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Jane C. Ginsburg
Columbia Law School, jane.ginsburg@law.columbia.edu

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From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law

Jane C. Ginsburg

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Essay:
**From Having Copies to Experiencing Works: the Development of an
Access Right in U.S. Copyright Law**

Jane C. Ginsburg*

A radical change looms in the way we apprehend and enjoy works of authorship. For all the transformations in the history of the production and communication of works that technological advances have wrought by making them more plentiful and less expensive, this change is different. From Gutenberg to the photocopier and videotape, prior developments had facilitated, indeed promoted, the acquisition of physical copies of works. At first, only publishers and pirates employed the new copying technologies. Intermediaries controlled the means of making and disseminating copies, because the mechanisms for copying and distributing entire works generally exceeded the financial and technical capacities of end-users. As a result, until now, 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. These devices gave consumers the power to “materialize” copyrighted works that had been made available to the public through means that had previously remained solely within the copyright owner’s control. Indeed, U.S. copyright law had long distinguished between public performances, including transmissions, and “publication,” on the ground that only the latter involved a public distribution of copies through which the copyright owner lost control over disposition of the work.¹ Mass market audio and audiovisual recording devices thus began to call into question this long standing distinction.

Digital media made the distinction even more dubious, because any digital transmission received in a computer would effect a copy at least in

*Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law. Many thanks to Professors Douglas G. Baird, Graeme Dinwoodie, Jessica Litman and Henry Monaghan, and to Kamiel Koelman. Thanks for research assistance to Allison Engel, Columbia Law School class of 2000.

¹For a recent and thorough discussion of the concept of “publication” in U.S. copyright law, see *Estate of Martin Luther King, Jr. v. CBS* 194 F.3d 1211 (11th Cir. 1999).

temporary memory, even if no copy were retained.² More important, digital media and communications made it even easier for consumers to create physical copies of any kind of work, whether previously fixed in a hard copy such as CD ROM, or received from a transmission, such as an Internet download. Thus, while digital media in one sense de-materialized copies, by instantly, albeit intangibly, converting any work into a series of 1s and 0s available for receipt in RAM, recipients not only could perceive the works fleetingly in “real” time, but they also held the power to re-materialize them into retention copies, whether printed, engraved on a CD ROM, or stored to hard disk.

Now, however, the moment of the material copy may be passing. The technological balance of control over hard copies, having swung toward empowering end-users, appears to be reverting to copyright owners. Every act of perception or of materialization of a digital copy requires a prior act of access. And if the copyright owner can control access, she can condition how a user apprehends the work, and whether a user may make any further copy. Access control can at the same time thus vastly increase the availability of copyrighted works in de-materialized form, yet constrain their susceptibility to conversion to physical copies. In the impending era of digital access, we will be able to download anything, whenever, and wherever we want. As a result, we will no longer need hard copies to enjoy the work; indeed, in a world of access conditioned on non retention of digital of copies, we will be able to summon up the work at any time, but we may not be able to have our own copy. Does that mean we will no longer want copies? And, more broadly, what are the consequences of these developments for copyright law?

Until now, a great deal of the enjoyment of works of authorship was possessive and tactile. Many of us liked acquiring works (including unauthorized private copies); we liked having them; and we liked touching them, even if we rarely, if ever, in fact read, viewed, or listened to them. None of this matters when we apprehend a work through digital access. The only reason to access a work, when one can't retain a copy, is to read, look at, or listen to it immediately. For those whose relationship to works of authorship is business-like, unsentimental, and centered on immediate experience, the disappearance of hard copies may be liberating. For the more romantically, or at least the more acquisitively, inclined, the reaction may be more desolate. In either event, the shift from hard to evanescent copies is recasting copyright law in ways some may find exhilarating, and others frightening.

This Essay addresses how current U.S. copyright law responds to new forms of distribution of copyrighted works, through the emerging right to control

²On the doctrine of RAM copying, see *infra*, TAN and note 20.

digital access to copyrighted works, as set out in the 1998 Digital Millennium Copyright Act.³ With respect to the access right, I contend that when the exploitation of works shifts from having copies to directly experiencing the content of the work, the author's ability to control access becomes crucial. More broadly, I suggest that, in the digital environment, the "exclusive Right" that the Constitution authorizes Congress to secure to authors⁴ is not only a "copy"-right, but an access right, and I explore the implications of that claim. I do not contend that the access right will or should *supplant* "copy"-right. On the contrary, my claim is that the access right is an integral *part* of copyright, and therefore should be subject to exceptions and limitations analogous to those that constrain "copy"-right. I also acknowledge that there will still be some among us for whom direct experience affords imperfect enjoyment of works of authorship, for whom "having" may be even more gratifying than "experiencing." Just as a 21st-century copyright regime that did not regulate access would be unrealistic and incomplete, so too a regime that assumes, or directs, that all forms of exploitation will be intangible may discourage the dissemination of hard copies (or hard copy-able versions), and by limiting all availability to works to the copyright owner's terms, thereby undermine the "progress of Science" that the Constitution's provision for the author's "exclusive Right" is intended to promote.

Copyright Without Hard Copies

It is the near-future. I am jogging along a tropical beach, or traveling across Europe by train, or sitting at my desk at home in New York; wherever I am, I have my palm-sized book reader-audio player-satellite cell phone that permits instant access through digital networks to an infinite variety of literary and musical works, with payment automatically charged to or debited from my account. At any moment, from any place, I can read or listen to any work I want. Moreover, with instant access to audio and video streamed works, hard copies need no longer encumber my home or briefcase. On the other hand, instant gratification may not always suffice: sometimes I may wish to annotate my copy, and retain those reflections. No problem: for a slightly higher fee, I am allowed one digital retention copy for note-taking, but I may not further reproduce that copy. Or, for a yet a higher fee, I can make a single place-shifting copy to put in a portable player, for the rare times when Internet access

³See 17 U.S.C. § 1201.

⁴U.S. Const. Art. I, § 8 cl. 8 ("Congress shall have power . . . to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writing s and discoveries.").

fails. And so on.

These kinds of distribution arrangements are likely only when copyright owners are confident that the “experiencing” copy will not turn into an unauthorized “having” copy, or worse yet, unauthorized sharing copies. Of course, every “experiencing” transaction will involve a simple click-on license, whose terms make clear the limits of the end-user’s enjoyment.⁵ But, for copyright owners, something more, and preferably self-executing, is also needed to deter consumer cheating. Hence the role of technological protection measures, from access barriers to anti-copying controls. Copyright owners nonetheless fear that these measures may prove futile, if no legal impediment exists to offering devices or services designed to circumvent the technological protections.⁶ Hence, the provisions of the 1998 “Digital Millennium Copyright Act” [DMCA] prohibiting both the act of circumventing access controls, and the provision of devices or services designed to circumvent either access or anti copying controls.⁷

Several commentators have recognized that the DMCA’s provisions on

⁵The enforceability of these licenses against non commercial end-users is uncertain. Cf. *ProCD v. Zeidenberg*, 86 F. 3d 1447 (7th Cir. 1996)(shrink wrap license enforced against commercial user); Maureen O’Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonconformity?*, 14 BERKELEY TECH. L. J. 635 (1999); Garry L. Foundas, *Shrinkwrap and Clickwrap Agreements: 2B or not 2B?*, 52 FED. COMM. L. J. 99 (1999); J.H. Reichman and Johnathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875 (1999).

The Uniform Computer Information Transactions Act [UCITA] would validate mass market click-on licenses when the end-user assented to terms that she had the opportunity to view. See arts. 112, 202, 203, 211. UCITA has been enacted in Virginia, see 2000 Va. H.B. 561 (SN) and 2000 Va. S.B. 372 (SN).

⁶Recently filed anti-circumvention claims suggest that these concerns are warranted. See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 2000 WL 48514 *2 (S.D.N.Y. 2000) (preliminary injunction entered 1/21/00 against websites posting “De-CSS” software to neutralize DVD access-controls); *RealNetworks v. Streambox*, 2000 WL 141196* (W.D. Wash. 2000)(preliminary injunction entered 1/18/00 against device converting streamed audio signal from an uncopyable format into a signal that may be copied).

⁷See 17 U.S.C. § 1201(a)(b). See also European Commission, Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM 1999 250 final 97/0359/COD) (May 21, 1999) [hereafter “Draft Information Society Directive], art. 6(2) (prohibiting dissemination of devices designed to circumvent access controls). Compare WIPO Copyright Treaty [WCT], art. 11, obliging member states to protect against “the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention . . .” Neither the WCT nor the Berne Convention clearly articulate a right to control access.

circumvention of access protections in effect create a new right under, or perhaps over, copyright: the right to control access to copyrighted works.⁸ A notable lack of enthusiasm for this development often characterizes those comments.⁹ Some criticisms express the principle that it is highly undesirable for the law to suppress technology by prohibiting the manufacture and dissemination of anti circumvention devices.¹⁰ Others object to the increase in copyright owners' power that control of access engenders, and to the consequent shift in the balance of copyright owner/user rights.¹¹ On the other hand, these commentators generally do not acknowledge that the "copyright balance" is hardly immutable: the development and distribution of mass market copying devices also shifted the copyright "balance" – in that case away from copyright owners and toward end-users.¹² It is far from apparent why the "balance" in force from the advent of these devices should be more normative and less contingent than the prior "balance," or than the now emerging balance. Before further addressing these concerns, however, it is appropriate first to consider the nature of the access right, and its place in U.S. copyright law.

Bases for the Access Right

In the beginning — that is, in the eighteenth and nineteenth centuries — copyright in most countries was divided into two rights: reproduction and public

⁸See, e.g., Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J. L. & THE ARTS 137, 140-43, 147-48 (1999); Kamiel J. Koelman, *A Hard Nut to Crack: The Protection of Technological Measures*, Amsterdam: Institute for Information Law (1999).

⁹See, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L. J. 519 (1999); Jonathan Band & Taro Issihiki, *The New Anti-Circumvention Provisions in the Copyright Act: A Flawed First Step*, 3 CYBER. LAW. 2 (1999).

¹⁰ See e.g. Samuelson, *supra* note 9 at 557.

¹¹ See e.g. Julie H. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L. J. 161 (1997); Julie H. Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 CONN. L. REV. 981 (1996); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 519 (1999). But see Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C.L. REV. 557 (1998) (favoring the development of pay-per-view/listen systems).

¹²See Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217 (1996).

performance.¹³ This division reflected the kinds of exploitations to which copyrighted works were then subject: reproduction in copies for public distribution, and performances of works in places open to the public. As time and techniques evolved, the concept of a public performance extended to a growing list of transmissions and re-transmissions, culminating in the Berne Convention — the leading multilateral copyright treaty — which became a morass of specific provisions on public communications with or without wires.¹⁴ In 1996, the WIPO Copyright Treaty [WCT] reweave the increasingly disparate strands into a general right of communication to the public, including to a public whose members are separated both in time and in space.¹⁵ The right now extends from live theatrical performances to online delivery of individual songs to individual consumers, thus reflecting the current and future range of exploitations of this kind. As for the reproduction right, with advances in technology, from tape recorders to digital media, domestic U.S. and international copyright law have increasingly recognized that the author’s right to authorize, or at least to be compensated for, the making of copies extends not only to one who makes multiple copies for public distribution, but to end-users who make individual copies for private consumption.¹⁶

What, then, is or should be the relationship of this evolution to “access” and its place in the U.S. copyright scheme? First, one might inquire whether “access” falls within the modern conception of either the right of communication to the public (still called the right of “public performance” in the U.S.), or the reproduction right. Second, whatever the “fit” of “access” with these older formulations, does an access right *belong* in a copyright regime? To answer that

¹³ See e.g., France, law of Jan. 15, 1791 (public performance right); law of July 21, 1793 (reproduction right); U.K. 8 Anne, ch. 19 (1710) (reproduction right); Dramatic Copyright Act 1833 (public performance right in dramatic works); U.S. Act of May 31, 1790, ch. 15, 1 Stat. 124 (reproduction right); Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (public performance right in dramatic works).

¹⁴ See Berne Convention, arts. 11, 11bis, 11ter.

¹⁵ See WIPO Copyright Treaty, art. 8; cf. 17 U.S.C. § 101 (definition of public performance).

¹⁶ See, e.g., Germany, Law dealing with copyright and related rights, art. 27(1)-(3) (originally enacted in 1965) (levies for private audio and video taping); France, Code of intellectual property, art. L. 311-1 - 311-8 (originally enacted in 1985) (same); Spain, Revised law on intellectual property, regularizing, clarifying and harmonizing the applicable statutory provisions, art. 25 (originally enacted in 1987) (same); U.S. 1992 Audio Home Recording Act, 17 U.S.C. §§ 1003-1007 (levies for digital audio private copying); Draft Information Society Directive, art. 5 (requiring “equitable compensation” for private copying, and anticipating the supplanting of digital private copying by technological protections).

question, we must consider what copyright *should* look like in the digital online environment.

By an “access” right, I mean the right to control the manner in which members of the public apprehend the work. The concept is distinct from reproduction or communication to the public to the extent that I may communicate a copy of my work to the user’s hard drive, or the user may purchase a digital copy such as a CD ROM, but the user may not “open” the work to apprehend (listen to, view) its contents, unless the user acquires the “key” to the work.¹⁷ And the key may vary with the nature and extent of enjoyment of the work. As part of my control over “access,” I may, depending upon the price the user pays, limit listening or viewing by number of plays, by number of computers on which the work may be played, by duration of access, and so on. By contrast, neither traditional reproduction nor public performance rights would have reached much of this conduct. For example, the “public” performance right does not extend to private enjoyment of a performance that the user generates (as opposed to receives from a transmission), such as by listening to a portable audio disk player.¹⁸ The reproduction right, and its corollary, the distribution right, gave the copyright owner control over the making and dissemination of copies, but once a particular copy was sold, the copyright law did not constrain the purchaser’s further disposition of that copy.¹⁹

Nonetheless, the seeds of an access right can be found in pre-Internet copyright law. For example, the doctrine of RAM copying — which holds that a “copy” is made when the work is received in a computer’s temporary memory²⁰

¹⁷See 17 U.S.C. § 1201(a)(3)(B) (definition of technological measure that effectively controls access to a work).

¹⁸See 17 U.S.C. § 101 (definitions of “performance” and “perform publicly”)

¹⁹See *id.* §§ 106(3), 109(a) (distribution right; “first sale” limitation on distribution right)

²⁰It is by now well established in U.S. copyright law that entry of a work into a computer’s random access memory constitutes making a copy. Hence the need to exempt certain RAM copies from liability for infringement, see 17 U.S.C. § 117. See Trotter Hardy, *Computer Ram “Copies”: A Hit or a Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns*, 22 U. DAYTON L. REV. 423, 455 (1997); Michael E. Johnson, *The Uncertain Future of Computer Software: Users’ Rights in the Aftermath of Mai Systems*, 44 DUKE L. J. 327 (1994); Katrine Levin, *Mai v. Peak: Should Loading Operating System Software into RAM Constitute Copyright Infringement?*, 24 GOLDEN GATE U. L. REV. 649 (1994). But see, e.g., Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts & Ent. L. J. 29, 42 (1994)(arguing against doctrine of RAM copying).

The RAM copying doctrine is implicit in E.U. copyright law as well, see Software Directive art. 5 (exempting certain temporary reproductions from liability), Directive 91/250/EC

— would cover “accessing” a work, since apprehending the work through a computer requires making at least a temporary copy. Similarly, in the digital era, extension of the public performance right to cover individual receipt of transmissions approaches an “access” concept. Indeed, the WCT’s articulation of the right of communication to the public covers the “making available to the public . . . in such a way that members of the public may *access* these works from a place and at a time individually chosen by them.”²¹ While on its face the definition puts the access choice in the public’s, not the copyright owner’s hands, the copyright owner’s ability to control the terms under which access is made available to the public may be implicit in this formulation.

Even if an “access” right does not precisely correspond to either of the traditional copyright rights of reproduction or public performance, it does respond to what is becoming the dominant way in which works are in fact exploited in the digital online environment. After all, there should be nothing sacred about the eighteenth- or nineteenth-century *classifications* of rights under copyright, in a technological world that would have been utterly inconceivable to eighteenth-century minds. By contrast, the *justifications* offered by the Enlightenment-era framers of copyright policy should still guide us. While Madison could not have foreseen the Internet, he clearly believed that the private rights of authors furthered the general public interest in the advancement of learning,²² and he believed that at a time when printing presses were “growing much faster even than the population.”²³ As a matter of economic incentive to

1991 O.J.(L122) 42. There may be more uncertainty as to whether RAM copying is an international norm. See WCT, Agreed Statement 1 (The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.”) The ambiguity of the term “storage” permits arguments that all kinds of copying, including in temporary memory are covered, see, e.g., Dr. Mihaly Ficsor, *Copyright for the Digital Era: The WIPO “Internet” Treaties*, 21 COLUM.-VLA J. L. & THE ARTS 197 (1997), as well as the contrary, see e.g. Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VIRGINIA J. INT. L. 369, 390-92 (1997).

²¹WCT, art. 8 (emphasis supplied).

²²See Federalist 43 (“The public good fully coincides in both cases [patent and copyright] with the claims of individuals.”).

²³MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA* 32 (1990). Significant technological innovations in printing, however, postdated The Federalist. See HELMUT LEHMANN-HAUPT, *THE BOOK IN AMERICA* 71 (2d ed. 1951)(industrialization of printing begins with the early nineteenth-century).

creativity, as well as the author's right to the fruits of her intellectual labor,²⁴ copyright should cover the actual exploitation of works of authorship.²⁵ On that account, one should welcome the access right, new arrival though it might be.²⁶

Indeed, without an access right, it is difficult to see how in a digital era authors can maintain the "exclusive Right" to their "Writings" that the Constitution authorizes Congress to "secure." Even if Congress might qualify the right's exclusivity by imposing a variety of compulsory licenses,²⁷ or outright exemptions,²⁸ it is surely one thing to introduce specific and narrow limitations in coverage,²⁹ quite another to design a system that pervasively fails to afford meaningful exclusivity. The latter course would clearly be inconsistent with the constitutional design.

In the past, Congress has usually, albeit not always swiftly or completely, adjusted the contours of copyright protection to correspond to the new technology-driven modes of exploitation. For example, after the advent of cable

²⁴Both these themes can be found in the constitutional copyright clause, in James Madison's brief justification for copyright in Federalist 43, and in other eighteenth-century documents concerning copyright in the U.S., see generally, Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. REV. 991 (1990).

²⁵Not everyone would agree with this proposition. Some would contend that, as a purely statutory creation, copyright extends only as far as Congress has provided, and that Congress should not rewrite the copyright laws to increase the statutory grant every time a new mode of exploitation evolves in order to afford copyright owners the full fruits of markets that new technologies have created. See, e.g., Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 DAYTON L. REV. 587, 596-98 (1997).

²⁶Arguably, the 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. For a pre-WCT argument for an access right in English copyright law, see Simon Olswang, *Accessright: An Evolutionary Path for Copyright in the Digital Era?* [1995] E.I.P.R. 215.

²⁷See, e.g., 17 U.S.C. §§ 111(d), 115, 118, 119, 122 (compulsory licenses for cable retransmission, phonorecords, public broadcasting, satellite retransmission).

²⁸See, e.g., id. §§ 107, 108, 110, 121 (exemptions for fair use, library photocopying, certain public performances, reproductions for the blind and disabled).

²⁹The fair use exception ranges more broadly, but incorporates limiting doctrines drawn from the constitutional copyright clause, and from the first amendment. See, e.g., *Rosemont Ents. v. Random House*, 366 F.2d 303 (2d Cir. 1966); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970).

retransmissions, and after the Supreme Court's rulings that the retransmissions were not a "performance,"³⁰ the 1976 Copyright Act made clear that the act of performance covered cable retransmissions, although it also imposed a compulsory license regime on much of the activity.³¹ In 1995, and again in 1998, Congress established a digital performance right in sound recordings. Before these amendments, sound recording copyright owners neither controlled nor received compensation for transmissions, notably broadcasts, of their works. Exclusion of sound recordings from the public performance right had been justified on the ground that radio broadcasts helped sell copies of sound recordings; no distinct market for transmissions was acknowledged.³² With the advent of digital transmissions of sound recordings, however, Congress ultimately recognized the importance of a performance right market for sound recordings, a recognition that appears to have evolved from Congress' initial realization that digital transmissions easily become digital private copies. In the digital environment, transmissions no longer advertise or enhance sales, they threaten to replace them.³³ The evolution of an access right is consistent with these earlier examples of Congressional response to emerging modes of exploitation of copyrighted works.

As we move to an access-based world of distribution of copyrighted works, a copyright system that neglected access controls would make copyright illusory, and in the long run it would disserve consumers. Access controls make it possible for authors to offer end-users a variety of distinctly-priced options for enjoyment of copyrighted works. Were delivery of works not secured, novel forms of distribution would be discouraged, and end-users would continue to be charged for all uses, whatever the level in fact of their consumption.

³⁰See *Fortnightly Corp. v. United Artists Television, Inc.* 392 U.S. 390, 88 S.Ct. 2084 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 94 S.Ct. 1129 (1974).

³¹See 17 U.S.C. § 111.

³²See e.g. Kamesh Nagarajan, *Public Performance Rights in Sound Recordings and the Threat of Digitalization*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 721, 724-5 (1995).

³³For the evolution of the digital performance right in sound recordings, see, e.g., Jane Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 166-70 (1999); Mark J. Plotkin, *The Times They Are A Changin': The Digital Performance Right in the Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998*, 1 VAND. J. OF ENT. L. & PRACT. 46 (1999).

See also 17 U.S.C. § 1201(k) (mandating inclusion of anticopying technology in analog video recorders manufactured or distributed after April 28, 2001).

Exceptions to the Access Right

Even granting that an access right is a Good Thing, is it nonetheless too much of one, at least as implemented by the DMCA? If an access right helps “secur[e] to Authors . . . the exclusive Right to their . . . Writings. . .,” does the DMCA secure the right too effectively, too exclusively? Critics have expressed fear that access controls will foster a digital “lock up” enabling copyright owners — who will have ceased to make the work available in analog or non protected digital formats — to restrict all access to works to their (overreaching) terms.³⁴ If, indeed, unprotected hardcopies will disappear, then fair use problems may arise. On the one hand, the “market failure” genre of fair use should fade away in a world of perfect price discrimination and direct enforcement of copyright through access controls.³⁵ On the other hand, access controls may be a measure too crude to accommodate a variety of non infringing uses, including reproduction of unprotected information contained within a copyrighted work,³⁶ and “transformative” fair uses, in which the second author seeks to create an independent work that comments or otherwise builds on its predecessor.³⁷

Since we are here discussing access controls, and not anti copying controls, arguably fair use is not an issue, because fair use normally comes into play only *after* access to the copy has been lawfully obtained. It may be fair use to copy from a protected work; it is not fair use to steal the book in order to copy from it. This epigram, however, may be far too simplistic in the new millennium. The Digital Millennium Copyright Act establishes legal rights against circumvention of technological measures controlling access to a *work*. This is not the same thing as controlling access to a *copy*. The following example illustrates the difference between “access to a work” and “access to a copy of a work.” Suppose that I download copyrighted songs or documents from an authorized

³⁴See, e.g., Julie Cohen, *supra* note 11; Larry Lessig, *supra*, note 11.

³⁵On “fair use as market failure,” see the seminal article by the same title by Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. R. 1600 (1982).

³⁶17 U.S.C. § 102(b) provides that copyright does not “extend to” the “ideas” and “discoveries” (generally understood to mean “facts”) contained within a work of authorship. Extracting facts from a protected work therefore is not copyright infringement. See, e.g., *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

³⁷On “transformative use,” see, e.g., Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). But see, Diane L. Zimmerman, *The More Things Change the Less They Seem “Transformed”*: *Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC’Y U.S.A. 251 (1999) (criticizing “transformative use” analysis).

website. Suppose also that to hear the songs or read the documents, I must register with the copyright owner, using the modem in my computer. In turn, the copyright owner communicates a password. A technological measure included in the download recognizes my password, and my computer. Thenceforth, when I wish to hear the song or read the document, I must enter my password, and listen to or view it on the same computer; I cannot use my downloaded copy of the song or document on another computer.³⁸

By making the authorized download, I have acquired lawful access to a *copy* of the work. Section 101 of the U.S. Copyright Act defines “copies” as “material objects” in which “a work” is fixed. The hard drive (or free-standing disk) on which the download was received is a material object. But the physical object “copy” is distinct from the incorporeal “work of authorship” that the copy embodies,³⁹ and I do not access “the work” until I have entered the password (from the correct computer). Thus, “access to the work” becomes a repeated operation; each act of hearing the song or reading the document becomes an act of “access.” When the DMCA bars circumvention of controls on access to the “work,” the law, in effect, says that I cannot listen to the song or read the document without implicating the copyright owner’s access right.

In this light, consider first the implementation of the user right to copy unprotected information, and second, the implementation of a transformative fair use privilege. Regarding the *de facto* protection of information, suppose that the documents I downloaded were substantially composed of public domain information, such as judicial opinions, or copyright-expired literary works. § 1201(a) protects technological measures controlling access to a “a work protected under this title;” the provision does not specify how *much* of the work must be “protected under this title;” nor does it distinguish “thin copyright” works from more creative endeavors. Accordingly, it appears that, 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 (such as a new introduction, or minimally original reformatting⁴⁰), a copyrighted work will result, however scant the covering. This

³⁸It also may mean, at least in theory, that I cannot communicate my password to a friend or family member to hear the song or read the document on my computer, since the password protects access to the work, and my disclosure of the password is an act that circumvents a protective measure that had limited access to me.

³⁹See 17 U.S.C. §§ 101, 202 (distinguishing the copy from the work).

⁴⁰See, e.g., *Maljack Productions, Inc. v. UAV Corp.*, 964 F. Supp. 1416 (C.D. Cal. 1997), *aff’d on other grounds sub nom Batjack Prods. v. GoodTimes Home Video Corp.*, 160 F.3d 1228 (9th Cir. 1998) (panning and scanning).

suggests that the copyrightable figleaf that a producer affixes to an otherwise unprotectable work could, as a practical matter, obscure the public domain nakedness of the compiled information, and thereby insulate the judicial opinions or copyright-expired poetry from the further access that is a prerequisite to otherwise lawful copying.

Regarding transformative fair use, suppose that I gain lawful access to a song on a pay per listen basis, without the right to make a retention copy. Since (for purposes of the hypothetical) I am also a musicologist, I then decide I would like to study the song's harmonic patterns. Unless I have an excellent memory, I will have to pay at least another listening fee, and, more likely, a listen-and-copy-once fee in order to examine the music. Exercise of my fair use privilege thus may appear to be more costly in an access-protected world. It seems quite problematic to require fair users to pay more for the privilege: in theory fair uses come out of the copyright owner's pocket, not the user's.⁴¹ On the other hand, in an access-protected world, fair use could in fact *cost less overall* than in the hard copy world. Without the price discrimination that access controls permit, all consumers of copyrighted works may now be paying for the fair use privileges of a few: if the work is offered at just one price point, then that price will cover some anticipated level of unauthorized copying.⁴² In other words, in the hard copy world, copyright owners are not necessarily subsidizing fair use, other users are. Access controls thus can offer a better deal to consumers who do not seek to make fair uses.

Does this mean that consumers who do wish to make transformative uses would be worse off than in the hard copy world? Perhaps not, because exercising fair use in the hard copy world can carry additional costs. To return to the example of the musicologist, if my first apprehension of the song was over the radio, I would have to endeavor to hear the song more often, rather than enjoying the convenience of hearing it on demand; I thus would incur greater non monetary transactions costs. Exercising fair use might also cost me more money than I

⁴¹See, e.g. Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-line Commerce*, 12 BERKELEY TECH. L. J. 115 (1997) (fair use is a "subsidy" from copyright owners to users). Alternatively, one might contend that fair uses, since they fall outside the scope of a copyright owner's rights, were never in the pockets of copyright owners.

⁴²For a recent discussion of the benefits, and problems, of price discrimination in intellectual property systems, see Wendy Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367 (1998) (defending price discrimination when employed by a producer who already has an intellectual property monopoly, such as a copyright, since price discrimination loosens the impact of the monopoly on users; by contrast, price discrimination is not an excuse for *creating* a monopoly, in non copyrightable or non patentable subject matter).

need spend in an access-controlled environment, since in the hard copy world, I might need to buy a copy of the full recording, at a price presumably higher than a copy-once delivery of just one song.

The real problems arise, not when a would-be non infringing user must pay for initial access, but primarily when she cannot obtain continued access on reasonable terms. The DMCA anticipates some situations in which continued access to the work should be available, regardless of the copyright owner's goals, and accordingly exempts from the prohibition on circumvention of access controls a narrow and highly specific list of objectives, including reverse engineering and encryption research (within the limits set out in the statute).⁴³ The list, however, is not coextensive with the exceptions to copyright protection set forth with respect to traditional rights under copyright.⁴⁴ Another provision of the DMCA, however, states: "Nothing in this section shall affect rights, remedies, limitations, or defenses applicable to copyright infringement, including fair use, under this title."⁴⁵ Does this provision introduce a fair use defense to circumvention of access controls?

At first blush, the answer would be "no," because the statute makes access circumvention a violation distinct from copyright infringement.⁴⁶ Moreover, Congress' direction to the Librarian of Congress to conduct a rulemaking inquiry to determine whether noninfringing users of works "are likely to be adversely affected by the prohibition" on circumvention of access controls, and accordingly, to publish classes of works that should be exempted from the prohibition,⁴⁷ suggests that § 1201(a) does not otherwise permit a fair use defense. The work is either protected against circumvention of access controls

⁴³See 17 U.S.C. § 1201 (d)-(j). Most of these exemptions apply only to the act of circumvention. By and large, the prohibition on manufacture and distribution of devices designed to circumvent access controls, under § 1201(a)(2), remains in effect. Only §§ 1201(d)(4); (g)(4) and (j)(4) permit the development or distribution of circumvention devices solely to carry out the circumvention authorized by those sections.

⁴⁴Compare id. §1201(d)-(j) with 17 U.S.C. §§ 107-22 (fair use, and other exceptions to reproduction and public performance rights).

⁴⁵Id. §1201(c)(1).

⁴⁶See Id. § 1203 (authorizing civil action and stating remedies for violation of anti circumvention provisions). Accord, *Universal City Studios, Inc. v. Reimerdes*, *supra*, note 6 (dismissing fair use defense on the ground that fair use does not apply to violations of § 1201(a)); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 729 (2000) ("the WIPO Treaties Act adds a wholly separate tort of unauthorized circumvention, to which the fair use defense is inapplicable.").

⁴⁷See 17 U.S.C. § 1201(a)(1)(C)(D).

for any purpose other than those explicitly set out in §§ 1201(d)-(j), or it is exempted; indeterminate defenses, such as the highly contextual fair use privilege, do not fit in this scheme.

Nonetheless, the syntax of § 1201(c) permits an argument that the phrase “including fair use,” as set off in commas, modifies not “defenses applicable to copyright infringement,” but “limitations . . . under this title.” Section 1201 is “under” Title 17, even if it is not, technically, a provision addressed to copyright infringement.⁴⁸ If fair use is a general limitation on rights set out in Title 17, including, for example, the (technically) extra-copyright right to fix performances of musical works set out in § 1101,⁴⁹ then § 1201(c) preserves fair use as to anti-circumvention as well. This argument works if one concludes that fair use is not merely a statutory rule expressed in § 107 of the Copyright Act, but that it is a general judge-made rule applicable to rights within the penumbra of copyright, as well as to other intellectual property rights, including trademarks.⁵⁰ Congress codified copyright fair use in § 107, but Congress disavowed any intent to “freeze” this judge-made doctrine, “especially during a period of rapid technological change.”⁵¹ By the same token, one might contend, Congress did not intend to limit the development of fair use to rights formally within the Copyright Act (as opposed to Title 17 in general, or even other statutory intellectual property rights). Because fair use is a “general equitable defense,”⁵² courts are likely — given an appropriate fact situation — to seek to apply it to the new access right by articulating additional, and highly contextual, limitations on the prohibition on circumvention of access controls.

This does not mean that fair use defenses to circumvention are or should

⁴⁸I am grateful to Professor Jessica Litman for drawing my attention to §1201(c)(1)’s syntax and its consequences, and for prompting the analysis that follows.

⁴⁹For example, where § 1101 applies to communication to the public of the sounds of an unauthorized recording of a musical performance, and contains no explicit fair use or educational performance exceptions, one could imagine a reasonable fair use argument on behalf of a music professor who plays a bootleg recording of Maria Callas in an opera appreciation course.

⁵⁰Courts have entertained “nominative fair use” defenses to trademark infringement, and may be developing broader concepts of non-statutory but lawful unauthorized use of trademarks. See, e.g., *New Kids on the Block v. News America Publishing*, 971 F. 2d 302 (9th Cir. 1992). In addition, one scholar has argued for extending the fair use doctrine to patent law, see Maureen O’Rourke, *Toward a Doctrine of Patent Fair Use*, 100 COLUM L. REV. (forthcoming 2000).

⁵¹See H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 66 (1976).

⁵²*Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

be fully coextensive with fair use defenses to traditional copyright violations. Rather, circumvention defenses should evolve in the context of digital online distribution; some traditional defenses may remain appropriate, others may not, but new ones may be needed.⁵³ One appropriate defense may arise in the context of the “copyrightable figleaf”: when the user seeks to obtain unprotected information, rather than to copy the protected work. 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.⁵⁴

A Fair Access exception for purposes of making a transformative use is, however, more problematic, because in this case, the user’s claim addresses core copyrighted works. Nonetheless, the user’s conduct would be privileged were the work disseminated without access controls. Does the use therefore become less “fair” when the copyright owner interposes an access control? In fact, fairness may depend on the nature of the access control: what is the copyright owner seeking to prohibit? In theory, access controls are designed to protect a business model based on price discrimination according to intensity of use; they are not intended to prohibit scholarly or critical examination of the works themselves. But that may be the result if the user cannot consult or acquire a fair-usable copy at a reasonable price, or from a source such as a public library. And if hard copies and unprotected digital copies do disappear in a brave new pay-per-access world, then the threat to transformative fair use becomes more than a paranoid fantasy.⁵⁵ In fact, works are likely to remain available in traditional hard copies and unprotected digital copies, but this Essay takes as its premise the eventual disappearance of those copies for at least some kinds of works. In that event, it may become necessary to modify the scope of the § 1201(a) access right, to continue to provide strong protection against unauthorized *initial* acquisition of a copy of a protected work, but to allow for circumvention in order to engage in fair uses, once the copy has been lawfully acquired.

The access right is, I would contend, a necessary and integral component

⁵³WCT, Agreed Statement regarding Art. 10.

⁵⁴This approach resembles that of § 1201(f), which permits circumvention of access controls on a lawfully obtained copy in order to “identify[] and analyz[e]” those elements of the computer program “necessary to achieve interoperability of an independently created computer program with other programs . . .” See also *Sony Corp. of America v. Connectix, [cite]* (9th Cir. 2000); *Sega Ents. Inc. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

⁵⁵The potential unavailability of hard copies also threatens future archives: if a work is available only in an access-protected format, and that format becomes obsolete, a record of the work may be lost unless librarians or archivists may circumvent the access control to extract the work for preservation in a more stable and accessible format.

of copyright law, despite its formal placement in a separate section of Title 17. But without an appropriate fair use limitation, the access right under § 1201 becomes more than such a component. It becomes instead an Über-copyright law, rigid as to specified exceptions, and therefore freed of further inquiry into the balance of copyright owner rights and user privileges that the fair use doctrine — and the general structure of copyright law — require.

Postscript: The Hard Copy of the Future

In a world of instant access, the hard copy of the future is likely to look very much like the hard copy of a relatively distant past. That is, deluxe editions will persist as attractive objects. Inexpensive mass market versions may eventually disappear, because their primary value is to convey content, not to cherish as an object. Online access may ultimately replace hard copies for content conveyance, but may also, perhaps paradoxically, enhance the appeal of physical originals and fine multiples. The ubiquity of the content makes its physical container all the more prized when the tangible medium is attractive in its own right.