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January 2007

Enabling Copyright Consumers

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Recommended Citation

Joseph P. Liu. "Enabling Copyright Consumers." *Berkeley Technology Law Journal* 22, (2007): 1099-1118.

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ENABLING COPYRIGHT CONSUMERS

By Joseph P. Liu[†]

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I. INTRODUCTION

When is it acceptable for a company to help consumers engage in fair use of copyrighted works? One might think that the answer would be: “always.” After all, a fair use is a privileged use, which copyright grants to consumers of copyrighted works.¹ Consumers have the right, for example, to make personal copies of their CDs. If that is the case, then shouldn’t a company be entitled to help consumers make copies of CDs? Similarly, consumers have the right to make copies of television broadcasts for later viewing.² Shouldn’t a company be entitled to help consumers do this in the most efficient way possible? Shouldn’t such a company, in fact, be lauded for making this process more efficient?

In fact, courts quite frequently hold companies liable for helping consumers engage in activities that would be fair or non-infringing uses if un-

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1. See 17 U.S.C. § 107 (2000).

2. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

dertaken by consumers themselves. For example, courts have suggested that students should be entitled to make and assemble, on their own, copies of excerpts from various books and articles.³ But when a copy shop performs this task, the courts have held this to be infringing.⁴ Similarly, consumers are generally understood to have the right to skip over the portions of a DVD they find objectionable or do not wish to see.⁵ This would likely extend to the right to make edits to the DVD for such a clearly personal and non-commercial purpose. But when a company facilitates this activity by selling already edited versions of the DVD, the courts have found this to be infringing.⁶ Most recently, a court held liable a cable company that stored broadcasts for later viewing on behalf of consumers,⁷ despite the fact that such an activity would be fair use if a consumer did it in the privacy of his or her own home.

What explains the courts' dim view of companies that help consumers engage in fair or privileged uses? The structure of copyright doctrine provides an immediate explanation. In deciding such cases, courts generally apply the fair use defense to the activities of the companies, not the ultimate consumers. So in the copy shop cases, for example, the courts find that the nature of the use is commercial, since the copy shop profits from the copying.⁸ The courts also frequently find that there is harm to the relevant market, since in many cases these companies could have secured a license from the copyright owner.⁹ The fact that the use might have been fair if performed by a consumer is irrelevant.

In many ways, the doctrinal explanation makes good policy sense. Many consumer uses are considered fair because they pose little harm to the market for the copyrighted work.¹⁰ The uses are, at least individually, small in scale. Moreover, the value of the uses is trivial in comparison to

3. *See* Princeton Univ. Press v. Mich. Document Servs. (MDS), 99 F.3d 1381, 1395 (6th Cir. 1996) (en banc) (Merritt, J., dissenting).

4. *See id.*

5. *Family Movie Act of 2004: Hearing on H.R. 4586 Before the H. Comm. on the Judiciary*, 108th Cong. 22 (2004) [hereinafter *Hearing*] (statement of Marybeth Peters, Register of Copyrights, Copyright Office of the U.S.).

6. *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

7. *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007).

8. *See* Princeton Univ. Press v. Mich. Document Servs. (MDS), 99 F.3d 1381 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

9. *See, e.g., MDS*, 99 F.3d at 1387.

10. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451-52 (1984).

the costs that would be entailed if consumers were forced to seek authorization for these uses.¹¹ Under the familiar market-failure theory of fair use, copyright law should permit these uses.¹² When third parties enter the picture, however, they make it far easier for consumers to engage in such uses. This potentially increases the amount of harm to the market for the work. It also reduces the potential licensing costs. Thus, copyright theory might well support such a result.¹³

Although this perspective is in many ways quite valid, I argue in this Article that it is only partially correct. Specifically, the current judicial approach to such cases fails to take sufficient account of the interest that consumers have in engaging in fair or privileged uses. By conceiving of such uses as based largely on market failure, the existing approach finds it easy to allocate the benefits of efficiency to producers. However, if we view consumer uses as affirmative privileges that are based on more than simply market failure, then it becomes less clear why the benefits of efficiency should not be enjoyed, at least in part, by consumers and by the companies that serve them.

In this Article, I suggest a number of ways in which a more consumer-oriented perspective might affect the way courts approach this question. Part II of this Article examines three specific areas in which courts have found companies liable for engaging in activities that would be fair uses if performed by consumers themselves. Part III analyzes the approach adopted by these courts and identifies situations where consumer fair use has a claim to be viewed as an affirmative entitlement. Finally, Part IV argues in favor of a more nuanced application of the fair use factors in such situations and explores some of the implications of the analysis for judicial decision making, as well as statutory initiatives such as the Digital Millennium Copyright Act.

II. WHOSE SHOES?

Courts in copyright cases have generally been reluctant to allow companies to “stand in the shoes” of their customers when it comes to fair

11. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

12. See *id.*

13. See, 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).

use.¹⁴ This Part describes a number of areas where courts have either rejected or failed to consider such arguments.

A. Photocopying of Coursepacks

Perhaps the most express consideration of the issue raised by this Article can be found in the copy-shop cases: *Princeton University Press v. Michigan Document Services (MDS)*¹⁵ and *Basic Books, Inc. v. Kinko's Graphics Corp.*¹⁶ In *MDS*, the plaintiff, Princeton University Press, sued a photocopy store that produced coursepacks for university professors. The coursepacks consisted of photocopied collections of excerpts from copyrighted books and articles chosen by the professor as readings for a particular course. The professors assembled the coursepacks, the copy shop reproduced the coursepacks, and students in the class purchased the coursepacks from the copy shops. The copy shop in *MDS* did not pay any licensing fees for the right to reproduce the copyrighted books and articles, and the plaintiff sued for copyright infringement.¹⁷

The court of appeals in *MDS*, sitting en banc, rejected the defendant's assertion of fair use. Applying the four fair use factors, the court held that (1) the nature and purpose of the use was both commercial and non-transformative; (2) the amount of the copyrighted work used was substantial; (3) the nature of the copyrighted works was creative and entitled to protection; and (4) the impact on the market was significant, insofar as the activity deprived the publisher of licensing fees that it was successful in obtaining from other copy shops.¹⁸ In reaching this result, the court analyzed the fair use defense from the perspective of the copy shop.

MDS had argued that the court should adopt, or at least take into account, the perspective of the students. From such a perspective, the fair use status of the practice looks quite different. The practice, non-commercial in nature and educational in purpose, is of precisely the type that fair use was originally designed to enable. Moreover, the impact on the market is not significant, insofar as students would not otherwise purchase all of the original copyrighted works. *MDS* argued that it was

14. See Llewellyn Joseph Gibbons, *Entrepreneurial Copyright Fair Use: Let the Independent Contractor Stand in the Shoes of the User*, 57 ARK. L. REV. 539 (2004).

15. 99 F.3d 1381 (6th Cir. 1996).

16. 758 F. Supp. 1522 (S.D.N.Y. 1991). The facts of *Basic Books* are very similar to the facts of *MDS*. Accordingly, this Article will focus its discussion on the latter, without repeating the analysis for the former.

17. *MDS*, 99 F.3d at 1384.

18. *Id.* at 1386-90.

merely facilitating the fair use of the students, and that the court should take this into account in its fair use calculus.¹⁹

One of the dissenting opinions noted the incongruity that the actions might well have been fair use if undertaken by the students themselves:

That the majority lends significance to the identity of the person operating the photocopier is a profound indication that its approach is misguided. Given the focus of the Copyright Act, the only practical difference between this case and that of a student making his or her own copies is that commercial photocopying is faster and more cost-effective. Censuring incidental private sector profit reflects little of the essence of copyright law.²⁰

Another dissenting opinion was even more express:

There is nothing in the statute that distinguishes between copies made for students by a third person who charges a fee for their labor and copies made by students themselves who pay a fee only for use of the copy machine. Our political economy generally encourages the division and specialization of labor. There is no reason why in this instance the law should discourage high schools, colleges, students and professors from hiring the labor of others to make their copies any more than there is a reason to discourage lawyers from hiring paralegals to make copies for clients and courts. The Court's distinction in this case based on the division of labor—who does the copying—is short sighted and unsound economically.

Our Court cites no authority for the proposition that the intervention of the copyshop changes the outcome of the case. The Court errs by focusing on the “use” of the materials made by the copyshop in making the copies rather than upon the real user of the materials—the students. Neither the District Court nor our Court provides a rationale as to why the copyshops cannot “stand in the shoes” of their customers in making copies for noncommercial, educational purposes where the copying would be fair use if undertaken by the professor or the student personally.²¹

Thus, to the dissenting judges, MDS was merely making more efficient the fair use that the students were otherwise entitled to engage in.

The majority, however, rejected this argument:

19. *Id.* at 1389.

20. *Id.* at 1393 (Martin, C.J., dissenting).

21. *Id.* at 1395 (Merritt, J., dissenting).

Two of the dissents suggest that a copyshop merely stands in the shoes of its customers and makes no “use” of copyrighted materials that differs materially from the use to which the copies are put by the ultimate consumer. But subject to the fair use exception, 17 U.S.C. § 106 gives the copyright owner the “exclusive” right “to reproduce the copyrighted work in copies. . . .” And if the fairness of making copies depends on what the ultimate consumer does with the copies, it is hard to see how the manufacture of pirated editions of any copyrighted work of scholarship could ever be an unfair use.²²

Thus, the court refused to consider or take into account the possibility that the students’ activities might constitute fair use.²³

While there may well be valid arguments against the position advanced by the dissenting opinions, the majority’s response seems somewhat weak. The majority seems to be concerned that allowing the copy shop to stand in the shoes of the students would provide no limiting principle, i.e., that it would mean that copy shops could make wholesale copies of entire books. But this is not the case—the limiting principle would be the fair use rights of the students. Making a wholesale copy of an entire book would likely be infringing even if done by a student.²⁴ Thus there is no real concern that allowing the copy shop to stand in the shoes of students would lead to unlimited copying. Rather, the extent of the copy shop’s right would be measured by, and be coextensive with, the rights of the students.

In a later portion of the opinion, the majority raised a more interesting objection. As noted above, the dissenting opinions argued that the copy shops were merely doing what the students were doing, but in a more efficient manner, and that it would be incongruous to penalize them for making the process more efficient. The majority responded by noting that other copy shops were able to serve this function while at the same time paying royalties to the publishers.²⁵

Unlike the earlier response, this response hits closer to the mark. Here, the court seemed to implicitly acknowledge that there was value in ena-

22. *Id.* at 1386 n.2.

23. Note that the court expressed no opinion about whether copying by the students would have been fair: “As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt.” *Id.* at 1389.

24. In such a case, the fair use factors would point largely against the student, particularly if the book were available for purchase.

25. *Id.* at 1389.

bling students to access coursepacks in a more efficient manner. However, it took issue with the argument that achieving this result required a fair use defense for the copy shops. Thus, for the majority, the question was not whether students could access coursepacks in an efficient manner, but whether the publishers would be compensated.

Thus, in the end, the court expressly rejected the argument that the copy shop could stand in the shoes of the students.²⁶

B. Space-Shifting and Time-Shifting

The same issue arises in cases involving space-shifting and time-shifting. Consumers have a relatively well-established right to record television broadcasts for later viewing, so-called time-shifting. They have also enjoyed, at least historically, the right to make personal copies of recorded music, so-called space-shifting. Both of these activities are generally considered fair use.²⁷

Yet in a number of cases, courts have imposed liability on companies that have sought to facilitate and make more efficient the consumer exercise of these rights. In *UMG Recordings v. MP3.com*,²⁸ for example, the defendant MP3.com provided a service whereby consumers could store, on MP3.com's servers, music they had purchased on CDs. Consumers would place their CDs in the CD drive of their computer and then upload the music onto MP3.com's servers. Consumers could then access the music from any computer with an internet connection by signing onto the MP3.com site.²⁹

In fact, however, MP3.com did not copy the music from the consumer's CD. Instead, MP3.com had already made copies of many music album CDs, such as those produced by UMG, and stored these copies on

26. *Accord Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 582 (6th Cir. 2007) (citing *MDS*, 99 F.3d 1381) (establishing the proposition that "the end-user's utilization of the product is largely irrelevant; instead, the focus is on whether alleged infringer's use is transformative and/or commercial"); *Video Pipeline, Inc., v. Buena Vista Home Entm't, Inc.*, 192 F. Supp. 2d 321, 333-34 (D.N.J. 2002) (citing *MDS*, 99 F.3d at 1389) (noting that company cannot stand in the shoes of customer for purposes of the first sale doctrine). See generally Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581, 635-36 (2004) (tracing the source of the proposition that companies cannot stand in the shoes of their customers).

27. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); Transcript of Oral Argument at 12, *Metro Goldwyn Mayer Studios, Inc. v. Grokster, Inc.*, 545 U.S. 913 (2005) (No. 04-480); Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-10 (2000).

28. 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

29. *Id.* at 350.

its servers. Whenever a consumer placed such a CD in his or her CD drive, MP3.com would verify that the CD contained the stored music. Then, rather than uploading the music onto its servers from the consumer's CD, MP3.com would instead provide the consumer with access to the copies of the songs from the CD that already resided on MP3.com's servers. Alternatively, if the consumer did not have a particular CD, he or she could purchase the CD from a cooperating online retailer. MP3.com would then provide access to its online copy.³⁰

UMG sued for copyright infringement, and the district court found MP3.com liable. In so doing, the court rejected MP3.com's fair use argument. In evaluating the fair use factors, the court found that the use was commercial and non-transformative, that MP3.com copied the entire work, and that the nature of the work was creative.³¹ MP3.com had argued that its service did not harm the direct market for CDs and even had the effect of enhancing the market, insofar as it required the purchase of the CD. The court rejected this argument, noting: "Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works."³² In a separate opinion, the court awarded massive statutory damages to the plaintiffs.³³

The court in *MP3.com* never directly addressed the argument that MP3.com was merely facilitating the exercise of a consumer's right. Either MP3.com never made that argument or the court rejected it and applied the fair use factors without acknowledging any consumer interest. The court did note in passing, however, that: "Copyright . . . is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders' property interests."³⁴

Although in a slightly different doctrinal setting, a recent case presents a similar issue in the context of time-shifting television broadcasts. In *Twentieth Century Fox Corp. v. Cablevision Services*,³⁵ the cable company Cablevision introduced a service that allowed customers to record cable television broadcasts for later viewing. The service functioned like a personal video recorder such as TiVo. However, instead of recording the shows on a set-top box in the customer's home, the service stored the recordings centrally at Cablevision's facilities. Cablevision's computers al-

30. *Id.*

31. *Id.* at 351-53.

32. *Id.* at 352.

33. *UMG Recordings, Inc., v. MP3.com, Inc.*, 2000 WL 1262568 (S.D.N.Y. 2000).

34. *UMG Recordings*, 92 F. Supp. 2d at 352.

35. 478 F. Supp. 2d 607 (S.D.N.Y. 2007).

located space to each consumer and stored shows on that space in response to the customer's choices about which shows to record.³⁶

The case thus presented many of the same issues raised in the *MP3.com* case, insofar as the activity would likely have been fair use if performed by the customer in his or her own home. However, in *Cablevision*, the court never addressed the fair use issue because Cablevision had waived its fair use defense in exchange for plaintiff's waiver of a potential contributory liability claim. Instead, Cablevision argued that it was only passively enabling copying by consumers, and thus the consumers were the ones actually engaging in the act of copying.³⁷

The court rejected Cablevision's argument, finding that Cablevision did more than passively facilitate copying by consumers. It pointed to the fact that Cablevision had extensive control over the means of copying and made decisions regarding when and how the copying would take place.³⁸ The court also distinguished Cablevision's service from a consumer's use of a personal video recorder, focusing largely on the technical differences between the two. It found that Cablevision's system more closely resembled a video-on-demand system, for which Cablevision paid royalties to the copyright owners.³⁹

Thus, in the end, the court refused to permit Cablevision to step into the shoes of its customers.⁴⁰ The court's analysis focused almost exclusively on the actions of Cablevision itself and, in particular, on the technical details of Cablevision's service. It did not consider the possibility that Cablevision's service might represent a more efficient way for consumers to time-shift than through the use of set-top boxes.

C. Bowdlerization of DVDs

Another example of the same phenomenon appears in the debate over bowdlerized versions of movies on DVD. In recent years, a number of companies have begun offering to the public versions of movies on DVD that have been edited to remove or mask scenes that might be objection-

36. *Id.* at 612-16.

37. *Id.* at 617.

38. *Id.* at 618.

39. *Id.* at 618-19.

40. *Accord* Atl. Recording Corp. v. XM Satellite Radio, Inc., 2007 WL 136186, at *7 (S.D.N.Y. 2007) (refusing, under the Audio Home Recording Act, to allow a distributor of an XM receiver plus recording MP3 player to step into the shoes of consumers who would otherwise be authorized to make recordings of broadcasts); *Pac. & S. Co. v. Duncan*, 572 F. Supp. 1186, 1194-95 (N.D. Ga. 1983), *rev'd on other grounds*, 744 F.2d 1490 (11th Cir. 1984) (refusing to let operator of a TV news clipping service to stand in the shoes of its customers for fair use purposes).

able to certain segments of the public. A consumer mails a DVD to one of these companies. The company edits the movie to remove or mask objectionable content (nudity, language, violence, etc.), and then sends back a disk containing the modified movie. The companies are generally careful to maintain a one-to-one ratio between purchased DVDs and edited copies.⁴¹

A number of movie studios sued several such companies for copyright infringement. The district court rejected the companies' fair use defense.⁴² The court found the use to be commercial and rejected the argument that the edited versions of the copyrighted works were transformative.⁴³ The court also held that the works were creative and that the companies had copied the entire works.⁴⁴ Finally, the court rejected the argument that the use had no negative impact on the market. The defendants had argued that their use actually increased the market for such works, insofar as they required consumers to first purchase the unedited DVDs. Thus, many consumers would not have purchased the DVDs but for the editing service. The court responded by noting that, even if this were the case, copyright owners should in any event have the right to decide whether or not they wished to enter this market.⁴⁵

Here too, the court never directly addressed the interests of the consumers.⁴⁶ Consumers presumably have the right to skip over or mute portions of DVDs that they do not wish to see or hear.⁴⁷ Consumers would

41. *See* Clean Flicks of Colo., LLC, v. Soderbergh, 433 F. Supp. 2d 1236, 1238-39 (D. Colo. 2006).

42. *Id.* at 1242.

43. *Id.* at 1241.

44. *Id.* at 1241-42.

45. *See id.* at 1242. The court stated:

The argument has superficial appeal but it ignores the intrinsic value of the right to control the content of the copyrighted work which is the essence of the law of copyright. Whether these films should be edited in a manner that would make them acceptable to more of the public playing them on DVD in a home environment is more than merely a matter of marketing; it is a question of what audience the copyright owner wants to reach.

Id.

46. The closest the court came was in rejecting statements from customers submitted by the companies, touting the value of the services rendered. The court held that this interest was "inconsequential to copyright law and is addressed in the wrong forum." *Id.* at 1240.

47. *Hearing, supra* note 5, at 22. Marybeth Peters, the Register of Copyrights, testified:

Let me start with a proposition that I believe everybody can agree on. I do not believe anybody would seriously argue that an individual who is

also likely have a fair use right to modify DVDs they purchased in order to edit out objectionable portions.⁴⁸ Thus, in a sense, the providers of bowdlerization services merely enable consumers to access works in a way that they would be entitled to under fair use. Indeed, the services would appear to be essential to the widespread exercise of these consumer rights, insofar as most consumers would not have the technical ability to make the required modifications.

Unlike the courts, Congress expressly addressed the consumer interest in this area by passing the Family Movie Act of 2005.⁴⁹ The Act allows companies to provide consumers with hardware and software that would permit consumers to mask or delete objectionable scenes in movies. Under the Act, companies can sell specially designed DVD players and provide files that the DVD player can use to alter or remove scenes from movies “on the fly,” that is, while the movie is being played and without making a permanent altered copy.⁵⁰ The Family Movie Act thus represents an interesting example of Congress expressly recognizing this consumer interest, albeit in a limited manner, and enacting a specific privilege furthering it.

III. TRYING THEM ON FOR SIZE

There may be good reasons for the courts in the cases presented above to prevent companies from stepping completely into the shoes of their customers. The involvement of these companies may adversely affect the policies underlying copyright, such as the incentive to create expressive works. At the same time, courts have been too quick to dismiss the interests of consumers in these cases. Section A analyzes and critiques the cases presented above and suggests modifications that would take greater account of consumer interests in fair use. Section B then discusses some situations in which these modifications might be particularly appropriate.

watching a movie in his or her living room should be forbidden to press the mute button on a remote control in order to block out language that he or she believes is offensive. Nor should someone be forbidden to fast-forward past a scene that he or she does not wish to see. And certainly parents have the right to press the mute and fast-forward buttons to avoid exposing their children to material that they believe is inappropriate.

Id.

48. *But see infra* Section IV.B (discussing effect of the Digital Millennium Copyright Act).

49. Pub. L. No. 109-9, 119 Stat. 218, 223-24 (2005) (amending 17 U.S.C. § 110).

50. *Cf. Lewis Galoob Toys, Inc., v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992) (finding no infringement for device that altered gameplay “on the fly”).

A. Critique and Modifications

As a doctrinal matter, it is hard to fault the approach adopted by the courts above. In many of the examples above, a company defended itself against claims of copyright infringement by asserting a fair use defense. When analyzing the entitlement to fair use in these situations, it makes sense to prefer the perspective of the defendant company itself to the perspective of the ultimate consumer. After all, the company, not the consumer, is the party charged with infringement. And nothing in the statutory fair use provision expressly directs a court to consider the interests of third parties such as the consumer.⁵¹

The fair use defense, however, does not rule out consideration of the interests of third parties, such as the consumer in the above cases. The statutory factors are not expressly limited to actions taken by the defendant.⁵² Moreover, fair use is ultimately a very flexible doctrine, and courts are given much discretion in applying it to specific cases.⁵³

The question, therefore, is whether copyright policy warrants consideration of third-party interests. From a policy perspective, there may be good reasons not to permit companies to step fully into the shoes of their consumers when raising a fair use defense. Many fair uses are small-scale uses that have little impact, at least individually, on broader copyright incentives. Moreover, the cost of licensing such individual uses may greatly exceed the value of such uses. Thus, permitting small-scale uses may permit greater dissemination of copyrighted works without a corresponding reduction in copyright incentives.⁵⁴

When companies step in to facilitate such uses, however, both sides of this equation change. The defendant companies above make it far more efficient for consumers to engage in the uses in question. Given the reduced cost of the activity to the consumer, this might have the effect of increasing the extent to which consumers engage in such uses. A more widespread practice might pose a greater threat to the direct market for the copyrighted work. Thus, ultimately there may be a greater adverse impact, in the aggregate, on copyright incentives. So, for example, if students had to assemble their own coursepacks, we might expect the inconvenience associated with the practice to limit the extent to which it is adopted. On

51. 17 U.S.C. § 107 (2000).

52. *Id.*

53. H.R. REP. NO. 94-1476, at 9-10 (1976) (“Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”).

54. *See* Gordon, *supra* note 11, at 1618.

the other hand, if the copy shops streamline the process, we might expect greater student adoption of this process and, correspondingly, a greater reduction in sales of the underlying books and articles.

In addition, the participation of the company may reduce potential licensing costs. The company acts as a locus for licensing. It has greater resources than the individual consumers and derives a profit from the activity. It can thus afford to seek out the copyright owners and negotiate licenses for the activity. So, for example, a copy shop will find it far easier to negotiate blanket copying licenses than the individual students or professors. Hence, for fair use purposes, there may be good reasons to treat companies differently than the consumers they serve.

Note, however, that this perspective depends on a certain view of consumer fair use. Under this view, fair use by consumers is a very tenuous entitlement. It is justified solely by the fact that there is no efficient way to make the consumers pay for the use. If there were a way to eliminate the inefficiency, then under this view the use would be foreclosed. In the above examples, once a company steps in to eliminate the inefficiency, the entitlement is automatically re-allocated to the copyright owner. Consumer fair use is thus, in many ways, a residual and very contingent entitlement.⁵⁵

If we adopt a different view of consumer fair use, however, the results in the above cases make far less sense. Suppose we viewed consumer fair use as an affirmative entitlement—less like an immunity from liability, and more like an affirmative right. For example, what if we thought that it was an affirmatively good thing for students to be able to assemble their own customized packages of readings from copyrighted articles and books? Or what if we believed that it was an affirmatively good thing for purchasers of DVDs to be able to edit their purchases for personal consumption in ways that they saw fit?

The activities of the companies look very different in this light. Instead of engaging in widespread infringement or free-riding off of the labor of the copyright owners, the companies serve the valuable function of enabling consumers to exercise their rights. They step in to eliminate an inefficiency in the marketplace. Moreover, the profit that they earn from this activity is what motivates them to seek out and address these market inefficiencies. It is both their reward and their incentive.⁵⁶

55. See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

56. See *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1393-94 (6th Cir. 1996) (Martin, C.J., dissenting).

Such a perspective addresses one of the somewhat odd results of the existing approach. Under the existing approach, fair use depends on the existence of inefficiency. It is justified by the inefficiency. Thus, once a company steps in to eliminate that inefficiency, the use is no longer fair. This gives rise to some perverse incentives on the part of these companies to maintain some level of inefficiency in their dealings. Thus, in the example of the cable company and the personal video recorder, the doctrine gives the company incentives to maintain a more inefficient method of recording.⁵⁷ It is somewhat odd that the doctrine punishes attempts to make a process more efficient for consumers. If we adopt a more consumer-oriented view, however, this tension is resolved, as the cable company is viewed as providing a valuable service to consumers.

B. Some Examples

Of course, this all raises the question: is there a basis for viewing consumer fair use as an affirmative entitlement rather than an entitlement triggered solely by market failure? Here, I think, is where the existing approach falls short in failing to consider that, in some cases, the answer to this question may be yes. That is, there may be reasons in some cases to view the fair use engaged in by consumers as more than merely a residual right that grudgingly exists only when the market has not found a way to make consumers pay.

In some cases, we might view the consumer fair use as an affirmative entitlement because it serves certain non-market values that justify and underlie fair use more generally.⁵⁸ Take, for example, the copy shop cases.⁵⁹ Unlike the majority opinion, the dissenting opinions view the consumer use as an affirmative entitlement or good. The ultimate users of the coursepacks, the students, are using them for educational purposes. This is a good thing, a broad purpose that fair use is designed to promote.⁶⁰ Under this view, then, the copy shops are facilitating this beneficial use by the ultimate consumers. They are enabling the consumers to efficiently exercise their affirmative entitlements.

Under this view, it seems particularly odd to automatically allocate the benefits of this efficiency to the copyright owners. This is what underlies

57. See Ed Felten, *Cablevision and Anti-Efficiency Policy*, FREEDOM TO TINKER, Apr. 18, 2007, <http://www.freedom-to-tinker.com/?p=1144>.

58. See, e.g., Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997).

59. See *supra*, Section II.A.

60. 17 U.S.C. § 107 (2000) (“[F]or purposes such as criticism, comment, news reporting, teaching, scholarship, or research. . .”).

the difference between the majority and dissenting opinions. The dissenting opinions repeatedly focus on the fact that the copy shops are merely helping the students engage in an ultimately desirable activity. The majority opinion, by contrast, views the student activities more skeptically and accordingly treats the copy shops far less favorably.

In other cases, we might view the consumer fair use from the perspective of consumer autonomy in the consumption of copyrighted works.⁶¹ So, for example, in the bowdlerization cases, there seems to be a persistent belief that consumers should have a basic right to control how and when they view movies on DVDs. The Register of Copyrights testified to this effect,⁶² and Congress recognized this in the passage of the Family Movie Act of 1995. If this is the case, then it becomes harder to understand why companies should be prevented from helping consumers exercise this affirmative entitlement. After all, under this view, the companies that provide consumers with edited DVDs are simply enabling consumers to effectively exercise rights that we wish them to have.

Yet another consumer interest might be an interest in being able to manipulate and transform digital works. As many have recognized, consumers have an interest in interacting with copyrighted works in more complex ways.⁶³ Because this interest is greatly facilitated by digital technology,⁶⁴ consumers are able to engage in an unprecedented level of creativity. This results in a broader and richer cultural environment, one with often quirky and unexpected results. If we consider this to be an affirmative good, then companies that facilitate this kind of creativity should be viewed more favorably. At the very least, they should have the opportunity to argue that they are facilitating the exercise of valuable consumer rights.

In this light, take the example of YouTube.⁶⁵ Many of the video clips posted by users of YouTube contain copyrighted materials. Some of these materials are merely copies of commercially produced copyrighted works. Others, however, include some degree of additional creative expression. For example, there are many clips in which copyrighted music serves as a backdrop to lip-synching, dancing, or other activities. Such YouTube users

61. See Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005).

62. *Hearing, supra* note 5, at 22 (testimony of Marybeth Peters).

63. See, e.g., Liu, *supra* note 61.

64. See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

65. See YouTube, <http://www.youtube.com> (last visited August 26, 2007).

can likely assert the defense of fair use, as their use is non-commercial and transformative, and no easily accessible licensing markets for these uses exist. However, YouTube makes the creation and dissemination of this material far more efficient. YouTube could also potentially negotiate some kind of blanket license on behalf of its users. Yet before concluding that YouTube should be required to do so, YouTube should be entitled to argue that it is facilitating the fair use rights of its users.

Now, to say that courts should take the consumer perspective more seriously is not to say that the consumer perspective should always triumph. It may be that, in some cases, the facilitation of fair use by such companies has too great of an adverse impact on copyright incentives. The benefits of recognizing and facilitating consumer fair uses must be weighed against such a potential effect. But as a general matter, the analysis above suggests that courts should at least consider the possibility that the consumer fair use at issue may be an affirmative entitlement and that companies may have a legitimate interest in making the exercise of such an entitlement more efficient.

IV. HOW DO I LOOK?

So how might copyright look in these cases if courts took more seriously the consumer interest? This Part explores and attempts to flesh out the implications of the above analysis for fair use case law and recent copyright legislation.

A. For Case Law

The adoption of a more consumer-conscious perspective on these cases would have several effects on how courts apply fair use analysis in these kinds of cases. First, courts would adjust their view of the purpose and character of the use—the use by the ultimate consumer would be relevant in such an inquiry. Courts would have to expressly consider whether the use engaged in by the consumer was an affirmative entitlement, or whether it was more of a residual right. If it were an affirmative entitlement, then the commercial nature of the company's use would be far less relevant. The compensation to the company would be seen as an appropriate reward for making the exercise of the entitlement more efficient. On the other hand, if the ultimate use engaged in by the consumer occurs more because of an inability to license, then the commercial nature of the company's use would remain quite relevant.

This would require courts to make substantive distinctions between different types of consumer uses. So, for example, in the copy shop cases,

courts would have to affirmatively decide whether student copying of journal articles and book excerpts is, in itself, fair use. A court could certainly conclude that it is not, and therefore the copy shops should get no special consideration. Yet at the very least, courts should be required to engage in this analysis. This would force courts to adopt a broader perspective by preventing the narrow application of the fair use factors to only the company at issue.

Second, courts would look more carefully at the harm to the market factor. In some cases, even if the activities of the companies facilitate exercise of an affirmative fair use right, there might be too great a harm to the direct market for the work. So, for example, in the *MP3.com* case, there might be a quite reasonable fear that the actions of MP3.com not only make space-shifting more efficient, but also facilitate copying that would clearly not be fair use (for example, use of a single CD by several different people to gain access to multiple copies of a copyrighted song). Or, in the copy shop cases, it is possible that facilitating the student use of coursepacks might in the end so undermine the market for books and articles that this would outweigh the benefits from greater exercise of fair use.⁶⁶

However, such claims should be critically examined and not simply uncritically accepted. Viewing a consumer use as an affirmative entitlement would lead courts to more carefully assess claims of market harm by forcing them to weigh that harm against a competing consumer interest. Thus, if it turned out that, due to the peculiarities of the market for academic publishing, coursepacks would not have a significant impact on the production of academic works, this would support the entitlement of the copy shops. At the very least, once a consumer interest is identified, there is a reason for courts to engage in a more thorough inquiry into the impact of the use on the market.

Moreover, courts would more carefully scrutinize claims of lost licensing revenue and would not automatically credit such claims. Viewed from the perspective of the consumer, it is far less clear why the loss of potential licensing revenue should be considered market harm. In effect, this is a question regarding the allocation of the benefits from more efficient consumer fair use. If a court views the consumer fair use as an affirmative

66. See *Los Angeles News Service v. Tullo*, 973 F.2d 791, 797-99 (9th Cir. 1992); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 112 (2d Cir. 1998) (citing *MDS* for the proposition that “large-scale photocopying, even for the statutorily-approved purpose of educational use, can still infringe”).

good, then the company facilitating the use may have a greater claim to the proceeds from the increased efficiency.

Consider the bowdlerization example. The companies in these cases are careful to maintain a one-to-one ratio of edited-to-original DVDs. Accordingly, there is no realistic claim of harm to the direct market. Indeed, there is a very good claim that the service benefits the direct market by enabling purchases by consumers who would otherwise have avoided purchasing the DVD in the first place. Moreover, the claim of harm to the market via licensing seems particularly weak, given that the copyright owners have not sought to exploit this market, and the companies in these cases should share in the benefits of a service that enables consumers to more efficiently exercise their right to view movies in the manner they wish.

Finally, courts may consider the possibility of withholding injunctive relief and instead awarding some level of damages. In some cases, a court might well conclude that the benefits from more efficient consumer fair use should be shared between the company and the copyright owner. Where a court believes that bargaining would not result, a court could award damages rather than an injunction. This might give more incentive to companies to look for opportunities to help consumers exercise their fair use rights.

Ultimately, a consumer-conscious perspective would require courts to take more seriously the argument that a supposedly infringing company is instead actually facilitating a consumer's exercise of fair use rights. Although such a result would not always allow companies to step into the shoes of their customers, it would at least allow them to briefly slip the shoes on to see if they fit.

B. For the DMCA and DRM

While the analysis in the preceding section focused on the fair use defense, it is worth asking how recent changes to the copyright laws, namely the enactment of the Digital Millennium Copyright Act, affect this analysis.⁶⁷ To some extent, the DMCA places another potential barrier to the more effective exercise of consumer fair use. Many copyright owners are increasingly deploying technologies to restrict the ability of consumers to copy or freely manipulate digital copies of copyrighted works. The DMCA imposes liability for the circumvention of these technological

67. 17 U.S.C. §§ 1201-05 (2000).

measures.⁶⁸ It also bars the sale of technologies that have limited uses other than to enable circumvention.⁶⁹

The DMCA thus stands in the way of many attempts by consumers to exercise their fair use rights. Take the bowdlerization example. I have argued above that we should recognize a right on the part of consumers to control how and when they watch a movie, and that this right likely extends to a fair use right to modify movies on DVD for personal consumption. Yet most consumers will not be able to do so because DVDs are encrypted. Thus, they do not have the technical ability to exercise their fair use rights.⁷⁰

Moreover, even if a particular consumer did have such technical ability, he or she would be barred from exercising it by the DMCA, since doing so would constitute the illegal act of circumvention. The DMCA, unlike copyright more generally, does not contain a fair use defense. So even if the underlying use were to be fair, there would be no defense to the act of circumvention unless the use fell within a specific exemption or exclusion.⁷¹ And even if consumers were to somehow obtain an exemption, they would have no access to technologies that would enable them to take advantage of the exemption.

Thus, in the end, the DMCA may obviate much of the above analysis, at least for works that are routinely protected by technological protection measures. In such cases, the role played by companies that facilitate fair uses would be even more vital, since most individuals likely do not have the technical expertise required to overcome the technological protection measures. Yet any company that facilitated such uses by individuals would likely run afoul of the DMCA. And, unlike the case with copyright, there is no general fair use defense available for these companies to leverage.⁷²

The effect of the DMCA, therefore, is to largely disable consumers from exercising rights they would otherwise possess under fair use. If fair

68. See 17 U.S.C. § 1201(a)(1) (2000).

69. 17 U.S.C. §§1201(a)(2), (b) (2000).

70. Cf. Llewellyn Joseph Gibbons, *Entrepreneurial Copyright Fair Use: Let the Independent Contractor Stand in the Shoes of the User*, 57 ARK. L. REV. 539 (2004) (noting that end-users may not have technical sophistication to engage in some fair uses).

71. Under the DMCA, the Librarian of Congress may grant exemptions to circumvention liability in a triennial rulemaking proceeding. See 17 U.S.C. § 1201(a)(1)(C) (2000). One such rulemaking exempted film professors from liability for circumvention of technological protection measures to compile film clips for class. See 37 C.F.R. § 201.40(b)(1) (2006).

72. See *Universal City Studios, Inc., v. Corley*, 273 F.3d 429 (2d Cir. 2001) (holding that there is no fair use defense to DMCA liability).

uses are residual rights justified only by inefficiency, then we might not care about this effect, since new technologies will presumably make licensing less costly and eliminate the justification for fair use. However, if fair uses have independent value and are not just residual rights, then the DMCA acts as a practical limit on the ability of companies to step in and make such uses more efficient and accessible.

V. CONCLUSION

In this Article, I have argued that courts should be more sympathetic to attempts by companies to invoke the fair use rights of their customers. To the extent that we view some consumer fair uses as affirmative entitlements, consumer fair use arguments by the supposedly infringing companies that facilitate the exercise of such entitlements should be treated more favorably. Although such arguments should not always be dispositive, courts should at least carefully evaluate them.