

This is a comment in regard to the effects of the Digital Millennium Copyright Act on the first sale doctrine, by Ray Van De Walker

>(e) To what extent, if any, is the first sale doctrine related to, >or premised on, particular media or methods of distribution?

Copying provides less public benefit than ever before. Formerly, a publisher had to recoup the risks and costs of printing presses, physical transport, and warehousing. Guaranteeing a publisher an income by means of a copyright license was an equitable return on these risks. In return, purchasers got a tangible object, one difficult to reproduce.

The cost to copy a digital work is less than in any previous media. When private copying is cheaper than licensed copying, clearly distributors no longer provide public benefit by copying. At the same time the value of the media no longer justifies the first sale doctrine. Clearly the value is now in the art, editing, and archiving, not the copying or media.

(g) Should the first sale doctrine be expanded in some way to apply to digital transmissions? Why or why not?

The correct model is now to rent rights to the work, not sell the media. Artists have always rented rights to publishers. Now everyone can publish, so everyone should rent rights.

Recording the rental contract has to be made very cheap, but the government, the guarantor of all contracts, can establish standards for recording digital contracts. An important issue is that people should be able to buy and sell contracts. Another is that people should be able to keep contracts in their own private devices. Verifying such contracts should be something that any playback device should be able to do, by some automated means. I think designing such a system would be very easy for a good cryptographer. The government could just put out an RFP.

Now I have a scheme to enforce these contracts (forgive me- I love to invent things).

The regulatory agencies can -require- play-back devices to nag or display advertising when a valid contract is not present- periodically (5 minutes would be very annoying, yet not interfere with excerpting). Advertising permits all fair uses and generates income for artists. Nagging permits fair uses, and can be placed in even the simplest legitimate open-source software to comply with the regulations. The artistic work itself can be in clear, and copied and viewed by public-domain programs. It is simply required to have an identifying tag.

Automatic nagging is like publisher's access to manuscripts. The form is inconvenient, but the content is available for evaluation. Nagging also need not degrade the quality of presentation.

Absence of a nag feature would be evidence of an intent to steal. Publishing nagless playback software would be conspiracy to commit theft. That is, these would be prosecutable, which satisfies me as a copyright owner... Also, in the misty future, when the media is obsolete, the public-domain players would still exist.

The DMCA, or something like it, would then be about falsifying digital contracts or identification tags. That is, fraud.

A) What effect has the DMCA had on the first sale doctrine?

It contributed to the destruction of equity between seller and buyer.

Books, records and movies are traditionally published in clear. It seems obvious that distributors have a public duty to make their media both usable, and long-lived.

When media are in clear, consumers, libraries and other conservors can copy them, giving them an indefinite useful life. This is how all ancient literature survived into modern times. In clear text.

Most copyright-based industries now plan to encrypt digital works, specifically to prevent consumers from copying them into more modern formats. This violates customary usage. It prevents numerous fair uses, including excerption, parody, and archiving.

DMCA -eliminates- any lawful possibility of circumventing these encryptions, and maintaining customary fair use rights.

b) What effect has the DMCA had on the operation of the first sale doctrine?

Of course, the DMCA was an attempt to strengthen first sale rights by protecting the value of artistic works.

It failed (see above) because it attempts to force value to inhere in the media. Value actually inheres in the work itself, not the media. Now interested parties are escalating the resulting conflict.

So, I no longer feel protected by the law, but rather oppressed by it. I am a professional computer programmer. I personally make a living from copyright law.

In the recent DeCSS case, civil and criminal actions were brought against computer programmers for the metaphorical equivalent of opening the hood of a car, taking apart the engine, and making tools to fix the engine so it works the way engines always worked before...

The cross-posting of DeCSS, and the creation of anonymous internet file-replication software are clear acts of civil disobedience to retain customary reverse-engineering and fair use rights.