

Hollywood vs. Consumers *Does Tinseltown Hurt Itself with Consumers By Stifling 21st Century Innovation?*

by

Wayne T. Brough, Ph.D.

Executive Summary

Fighting a slump in DVD revenues and a rapidly changing marketplace, the motion picture studios recently filed a lawsuit to ban RealDVD, new software that allows consumers to make a single backup copy of DVDs they have legally purchased to the hard-drive of their computer. While doing little to quell illegal DVD piracy (one cannot use RealDVD to burn movies onto a disc or load movies onto the web), banning new products will impose substantial new limitations on consumers and their use of the DVDs they purchase. Should

the motion picture industry succeed with their lawsuit, which will be heard later this week in a Federal courtroom in San Francisco, consumers will lose fair use rights that have been carefully defined and protected by the courts. Banning new products such as RealDVD will also hamper competition and technological innovation in one of the most dynamic sectors of the economy.

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Introduction & Summary

Technological innovation drives change in every sector of the economy. It is also the source of new challenges as markets evolve and businesses continually adapt to new conditions and consumer demand. Nowhere is this more evident than in the entertainment world, where the digital revolution has fundamentally altered the market for creative content. Technology's dramatic pace of change has provided consumers a stunning array of new choices with respect to both content and equipment.

The emerging new marketplace is not without a certain degree of concern for those who produce and provide content, creating new challenges for the movie industry. But rather than adapt to, compete with, and ultimately embrace new revenue streams, some key industry players hope to maintain the status quo and resist changing market forces and consumer interests by using litigation to shut down innovation.

The tensions generated by technology played out most notoriously in the recording industry, where the public clash between content owners and consumers generated new laws for digital rights management and lawsuits against those who ignored these laws. Instead of learning from the mistakes of the recording industry by seeking out new revenue streams and looking to get ahead of the consumer curve, the motion picture industry has remained a few paces behind the changes in the recording world that consumers now take for granted.

The most recent example is the launch of RealDVD last fall. The software, created by Seattle-based RealNetworks, allows users to legally save a copy of any DVD that they own to their computer or laptop. Consumers can load copies of DVDs they have purchased onto a hard drive for later viewing anywhere or anytime. To avoid

piracy and copyright violations, RealNetworks developed a product that does not remove existing digital rights management (DRM) encryption, and actually adds another layer on top to lock the copy to the specific hard drive to which it was downloaded.

Nonetheless, the motion picture studios—including Disney, Paramount, Sony, Twentieth Century Fox, Warner Bros., and Viacom—have filed a lawsuit against RealNetworks to have the new product banned, and on October 3, a temporary restraining order was issued by the court, taking the product off the market less than a week after its launch.

Clearly, such legal wrangling will be a significant factor determining RealDVD's viability in the marketplace. But for consumers, the legal battles may have a far broader impact that will define—and perhaps restrict—how they use DVDs that they have legally purchased. *In essence, consumer rights could be dramatically curtailed or even eliminated if the courts determine that the Digital Millennium Copyright Act trumps the long history of legal decisions that define fair use.*

RealDVD—A Legal Way to Copy DVDs

RealDVD offers the next logical step in the development of digital entertainment, allowing users to save an exact copy of a DVD image to an internal or portable hard drive. It will not, however, allow users to download a DVD that can then be used to burn multiple copies. RealDVD initially allows the consumer to use the product on a single computer. If he or she would like to watch downloads on additional computers, up to four additional software licenses can be purchased for \$20 each.

There are a variety of reasons why consumers would choose to make a back-up of DVDs they have purchased, including protecting

discs from “scratches and damages,” and “saving your movies legally, and with confidence.”¹ One prominent use for such software would be in conjunction with a laptop, allowing the user to load DVDs that can be viewed on the go and at any time. For many consumers, the flexibility to copy their DVD to a hard drive is an important attribute, much like copying music CDs to a hard drive. In a recent poll by the National Consumers League, 90 percent of the respondents felt that consumers should be able to back up their DVDs.²

But it is the claim of legality that makes RealDVD a unique offering when compared to the many DVD rippers easily found on the internet. This claim is also what sparked the lawsuit from the motion picture industry.

For starters, RealDVD does not remove the content scramble system (CSS) that protects copyrighted material, which ensures that it does not run afoul of Digital Rights Management (DRM) requirements. In addition, a new layer of encryption is added that locks the copy to a single hard drive and eliminates the possibility of making additional copies for distribution, removing the threat of piracy. RealNetworks licenses the encryption software from the DVD Copy Control Association, just as a hardware manufacturer producing DVD players would.

This stands in clear contrast to the many DVD rippers that are obtainable for free or a minimal charge. These products work by specifically targeting the CSS for removal, unlocking the DVD so that it can be freely copied and distributed as well as translated into any

¹ RealDVD, available at <http://www.realdvd.com/>.
² National Consumers League, “Consumer Perceptions and Attitudes Regarding DVD Usage Rights,” April 2009, p. 15, available at http://www.nclnet.org/news/2009/ncl_dvdsurvey_report_04062009.pdf.

number of formats that allow viewing on computers, game consoles such as PlayStation, and personal media players such as an iPod. Under current laws, such DVD rippers are clearly illegal. They are also the major source of illegal copying; nonetheless, the major studios have opted to target RealDVD, a product clearly designed to limit illegal copies.

From DVDs to the 21st Century

The convergence of computers, home theaters, and stereos is redefining how people consume music and videos. In fact, more than 75 percent of consumers who have the capability will view DVDs on computers, and three out of five consumers would like to copy a purchased DVD to their iPod, laptop, or home computer.³

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Along with music, DVDs and video are migrating to a digital platform that can be accessed from any room in the house—with different rooms able to listen or watch

independently from one another. Just as products such as Sonos and the Logitech Squeezebox provide an opportunity for streaming digital music throughout a house, Popcorn Hour has introduced a product that allows digital video streaming. These products are a marked departure from standalone systems and rely on a central archive of content.

Whole-house solutions are becoming the norm, not the novelty, just as offices have transitioned from desktops to networks. Already a variety of whole-house digital products are being offered, from the high-end Kaleidescape to the more moderately priced Windows Home Server. The basic goal of all these systems—and the direction that technology is heading—is to provide a central location that can store and archive digital and audio media that can be accessed from anywhere. Requiring a DVD to be physically inserted prior to

³ *Ibid.*, p. 10, p. 12.

watching a movie remains the only solution if the motion picture industry is successful in its effort to control technological innovation.

While RealDVD has limited functionality with respect to home theater systems, RealNetworks recognizes the future of the home video market, and its literature suggests increasing functionalities along these lines in future releases of the software.⁴

Notably, one home media server won an important legal challenge against the motion picture industry. Kaleidescape, which produces a high end server that allows consumers to copy their DVDs into an archive that is then locked to prevent further copying, was sued by the DVD Copy Control Association (DVD CCA), which alleged this violated the licensing agreement. The court ruled in favor of Kaleidescape, claiming that the language on which the DVD CCA relied for its lawsuit was actually in a secondary document and not the license itself. Kaleidescape, therefore, was not violating its contract with the DVD CCA and its product is considered legal—at least for now; the DVD CCA has appealed the decision.⁵

Importantly, the DVD CCA avoided a direct challenge to fair use rights, relying instead on a technical argument about the license. But as technology advances and consumers are offered new ways to view video content, the clash between the DMCA and fair use must be addressed, making the legal challenge to RealDVD a significant case for consumers.

The motion picture industry has countered that they are providing new products as part of their

DVD sales that would allow the transition to new technologies and new viewing habits to proceed unimpeded. Digital downloads and the inclusion of a DVD that can be copied with the purchase of a regular DVD would facilitate the use of a home server. It also facilitates the monopoly rents of Hollywood by banning competition in the ancillary market for technological innovation for home video.

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accurately, the major studios are in a struggle to protect fading revenue streams and are failing to embrace new revenue streams being created through innovation. As one commenter noted, “Effectively, the Big Content players believe that they own their industries, and innovation

should come from the top down through the paths that they choose. Thus, these sorts of lawsuits will continue until the management of these firms recognize that innovation is a bottom-up phenomenon. Or, the big firms go out of business. Whichever comes first.”⁶

Copyright, Fair Use, and the DMCA

Since its founding, the United States has recognized the importance of copyright, as well as its ambiguity from a property rights perspective. Article I, Section 8 of the Constitution—often called the Copyright Clause—states that Congress has the authority “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” A

⁴ See RealDVD FAQs, nos. 17 and 18, available at <http://realdvd.com/faqs>.

⁵ See DVD Copy Control Assoc. (DVDCCA) Files Opening Brief in Appeal of Kaleidescape Decision, available at <http://www.dvdcca.org/DVDCCAAppealPost1.pdf>.

⁶ Mike Masnick, MPAA’s Suit Against Real About Control and Innovation—Not Piracy, *TechDirt*, October 13, 2008, available at <http://www.techdirt.com/articles/20081013/0105432524.shtml>.

period of exclusive ownership or copyright provides an incentive to produce works that might otherwise not be undertaken.

Congress first exercised this authority in 1790 when it passed the Copyright Act that determined a copyright to last for 14 years, with an option for an additional renewal of 14 years. Over time, Congress has revisited this definition, most recently in the Sonny Bono Copyright Extension Act of 1998, which extended copyrights to include the life of the author plus 70 years, or in the case of corporate authorship 120 years from the year of creation or 95 years from the year of publication, whichever comes first.⁷

Clearly, the Congress has provided an increasing level of exclusivity for copyright holders over time. But this exclusivity has always been balanced by the doctrine of fair use, which, under certain circumstances, allows limited use of copyrighted materials without first seeking permission from the owner of the copyright. Typically, such use is based on a four factor test:

- The purpose of the use
- The nature of the work being infringed
- The amount taken from the original work
- The effect of the use on the potential market for, or value of, the work.

The fair use doctrine attempts to provide a common sense balance to copyright. Without a fair use doctrine, many trivial and uncontroversial uses of copyrighted material would be illegal. The

⁷ See, United States Copyright Office, Circular 92, "Copyright Law of the United States of America and Related Laws Contained in Title 17 of the *United States Code*," available at <http://www.copyright.gov/title17/92chap3.html#302>.

courts have traditionally navigated this netherworld between copyright protection and violation, addressing much thornier questions of use to determine what is fair.

Congress's continuing extensions of copyright protection suggest that the importance of copyright as an incentive for innovation and production is well established. Often overlooked, however, are the economic benefits generated by fair use. A number of industries rely crucially on fair use, from education to broadcasting to new internet technologies. Indeed, some of the fastest growing sectors of the economy rely on to some degree on fair use. One study found that fair use generated more than \$2 trillion in added value to the U.S. economy in 2006.⁸

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In practice, the doctrine of fair use is a discovery process that is continually refined and updated in light of technological innovation that redefines how consumers can use copyrighted materials. As Fred von Lohmann of the Electronic Frontier

Foundation states, "The fair use doctrine operates as a 'safety valve' not just for free expression, but also to mediate the tension between copyright and new technologies. As new technologies develop, courts generally have the first opportunity to apply copyright law to them, with Congress lagging behind. This spares the public, technologists, and copyright owners from having to apply to Congress for a legislative solution for each new technology that is developed."⁹

⁸ Thomas Rogers and Andrew Szamosszegi, *The Economic Contribution of Industries Relying on Fair Use*, Capital Trade Incorporated, prepared for the Computer and Communications Industry Association, 2007.

⁹ Fred von Lohmann, "Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension between Them," Electronic Frontier Foundation, April 16, 2002, p. 3. Available at http://w2.eff.org/IP/DRM/cfp_fair_use_and_drm.pdf.

In this sense fair use doctrine is a “loose joint” that allows the courts to balance the interests of consumers and copyright owners in a constantly changing world. This process was perhaps most famously displayed in the Supreme Court’s Betamax case in 1984.¹⁰ The court ruled that recording a television show for later viewing—“time shifting”—was a legitimate fair use for consumers. More so than any other decision, this case has shielded technological advance from aggressive copyright claims. The court acknowledged that a VCR could be used for copyright infringements, but ruled there were legitimate non-infringement uses that must be considered. Simply because a new technology can be used for illegal purposes does not mean that its use by consumers should be banned.

Since the Betamax decision, the copyright lobby, led by the motion picture and recording industries has sought to tighten the constraints on potentially infringing technologies, both in the courts and in Congress. Most controversially, a successful legislative effort in 1998 led to the passage of the Digital Millennium Copyright Act (DMCA), which criminalized some infringements and included new legislative language that limited the loose joint of fair use doctrine and recast the balancing act conducted by the courts. In particular, the DMCA made the production or distribution of any device, technology, or service that circumvented copy protection technologies such as DRM a criminal activity.

The DMCA’s impact has been significant, but not in ways that benefit consumers or reduce illegal reproductions of copyrighted materials. With respect to piracy, DRM has been virtually useless. While an impediment to the average consumer, anyone seeking to illegally reproduce

and distribute copyrighted materials can easily bypass DRM protections. Piracy of both recordings and motion pictures have increased in the wake of the DMCA’s passage. In discussing the vote on the DMCA, former Rep. Bob Barr points out how the DMCA has moved far beyond its original intent: “When [the DMCA] was introduced it was about piracy. The protection of encryption was about preventing piracy. That was the bill we passed. But now you see [copyright owners] using it in ways that have nothing to do with piracy.”¹¹

Technologies and services available to the consumer have been restricted under the DMCA. Many practices that would withstand the traditional fair use test have been found to be illegal. The DMCA has given the content providers a virtual monopoly on platforms for the distribution of their products by requiring all new technologies be licensed by the DVD CCA. But a copyright is a

negative right. That is, it is a limitation on others using the creator’s work. It does not provide the creator with the right to do something with a copyrighted work, and it certainly should not create a monopoly for the technologies that consumers

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may purchase.

Unfortunately, that is precisely what the DMCA has created. The case against RealDVD is the most recent attempt by content providers to limit competition and technological innovation. There are numerous reasons an individual may want to archive a copy of a legally purchased DVD. However, the ability to do so is now under fire from the motion picture industry.

Studios thus far have avoided a direct challenge on the important question of whether the DMCA trumps the case law defining fair use. In

¹⁰ *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984)

¹¹ Quoted by Paul Sweeting at Content Agenda, available at <http://www.contentagenda.com/blog/1500000150/post/1540042754.html>.

this instance, RealDVD makes the case that it preserves the encryption while adding another layer to lock it to a specific hard drive, so there has been no circumvention of the DRM system. Additional copies cannot be made or distributed. If the case is decided on this narrow ground, the purpose of the circumvention (for example, a personal copy of a legally purchased DVD) under the fair use doctrine still may not be addressed.

Ultimately, however, this legal challenge could force the courts to address the tensions between fair use and the DMCA, which can have far reaching implications for consumers. If the studios win their legal challenge to RealDVD, the courts, in effect, will be asserting that the DMCA adds significant new restrictions to what consumers are allowed to do with DVDs they purchase.

Economic Realities vs. Piracy

While RealDVD is one of the latest targets of the Hollywood studios, their troubles go well beyond just one product or one market. Quite simply, DVD revenues—which have been a cash cow for the industry—are plummeting. Much like the music industry, the studios are scrambling to come to grips with new technologies and new consumer preferences.

Publicly, the slump has been blamed on the economic downturn, and this may in fact play a part. Piracy, too, plays a role in the decline, with the Motion Picture Association of America estimating losses to piracy in the United States to be \$1.3 billion in 2005.¹² But there are larger trends at work that threaten to reduce revenues even in the absence of piracy and a slumping economy.

¹² Motion Picture Association of America, “Worldwide Study of the Losses to the Film Industry and International Economies Due to Piracy; Pirate Profiles.”

The losses are more systemic than a drop in consumer spending. In fact, the space in which DVDs compete is dynamic and has evolved in ways that are forcing studios to revisit more fundamental business questions. Television broadcasters, for example are moving to stream more free content on the internet as they see their market in flux. Movie studios must also come to grips with the increasing prominence of the internet, a valid and growing competitor to the old model of producing for movie theaters with an aftermarket of televisions.¹³

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New technologies make streaming over the internet easier and new business models must evolve to capture consumers who opt for the internet over televisions or DVDs. Internet streaming with advertising and subscription services are being examined by various studios, and ultimately may generate new products and revenues.

At the same time, home libraries of DVDs have hit saturation levels, exacerbating the decline in DVD revenues. Since a peak in 2006 of \$24.1 billion, DVD sales were off by \$2.5 billion in 2008.¹⁴ The industry hoped to see an increase in sales as new, high-definition DVDs became available, but sales have been sluggish, despite the resolution of the format wars and the emergence of Blu-Ray as the new standard. The studios also are seeking to boost the sales of standard DVDs by adding new features such as downloadable disks that provide consumers flexibilities similar to those offered by RealDVD.

Finally, the internet has provided consumers additional forms of entertainment, from videos produced for online consumption to video games

¹³ Martin Peers, “Media Risk Walking the Plank,” *Wall Street Journal*, March 9, 2009.

¹⁴ Nicole LaPorte, “DVD Sales Way Down; High-Def Sales Slow to Rescue,” *The Wrap*, February 15, 2009, available at www.thewrap.com.

and online gaming that compete directly with DVDs.

While piracy is clearly a concern for the studios, there are other trends unfolding that also have a significant impact the studios' business model. The internet and personal technologies have splintered the market and introduced new forms of competition.

Like the recording industry and the newspapers, the studios are being challenged to come up with new ways of doing business. Banning consumers from making copies of legally purchased DVDs only threatens to alienate consumers while offering little to address the more fundamental concerns of the industry's evolving business model. As Martin Peers notes in the *Wall Street Journal*, "Whichever way entertainment companies jump, they will likely have to accept lower revenue than in the past."¹⁵

Stopping the Real Pirates

When challenging RealDVD, the motion picture industry's strongest argument relies on the claim that the software allows users to save copies of DVDs they do not legally own, commonly portrayed as "rent, rip, return." Under the fair use standards of the Betamax case, however, the ability for infringement should not make a technology illegal. In a case where the underlying technology does not even circumvent the DRM requirements, the fair use exception should still be applicable.

Assume, for an instant, however, that the motion picture studios can demonstrate that RealDVD coupled with a rent and burn mentality leads to reductions in revenue. Even then, it is not intuitively obvious that the best solution to the problem is to ban products such as RealDVD from the marketplace.

¹⁵ Martin Peers, *op.cit.*

In 1960, Nobel prize winning economist Ronald Coase wrote "The Problem of Social Cost," one of the most influential articles in the economics literature.¹⁶ Simply put, Coase suggested that if there are costs or benefits not captured in the price of a transaction—termed externalities by economists—then the most efficient solution is to place the burden of minimizing the externality problem on the "least cost avoider." The cost of solving the problem should be borne by the party who can do so most efficiently.

As Coase noted, "Analysis in terms of divergences between private and social products concentrates attention on particular deficiencies in the system and tends to nourish the belief that any measure which will remove the deficiency is necessarily desirable. It diverts attention from those other changes in the system which are inevitably associated with the corrective measure, changes which may well produce more harm than the original deficiency."¹⁷

In the case of RealDVD, the potential externality is piracy. The MPAA assumes that the cheapest way to resolve the threat of piracy is to ban products such as RealDVD from the marketplace. This imposes significant costs on RealDVD for what actually may be a trivial reduction in piracy.

As mentioned earlier, most individuals seeking to pirate and copy DVDs rely on software freely downloaded from the internet that allows more flexibility with respect to the number of copies and format of copies that are pirated. A more efficient solution to piracy, therefore, might be a ban on the software that allows illegal downloading.

¹⁶ Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics*, vol. 3, October, 1960, pp. 1-44.

¹⁷ *Ibid.*, pp. 42-43.

But providers of illegal software are often located offshore beyond the reach of the law, and the ease of circumventing DRM makes it difficult to prevent new entrants in the piracy market. Nonetheless, that does not make a ban on products such as RealDVD the efficient solution to a piracy problem.

In fact, from a broader perspective of reducing large scale piracy, perhaps the Coasian solution would be to place the burden on companies such as Netflix that supply the DVDs that are eventually illegally copied, or even the DVD manufacturers themselves. DVDs that are widely circulated as rentals could possibly require a technological marker that identifies them as rental copies and makes it more difficult to copy. Indeed, RealNetworks has expressed a willingness to work with the studios and other key players in the market to implement such a system; nonetheless, the major studios have opted to seek a ban on RealDVD rather than cooperate to solve the problem.

But even this approach is only an option to be evaluated; a thorough analysis of the entire industry is required to determine the most efficient resolution to the problem. Banning a product that is clearly inferior for those seeking to pirate DVDs will do little to quell the illegal reproduction and distribution of DVDs.

Shifting the burden of content protection to consumers and other technology sectors can have significant impacts and costs for the economy. One study found, “The potential shifting of costs of content protection to the consumer electronics and information technology industries poses a challenge to one of the most dynamic sectors of the U.S. economy. Not only would such cost-shifting reduce the incentives of the content distribution industry to manage the transition to the digital world—and place the incentives on a sector farther from the source of the problem—but, by imposing design constraints, it would also challenge the information

technology industry’s ability to innovate. That innovation has resulted in enormous investment in information technology over the last decade (a critical factor in the economic successes of the U.S. in the 1990s) and contributed substantially to the upward trend in productivity growth that emerged in the U.S in the late 1990s.”¹⁸

RealDVD Boosts the Demand for DVDs

The allegations made by the MPAA are sweeping and require empirical support before they can be used as a basis for denying consumers the use of a new product. In fact, there is little evidence that has been provided to demonstrate that RealDVD actually increases piracy and therefore harms the movie studios. The impact is, in fact, just as likely to be neutral or actually beneficial to the movie studios.

Pirates will rip, burn, and copy any DVD with the goal of maximizing the number of DVDs they can acquire, paying no heed to copyright laws. For pirates, the impact of RealDVD will be minimal; it offers little advantage to the pirate seeking to copy DVDs for widespread distribution.

The response of the online technology community to RealDVD’s rollout suggests as much. Some tech-related websites greeted the product with a yawn, complaining that the product did not unlock DVDs while adding more encryption. Reviewers questioned whether consumers would actually use the product, when there were more versatile—albeit illegal—products available for free on the internet.

As one commenter noted, “In the end, it may not matter whether RealDVD survives (or even launches). The majority of folks savvy enough to

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¹⁸ *Promoting Innovation and Economic Growth: The Special Problem of Digital Intellectual Property*, A Report by the Digital Connections Council of the Committee for Economic Development, 2004, p. 58.

contemplate archiving DVDs have probably already discovered methods that incur no additional DRM (I use Handbrake on Mac and FairUse on PC). DMCA or not, I doubt any individual consumer would end up facing consequences in ripping DVDs for personal usage—*assuming they steer clear of file sharing networks.*¹⁹

The relevant figure, then, is the net increase in copying by law-abiding consumers of DVDs they have not purchased. The motion picture industry has provided no evidence that directly addresses this question, instead making a blanket charge of increased piracy. Yet a recent poll by the National Consumers League suggests that the threat of increased piracy may, in fact be small. The survey found that almost 80 percent of consumers had no interest in copying DVDs.²⁰ Before attempting to eliminate the consumer's rights to use legally purchased materials they already own, this question must be specifically addressed.

Moreover, RealDVD includes a number of features that may, in fact, boost the demand for DVDs, raising a direct challenge to the motion picture studios' assertions that a product like RealDVD detracts from their revenues. Allowing consumers to view their DVDs without having to carry the discs or a drive that plays DVDs increases the value of the DVD, which can increase demand.

In fact, the enhancements in value added by products such as RealDVD must be included in any analysis of economic harm. Providing a more durable backup, allowing DVDs to be loaded onto laptop computers, increasing parental control, and

even allowing DVDs to be loaded onto a media server are all qualities that benefit consumers and increase the demand for DVDs. These benefits must be included in any assessment of RealDVD's impact on the revenues of the major studios.

RealDVD also can provide additional benefits, such as recommendations for other DVDs of interest, much the way Amazon.com makes recommendations for its customers. Consumers can also search for new movies by title, genre, and actor. These innovations encourage the purchase of additional DVDs by consumers, which can boost sales of DVDs. Given these qualities, in economic terms, RealDVD may actually be a complement—not a substitute—for content provided by the motion picture industry. Increased demand through an improved experience for the consumers would have to be included in any assessment of potential revenue impacts of a product like RealDVD.

But as the music industry has learned, declaring war on the consumer does not offer a viable long-run business plan. Yet the case against RealDVD does just that, limiting the rights of the consumer to use legally purchased DVDs.

In fact, the recent National Consumers League poll found that while 40 percent of consumers surveyed said they would purchase fewer DVDs one year from now due to the economic slowdown, an equal number said they would increase their purchases if they included enhancements that increased the value they derive from the DVD. RealDVD does just that, providing greater convenience and versatility, and this should be included in any assessment of RealDVD's impact.²¹

Likewise, broad accusations of piracy must be more carefully scrutinized. There is an important distinction between illegal copies and legal copies that keep digital rights management protocols intact. RealDVD offers few incentives for the DVD pirate (who will opt for readily available freeware when making illegal downloads) while

¹⁹ See ZNF 'Round the Web, Jan 23, 2009, available at <http://www.zatnotfunny.com/index.php/?s=RealDVD&submit.x=6&submit.y=12>.

²⁰ National Consumers League, "Consumer Perceptions and Attitudes Regarding DVD Usage Rights," *op. cit.*, p. 13.

²¹ *Ibid.*, pp. 16, 18.

offering significant benefits for the average DVD consumer.

The Market May Be Changing, But Consumer Choice Is Increasing

Clearly, business models are in flux across the entertainment industry as new opportunities and challenges emerge. But from the consumer's perspective, the market is thriving. New technologies have reduced costs and introduced new models of production and distribution. In the music world, for example, while the major labels face unprecedented challenges, consumers enjoy access to perhaps the widest array of music ever available. From classical to experimental electronic music, consumers can select from traditional labels as well as a thriving and growing group of independent labels. Digital downloads offer a new way to purchase music, which has, in turn, allowed a shift in consumer preferences from purchasing albums of music to downloading particular songs.

At the same time, social networking sites such as MySpace and Facebook allow consumers to explore new artists while providing new marketing channels for the artists. These innovations will affect the major studios as well. Legitimate concerns over piracy may be a challenge for the traditional studios, but they are also facing intense new forms of competition from within and without the motion picture industry.

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Conclusion

Film has moved from celluloid to VHS to DVD, and rapidly is being pulled further into the

digital world, where it is the bits and bytes of data rather than its physical format that matters. New technologies offer consumers a host of new opportunities to enjoy video content. The copyright laws were created to protect those who create this content, and the courts have always used the fair use doctrine to balance the interests of consumers and producers.

In recent years, however, legislation has impeded the balancing act, particularly the DMCA and its DRM provisions. While attempting to reduce copyright infringements, the law has actually stifled innovation and reduced consumer choice while doing little to stem the flow of piracy. The recent case against RealDVD clearly demonstrates the DMCA's potential to deny consumers non-infringing uses of copyrighted materials they have legally purchased.

The tensions between fair use doctrine and the DMCA have been mounting and the case against RealDVD is just the most recent clash in the struggle to define fair use. To date most cases have avoided the direct question of whether the DMCA has trumped fair use, but for consumers this question is becoming increasingly urgent, as they may lose the right to use materials they have legally purchased. If, in fact, the courts rule against RealDVD, the DMCA will figure much more prominently, much to the detriment of fair use, innovation, and competition.

While attempting to reduce copyright infringements, the law has actually stifled innovation and reduced consumer choice while doing little to stem the flow of piracy.