

THE DEATH OF THE FIRST SALE DOCTRINE

KIMBERLEY BYER*

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INTRODUCTION

The traditional brick-and-mortar video rental stores may soon be a thing of the past and copyright law’s first sale doctrine may go right along with them. Historically, video rental stores and used book stores have thrived under the protection of the first sale doctrine, which provides that the purchaser of a lawfully made copy of a copyrighted work can subsequently transfer that particular copy to others without needing the copyright owner’s permission.¹ The first sale doctrine focuses on the distinction between owning a particular “copy” of a work and ownership of the underlying “copyright.” Accordingly, someone who purchases a lawfully made DVD copy of a movie can then sell, rent, trade or give away that DVD without permission from the movie studio that owns the copyright in the underlying movie. This is how traditional video rental stores operate: they purchase the DVDs they rent out, thus eliminating the need to enter into any type of licensing agreement with the movie studios.

With the modern prevalence of technology, digital files have begun to squeeze their analog counterparts out of the market. As more and more content owners start to forgo the traditional method of distributing copyrighted works in tangible physical mediums in favor of digital licenses, the important question is what impact will this have on

* J.D. Candidate, 2013, University of Colorado Law School

1. 17 U.S.C.A. § 109(a) (West 2008).

copyright law. Particularly, will copyright's first sale doctrine survive this transition, or is the Copyright Act in desperate need of a major reform?

One way to phrase the complexity of the issue is to ask: if it is legally permissible to rent a DVD and a DVD player to an individual to enjoy in the privacy of his home, does it follow that it would be legally equivalent to do the same basic thing but with the physical device in a different location. Put more simply, does the length of the cable matter in determining whether something constitutes copyright infringement?² If the cable from your DVD player to your TV is just a few feet long, it is legal. But if the cable is much longer such as when the DVD player is located in a central data center, is it suddenly illegal?³ A recent decision from a federal district court seems to suggest just that.

Zediva, an innovative start-up, cleverly attempted to create the next generation DVD-rental store. According to Zediva, its business model was analogous to a traditional brick-and-mortar DVD rental store: Zediva bought physical copies of new-release DVDs and rented the physical disk along with a DVD player to its customers, and like brick-and-mortar rental stores, Zediva rents those DVDs to only one person at a time. However: "It does so not by requiring the customer to come to a physical store, but by bringing the store to the customer via the Internet."⁴

Motion Pictures sued for infringement of its exclusive right, as the copyright owner, to publicly perform the work. The studio argued that unlike a brick-and-mortar video rental store, which can rent its copies without permission from the copyright holder under the first sale doctrine, Zediva was publicly performing the movies by streaming them to its customers. Motion Pictures contended that because Zediva was publicly performing the movies rather than merely distributing copies, Zediva's conduct was outside of the protection of the first sale doctrine.

Zediva argued that under the first sale doctrine, it did not need a license from Motion Pictures. Zediva contended that unlike other online streaming services, such as Netflix and Amazon, which allow multiple users to access the same digital file, Zediva streams from the actual, physical copies of DVDs, which play on DVD players housed at its central data facility.

2. Mike Masnick, *Court Shuts Down Zediva: Apparently The Length Of The Cable Determines If Something Is Infringing*, TECHDIRT (Aug. 2, 2011, 11:09 AM), <http://www.techdirt.com/articles/20110802/02374615353/court-shuts-down-zediva-apparently-length-cable-determines-if-something-is-infringing.shtml>.

3. *Id.*

4. Opposition to Motion Picture Studios' Motion for Preliminary Injunction at 8, Warner Bros. Entm't., Inc. v. WTV Sys., Inc. (C.D. Cal. 2011) (No. 11CV02817), 2011 WL 4401800.

A U.S. district court in California disagreed with *Zediva* and issued a preliminary injunction ordering the company to shut down its operations.⁵ This case illustrates the growing tension between the first sale doctrine and public-performance rights. Under the first sale doctrine, individuals who buy legal copies of a copyrighted work are allowed to resell, rent, or lend those copies. The first sale doctrine embodies the essential balance in U.S. copyright law between increasing public access to works and incentivizing their creation. It essentially gives the copyright owner the right to control the initial public distribution of a work while also lessening the copyright owner's monopoly over any subsequent sale or rental of a particular copy of a work. In the age of digital media, however, consumers are turning to digital copies as a replacement for traditional physical copies. If purchasing physical copies becomes obsolete, will the first sale doctrine lose all meaning?

This note reviews existing copyright law in the context of the *Zediva* case and considers if new reform is needed to bring copyright law up to date with the state of modern technology. Part II explores the statutory framework of the Copyright Act, particularly how the first sale doctrine operates to protect the public's interests in relation to the copyright owner's exclusive right of public performance. Part III examines how case law has developed to determine when a performance becomes "public" under the statute. Part IV analyzes the legality of *Zediva's* business model in the context of this prior case law. Finally, part V explores the policy arguments for and against copyright reform, asks whether the digital revolution has basically killed the first sale doctrine, and considers what that might mean for copyright law. This note proposes that if the public performance right is extended too far beyond the traditional movie theater concept, to the point that a performance in the privacy of one's home is considered public, then the counter-balancing effect of the first sale doctrine is rendered obsolete and copyright owners now have, in essence, a full monopoly right over their works.

I. STATUTORY FRAMEWORK

Section 106 of the Copyright Act grants copyright owners six exclusive rights: reproduction, preparation of derivative works, distribution, public performance, public display, and digital transmission performance.⁶ In other words, one must obtain the copyright owner's

5. *Warner Bros. Entm't v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011) (order granting preliminary injunction).

6. 17 U.S.C. § 106 provides:
"Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

permission to copy the work, make an adaptation of it, distribute or sell it, or perform or display it publicly.

A. *The First Sale Doctrine*

The Copyright Act places several limitations on these rights. The first sale doctrine limits a copyright owner's distribution right such that her right to control the sale of a particular copy of a work is terminated once the owner releases that copy to the public through a sale, gift, or loan.⁷ The first sale doctrine embodies the law's well-established policy prohibiting restraints on the alienation of personal property.⁸ The system of distributing copyrighted works in the form of freely alienable copies has benefited the public by increasing the overall affordability and access to the works.⁹ Furthermore, the first sale doctrine is crucial to preserving the delicate balance between protecting copyright owner's rights and ensuring public access to creative works.

The first sale doctrine originated from the common law's historic disfavor of restraints on the alienation of personal property. In 1908, the United States Supreme Court expressly recognized the first sale doctrine in *Bobbs-Merrill Co. v. Straus*,¹⁰ holding that although the copyright owner has an exclusive right to reproduce a work, copyright law does not give the copyright owner the right to control the resale market of the work by imposing mandatory price restraints on what others can charge.¹¹ Once the copyright owner sells copies of a work at a wholesale price to a retailer, the copyright owner's vending right is exhausted, and the retailer is free to resell the copies to the public at any price she chooses.

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- (1) to reproduce the copyrighted work in copies or phonorecords;
 - (2) to prepare derivative works based upon the copyrighted work;
 - (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
 - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."

7. 17 U.S.C. § 109(a).

8. R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 584 (2003).

9. *Id.*

10. 210 U.S. 339, 350 (1908).

11. *Id.* at 341 (the Plaintiff-copyright owner of a book had placed the following notice in copies of the book: "[t]he price of this book at retail is \$1 net. No dealer is licensed to sell it [the copies] at a less price, and a sale at a less price will be treated as an infringement of the copyright." The defendant wholesaler disregarded the plaintiff's notice and sold the books for eighty-nine cents).

A year after the *Bobbs-Merrill* decision, Congress codified the first sale doctrine in the Copyright Act of 1909. Intending to strike a balance between the copyright owner's right to control distribution of his work and the public's interest in alienating copies of the work,¹² Congress provided the following provision in Section 27 of the 1909 Copyright Act:

The copyright is distinct from property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.¹³

As it reads today, Section 109(a) of the Copyright Act provides: "Notwithstanding the provisions of section 106(3) [granting the exclusive right of distribution], the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."¹⁴

As a result, an owner of a lawful copy of a work may resell that copy, rent it, loan it to a friend, give it away or destroy it without having to obtain permission from the copyright owner. It is the first sale doctrine that has historically enabled video rental stores, used bookstores, and libraries to flourish by permitting them to realize the full resale value of the used copies without having to pay royalty fees to the author or publisher.¹⁵

Section 109(a) of the Copyright Act establishes a two-pronged test for the first sale exception to apply. First, the first sale doctrine protects only the *owner* of a particular copy that was lawfully made under the copyright statute. Ownership can be established by virtue of a sale, gift, bequest or other transfer of title: "Because the first sale exception rests upon the principle that copyright owners receive full value for the work when it is first sold," a person with anything less than full ownership may not be protected by first sale.¹⁶ A copy that was loaned, rented, stolen or otherwise transferred without transferring title would not be protected by the first sale doctrine. Mere possession, therefore, is

12. Keith Kupferschmid, *Lost in Cyberspace: The Digital Demise of the First-Sale Doctrine*, 16 J. MARSHALL J. COMPUTER & INFO. L. 825, 832 (1998).

13. 17 U.S.C. § 27 (1977) (current version at 17 U.S.C. § 109 (2011)).

14. 17 U.S.C. § 109(a).

15. Reese, *supra* note 8, at 585.

16. Victor F. Calaba, *Quibbles 'N Bits: Making a Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. TECH. L. REV. 1, 5 (2002).

insufficient for the first sale doctrine to apply, “regardless of whether that possession is legitimate, such as by rental, or illegitimate, such as by theft.”¹⁷ Thus, someone who rents a video from Blockbuster and then resells it or rents it to someone else is not protected by the first sale doctrine and would be infringing the author’s distribution right, because the renter does not “own” the copy.¹⁸

Under the second prong, only copies made with the authority of the copyright owner or the law receive the benefit of the first sale doctrine. To come within the scope of the first sale doctrine, section 109(a) requires that the particular copy be *lawfully made*, though not necessarily with the copyright owner’s authorization.¹⁹ Under the statute, a copy could be “lawfully made” even without the copyright owner’s authority or permission. For example, a copy made under fair use or under the compulsory licensing provisions could qualify; however, pirated copies, regardless of whether or not the owner has knowledge of the piracy, are not protected under the doctrine, and the sale or rental of the pirated copy may infringe the copyright owner’s distribution right.²⁰ This distinction further exemplifies Congress’s intent to limit the scope of the copyright owner’s rights, in contrast to the tendency of current case law, which has broadened the reach of copyright holders.

Finally, the first sale exception limits only the distribution and display rights. It does not protect one from copyright infringement liability who reproduces, adapts, or publicly performs a work without permission from the copyright holder. Even though the first sale doctrine allows the owner of a particular copy to resell it, the first sale doctrine does not apply to the copyright holder’s exclusive right to publicly perform the work.²¹ Thus, the first sale doctrine is a defense to the distribution and display rights only, and is irrelevant in an infringement suit based on the public performance right.²²

17. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 99-101 23 (Aug. 2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

18. Because the first sale doctrine protects only the “owner” of a copy, some copyright owners attempt to use licenses to avoid the first sale doctrine by characterizing the transaction in such a way that transfer of ownership does not pass to the buyer of a particular copy. For example, computer software is often licensed to the user. If the buyer claims first sale protections, the copyright owner may argue that the first sale does not apply because the buyer does not own the copy. *See, e.g., Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010).

19. 17 U.S.C. § 109(a).

20. H.R. REP. NO. 94-1476, at 79 (1976) (“[the] resale of an illegally ‘pirated’ phonorecord would be an infringement, but the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not.”).

21. 17 U.S.C. § 109(a).

22. James Grimmelmann, *That Zediva Thing? It’s So Not Going to Work*, THE LABORATORIUM (Mar. 16, 2011, 3:27 PM), http://laboratorium.net/archive/2011/03/16/that_zediva_thing_its_so_not_going_to_work.

B. The Public Performance Right

Section 106(4) of the Copyright Act grants copyright owners the exclusive right “in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly.”²³ The Copyright Act, in two clauses of Section 101, defines what constitutes a public performance for purposes of Section 106(4):

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²⁴

A performance is “public” if the location is open to the public, if more people are present than just family and social acquaintances, or if the work is transmitted to such a public location or to the public (even if members of the public receive it at separate places and times).²⁵ For example, if Carol wanted to invite a few friends over to her house on a Friday night to watch a movie, that would probably not constitute infringement because it is a private performance.²⁶ But, if Carol wanted to show the movie at a public park, it would constitute a public performance and would require the copyright owner’s authorization.

The limiting factor is “to the public:” unlicensed performances “to the public” are infringing; unlicensed private performances are not. Determining when a performance becomes public is therefore crucial in analyzing the public performance right.²⁷ Unfortunately, although § 101

23. 17 U.S.C. § 106(4).

24. 17 U.S.C. § 101.

25. *Id.*

26. However, it is not always this simple. The statute does not define what constitutes a normal circle of family and social acquaintances or how many people beyond that circle are necessary to reach a “substantial number of persons.” The “substantial number of persons” sub-clause of Section 101(1) is ambiguous and courts can affect the outcome of a determination of a public performance by changing the temporal or spatial scope of the place. For example, if a court wanted to consider a hotel room occupied for one night by one person a private place, but considered the whole hotel over a longer time span a “public” place under the “substantial number of persons” sub-clause.

27. John Kheit, *Public Performance Copyrights: A Guide to Public Place Analysis*, 26 RUTGERS COMPUTER & TECH. L.J. 1, 5 (1999).

of the Copyright Act explains the meaning of a “performance,”²⁸ the statute does not clearly define what constitutes a “public place.”²⁹ The statutory definition of public performance lacks a physical definition of a public place; rather a space is implicitly transformed into a “public place” depending on certain amorphous conditions, which leads to inconsistent interpretation by the courts.³⁰ As a result, the definition of a public performance “has been left obfuscated by statute, legislative history, and case law.”³¹

The “substantial number of persons” sub-clause of Section 101(1) is particularly ambiguous and a court can often affect the outcome by simply changing the temporal or spatial scope of what constitutes “the place” for purposes of determining whether it is a public or private performance.³² For example, an individual hotel room, occupied for one night by one person, may be considered a private place, but a court could also find that it is a “public” place if it chose to broadly consider the whole hotel over a longer time span.³³

The unclear and confusing language in the “transmit” clause further complicates public performance analysis.³⁴ Section 101 of the Copyright Act states that a performance may be “to the public” even if it is received in “separate places” and at “different times.”³⁵ Neither the Senate nor House Reports offer any explanation of what this phrase means.³⁶ This ambiguity leads to the seemingly contradictory result that a performance may be “to the public” even though only one person ultimately receives it.³⁷ If taken literally, it would mean that playing a video in one’s own private home would constitute a public performance because other

28. Section 101 of the Copyright Act states: “to perform” a work means “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101 (2010).

29. Kheit, *supra* note 27, at 17.

30. *Id.* at 19.

31. *Id.* at 18.

32. *Id.* at 24-25.

33. Compare *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989), with *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991).

34. The statute defines the act of transmission: “To ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. § 101.

35. *Id.*

36. MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.14[C][2] (2012 ed.) (explaining that under the statutory phrase “same place or separate places,” a television or radio broadcast received in the privacy of individual homes is nevertheless a “public” performance).

37. See, e.g., *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 616 (S.D.N.Y. 2007) [hereinafter *Cablevision I*], *rev'd in part, vacated in part sub nom.* *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 123-24 (2d Cir. 2008) [hereinafter *Cablevision II*].

members of the public may be playing the same work in their own homes “at different times.”³⁸ This interpretation leads to the absurd result that a person who buys a DVD may clearly resell it under the first sale doctrine without violating the copyright holder’s distribution right, but in order for the buyer to play it on her own DVD player in her own home, she would have to obtain a performance right license.³⁹ Professor Nimmer proposed one explanation to the definition: “Upon reflection, it would seem that what must have been intended was that *if the same copy . . .* of a given work is repeatedly played (*i.e.*, ‘performed’) by different members of the public, albeit at different times, this constitutes a ‘public’ performance.”⁴⁰

II. THE DEVELOPMENT OF CASE LAW

A. “Open to the Public” and the Nature of the Place Analysis

The ambiguities in the statute have led to inconsistent interpretation by the courts and public place analysis appears to be more about the courts value judgments than statutory interpretation.

In *Columbia Pictures Industries v. Redd Horne, Inc.*,⁴¹ a video rental store, Maxwell’s Video Showcase, provided private viewing booths in the rear of the store where customers could watch the videos they had just rented. The VCRs were not located in the booths themselves, but were kept behind the counter in the front of the store.⁴² One of the store’s employees would place the cassette in the VCR and press play; the movie was then transmitted to the TV in the viewing booth where between two to four people could watch it.⁴³ Under Nimmer’s “different times” theory, the same copy of a video would not only be repeatedly played, but also transmitted from the front of the store to the back.

The Third Circuit held that this constituted a public performance in violation of the copyright holder’s exclusive right.⁴⁴ The court found the viewing booths analytically indistinguishable from traditional movie theaters, with the additional feature of privacy.⁴⁵ However, the court did not base its holding on the transmit clause, but rather, on the nature of

38. NIMMER & NIMMER, *supra* note 36, at § 8.14[C][3].

39. Prima facie it would seem that such a performance is not a public performance. But the above-quoted “at different times” phrase in the definition of what constitutes a public performance casts some doubt upon this conclusion. *Id.*

40. *Id.*

41. 749 F.2d 154 (3d Cir. 1984).

42. *Id.* at 157.

43. *Id.*

44. *Id.* at 158-59.

45. *Id.*

Maxwell's stores as places that were "open to the public."⁴⁶ The court added that "[s]imply because the cassettes can be viewed in private does not mitigate the essential fact that Maxwell's is unquestionably open to the public."⁴⁷ In other words, the court defined the relevant "place" where the performance occurred as the entire store, not each individual booth within the store.⁴⁸ Here, the performance was public because the place where the showing occurred was open to the public, even though the viewing audience was limited to a small group of family or social acquaintances.⁴⁹

A couple of years later, the Third Circuit extended *Redd Horne's* nature of the place definition to find that the mere authorization of a performance violated the copyright holder's public performance right.⁵⁰ *Columbia Pictures Industries, Inc. v. Aveco, Inc.* presented a slightly different variation of *Redd Horne's* facts. The defendant Aveco rented videocassettes and private viewing rooms.⁵¹ The primary difference in Aveco was that the video players were kept in the individual booths and the video was not transmitted beyond the particular room in which it was played.⁵² The customer could operate the machines and be allowed "complete control" over them; Aveco employee's assisted only upon request.⁵³ The Third Circuit found *Redd Horne* indistinguishable.⁵⁴ The court stated "[its] opinion in *Redd Horne* turned not on the precise whereabouts of the video cassette players, but on the *nature* of [the defendant's] stores."⁵⁵

But in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, the Ninth Circuit found no violation of public performance rights when the hotel rented video discs to its guests for viewing on hotel-provided equipment installed in the guests' rooms.⁵⁶ The copyright owners in *Professional Real Estate* argued that because the hotel rooms were available for rent by the public, hotels were "open to the public," and thus, movies viewed in a guest's room are "performed . . . publicly."⁵⁷ The court, however, rejected this argument and upheld

46. *Id.* at 159 ("We find it unnecessary to examine the second part of the statutory definition because we agree with the district court's conclusion that Maxwell's was open to the public.").

47. *Id.*

48. *Id.*

49. *Id.*

50. *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986).

51. *Id.* at 61.

52. *Id.*

53. *Id.*

54. *Id.* at 62.

55. *Id.* at 63.

56. *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 281 (9th Cir. 1989).

57. *Id.* at 280.

the lower court's decision that in-room viewing was a private performance, distinguishing it from the private booth viewings in the Third Circuit's *Redd Horne* and *Aveco* decisions. Distinguishing *Redd Horne* and *Aveco*, the district court in *Professional Real Estate* noted:

The principal and sole purpose of viewing rooms in the *Redd Horne* and *Aveco* cases was to watch movies. In contrast, a hotel is a place to live while away from one's permanent home. The primary or even a principal reason of renting a hotel room is not to view movies. At best, the viewing of movies in a hotel room is incidental entertainment, no different from viewing movies in the privacy of one's home.⁵⁸

Finding that a hotel room is not a place "open to the public," the court applied the nature of the place analysis but narrowed its focus to the individual hotel room, rather than the entire hotel, which was clearly open to the public.⁵⁹ The court noted that while the hotel may be "open to the public," a guest's hotel room, once rented, is not.⁶⁰ The court analogized the circumstance to people viewing the movie in their own homes, a place where "individuals enjoy a substantial degree of privacy," and found that this precluded having a public performance.⁶¹ The court stated that the House Report⁶² specifically exempts these performances from the copyright owner's control: "to the extent that a gathering of one's social acquaintances is normally regarded as private, we conclude that in-room videodisc movie showings do not occur at a 'place open to the public.'"⁶³ Thus, it seems likely that if the viewer is actually in his or her own home, the performance should not be deemed "public."

B. The Transmit Clause

The Ninth Circuit's holding in *Professional Real Estate* was based on its reading of the definition of a "public place." It did not have the occasion to consider the scope of the transmit clause.⁶⁴ In considering whether the hotel "otherwise communicate[d]" the movies "to the

58. *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, No. 83-2594, 1986 WL 32729, at *5 (C.D. Cal. 1986), *aff'd*, 866 F.2d 278 (9th Cir. 1989).

59. *Prof'l Real Estate*, 866 F.2d at 281.

60. *Id.*

61. *Id.* at 281.

62. H.R. REP. NO. 94-1476, at 64 (1976) ("The term 'a family' in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a 'substantial number of persons.'").

63. *Prof'l Real Estate*, 866 F.2d at 281.

64. *Id.*

public,” the court noted that a plain reading of the “transmit clause” indicated that its purpose is “to prohibit transmissions and other forms of broadcasting from one place to another without the copyright owner’s permission.”⁶⁵ The court opined that under the transmit clause, a public performance at least requires “sending out some sort of signal via a device or process to be received by the public at a place beyond the place from which it is sent.”⁶⁶ If a transmission and reception did occur, it did so entirely within the guest room, and it was certainly not received beyond the place from which it was sent.⁶⁷ Thus, in finding that the transmit clause did not apply to the in-room video rentals because the videos were not transmitted beyond the guest’s room, the court’s analysis is limited to whether the hotel rooms themselves were “places open to the public.”

A few years after the *Professional Real Estate* decision, a case involving the transmission of movies at a hotel raised the previously unanswered issue of whether transmitting a video from a central location to a hotel room was a transmission to the public, even though the individual hotel room was considered a private place.⁶⁸ In *On Command Video Corp. v. Columbia Pictures Industries*, the plaintiff sought declaratory judgment that its hotel video movie viewing system did not constitute a public performance of the copyrighted videos shown through the system. Hotel guests could watch a movie in their hotel room by turning on the television and using a remote control to select a movie from an on-screen menu.⁶⁹ The hotel’s viewing system consisted of a computer program, a sophisticated electronic switch and a bank of video cassette players, all of which were centrally located in the hotel’s equipment room.⁷⁰ The video cassette players each contained a videotape and were connected to televisions in the hotel rooms by wiring.⁷¹ The district court described the system as follows:

A hotel guest operates the system from his or her room by remote control. . . . Once a particular video is selected, that video selection disappears from the menu of available videos displayed on all other television sets in the hotel. The video is seen only in the room where it was selected by the guest. It cannot be seen in any other guest room or in any other location in the hotel. The viewer cannot pause, rewind, or fast-forward the video. When the movie ends, it is

65. *Id.* at 282.

66. *Id.*

67. *Id.*

68. *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 789 (N.D. Cal. 1991).

69. *Id.* at 788.

70. *Id.*

71. *Id.*

automatically rewind and then immediately available for viewing by another hotel guest.⁷²

The copyright owners argued that because the system is comprised of components dispersed throughout the hotel and not just in the guests' rooms, the relevant place of the performance was not the individual rooms, but rather the entire hotel, which is a public place.⁷³ However, the court rejected this argument, noting that it would eviscerate both the concepts of "performance" and "public place."⁷⁴ The court stated that "a performance of a work does not occur every place a wire carrying the performance passes through; a performance occurs where it is received."⁷⁵ Thus, a movie video is "performed only when it is visible and audible."⁷⁶ The only place where this occurred in On Command's viewing system was in the individual hotel rooms. Thus, the court stated that was the only place of performance for the public place analysis.⁷⁷ Relying on the *Professional Real Estate* decision, the district court held that no public performance occurred under the public place clause of section 101 because hotel rooms are not public places.⁷⁸

However, the court stated that the "non-public nature of the place of the performance has no bearing . . . under the transmit clause."⁷⁹ The court held that under the meaning of the transmit clause, the public performance right was infringed "because the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, 'public' one regardless of where the viewing takes place."⁸⁰ Thus, a public performance occurred because On Command's system "transmitted" the movies to "the public."⁸¹ Even though hotel guests watching the videos through On Command's system did not watch them in a "public place," they were still "members of the public."⁸²

Attempting to avail itself of the first sale defense, On Command argued that its system did not involve "transmissions," but rather "electronic rentals" similar to guests borrowing physical videotapes.⁸³ Rejecting this argument, the court held that On Command transmitted

72. *Id.*

73. *Id.* at 789.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 790.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 789.

performances of the movies directly under the language of the statute.⁸⁴ “The system ‘communicates’ the motion picture ‘images and sounds’ by a ‘device or process’—the equipment and wiring network—from a central console in a hotel to individual guests rooms, where the images and sounds are received ‘beyond the place from which they are sent.’”⁸⁵ The court found it immaterial that the hotel guests initiated the transmission by turning on the television and choosing the video.⁸⁶

Applying the transmit clause’s “separate places/different times” provision, the court reasoned that “whether the number of hotel guests viewing an On Command transmission is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public.”⁸⁷ In reaching this conclusion, the district court focused on a piece of legislative history from a 1967 House Report:

[A] performance made available by transmission to the public at large is “public” even though the recipients are not gathered in a single place, and even if there is no direct proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms. . . ; they are also applicable where the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.⁸⁸

According to the district court, because the transmitter and the audience had a commercial relationship, the relationship necessarily involved members of the public.⁸⁹ Thus, under the *On Command* court’s broad definition of “public performance,” a commercial relationship will be a determinative factor in finding a public performance.⁹⁰

However, in a more modern case, *Cartoon Network L.P. v. CSC Holdings, Inc.* (referred to as the “Cablevision” case), involving a remote DVR, the Second Circuit interpreted the transmit clause’s “separate

84. *Id.*

85. *Id.* at 789-90.

86. *Id.*

87. *Id.*

88. H.R. REP. NO. 90-83, at 29 (1967).

89. *On Command*, 777 F. Supp. at 791; see also Daniel Diskin, *The Zediva Lawsuit: Why the Studios Will Win*, COPYRIGHT AND TRADEMARK BLOG (Apr. 13, 2011), <http://copymarkblog.com/2011/04/13/the-zediva-lawsuit-why-the-studios-will-win>.

90. Vivian I. Kim, Note, *The Public Performance Right in the Digital Age: Cartoon Network LP. v. CSC Holdings*, 24 BERKELEY TECH. L.J. 263, 283 (2009).

places/different times” provision more narrowly.⁹¹ In *Cablevision*, a cable television provider, offered “remote storage” DVR systems that allowed customers who did not have a stand-alone DVR to record cable television programs on central hard drives housed and maintained by Cablevision at a “remote” location.⁹² RS-DVR customers would then receive playback of those programs through their televisions using only a remote control and a standard cable box equipped with Cablevision’s RS-DVR software.

Copyright holders of numerous movies and television programs sued Cablevision for declaratory judgment and injunctive relief. The copyright owners argued that because the recordings were made at Cablevision’s facilities and the playbacks were transmitted from there, Cablevisions operation of the RS-DVR would directly infringe their exclusive rights of reproduction and public performance.⁹³

Comparing the RS-DVR to the standard set-top DVR, the district court observed, “the RS-DVR is not a single piece of equipment,” but rather “a complex system requiring numerous computers, processes, networks of cables, and facilities staffed by personnel twenty-four hours a day.”⁹⁴ But the complexity of Cablevision’s systems did not figure in the Second Circuit’s analysis; rather, the court focused on the fact that the customer could do no more with the remote DVR than they could with a standard set-top DVR: “to the customer, however, the processes of recording and playback on the RS-DVR are similar to that of a standard set-top DVR.”⁹⁵ The primary difference between the set-top DVR and the RS-DVR is the location of the equipment; in an RS-DVR, the technology is housed with the cable provider and not in the viewer’s home. As a result, instead of sending signals from the remote to an on-set box, the viewer sends signals from the remote, through the cable, to the server at Cablevision’s central facility. In other words, the system in *Cablevision* operated, from the user’s perspective, like playing a movie back from a DVR with a very long cable attached. A standard set-top DVR and the resulting time-shifting by at-home viewers has long been considered permissive.⁹⁶ If both the end result and the amount of viewer control is basically the same in both the new and the old technologies, shouldn’t the two be legally equivalent? Put differently, if the only

91. *Cablevision II*, 536 F.3d 121, 134 (2d Cir. 2008).

92. *Id.* at 124.

93. *Id.* at 134.

94. *Id.* at 125.

95. *Id.*

96. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984) (time-shifting by consumers in private homes is fair use and not copyright infringement, and, thus, the manufacturer of the VCR technology cannot be held liable for any activity on part of the consumer).

significant difference between the standard DVR and the remote DVR is the location of the equipment, should the length of the cable be determinative in deciding whether infringement of a copyright occurred? The Second Circuit in *Cablevision* thought no.⁹⁷

The question at issue in *Cablevision* was whether the transmissions of those shows during playback from Cablevision's central servers to its user's homes constituted a performance "to the public." The district court thought this type of transmission was "to the public," because it considered the potential audience of the underlying work (i.e., the program) being transmitted as opposed to the potential audience of the single *transmission*. Thus, it concluded that the RS-DVR playbacks constituted public performances because "Cablevision would transmit the *same program* to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS-DVR playback."⁹⁸ The district court further relied on the nature of the relationship analysis in *On Command*, and stated that "where the relationship between the party sending a transmission and party receiving it is commercial," as it is here between Cablevision and its RS-DVR customers, "courts have determined that the transmission is one made 'to the public.'"⁹⁹ In so holding, the district court awarded summary judgment to the plaintiff-content owners.

The Second Circuit reversed and interpreted the transmit clause more narrowly to refer to a particular "transmission," and not a particular "work." The court held that "under the transmit clause, we must examine the potential audience of a given transmission by an alleged infringer to determine whether that transmission is 'to the public.'"¹⁰⁰ In other words, "it is relevant, in determining whether a transmission is made to the public, to discern who is 'capable of receiving' the performance being transmitted."¹⁰¹ Under this analysis, Cablevision does not transmit "to the public" because a particular playback transmission is only capable of going to a single user's home and does not have the potential of reaching the public at large, even "in separate places" or at "different times."¹⁰²

97. *Cablevision II*, 536 F.3d at 134.

98. *Cablevision I*, 478 F. Supp. 2d at 623 (emphasis added).

99. *Id.*

100. *Cablevision II*, 536 F.3d at 137.

101. *Id.* at 134; see *In re Cellco P'ship*, 663 F. Supp. 2d 363, 371 (S.D.N.Y. 2009) (stating that in analyzing whether a transmission is to the public, "the focus is on the transmission itself and its potential recipients, and not on the potential audience of the underlying work"); *United States v. ASCAP*, 627 F.3d 64, 73 (2d Cir. 2010) (*quoting* *Cablevision II*, 536 F.3d 121, 136 (2d Cir. 2008) ("[W]hen Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission, not simply to transmitting a recording of a performance.")).

102. 17 U.S.C. § 101.

Finding that Cablevision did not infringe the plaintiff's copyrights, the court held, "because the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission."¹⁰³

In so holding, the Second Circuit rejected the district court's broad approach as irreconcilable with the language of the transmit clause.¹⁰⁴ The court explained that the implication of the district court's interpretation, which focuses on the potential audience of a particular "work" rather than on the people capable of receiving a particular "transmission," is the odd result that *any* transmission of a copyrighted work would constitute a public performance. The court feared that under such a broad interpretation of the transmit clause, "a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public."¹⁰⁵ Rather, the Second Circuit stated that when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission

III. THE ZEDIVA CASE

Relying on the *Cablevision* decision, Zediva purchased physical copies of new release DVDs at retail and used place-shifting technology to essentially "rent" those movies out using the Internet such that only one user could watch the same physical DVD at the same time. As the company explains on its website:

A couple of years ago we came up with an idea for the next generation of DVD rentals. It seemed to us logical and evolutionary that if a customer was able to rent and play a DVD in his home, there should be no reason why he or she could not do that from the Internet cloud. After all, you can do that with a DVR, so why not with a DVD player?¹⁰⁶

Instead of negotiating streaming rights, Zediva thought it could invoke the protections of the first sale doctrine and thus circumvent the need to get a license from the movie studios by following the model of a brick-and-mortar video rental store and literally rent DVDs and DVD

103. *Cablevision II*, 536 F.3d at 137.

104. *Id.* at 135.

105. *Id.* at 136.

106. Christophor Rick, *Virtual DVD Rental Service Zediva Shut Down Permanently*, REELSEO, <http://www.reelseo.com/zediva-shut-down-permanently/> (last visited April 7, 2013).

players directly to customers. Under this model, Zediva was able to “shave down” its pricing by “cutting movie studios out of the equation.”¹⁰⁷ For \$1.99, customers could rent a physical disk and DVD player. In comparison, Zediva’s competitors, like iTunes, Netflix, and other licensed streaming video services, charged between \$3.99 and \$5.99 for new releases.¹⁰⁸ This approach had the additional advantage of allowing Zediva to rent out new-release movies the day they came out on DVD, often weeks earlier than the studios released them to Netflix or Redbox.

On April 4, 2011, the Motion Picture Association of America (MPAA) and some of its member studios filed suit against Zediva in the United States District Court for the Central District of California, alleging that Zediva has directly infringed the studio’s exclusive right to publicly perform their copyrighted works and asking the court to grant a preliminary injunction. The studios argue that Zediva’s portrayal of itself as a modern day video rental store is “disingenuous” and a “gimmick [. . .] in an effort to avoid complying with U.S. Copyright Law.”¹⁰⁹ They argue that Zediva is transmitting its movies to the public, via its streaming technology, which is not the same as the method of physical delivery used by brick-and-mortar rental stores. According to the studios, it is this transmission that makes Zediva’s service a public, rather than private, performance in violation of the studio’s exclusive right.

Because the first sale doctrine is a defense only to the distribution right the central issue was whether Zediva’s rental service constituted a “transmission” “to the public,” and was thus an infringement of the movie studio’s exclusive right of public performance, or was an online rental of physical DVDs, and thus beyond the reach of the studio’s copyright.

Zediva maintains racks full of DVD players at its data center. Each DVD player holds a single DVD. When a customer has rented a DVD and DVD player, that customer has sole and exclusive control of that DVD and DVD player, and only that customer can view the disc.¹¹⁰ During the rental period, the customer controls the DVD player by pressing play, stop, rewind, etc.¹¹¹ As with traditional video rental

107. Jared Newman, *Zediva’s Movie Rentals Are 50% Cheaper Than iTunes*, TIME TECHLAND BLOG (Mar. 16, 2011), <http://techland.time.com/2011/03/16/zedivas-movie-rentals-are-50-cheaper-than-itunes/#ixzz1rrhbBbY>.

108. Warner Bros. Entm’t Inc. v. WTV Sys., Inc., 824 F. Supp. 2d 1007, 1015 (C.D. Cal. 2011) (order granting preliminary injunction).

109. *Id.*

110. Opposition to Motion Picture Studio’s Motion for Preliminary Injunction at 9, Warner Bros. Entm’t Inc. v. WTV Sys., Inc., 824 F. Supp. 2d 1003 (C.D. Cal. 2011) (No. CV 11-02817), 2011 WL 4401800.

111. *Id.* at 3 (“While the movie is playing, the user’s web browser displays buttons with which the user can send commands to the DVD player. These buttons allow the user to pause

stores, only after the customer returns the disk can Zediva rent it out to someone else.¹¹² Thus, the only way for Zediva to increase capacity to meet demand “is to do the same thing any other DVD rental business would have to do—buy lots and lots of DVDs.”¹¹³

Zediva characterizes its system as analogous to “playing back a movie from a DVD with a very long cable attached.”¹¹⁴ Under this analogy, the user’s computer acts as a “remote control” for the DVD player located at Zediva’s facilities. When a Zediva customer wishes to “rent” a particular movie, the customer “presses” a virtual button on the Zediva website. Zediva’s system then sends a request to their control server, which sets in motion a series of actions on various servers created and controlled by Zediva. However, unlike traditional video rentals, Zediva’s customers never have physical access to the DVDs or the DVD players. When a customer requests a particular DVD by pressing the virtual “button”, Defendants, through their Zediva system:

- (1) start the play process on a particular DVD player holding the requested Copyrighted Work; (2) convert the analog video signal from the DVD player into a digital signal using a video adapter; (3) feed the digital signal into a DVD control server which converts the digital signal to a form suitable for streaming across the Internet; (4) convert the digital signal to a format that can be viewed in the player created by Defendants and used on their website; (5) transmit the performance via the Internet to the customer; and (6) provide the customer with a custom viewer necessary to view the video stream.¹¹⁵

Federal Judge John Walter found that Zediva is transmitting the studios’ copyrighted movies, and that the transmission was to the public, concluding that Zediva’s service constituted a public performance. Although the court noted that injunctive relief is “an extraordinary remedy that may only be issued upon a clear showing that plaintiff is entitled to such relief,”¹¹⁶ Judge Walter granted the studios’ motion for a preliminary injunction, finding that the MPAA was not only likely to prevail on the merits but would also suffer irreparable harm absent a preliminary injunction.¹¹⁷

the DVD, to skip to another part of the DVD, to turn on or off subtitles, and so on. The user watches the movie straight from the original DVD.”).

112. *Warner Bros.*, 824 F. Supp. 2d at 1007 (noting that on Zediva’s website, “if all of the copies of a particular Copyrighted Work are ‘rented out’ when a customer wants to view it, that customer ‘can request to be notified, via email, when it becomes available’”).

113. *Opposition*, *supra* note 110, at 10.

114. *Id.*

115. *Warner Bros.*, 824 F. Supp. 2d at 1007.

116. *Id.* at 1008 (*quoting* *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008)).

117. A plaintiff seeking a preliminary injunction must establish: (1) a likelihood of

The court determined that the studios had a strong likelihood of success on the merits because under the plain language of the transmit clause, Zediva was engaged in the public transmission of copyrighted works.¹¹⁸ The court rejected Zediva's argument that their service offered "DVD rentals" rather than "transmissions" of any performances, comparing this reasoning to the similarly unsuccessful argument made in *On Command*, in which a hotel transmitted movies from a central console to individual guests' rooms. As in *On Command*, the court concluded Zediva "transmits performances of Plaintiffs' Copyrighted Works 'directly under the language of the statute.'"¹¹⁹ According to the court, the fact that the works were transmitted beyond the place where they were sent was sufficient to bring Zediva's system within the scope of the transmit clause. The court explained, Zediva "'communicates' the 'images and sounds' of Plaintiffs' Copyrighted Works through the use of a 'device or process'—the equipment, including various servers, and internet—from a central bank of DVD players to individual customer's computers, where the images and sounds are received 'beyond the place from which they are sent.'"¹²⁰ In contrast to the court's reasoning in *Cablevision*, the court found it immaterial that Zediva's users initiated the transmission by turning on their computers and choosing which movie to view.

After rejecting Zediva's rental theory and finding that Zediva transmitted the works, the court further held that these transmissions were "to the public." The court stated that the issue is not whether customers are watching in a "public place" but only that those customers are "members of the public."¹²¹ Relying heavily on the *On Command* decision, which also placed great emphasis on the commercial relationship, the court explained that "[Zediva's] transmissions are 'to the public' because the relationship between [Zediva], as the transmitter of the performance, and the audience, which in this case consists of their customers, is a commercial, 'public' relationship regardless of where the viewing takes place."¹²²

In *Cablevision*, the Second Circuit rejected *On Command* and strongly criticized the emphasis on the commercial relationship. The Second Circuit stated, "[w]e find this interpretation untenable, as it completely rewrites the language of the statutory definition. If Congress

success on the merits; (2) that the moving party will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public's interest. *Winter*, 555 U.S. at 20.

118. *Warner Bros.*, 824 F. Supp. 2d at 1012.

119. *Id.* at 1009.

120. *Id.*

121. *Id.* at 1008.

122. *Id.* at 1010.

had wished to make all commercial transmissions public performances, the transmit clause would read: ‘to perform a work publicly means . . . to transmit a performance for commercial purposes.’”¹²³

However, the *Zediva* court dismissed the *Cablevision* case, distinguishing it in a lengthy footnote. The court noted that, in *Cablevision*, each transmission was to a single subscriber from a unique copy created at the initiative of the subscriber. Here, *Zediva* was using the same DVD over and over again.¹²⁴

CONCLUSION: POLICY REFORM?

The Constitution grants Congress the power to award artists a limited monopoly over their creative works in order to advance creative innovation. The ultimate purpose of copyright law is not to reward the artists by protecting their economic investments in works, but rather, to stimulate artistic creativity and provide public access to creative works. Thomas Jefferson cautioned against unlimited monopoly rights and believed protecting the public against overly long monopolies on creative works is an essential role of the government: “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”¹²⁵ In protecting artists’ creative expression, copyright law seeks to strike the proper balance between public access and incentivizing the creation of works.

With the rise of new technologies, it is not always clear how traditional copyright law applies to digital media. “The definitional lines separating the exclusive rights—once fairly clear—are now blurred. Confusion over which rights are implicated in online transactions has created uncertainty in the marketplace and chilled innovation.”¹²⁶ The current statutory regulation, passed in 1976, is stifling entrepreneurial innovation by making it too costly for start-up companies to risk relying on the current state of the laws and then subsequently be sued out of existence, as was *Zediva*’s fate. The fundamental issue here is the very nature of copyright law itself, “which is patched up with duct tape each time some new technology hits the market.”¹²⁷

However, scholars disagree on whether the proper solution to this problem is statutory reform or a market-based solution. Some argue that market-based solutions won’t work because “voluntary agreement

123. *Cablevision II*, 536 F.3d 121, 139 (2d. Cir. 2008).

124. *Warner Bros.* 824 F. Supp. 2d at nn.7-8.

125. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

126. John Eric Seay, *Legislative Strategies For Enabling The Success Of Online Music Purveyors*, 17 UCLA ENT. L. REV. 163, 164 (2010).

127. Masnick, *supra* note 2.

among the parties seems highly unlikely given the history of dissension between them.”¹²⁸ In order to combat online piracy and illegal streaming of copyrighted works while also promoting new development, Congress needs to clearly define the rights and create a fair digital marketplace to ensure that entrepreneurs and start-up companies are able to enter the marketplace to invest in new technologies.¹²⁹

Others contend that Congress, as a political culture, is not capable of producing the regulation necessary because powerful interest groups too easily displace its goals.¹³⁰ Entities like the Recording Industry Association of America (“RIAA”) and other Hollywood interest groups hope to forestall change so that music labels and movie studios can continue to exercise a strong monopoly right in the industry. As a result, the balance between public access and rewarding innovation has tipped toward the type of unlimited monopoly right Thomas Jefferson feared. Rather than encouraging innovation in the digital market place, increased protection of the exclusive rights of copyright holders has led to “criminalizing the core creativity that this [technology] could produce.”¹³¹ Lawrence Lessig argues, “[w]e are at a stage in our history when we urgently need to make fundamental choices about values, but we should trust no institution of government to make such choices.”¹³²

128. Seay, *supra* note 126, at 167.

129. *Id.* at 165.

130. *Id.* at 164 (Seay offers, “while legislative change is needed, it is difficult to salve a wound when the patient will not submit to treatment.”).

131. LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, VERSION 2.0 8 (2011).

132. *Id.*