant of a preliminary injunction, the court of appeals emphasized that Randall’s retelling was critical and transformative. The court was particularly impressed by the fact that the Mitchell estate forbids any authorized derivative works based on *Gone with the Wind* to mention homosexuality or miscegenation, while Randall made both part of her plot.<sup>13</sup> The Mitchell estate, in other words, was trying to use copyright law as its own private Comstock Act. Fair use stood in the way of such censorship.<sup>14</sup>

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<sup>11</sup> See Rebecca Tushnet, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It, 114 YALE L.J. 535, 550-52 (2004).

<sup>12</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>13</sup> See *id.* at 1282 (Marcus, J., concurring specially); *id.* at 1270 n.26 (majority opinion).

<sup>14</sup> See *id.* at 1263 (“[C]opyright laws were enacted in part to prevent private censorship . . .”).

Randall was criticizing the dominant paradigm, the myth of white Southern gentility, whose most effective piece of propaganda is *Gone with the Wind*. As a critic of a popular cultural icon, Randall fit the model of a rebel speaking truth to power and suffering for it. Like a protester burning an American flag, she seized on a powerful symbol and altered its meaning; giving the Mitchell estate control of how *Gone with the Wind* is reinterpreted would be like requiring that the flag always be treated with respect, something that the First Amendment forbids. As a result, Randall's fair use defense gained force from appeal to free speech principles.

The *Wind Done Gone* decision now seems to many scholars to be an archetypical fair use case.<sup>15</sup> Protecting transformative uses the copyright owner hates is fine as far as it goes. The trouble is that, in protecting transformation and emphasizing the reasons that transformation should be outside copyright owners' control, courts and commentators are tempted to divide copiers into two kinds – the “good” critic and the “bad” pirate. The first makes copies that are transformative, critical, adding new material and usually not reproducing all of the original. The second merely reproduces, and therefore is unlikely to qualify for the fair use defense.<sup>16</sup>

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<sup>15</sup> See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 198-99 (2001); NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX: PROPERTY IN EXPRESSION/FREEDOM OF EXPRESSION* (forthcoming 2005) (manuscript at 1-2, on file with author); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, *LAW & CONTEMP. PROBS.*, Winter/Spring 2003, at 173, 195- 96 (using case as one of three core examples); Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 *LOY. L.A. L. REV.* 159, 188-89 (2002).

<sup>16</sup> See, e.g., *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 923 (2d Cir. 1995) (stating that transformative use is “central” to a fair use defense); Tushnet, *supra* note 10, at 555-60; Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem “Transformed”*: *Some Reflections on Fair Use*, 46 *J. COPYRIGHT SOC'Y U.S.A.* 251, 257

This bias against reproduction is occurring despite the historic status of pure copying at the core of fair use, which is reflected in the portion of the preamble of section 107 of the Copyright Act that mentions "multiple copies for classroom use."<sup>17</sup> (Tellingly, the *Wind Done Gone* court omitted those words when quoting the preamble in its discussion of how fair use is valuable because it furthers free speech interests.)<sup>18</sup> It is also in some tension with the *Betamax* case, which held that private home time-shifting of broadcast programs was a fair use<sup>19</sup> – but then, that case is under sustained attack from many fronts today.

Current copyright doctrine invites the conclusion that, though the copyright owner cannot control many transformative uses, it will usually be allowed total control over mere reproduction, as a fair trade-off. Reproduction, after all, has none of the relevant features of transformative use – copyright owners are likely to license pure reproduction, so they aren't suppressing critical commentary or otherwise acting as censors when they demand payment, and pure reproduction doesn't directly add new works to the world, so control doesn't suppress creativity.

Lost in this neat division is the importance of access to copyrighted works in the first place. The distinction between transformation, which may be the final step in a

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(1998) ("[T]he presence or absence of transformation has become the linchpin on which post-Campbell fair use cases tend to turn.").

<sup>17</sup> 17 U.S.C. § 107; *see also* *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1351, 1353-57 (Ct. Cl. 1973) (upholding copying of entire articles by library as fair use), *aff'd by an equally divided Court*, 420 U.S. 376 (1975); MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 431 (3d ed. 1999).

<sup>18</sup> *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001) ("[P]urposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research' . . . are at the heart of fair use's protection of the First Amendment . . . ." (quoting 17 U.S.C. § 107) (first omission in original)).

<sup>19</sup> *See Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984).



library patron's use of a resource, and simple copying, is vital: A research paper that quotes earlier works is transformative, but the copies that the researcher made at the library in order to have those earlier works at hand while she wrote are not transformative. What seem like victories for critics of copyright owners, then, contribute to the worsening situation for library fair users, who don't look much like critics. Libraries, which offer resources to all kinds of patrons, are even more distant from the partisan critic who is currently favored in fair use law. The values of helping people find the best of existing works and of preserving public access to a wide variety of materials – the values of libraries – do not fit the individualistic, dissenter-oriented model of transformative fair use. The risk is that we will end up with a system that allows freedom only to critics who have already paid the price of admission; those who can't pay won't be able to criticize, much less see what there is to criticize, in the copyrighted world.

Although a few recent fair use defenses have succeeded in the absence of transformation, they have involved circumstances unlikely to occur in the library context – a search engine's digital index that offered small, low-resolution versions of copyrighted photographs but sent users to the copyright owners' websites for the full-size versions,<sup>20</sup> or a reproduction of a photograph that was causing public controversy as part of a news story.<sup>21</sup> Courts are not likely to see these exceptional cases as similar to a library's systematic efforts on behalf of its patrons.

Along with doctrinal changes favoring transformation and thus necessarily disfavoring pure copying, copyright owners have changed the "effect on the market" analysis by redefining their expected markets. Simple reproduction, even as part of

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<sup>20</sup> See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

<sup>21</sup> See *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

assisting research, is less likely to be seen as fair use these days because copyright owners can assert that they have licensing mechanisms in place for such reproduction. The *New York Times*, for example, has easily searchable online archives, and will deliver a copy of any article to anyone willing to pay a few dollars. Thus, a library that does not pay when it makes a copy for a user is costing the copyright owner money, and harm to a legitimate market is a strong, often fatal strike against fair use. (Section 108 of the Copyright Act provides some shelter for non-systematic library copying for patrons, but that exception is tightly limited; the point is that, when Section 108 is not available, fair use is unlikely to provide a backstop. Moreover, the same arguments that have persuaded courts to condemn plain copying under a fair use analysis make Section 108 vulnerable politically when copyright owners complain that the heavy hand of government is preventing them from exploiting a legitimate market.)

The result of these developments is that, even though libraries have a higher moral ground than music file-sharers, the doctrinal categories developed in response to new distribution methods offer few chances to recognize that difference. Centrally, neither the file-sharer nor the library engages in “transformation” in the sense of creating new works when they distribute existing works.<sup>22</sup>

The clearest distinctions between the traditional library and the music lover who throws his “library” of mp3 files open to the world are that the traditional library imposes

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<sup>22</sup> Changing a work’s context can often give it new meaning, and libraries certainly do that, for example when a librarian offers a fan of the *Harry Potter* novels examples of other British children’s literature that deepen a reader’s understanding of the books, or responds to a patron’s interest in George Orwell’s *1984* with nonfiction books about the Soviet Union and Nazi propaganda, but that kind of recontextualization isn’t generally recognized as transformative by courts even though it can transform understanding. See Tushnet, *supra* note [], at 573 & n.97.

a time limit on a patron's possession of an item and that the traditional library loses physical control over its copy while it is lent out and cannot send the same copy home with another patron, while the file-sharer gives copies away permanently and without losing his own file. But many traditional library activities, such as helping patrons find books and articles that they may then copy for research or other personal use, lead to the creation of new permanent copies, and many libraries would be happy to have infinite copies of popular works available so that every patron could get access without competition from a waiting list.<sup>23</sup>

After *Napster*, libraries have reason to be concerned that courts will be willing to treat their activities in the aggregate, and thus find that such activities are commercial – because they allow patrons to get for free works for which they would ordinarily have to pay – and harmful to copyright owners – because copyright owners are willing to license the things libraries have traditionally done on their own. As long as there is no lending right in US law, libraries can still lend out books, tapes and other physical media,<sup>24</sup> but

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<sup>23</sup> Sufficiently prolific “lending” could even ultimately substitute for permanent copying of all kinds. If a patron's electronic copy was protected by a technological measure imposing a time limit on access, but the patron could easily “renew” or download a new copy every time the old one expired, then the copy would be permanent for all relevant purposes. After all, most people don't listen to all their music or read all their books every day; the physical presence of the book or CD is just a reminder that the work is available. More to the point, the easily-renewable electronic copy would be a perfect economic substitute for a permanent copy, and would therefore harm the copyright owner's market just as much as a standard physical copy.

<sup>24</sup> Even under the most copyright-owner-favorable doctrine, it's hard to imagine a court finding a library liable for vicarious or contributory liability if patrons make unauthorized copies of the materials they borrow. But nothing is sacred; I could construct an argument for liability for a library that lends out music CDs even though it knows how likely it is that patrons will rip the songs to their home computers, then return the CDs. Especially in a world where protected versions of the same music are available, how could a library not foresee that its practices will encourage unauthorized copying?

even that may become less important as users demand access to new technologies and libraries try to use those technologies to compensate for budget limits.

## B. A Case Study: The iPod and Its Discontents

Like personal, private use in the home, library lending used to be limited by the library's ability to acquire physical copies. But digitized materials can be shared with a hundred patrons at once, if the library is not bound by law or contract to restrict access beyond what the technology would allow. Experiments with lending the iPod Shuffle to library patrons suggest the possibilities for distributing digital files to patrons so they can get more value from libraries. At the same time, use of the iPod Shuffle illustrates the limitations of the current system, which uses both contract and digital rights management (DRM) technology to restrict access to copyrighted materials that could technically be disseminated without any restrictions.<sup>25</sup>

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<sup>25</sup> See Cyrus Farivar, *Library Shuffles Its Collection*, Wired, Mar. 3, 2005, <http://wired-vig.wired.com/news/mac/0,2125,66756,00.html>. Although Farivar's story reports that the library is using mp3 files, other reporting suggests that the audiobooks are downloaded from Audible.com via Apple's iTunes store, see Michael Stephens, *The iPod Experiments*, Library Journal, Apr. 15, 2005, <http://www.libraryjournal.com/article/CA515808>, and therefore are wrapped in a proprietary digital rights management scheme, whereas mp3 files are unprotected and can be copied at will.

One might wonder how much protection the iTunes DRM offers: An iTunes user who has a valid iTunes account can burn a protected file onto a CD in an unprotected format that will play on any CD player; this CD could then be ripped and turned into an unprotected mp3. But this is probably not a huge problem for copyright owners (the fact that so many licensed their music and audiobooks to Apple and Audible is some evidence of that). The protected file-to-CD-to-mp3 workaround results in diminished sound quality and is generally not worth the bother. Even if it were a problem, a library's use of protected files is uniquely unlikely to cause files to "leak" to mp3 format: The workaround is only available to users who are authorized to play the protected file on

As an initial matter, the iPod Shuffle experiment might be offered as evidence that DRM, combined with attractive pricing, can offer benefits both to libraries and to copyright owners. One library using iPods has explained that the combined cost of purchasing the iPods and downloading the digital audiobooks is less than that of acquiring the same audiobooks on CD; the benefit to a cash-starved library is obvious.<sup>26</sup>

The copyright owner also benefits. Not only does the copyright owner profit directly from the sale of the audiobook file, but, compared to lending out CDs -- which patrons can rip to obtain an unprotected copy for themselves and then return -- library lending of iPod Shuffles also looks substantially better for avoiding widespread file-sharing of unprotected copies. In theory, a library could also take an audiobook on CD and rip it to mp3 or other unprotected format for lending on an iPod, which would increase the risk that the library's copy would "leak" onto file-sharing services -- though a patron would still have to figure out how to transfer the files from the iPod to his personal computer. A library that owns a stock of previously purchased audiobooks on CD might desire to make them available in this new, convenient format without spending more money. In the long term, though, the lower price for downloadable, DRM-protected audiobooks could make them more attractive for future purchases.

It should be noted, however, that the current significant price differences likely stem from the fact that the iTunes Store does not presently have a mechanism for price

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their home computers. The library discussed in *Wired's* story does not seem to be giving out its account information, nor would it make sense for any library to do so. Thus, though a patron could theoretically "hack" the iPod Shuffle and transfer the audiobook file to her personal computer, playing the file or burning it to CD would be impossible without further illegal hacking in order to defeat the DRM. (All the iTunes hacks of which I am aware require an authorized computer before the DRM can be removed, so our intrepid library hacker would have to do a lot of work.)

<sup>26</sup> See Farivar, *supra*.

discrimination. The iTunes Store simply cannot tell whether a purchaser is a private person or a library and thus it does not charge higher prices to the library, even though a copy of *The Da Vinci Code* is worth more to the library – whose patrons will collectively read it many times – than to an individual who only expects to read the book once.

The technology, indeed, enhances the benefit a library receives from an iTunes download compared to the benefit a private consumer receives. While media generally are more valuable to a library than to any individual patron, the downloaded audiobook is potentially much more valuable to the library than the same book on CD or in print. This is because the iTunes model is designed so that the average individual consumer will not notice the service's technological limits on use<sup>27</sup>: An iTunes account currently allows a protected file to be played on up to five computers and on an unlimited number of personal devices such as the Shuffle.<sup>28</sup>

As a practical matter, a private individual is not likely to have an “unlimited” number of personal devices; but a library can purchase on a grander scale, and then copy a single audiobook file onto as many Shuffles as it can buy. By repeatedly lending its Shuffles to new patrons, it can achieve far broader distribution than ever before – and all this from buying one copy of an audiobook, whereas it would have had to buy multiple copies of the book on CD or in print to achieve the same benefits to its patrons through those media. This, along with the ability to change the contents of the Shuffles regularly

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<sup>27</sup> See, e.g., Bill Palmer, With iTunes Set for World Domination, Steve Jobs Is the New Crusader for Our Digital Rights, <http://www.billpalmer.net/ipodgarage/ipod000089.html> (“[T]he rights [granted by iTunes] were broad enough and consistent enough that most users would never even notice there were any restrictions in place at all, as long as they were doing things on the up and up.”).

<sup>28</sup> See iTunes Tutorial: Understanding Your Digital Music Rights, <http://www.apple.com/support/itunes/tutorial/segment102095b.html>. Burning to CDs is also allowed.

to meet patron demand, is why libraries might embrace the Shuffle, but it is also why copyright owners are likely to resist libraries' attempts to use consumer services like the iTunes Store.

The iTunes Store's inability to discriminate between institutions and individuals, moreover, is technical, which means both that it may change with newer versions and that non-technical solutions may be available to copyright owners. In fact, the iTunes Store's Terms of Sale arguably forbid library use of the Store, since they authorize only "personal, non-commercial use" and state that the Store "sells products to end user customers only."<sup>29</sup> Likewise, the Audible.com website, which supplies audiobook content to iTunes, limits its offers to individuals making "personal non-commercial use."<sup>30</sup> The Books on Tape website, which offers separate sections for libraries and individual consumers, heavily promotes Audible.com on the consumer part of its site, but makes no mention of the service on the library section. This is consistent with publishers' desire to discriminate based on price; Books on Tape offers CDs and tapes to consumers for a discount from the prices it charges libraries.<sup>31</sup> It is likely that, when publishers explicitly make audio downloads available to libraries and other institutions, they will charge more or restrict the ability to transfer a single file onto more than one

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<sup>29</sup> iTunes Terms of Sale, <http://www.apple.com/support/itunes/legal/policies.html>. See also iTunes Music Store Terms of Service, <http://www.apple.com/support/itunes/legal/terms.html> (containing identical "personal, non-commercial use" limitation).

<sup>30</sup> Audible.com, Legal Notices, [http://www.audible.com/adbl/faqs/terms.jsp?BV\\_SessionID=@@@@0729267410.1115053445@@@@&BV\\_EngineID=cccgaddekhghlghcefecegedfhfdhfj.0&uniqueKey=1115053447654](http://www.audible.com/adbl/faqs/terms.jsp?BV_SessionID=@@@@0729267410.1115053445@@@@&BV_EngineID=cccgaddekhghlghcefecegedfhfdhfj.0&uniqueKey=1115053447654).

<sup>31</sup> Libraries can get close to consumer prices if they agree to buy a certain number of audiobooks each year, but consumers still have a slight advantage in price and a large advantage in flexibility.

portable device, potentially negating the price savings that current pioneer libraries are realizing.<sup>32</sup>

The contractual issues surrounding digital products thus offer another set of potential traps for a library striving to serve its patrons better using new technologies. Even if we ignore the contractual issues, however, it is useful to ask whether libraries that copy audiobooks onto iPod Shuffles are risking copyright liability. For example, what about the library that takes its audiobook CDs and rips them to files that fit on an iPod?<sup>33</sup> None of the current exceptions for library copying would seem to authorize such behavior.<sup>34</sup>

What about fair use? Arrayed against the library from the start are the amount copied (the entire work) and, in most cases, the nature of the work (fictional or, even if nonfictional, probably a creative assemblage of facts, like a popular biography). As discussed above, the purpose of the use might be seen as commercial if it circumvents the need to pay for each copy, and it would not be transformative, since the copied work would not be altered in any way. For those reasons, a court would also be tempted to find harm to a copyright owner's market, especially because a library-specific market for CD audiobooks already exists. All the relevant factors, then, weigh against the library's copying in this instance.

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<sup>32</sup> Publishers in general are wary of libraries, and have been for a while. *See, e.g.*, Linton Weeks, Pat Schroeder's New Chapter: The Former Congresswoman Is Battling for America's Publishers, Wash. Post, Feb. 7, 2001, at C1 (describing the Association of American Publishers's "serious issue" with library lending).

<sup>33</sup> I am assuming that no shrinkwrap contract on the CDs explicitly bars such acts.

<sup>34</sup> Section 108 of the Copyright Act, which deals with exceptions to copyright's exclusive rights specifically targeted to libraries and archives, does not authorize systematic, deliberate reproduction of multiple copies. *See* 17 U.S.C. § 108(g).



In other words, despite the positive press coverage for library iPods and the exciting possibilities they offer, a library using iPods to deliver copyrighted content to patrons without the explicit consent of the copyright owner is running some substantial risks. Given that the libraries using iPods are doing so responsibly, in a way that does not encourage widespread copying, it seems that libraries are behaving fairly in the lay sense, but that may not help them if copyright owners begin to protest such new uses.

## II. The Digital Millennium Copyright Act

### A. Overview

The Digital Millennium Copyright Act (DMCA), made several important changes in copyright law. Most relevant here, the DMCA introduced an extra layer of quasi-copyright protection into American law, prohibiting circumvention of technological measures that control access to copyrighted works and also prohibiting trafficking in – essentially, distributing -- technologies that circumvent access or rights controls. Circumvention is unlawful even if there is no further violation of copyright law – that is, even if the circumvention enables fair use or allows a circumventer to do something that isn't within the copyright owner's right to control, like performing a work in private or making a copy for a library of a damaged work under section 108. The DMCA's provisions for rights controls and access controls are distinct but related.<sup>35</sup> Rights controls govern users' exercise of copyright owners' exclusive rights such as the right of

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<sup>35</sup> For a useful overview of the many issues surrounding the interpretation of the DMCA's anticircumvention provisions, see Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium"*, 23 COLUM.-VLA J.L. & ARTS 137 (1999).

reproduction; access controls deal with initial access to the work, such as password protection.

The distinction between rights and access controls is often not significant, in large part because most people cannot circumvent DRM technology on their own and thus the anti-trafficking provisions, which apply to both rights and access controls, are of overwhelming practical importance.<sup>36</sup> Moreover, courts have been willing to call any DRM-circumvention technology “access control,” so that both the individual circumvention ban and the trafficking ban apply in any given case.<sup>37</sup> As a practical matter, many access controls function mainly as rights controls – a LEXIS password controls access the LEXIS database, and once a user has access, she can easily copy text from the database using standard computer commands. DVD “access controls” allow DVDs to be played on any licensed player, and licenses are freely granted to companies that agree to comply with anticopying rules. As a result, no ordinary viewer is stumped by such controls (at least if her DVD and her DVD player are set to the same region code), and the real point of such access controls is to prevent digital copies.<sup>38</sup>

The DMCA’s first major test, indeed, came with respect to DVDs. In a well-publicized case, the movie studios were able to stop the on-line dissemination of DeCSS, code that promised to allow DVDs to be played on unlicensed players and, potentially, copied and distributed with ease. The plaintiffs provided evidence that there was a

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<sup>36</sup> R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 654-55 (2003).

<sup>37</sup> *See id.* at 640-47.

<sup>38</sup> *See id.* at 645 (“The studios' real concern was to keep the user from using a device [without copy controls] to copy the film.... This control over the exercise of rights was implemented, however, by limiting access to the film only to certain devices.... As a result, CSS could be seen as both a rights-control and an access-control measure ....”).

thriving Internet trade in pirated DVD content, though they could not identify a case in which DeCSS had been used to produce the copies. Nonetheless, DeCSS was one way in which such copies could be made, by defeating the restrictions the studios had imposed on the kinds of programs allowed to access DVD content.

The Second Circuit upheld an injunction against posting DeCSS and against purposefully linking to other sites where DeCSS could be found.<sup>39</sup> Despite many technical arguments about whether DeCSS was truly “circumvention technology,” the decision was consistent with Congress’s intent in enacting the DMCA. Protections for DVDs and other new media, so that content owners would feel confident that they could control the dissemination of their works in new forms, was precisely the point. What would happen to ordinary users was less on Congress’s mind; while the DMCA contains a number of detailed exceptions for specific, unusual uses, it does not explicitly contemplate any protection for ordinary users trying to do things with their audiobooks they could have done with their hardcovers, like lending them to friends.

#### B, The DMCA and Fair Use

One of the major concerns raised by the defendants and various amici in the DeCSS case was that DRM does not allow many kinds of fair use – both technical fair use and other acts that do not violate the copyright owner’s rights, like library lending. Plainly, DRM technology cannot go through section 107’s four-factor balancing test for fair use. It usually prohibits any copying whatsoever, even copying fragments of text or images that would readily be seen as fair use by human beings. DRM also controls acts

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

that weren't previously within the copyright owner's control, such as private performance in the home (DRM could, for example, restrict the number of times a file can be played) and lending (DRM could, somewhat like iTunes does, require each computer playing a CD to check in with a central server, and if too many computers had already been authorized to play the CD the CD would be disabled<sup>40</sup>).

While libraries were not the specific target of the DMCA, the law nonetheless presents substantial risks that libraries will be unable to use protected works in the ways they want to, ways which usually track the broader sense of fair use. As discussed above, the DRM technology incorporated into downloads from the iTunes Store does not currently limit the number of audio devices on which a file can be played, but if iTunes develops an institutional licensing model, it would be surprising if it did not use DRM in that way, so a library with fifty iPods would pay a greater licensing fee than a library with five. Instead of selling audiobooks on CD, future publishers may sell audiobook rights, so that libraries will pay per use rather than paying once for the physical medium. (Note that this offers positives as well as negatives for the library. Unpopular works accessed only by one person a year might not be a significant drag on the budget, allowing libraries to acquire a wider variety of works for patrons whose needs are currently sacrificed in order to pay for works with broader appeal. The effects of these changes depend heavily on the kind of price structure copyright owners actually adopt.)

Not all content owners will necessarily be willing to negotiate a sliding scale of fees, though; individualized pricing can be expensive, and a publisher might just establish

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<sup>40</sup> For discussions of this type of "tethering" technology and similar measures, see R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C.L. REV. 577, 613-14 (2003); U.S. Copyright Office, DMCA Section 104 Report 75 (2001), available at [http://www.copyright.gov/reports/studies/dmca/dmca\\_study.html](http://www.copyright.gov/reports/studies/dmca/dmca_study.html).

simple rules for its products. Consider DRM that operates to prevent a library from making more than five printouts of any one article on a CD-ROM per year. Once the limit is reached, that's it for the year. The technology cannot be reasoned with, negotiated with, or ignored, as contractual limits can be (witness the iTunes example discussed above). The CD-ROM might be a good deal compared to the cost of microfiche, and it might serve most patrons' needs equally well, but DRM could fundamentally change a library's ability to predict what resources it will have available over time.

Courts have nonetheless claimed that fair use is not endangered by the DMCA, because in general authorized works are readily available, and people can generally continue to make fair uses if they can get legitimate access to a work. A film professor who wishes to use a portion of a movie can get it on videotape; even if videotape is unavailable, the professor could point a video camera at the screen of a television playing the DVD, and this would not be considered circumvention, according to the Second Circuit (though why it should not be is not entirely clear).<sup>41</sup>

Because of this "analog hole" that requires works to be visible and/or audible to be useful to people, libraries will be able to make copies even when technological protections prevent digital copying. They will simply be forced to use clunky, lower-quality copying methods, regressing in the direction of monks sitting in scriptoria, dreaming longingly of the printing press. Or perhaps the smart librarian will keep a digital camera on hand, or encourage patrons to bring theirs in, to photograph screenshots when the library lacks printing rights. The inconvenience means that copying will

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<sup>41</sup> See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).

happen less often; but then, Congress intended to make copying more difficult, in order to prevent uncontrolled digital dissemination of copyrighted works.

This defense of the DMCA makes more sense if “fair use” is just about transformation, which often can be done without much physical copying – Alice Randall hardly needed to make a physical copy of *Gone With the Wind* to write her parody. Even for transformative fair use, however, the DMCA poses significant threats. Many kinds of transformation do involve “sampling” – that is, pure copying – and not everyone who is motivated to transform a work will have the resources to engage in the necessary workarounds.<sup>42</sup> More significantly, transformation can only occur when people have been exposed to the original in the first place; the DMCA allows copyright owners to control who can see their works in ways unavailable to conventional publishers of books and producers of records.

All this, moreover, assumes that fair use is the freedom to reuse and rework, but there is also value in making works widely available to people, even if the end result is not transformation but simply edification and enlightenment. Traditionally, technical fair use encompassed some kinds of library and educational copying; the statutory exceptions for libraries and educators are also designed to allow some copying whether or not it

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<sup>42</sup> Tony Reese ably articulates objections to the argument that the DMCA doesn't disable would-be fair users from copying somehow:

In the case of many works, copyright owners may well be moving toward issuing works only in protected formats, ending the availability of new works in unprotected analog copies. And while the possibility of copying the visual or audio output of a protected work may offer some room for noninfringing use, it seems likely as a practical matter to substantially diminish the quality and availability of such use. In addition, some copyright owners have expressed a desire to use technology, perhaps backed by legal requirements, to “plug the analog hole” and prevent such copying of copyrighted works.  
Reese, *supra* note [], at 653.

results in transformation somewhere further down the line. If fair use also extends to some kinds of pure reproduction standing on its own, the objection to the DMCA seems much stronger. Furthermore, even if technical fair use is limited to critical transformations, the many uses of ordinary copyrighted works that are beyond the copyright owner's control – down to the right to read a copy of a book one lawfully owns – are worth defending. And these kinds of uses are threatened by technological controls.

Libraries, therefore, face two interlocking trends: The first, which produced the DMCA's anti-circumvention provisions, gives copyright owners the right to control most ordinary uses of a work through technical and contractual means, and the second, the change in §107 fair use doctrine, discussed above, favors transformation and disfavors plain copying. The combination of the two trends leads decision-makers to discount the importance of free access to works as long as, once a person has access to a work, she is relatively free to criticize, rework and transform it, using her own words or images.

These changes are occurring even as it is becoming technically possible to expand access almost infinitely for digitized works, so that every library could theoretically share its collections with the world. It may be ironic that distribution is becoming devalued even as it is suddenly possible on a grander scale than ever before, or it may be a natural tendency to undervalue what is ubiquitous, like the air we breathe.

### C. Garage Door Openers in the Library: Separating Access from Statutory Fair Use?

The DMCA outlaws unauthorized access in almost all circumstances, and copyright owners assert that they have total control over the terms of access, even if that

involves getting rid of fair use. Here, fair use is broadly defined to include not just statutory fair use and statutory exceptions but even rights that copyright law does not give to owners, such as the right to control lending or the right to control the number of times a digital work is accessed. Libraries and others asserting the public interest in broad access to works find themselves forced to defend their basic rights to read, hear or watch – or, in language more suited to the redefinition of reader/listener/viewer as consumer, their rights to *use* – copyrighted works.<sup>43</sup>

As Frederick the Great said, however, he who defends everything, defends nothing. Thus, considering access as part of fair use, broadly defined, can make it even more difficult to preserve other kinds of fair use. Just as thinking of transformation and criticism as the basic justifications for fair use limits our ability to defend traditional nontransformative fair uses, thinking of access as the basic value that needs protection in the DMCA context threatens to sacrifice other valuable freedoms – including the freedoms to make copies in certain cases and to make transformative fair uses.

One instance of this dilemma may be seen in the recent DMCA case involving garage door openers, *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*<sup>44</sup> Garage door openers may seem far from libraries' concerns, but because the DMCA is important to so many emerging technologies, and because of the specific way in which the Court of Appeals resolved the question before it, the case deserves attention.

The defendant, without the plaintiff's consent, sold replacement garage door openers that were compatible with the plaintiff's system. The replacement openers,

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<sup>43</sup> Often, "fair use" seems to be the only term left to describe the kinds of acts people should be free to do, which puts increasing stress on the category. See LAWRENCE LESSIG, *FREE CULTURE* 143-45 (2004).

<sup>44</sup> 381 F.3d 1178 (Fed. Cir. 2004).



however, worked by sending a signal to the computer program embedded in the receiving unit – a code that allowed the program to work, or in other words a code that “accessed” the program -- something that the DMCA appears to regulate. In holding that the defendant’s conduct was lawful, the Court of Appeals for the Federal Circuit stated that “the copyright laws authorize consumers to use the copy of Chamberlain’s software embedded in the [garage door openers] that they purchased.... [T]he copyright laws authorize members of the public to access a work, but not to copy it.”<sup>45</sup>

Neither part of the last sentence is true. There is no explicit right of access in the Copyright Act, only a first sale right to transfer or otherwise dispose of a lawfully acquired copy of a work without the consent of the copyright owner. Moreover, the Copyright Act does authorize copying against the copyright owner’s will in certain circumstances. But in order to prevent the DMCA from being applied in a ridiculous manner, the Court of Appeals apparently felt forced to make broad claims about basic access rights which, concomitantly, led it to assert that the law allows copyright owners total control over copying.

The *Chamberlain* court’s suggestion that the DMCA legitimately allows copyright owners to control fair uses as well as foul conflicts with its holding that “[w]hat the law authorizes, Chamberlain cannot revoke”<sup>46</sup> – unless we see access as something

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<sup>45</sup> See *Chamberlain*, 381 F.3d at 1193; see also *id.* at 1203 (“The DMCA cannot allow Chamberlain to retract the most fundamental right that the Copyright Act grants consumers: the right to use the copy of Chamberlain’s embedded software that they purchased.”); *id.* at 1204 (“The Copyright Act authorized Chamberlain’s customers to use the copy of Chamberlain’s copyrighted software embedded in the GDOs that they purchased.”).

<sup>46</sup> See *id.* at 1202 (“Copyright law itself authorizes the public to make certain uses of copyrighted materials. Consumers who purchase a product containing a copy of

fundamentally distinct from other legitimate “uses” of copyrighted works, like transformative fair use, multiple copies for classroom use, and library copies authorized by section 108. (While I’m critical of the elevation of transformative fair use over other types of fair use, I’m equally unwilling to abandon transformation or copying rights to save access.) Thus, the decision creates a hierarchy in users’ rights, privileging passive access while leaving other acts, such as those that would involve copying part of a work in order to comment on it, vulnerable to technological controls.

Similar hints of a distinction between basic access and other acts that do not violate copyright owners’ rights can be found in other parts of the DMCA. As Tony Reese has discussed, the DMCA’s legislative history suggests that the drafters believed that access, on its own, generally would not implicate copyright owners’ rights and would not be subject to the DMCA’s rights control provisions.<sup>47</sup> The legislative history explicitly contrasted access to reproduction (copying). The wrinkle here is that “access” is not a traditional copyright right under US law, but it interacts with rights that *are* sometimes part of the copyright owner’s exclusive rights: Access to a digital work necessarily includes some type of performance or display, depending on the type of work at issue, because digital works must be performed or displayed in order to be intelligible to humans.<sup>48</sup> And copyright owners generally have the exclusive rights of public display and performance.<sup>49</sup>

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embedded software have the inherent legal right to use that copy of the software. What the law authorizes, Chamberlain cannot revoke.”).

<sup>47</sup> See Reese, *supra* note [], at 635-36 (discussing 17 U.S.C. § 1201(h), an exception for circumvention of access controls in order to protect minors from inappropriate Internet content).

<sup>48</sup> While the *Chamberlain* court asserted that “all defendants who traffic in devices that circumvent rights controls *necessarily* facilitate infringement,” 381 F.3d at 1195

One difficulty with the access/reproduction distinction for libraries, therefore, is that their activities may not involve *private* displays and performances.<sup>50</sup> As a result, distinguishing access from reproduction is not enough to establish a baseline of acts that will generally be permitted by institutional actors, even though the distinction might offer some solace for individual consumers.

Instead, libraries could push for an understanding of the access/reproduction line that puts library-type displays and performances on the access side of the line.

Uncontrolled reproduction, after all, is what Congress saw as the reason to pass the DMCA,<sup>51</sup> and uncontrolled reproduction is the problem of file-sharing programs.

Uncontrolled private performance and display without uncontrolled reproduction is the present situation with regard to non-digital works. And such performances and displays – at least if they’re made using legitimate copies – are not dangerous to copyright owners’ financial survival (although denying copyright owners the right to control private uses

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(emphasis added), this is only a plausible statement with respect to the reproduction right. Most displays and performances of digital works are private, and thus not within the scope of a copyright owner’s rights in the first place. Even as to the reproduction right, and even counting § 107 fair uses as instances of infringement allowed by an affirmative defense, the court’s statement ignores the explicit exceptions in the copyright law, consistent with the judicial trend to allocate control over all reproductions to copyright owners.

<sup>49</sup> The public performance rights of sound recording copyright owners are more limited than the rights of owners of other kinds of works, but the differences are not relevant to this discussion.

<sup>50</sup> The DMCA is silent on the public/private distinction, and it is highly unlikely that a technological measure currently could operate as a “rights control” by controlling *only* public performances or displays; rather, technological measures control whether a work can be performed or displayed at all. Sufficiently advanced “tethering” technology could perhaps verify whether a device was in a private home or a lecture hall and allow only private performances or displays, but it is hard to see who’d have an interest in developing that kind of technology.

<sup>51</sup> See *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1197 (Fed. Cir. 2004) (discussing “copying and distribution” as Congress’s central concern in enacting the DMCA).

may prevent them from engaging in precise pay-per-use models). Getting the right to perform and display works when that's a natural consequence of using the work in its digital form might be far more valuable to libraries, schools and other educational institutions than another narrow section 108 exemption for copying.

Note, however, that the iPod uses discussed above all involve one reproduction per iPod, so an access/reproduction line would still leave this new distribution model up for negotiation with copyright owners. If the reasoning in *Chamberlain* were applied to libraries, it could give them the right to modify digital rights protections in order to give patrons access to a single digital copy on-site,<sup>52</sup> but would do nothing to allow the more exciting, broadly useful applications of digital technology, such as delivering digital books to patrons outside the library.

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<sup>52</sup> If this is true, that would represent a modest expansion of the current, explicit exceptions for libraries under the DMCA. Section 1201(d) allows a nonprofit library, archive or educational institution to gain access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work, when an identical copy of that work is not reasonably available in another form. (Since "trafficking" in DRM-circumvention technology is still banned under this section, the library will need some clever programmers to make this work.) Under *Chamberlain*-type analysis, accessing a work solely to use it without copying it would generally be legitimate. Of course, the very existence of the 1201(d) exception to the DMCA's access control provisions undermines the *Chamberlain* court's reasoning, since it implies that access *can* generally be prohibited under the DMCA. *Chamberlain* does not analyze situations in which a purchaser had a time-limited right by contract to access a work but that contract expired, or other instances in which access was limited by contract.

It is also relevant that other provisions of the copyright law explicitly allow libraries to make some digital copies for archival or replacement purposes. See 17 U.S.C. §108(b) & (c). Subsection (b) allows the duplication of an unpublished work for purposes of preservation and security or for deposit in another library for research use; subsection (c) allows the duplication of a published work for purposes of replacement if the work is damaged, deteriorating, lost, stolen, or in an obsolete format and a replacement can't be obtained at a reasonable price. Both subsections require that digital copies are not made available to the public in digital format outside the premises of the library.

### III. Tentative Responses

In a perfect world, fair use broadly understood would include government subsidies to libraries so that the libraries can pay copyright owners for access to their works. The problem with that is the familiar one: Funding obviously costs money, whereas legal protections for libraries – like tax breaks – are off the books and thus politically more palatable in a budget-starved time. Thus exceptions to copyright law are more likely to be generous, and stable over time, than budget allocations.

An important strategic question is how libraries should respond to the anti-copying, potentially pro-access trend in the judicial interpretation of fair use. One option is to seek more protection from Congress for activities that libraries want to engage in.<sup>53</sup> As noted above, this would help provide certainty and ensure that libraries could continue to serve some of their core functions. It might also be advisable, if U.S. copyright law becomes more influenced by international copyright law. Section 107's fair use standard may be inconsistent with our international obligations, which require that exceptions to the copyright owner's exclusive rights be limited to special situations which do not unreasonably harm the copyright owner's interests. A carefully defined, library-focused exemption is much more likely to pass muster under that standard than a vague, general claim of "fair use."

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<sup>53</sup> *Cf.* 17 U.S.C. § 110(2) (the TEACH Act, which categorically allows certain defined types of reproduction, display and performance in the context of computer-assisted education).

But there is a cost: Specific exemptions may detract from libraries' commitment to defending general fair use rights. This is true not only because libraries, if they get what they want from Congress through a specific exemption, have less incentive to join with other public interest groups in defending fair use more generally, but also because politics is the art of compromise. In order to get new exemptions to combat copyright owners' expanded ability to control access, libraries may be tempted to trade away something else, and that something else could easily be mushy, undefined fair use rights. Indeed, it may be impossible to preserve old freedoms and also establish new parameters for the digital world. It is important for libraries to preserve their §107 rights, however, to preserve some breathing space for new or unusual situations – or at least to get a good deal before giving up those rights.

One possibility is to build on current activism on orphan works. Libraries could collect information on beneficial library practices that are nonetheless legally risky, then lobby for an exemption tailored to those practices. This would involve accepting the general tone of copyright owners that whatever is not permitted is forbidden, but it could help in specific cases. Moreover, if courts and legislatures got used to the idea that user groups would work towards best practices, the general climate of tolerance for good-faith attempts to serve users might improve. It would not be a matter simply of winning a new provision for orphan works, or library uses of digital technology, but of establishing a pattern that emerging uses should readily achieve statutory safe harbors if they are in fact fair and limited.