

“Evolving Anti-Circumvention Law Under the Digital Millennium Copyright Act”

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Introduction

This paper discusses the evolution of copyright law in order to meet the challenges of the digital age. It provides background on the Digital Millennium Copyright Act’s (“DMCA”) anti-circumvention measures, constitutional challenges against the statute, judicial interpretations of key terms in the DMCA, and the difficulty in preserving certain “fair uses” consistent with the DMCA’s anti-circumvention restrictions. The paper concludes with an analysis of proposed legislation to amend the DMCA and other copyright law affecting fair use and intellectual property rights.

Historical Impetus to the DMCA

Digital technology permits copyrighted works to be “digitized,” or sampled, stored and transmitted over wireless networks and the Internet. This translation from a coherent whole work in an analog environment into a stream of 1s and 0s greatly facilitates unauthorized copying. Moreover, digital technology permits essentially unlimited distribution with concomitant damage to intellectual property rights-holders. As bandwidth connections to the Internet and wireless networks increase, copyright owners face the potential for a corresponding diminishment of economic returns from their works. Piracy of analog copies faced inherent quality limits due to degradation from consecutive copying. However, little or no degradation occurs from digital copying – each copy is a near-perfect replica of the next.

In an effort to secure threatened property rights for authors, songwriters, musicians, Hollywood and others who create content, Congress enacted the DMCA. Moreover, the DMCA implemented the United States’ obligations under the World Intellectual Property Organization (“WIPO”) Performances and Phonograms Treaty. As a signatory, the U.S. agreed to the following treaty requirements to:

“provide adequate legal protection...against the circumvention of effective technological measures used by authors in connection with the exercise of their [copyrights] and that restrict acts... not authorized by the authors....”²

The DMCA meets these treaty obligations.

Legal sanctions are necessary because current technological anti-circumvention measures are limited and can be broken. Encryption with an extended bit length is secure, but is unwieldy with very limited implementation among consumers to date. The DMCA therefore provides a legal shield over a technological lock protecting against unauthorized use of a copyrighted work. Under the DMCA, it is illegal to either circumvent copyright protection technologies, or to distribute such circumvention technologies to others.³

The DMCA⁴ contains anti-circumvention provisions aimed at stopping copyright pirates from defeating technological measures protecting digital versions of copyrighted works. The DMCA added a new Chapter 12 to the Copyright Act under Title 17 of the U.S. Code. This paper addresses issues arising out of Section 1201 of that chapter, which contains three main prohibitions:

- (1) the circumvention of a technological measure that effectively controls access to a copyrighted work;⁵
- (2) the trafficking of any technology or device that is primarily designed for, marketed for, or has limited purposes other than the circumvention of a technological measure that effectively controls access to a copyrighted work;⁶ and
- (3) the trafficking of any technology or device that is primarily designed for, marketed for, or has limited purposes other than the circumvention of a technological measure that effectively protects a right of a copyright owner.⁷

Thus, there are two main types of prohibitions under Section 1201: one against the act of circumvention, and the other against the tools and technologies that make circumvention possible.

The DMCA's prohibition upon circumvention and trafficking protects both "access control" and "rights control" technologies. "Access control" technologies are those that require "the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the [copyrightable] work."⁸ "Technological measure" by definition has a broad scope, to include the "application of information." Similarly, with respect to "rights control," qualifying "technological measures" are those that "prevent[], restrict[], or otherwise limit[] the exercise of a right of a copyright owner."⁹ Absent an exemption or privilege, defeating a technological measure that protects either "access control" or "rights control" violates Section 1201 of the DMCA.

Where a circumvention device has other, legitimate uses, a court will evaluate the technology's primary purpose in assessing whether there is liability. A dual-use technology will be prohibited if it is "primarily designed or produced for the purpose of circumvention."¹⁰ Also prohibited are technologies having "only [a] limited commercially significant purpose other than to circumvent" copyright protection technologies.¹¹

Constitutional Issues Arising under the DMCA

Commentators have noted the tension between the DMCA's and First Amendment's respective purposes.¹² The competing policy objectives of promoting free speech, either directly through an absolutist approach; or indirectly through copyright law's incentives to publish, have grown more acute with digital technology. Some critics view the DMCA as unconstitutional for trenching upon First Amendment rights, and advocate its repeal or amendment. The current state of the law is that the DMCA has survived all constitutional attacks brought to date.

Proponents note that the same First Amendment criticisms of the DMCA were broadly made against copyright law before the DMCA's enactment.¹³ Those were rebutted by the U.S. Supreme Court: "The Framers intended copyright itself to be the engine of free expression." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). For that reason, and because it is a content-neutral¹⁴, courts to date have held that the DMCA is fully consistent with the First Amendment's purposes. Without legal sanctions, technologists will continue to find creative ways to defeat limited protection measures, spilling content onto the Internet where unlimited piracy is a few mouse clicks away.

In *Felten v. RIAA*, one of the most important free speech challenges was mooted early before any judicial decision. The music industry founded the Secure Digital Music Initiative ("SDMI"), which offered a prize to anyone who could defeat their digital watermarking technology. Professor Edward Felten, a Princeton professor, managed to overcome their copy protection technology. Rather than claim the prize, however, he planned to publish and present a paper on the SDMI's technological flaws. The SDMI threatened to sue under the DMCA to prevent publication. The grounds asserted were impliedly that such a publication would constitute trafficking of a circumvention technology. Felten sued, seeking a declaration that such publication would not violate the DMCA.¹⁵ The RIAA withdrew its threat, mooting the issue.

Another early First Amendment attack upon the DMCA occurred in *Universal City Studios, Inc. v. Corely*. That case involved distribution of software that disabled copy protection for Digital Versatile Disks ("DVDs"). A "Content Scramble System" ("CSS") was used to protect content such as movies residing on

the disk in digital form. Jon Johansen, a Norwegian teenager, developed software that would decode DVD encryption, and aptly named it “DeCSS.” (i.e., decode CSS.)

Various movie studios sued the publisher¹⁶ of a “hacker” magazine and an affiliated website for posting the DeCSS software on the Internet. The defendant argued that the DMCA was unconstitutional because it impinged upon the First Amendment right to free expression. Defendant illustrated his point in colorful fashion, publishing the software in movie-credit style and *haiku* formats. While agreeing that First Amendment rights were implicated,¹⁷ the Second Circuit held that no constitutional violation occurred, and affirmed the injunction against defendants from further publication or linking.¹⁸

It is likely that further constitutional challenges will be mounted. “The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law.”¹⁹ Attempts to instigate judicial line-drawing between free speech and copyright policy objectives will continue. Great debate remains over whether short term protection against publication of security flaws comes at the expense of long term security enhancements.

Criminal Litigation under the DMCA

Elcom Ltd. (“Elcom”), a Russian software company, developed and distributed a product that defeated copy protections in Adobe eBooks. Elcom’s program permitted, among other uses, to have the eBook text translated to speech. Adobe complained, and the U.S. Department of Justice obtained an indictment against Elcom. Elcom argued that because the DMCA was unconstitutional it violated the Intellectual Property Clause’s provision authorizing exclusive rights only for “limited times.”²⁰ This is because the DMCA’s anti-circumvention protection could have the effect of allowing publishers to prevent access to public domain works whose statutory term of protection had expired. The court denied Elcom’s motion to dismiss, finding that the DMCA was content neutral. The Court also held that precluding “back-up copies” under the DMCA did not substantially burden speech more than was necessary to effect legitimate interests of the DMCA.²¹ Elcom eventually prevailed at trial, in a first test before a jury of the criminal application of anti-circumvention provisions.²²

What Constitutes a Protected “Anti-Circumvention Measure”?

Exactly what constitutes an “anti-circumvention measure” protected by the DMCA is being fleshed out by judicial decisions. In *Pearl Investments LLC v. Standard I/O Inc.*, the defendant secretly continued use of a password-protected virtual private network in order to place a hidden program on plaintiff’s computers. Plaintiff argued that extensive use of the secret program significantly degraded the performance of its network. The jury found for the defense. The court upheld the

verdict, finding that impairment of the network did not “circumvent a technological measure” as prohibited by the DMCA.²³

Use of a legitimately issued, but stolen, password to access a private website does not violate the DMCA. In *I.M.S. Inquiry Management Systems Ltd. v. Berkshire Information Systems, Inc.*, the court as a threshold matter found that use of a password constituted an “access control technology.” The court, however, reasoned that defendant had not bypassed the technology barrier itself. Instead, the court found that defendant had avoided getting the website owner’s permission to use the password, which did not implicate the DMCA.²⁴

What Constitutes “Access” Under the DMCA?

In *Lexmark International v. Static Control Components*, the key issue was what constitutes “access” to a copyrighted work. Lexmark sold printer ink cartridges containing a very short computer program preventing third parties from refilling the cartridge and reselling it. Static Control sold a microchip that circumvented the authentication sequence, which had prevented the cartridge from being refilled. Static argued that the DMCA was being used to protect a non-copyrightable printer cartridge. Since “access” is not statutorily defined, the court looked to *Merriam-Webster’s Collegiate Dictionary*. Defined as the “ability to enter, to obtain, or to make use of,” the court granted Lexmark’s motion for a preliminary injunction. Finding a likelihood of success on the merits, the court rejected Static Control’s policy argument that application of the DMCA in that context would be anti-competitive.²⁵ The injunction was appealed, and oral arguments were made to the Sixth Circuit in early 2004.

In *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, the defendant sold replacement remote controls to open garage doors that were compatible with plaintiff’s garage doors. Plaintiff used a “rolling code” technology to defeat potential burglars from being able to trigger the door opener. Defendant figured out how to program replacement remotes to overcome that technology. The district court focused upon a consumer’s expectation that it would have “access” to its home. Partial summary judgment was granted to defendant,²⁶ and the case is now on appeal to the Seventh Circuit.

Can Legitimate Ancillary Functions Prevent Liability For Overcoming Anti-Circumvention Measures?

A software company, 321 Studios, distributed an enhanced version of DeCSS software with additional features. Defendant was sued under the DMCA’s provisions prohibiting the manufacturing and selling of circumvention technology. 321 Studios contended that no violation occurred, since its software could restore damaged DVDs and retrieve lost information. 321 Studios argued that because of

these additional features, the software was not “primarily designed or produced for the purpose of circumvention.” The court found such an argument to be pretextual, holding that liability under the DMCA cannot be dissipated by the existence of limited alternative uses.²⁷

How Broad is the Reverse Engineering/Interoperability Privilege?

Section 1201(f) provides for a privilege to circumvent technological protections for the sole purpose of ensuring that a second, independently created computer program is interoperable with an original protected program. However, to qualify for the privilege the act of reverse engineering must not itself constitute copyright infringement. In *RealNetworks, Inc. v. Streambox, Inc.*, defendant produced competing software that was interoperable with RealNetworks RealPlayer system. RealPlayer used a “secret handshake” protocol to prevent unauthorized copying of streamed music or video. The court held that plaintiff’s software constituted an anti-circumvention device.²⁸ Defendant’s software lacked that copy protection feature, and therefore could be used as a conduit to copy content. Defendant argued that its software permitted later playback of streaming content, and was therefore a “time-shifting” fair use under the *Betamax* decision. Finding a violation, the court rejected defendant’s argument that it had a valid privilege under Section 1201(f) to create an interoperable computer program.

The Challenge of Preserving Fair Use in the Digital Age

United States copyright law has long recognized an equitable doctrine of “fair use” as a defense to infringement of the exclusive rights granted to copyright owners. Fair use prevents copyright law’s application from being too rigid. For example, fair use permits limited excerpting of expression for the purposes of criticism, commentary or teaching. Permitting anyone, however, to remove copy protections in order to make and distribute copies of excerpts opens the door to piracy. A new bill, entitled the “Digital Media Consumers’ Rights Act,” (*infra*) has been proposed to try to preserve existing fair uses in the digital age. Whether its provisions can simultaneously protect both the interests of copyright owners and advocates of fair use remains to be seen.

History and Purpose of Fair Use

Courts and Congress have long recognized the need to balance the interests of copyright owners with the public’s interest in the wide distribution and use of creative works. Therefore, the “exclusive” rights granted to copyright owners are not absolute. For example, the general public is entitled to make fair use of copyrighted works in “transformative” ways or other ways that do not unduly affect the original work’s potential market.

Congress codified this judge-made doctrine and defense of fair use to copyright infringement in 1976 under 17 U.S.C. § 107. Section 107 does not attempt to exhaustively define fair use but rather lists four nonexclusive factors to be considered in determining whether a particular use is fair. These four factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The United States Supreme Court has held that these four factors must not be treated separately but rather weighed together in a case-by-case analysis to determine whether a particular use qualifies as “fair use.”²⁹

This balancing of incommensurables means that the boundaries of fair use are not precise. Application to a particular fact situation can only be made inferentially by reference to prior concrete judicial decisions. Indeed, one wag has commented that fair use is the only area of the law where two advocates relying upon the same cases can fairly argue for opposite results.³⁰ Irrespective of the difficulties in applying the doctrine with certainty, society has long enjoyed certain limited fair uses of a copyrighted work.

Traditional “Core” Fair Uses

Section 107’s preamble gives a non-exhaustive list of examples of fair use, such as the purposes of “criticism, comment, news reporting, teaching . . . scholarship, or research.”³¹ Thus, for example, a book reviewer may, as a fair use, quote a sentence or a paragraph from a copyrighted work in order to comment upon the work or the author’s writing style, whereas the complete reproduction of a book on even a non-profit educational website is not likely to be a fair use if such copying supplants or affects the market for the original work. Courts have also recognized parody as a form of fair use, in that a parody pokes fun at, criticizes, or comments on the original work from which it copies.³²

Furthermore, in the 1984 case of *Sony Corp. of America v. Universal City Studios, Inc.*³³ (also known as the “Betamax decision”), the Supreme Court held that “time-shifting,” or the home recording of television programs with a VCR for later viewing, constituted a fair use under Section 107. The Court reasoned that by “expand[ing] public access to freely broadcast television programs,” time-shifting “yields societal benefits” without causing any significant “harm to the potential

market for, or the value of, ... copyrighted works.”³⁴ The Court also held that since a home videotape recorder is capable of a commercially significant non-infringing use such as time-shifting, the makers, manufacturers, and sellers of these devices cannot be held liable for contributory copyright infringement.

The Clash Between Digital Rights Management (“DRM”) and Fair Use

The threat of piracy enhanced by digital media and the Internet led to the development and utilization of DRM technology that protects ownership and copyright of electronic content. DRM marries together technological restrictions with specified licensed uses pursuant to contract. DRM technology gives distributors or publishers of digital content the ability to control or restrict access to a copyrighted work with the help of customized encryptions. For example, a recording company can employ DRM technology to create copy-protected CDs that prevent a consumer from “ripping” songs from the CD while still permitting him or her to listen to the music through playback on approved devices.³⁵ With the assistance of DRM technology, the entertainment industry has become better equipped to defend itself against the enhanced threat of piracy in the digital age.

Countermeasures to overcome the protections of DRM technology were soon developed. Problematically, these circumvention devices can be employed both for potentially legitimate fair use and for illegitimate piracy. For example, in the Elcom case (*supra*), the company produced and distributed a tool called the Advanced e-Book Processor, which translates Adobe’s e-Book format into Adobe’s Portable Document Format (“PDF”) by removing the various restrictions that a publisher can impose on an e-book.³⁶ Consider a newspaper reporter wishing to provide excerpts from a politician’s “out-of-print” e-book. With licenses no longer available, the reporter would wish to use Elcom tool in order to gain access to the relevant passages. On the other hand, a copyright pirate could also use the Advanced e-Book Processor to remove the restriction against copying. After doing so, he could reproduce multiple copies of a copyrighted work and then distribute those copies for his own profit. At present, there is no way for a publisher to permit one use without opening the door to the other.

An early case sought to find that removing anti-circumvention measures in order to make a digital copy of a DVD for fair use purposes was permissible. Plaintiff asserted a constitutional challenge to the DMCA’s limitations on removing these copy protections in *Universal City Studios, Inc. v. Corley*. The Court disagreed:

“We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original.”³⁷

Thus removing copy protection features in order to make fair use of a DVD will not prevent liability under Section 1201 of the DMCA.

While these prohibitions may help thwart piracy by banning all acts of circumvention of works in a digital form, Section 1201 also may limit traditional fair use rights of limited excerpting for the purpose of commentary. Here are a few hypotheticals that illustrate this issue:

- A college student is writing a thesis on 16th century art, and one of the books he'd like to quote can only be found online in e-Book format.³⁸ The student hacks into the e-Book by circumventing the access control measures put in place by the publisher. Once he has accessed the content of the book, he does not commit any acts of copyright infringement; rather, he simply finds a few relevant passages in the book and quotes them in his thesis. The student's use of the copyrighted book clearly qualifies as a fair use, since it is for the purpose of comment, scholarship, and research. Before the enactment of the DMCA, the copyright holder's only recourse would have been to sue the student for copyright infringement, to which claim the student could successfully raise the fair use defense. Under the DMCA, however, the student is liable for his act of circumventing the access control measures installed on the e-Book, and his fair use of the book's content is no defense to a violation of Section 1201(a)(1)(A).
- Same situation as above, except that the art history student has no technical skills to hack into the e-Book by himself. He asks a technologist friend to help him access the book for his thesis. The friend then creates a computer program that can decrypt the protective measures installed on the e-Book. Before the DMCA, the friend would not have violated any copyright laws by creating this circumvention device. After the DMCA's enactment, however, the friend is liable under Section 1201(a)(2) for trafficking a technology or device that is designed primarily for the purpose of circumvention. Despite the fact that the underlying purpose of the device is a fair use and even if the friend does not sell or distribute the program to anyone else, the friend has violated Section 1201's anti-trafficking ban.
- A film professor purchases three movies on DVD.³⁹ Each movie contains scenes that the professor wants to show to her students as illustrations of the use of a given camera angle to enhance suspense. To facilitate teaching, the professor wants to copy all of the scenes from the different movies onto a single video cassette for ease of demonstration. Absent anti-circumvention technology, the professor could do so under the doctrine of fair use. However, since the DVDs are encrypted with technological measures that allow a viewing but not copying of the content

onto another format. Since the film professor has no technical skills of her own to be able to break the encryption, she would need a circumvention device to do it for her. Such a device is, however, banned by Section 1201(b), which prohibits the trafficking of any technology or device that protects a right of the copyright holder. This leaves the professor unable to make a fair use of the DVDs.

When drafting the DMCA, Congress knew of the potential limitations upon fair use imposed by the anti-circumvention provisions.⁴⁰ In an attempt to strike a balance between the users' interests and those of the copyright holders, Congress included a statutory exemption for users of particular classes of works who are likely to be adversely affected by the prohibition of Section 1201(a)(1)(A).⁴¹ Some argue that the exemption fails to adequately protect traditional expectations of fair use. Even if a user could demonstrate that he would be adversely affected, he would not be able to enjoy that exemption unless he also had the technical skills to be able to decrypt DRM systems.

Yet this statutory difficulty is understandable. After all, if the law allows for the creation of devices that can circumvent protective measures in order to advance fair use interests, it also opens the door for pirates to use these circumvention technologies for illegitimate purposes. Thus, the resulting impediments to fair use seems unavoidable in the digital age.⁴²

New Legislation Proposed:

"The Digital Media Consumers' Rights Act" (H.R. 107)

In January 2003, Representative Rick Boucher (D-VA) introduced H.R. 107, the "Digital Media Consumers' Rights Act" ("the DMCRA"), in an attempt to protect consumers from purchasing copy-protected CDs unknowingly and to mitigate the DMCA's limitation on fair use and legitimate scientific research. There are four major components of the bill: (1) it authorizes circumvention of a technical protection so long as the ultimate purpose of the circumvention is otherwise legally permissible; (2) it authorizes the trafficking of devices that can facilitate circumvention for legitimate purposes as long as the device is capable of substantial non-infringing use (thus affirming these standard set by the Supreme Court in its *Betamax* decision); (3) it requires appropriate labeling of copy-protected CDs so as to provide adequate notice that they may not play correctly on certain devices and cannot be copied; and (4) it broadens the existing exemption for encryption research to include scientific research on technical protection measures.

The DMCRA thus amends the DMCA in an attempt to protect and broaden existing fair uses. The new legislation, if enacted, would protect those who bypass protective technological measures in order to engage in fair use of copyrighted

works in digital form, like the art history student, his tech-savvy friend, and the film professor in the examples above. Furthermore, the bill seeks to reaffirm the Supreme Court's holding in the *Betamax* case negating liability where a device has "substantial non-infringing uses." That is a higher threshold for imposing liability than DMCA prohibition against devices "primarily designed" to overcome circumvention measures. The bill would permit competitors to remove anti-circumvention protections to engage in reverse engineering to develop competitive or interoperable products that had "substantial non-infringing uses."

Those opposed to the new legislation argue that the bill opens the door to increased piracy. Opponents argue that once circumvention technologies are legalized, it will be impossible to ensure that copyrighted content is being copied only for legitimate personal uses. Many members of the entertainment industry believe that the DMCA as enacted is necessary to reduce piracy by backing up DRM systems with the power of the law, and the DMCRA can only lead to more lost sales due to infringement.

Supporters of the bill counter that the current law under the DMCA is too broad and grants to copyright owners too much power to eliminate by contract various fair uses. They note that the DMCA, if not amended, will move "our Nation towards a 'pay-per-use' society."⁴³ For example, publishers can take old works that have fallen into the public domain, add a bit of original material to them, claim a copyright in the newly released whole, and then lock up the entire content with digital encryptions that require consumers to pay a licensing fee in order to access any portions of the work, including those in the public domain.⁴⁴

Indeed, while the DMCRA weakens a powerful tool for fighting piracy, it does not strip copyright holders of the ability to assert infringement actions against pirates. Thus, supporters of the DMCRA believe that the bill is narrowly tailored and will preserve existing fair uses under the DMCA. The contrary argument is that the DMCRA would make it much more difficult for copyright owners to find the source of piracy, and that preventing piracy in the first instance is the only economical means of securing intellectual property rights.

In seeking to preserve fair use in the digital age, the DMCRA tilts the playing field sharply back towards consumers by eliminating some of the DMCA's prohibitions against circumventing copy-protection technologies. The bill places thus more burdens on copyright owners. It remains to be seen, however, whether these additional burdens will ultimately advance or undercut the main purpose of copyright law "to promote the progress of science and useful arts."

"Family Movie Act of 2004" (H.R. 4586)

Introduced in June 2004, the Family Movie Act ("FMA") provides that making limited portions of audio or video content of motion pictures imperceptible

by or for the owner or other lawful possessor of an authorized copy of that motion picture for private home viewing, and the use of technology therefore, is not an infringement of copyright or of any right under the Trademark Act of 1946.

The FMA is a response to the film industry's lawsuit against Clearplay from introducing scene skipping technology on DVDs.⁴⁵ Clearplay reviews movies and flags scenes that fall into a variety of categories that may be deemed objectionable by a viewer. Clearplay's technology allows a viewer to skip scenes that contain objectionable material, such as nudity and violence.

Speaking through its (now former) Chairman, Jack Valenti, the Motion Picture Association of America objected to the scene skipping technology as infringing on either moral rights or making an unauthorized derivative work. In response, Rep. Lamar Smith (R-Texas) introduced the FMA to define scene skipping by Clearplay as a non-infringing use. Also, Marybeth Peters, the Register of Copyrights, weighed in that under existing law, Clearplay's use was non-infringing, and that the legislation was therefore unnecessary. The bill could unexpectedly result in less carefully crafted home-editing technologies being legitimated, even if they would currently be infringing uses.

Given that the major players have conflicting views of the scene skipping technology's status as infringement, non-infringing use, or fair use, it may be better left to Congress to add some certainty with a legislative solution.

"Inducing Infringement of Copyrights Act of 2004" (S. 2560)

Also introduced in June 2004, the Inducing Infringement of Copyrights Act ("IICI") was aimed at making peer-to-peer providers liable for any infringement by users of those networks.⁴⁶ This bill is moving unusually fast through the legislative process, with supporters in the movie and music industry, while there is strong opposition from those supporting traditional fair use balancing, who see the bill's measures as draconian. In surveying all of these proposals, it is clear that Congress is trying hard to reduce the law's lag behind technology.

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² WIPO Copyright Treaty, art. 11.

³ 17 U.S.C. § 1201(a)(1)(A); *Id.* at § 1201(a)(2).

⁴ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860.

⁵ 17 U.S.C. § 1201(a)(1)(A).

⁶ *Id.* at § 1201(a)(2).

⁷ *Id.* at § 1201(b)(1).

⁸ *Id.* at § 1201(a)(3)(B).

9 *Id.* at § 1201(b)(2)(B).
10 *Id.* at § 1201(a)(2).
11 *Id.* at § 1201(b)(1)(B).
12 Nimmer, *Does Copyright Abridge Guarantees of Free Speech and Press?* 17 UCLA L.REV. 1180
(1970); Goldstein, *Copyright and the First Amendment*; Sobel, *Copyright and the First
Amendment: A Gathering Storm?*, 19 COPYRIGHT LAW SYMPOSIUM 43 (1971)
13 *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.* 562 F.2d 1157, 1170 (9th Cir.
1977) (“[T]he impact, if any, of the First Amendment on copyright has not been discussed by the
[Supreme] Court. We believe this silence stems not from neglect but from the fact that the idea-
expression dichotomy already serves to accommodate the competing interests of copyright and
the First Amendment.”)
14 *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp. 2d 294, 329 n. 196 (S.D.N.Y. 2000).
15 *Felten v. RIAA* Case No. 01-CV-2669, (filed D.N.J. 2001).
16 The publisher, Eric Corely, ironically operated under the *nome de plume* Emmanuel Goldstein,
the fictional leader of the underground battling Big Brother in George Orwell’s classic, *1984*.
17 *See 321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 2004 U.S. Dist. LEXIS 2771 (N.D. Cal.
2004) (court rejected plaintiff’s claim that the DMCA was unconstitutional for violating the First
Amendment, and held that the DMCA did not exceed the scope of Congressional powers.)
18 *Universal City Studios, Inc. v. Corely*, 273 F.3d 429, 460 (2d. Cir. 2001)(defendant enjoined from
both posting DeCSS software on his website, or linking to other sites offering DeCSS software.)
19 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.10[A] at 1-66.55 (Matthew
Bender & Co., Inc., August 2001 ed.)(quoting Justice Benjamin Cardozo, *The Paradoxes of Legal
Science* (1927)).
20 U.S. Constitution, art. 1, § 8, cl. 8 (“The Congress shall have the power...to promote the progress
of science and useful arts, by securing for limited times to authors and inventors the exclusive
right to their respective writings and discoveries.”)(emphasis added).
21 *United States v. Elcom Ltd.*, 203 F.Supp.2d 1111, 1135 (N.D. Cal. 2002).
22 The jury did find that defendant Elcom’s Advanced eBook Processor was an unlawful
circumvention device. However, the jury acquitted on the basis that defendant, a Russian
software company, did not “willfully” violate the United States’ DMCA.
23 *Pearl Investments LLC v. Standard I/O Inc.*, Case No. 02-50-P-H (D. Me. 4/20/04).
24 *I.M.S. Inquiry Management Systems Ltd. v. Berkshire Information Systems, Inc.*, --F.Supp.2d--,
2004 WL 345556, (S.D.N.Y. 2004).
25 *Lexmark International v. Static Control Components*, 253 F.Supp.2d 943, 966 (E.D. Ky. 2003).
26 *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 292 F.Supp.2d 1040, 1046 (N.D. Ill.
2003)
27 *Paramount Pictures Corp. v. 321 Studios*, 2004 U.S. Dist. LEXIS 3306 (S.D.N.Y. 2004)(holding
that sale of DeCSS software violated anti-trafficking provisions of the DMCA).
28 *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000).
29 *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).
30 *See, e.g., Georgia Harper, “Will We Need Fair Use in the 21st Century?”* (1997)
31 17 U.S.C. § 107.
32 *See, e.g., id.; Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998); *SunTrust Bank
v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).
33 *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
34 *Id.* at 454, 456.
35 For a description of how one such product works, *see* key2audioXS™ , available at
http://www.key2audio.com/solution_xs_how.asp.
36 *See* Electronic Frontier Foundation, *Frequently Asked Questions (and Answers) About the Dmitry
Sklyarov & ElcomSoft Prosecution*, available at
http://www.eff.org/IP/DMCA/US_v_Sklyarov/us_v_sklyarov_faq.html (last modified Feb. 19,
2002).

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- 37 *Corley*, 273 F.3d at 459 n.164 (2d Cir. 2001).
- 38 *Id.* (similar hypothetical)
- 39 *See Reimerdes*, 111 F.Supp.2d at 322 n.160 (similar hypothetical posed by the court).
- 40 *See generally* House Comm. on Commerce, H.R. Rep. No. 105-551 (1998).
- 41 17 U.S.C. § 1201(a)(1)(B).
- 42 For a polemical summary of potential negative consequences of the anti-circumvention provisions of the DMCA, such as the chilling of free expression, scientific research, competition, and innovation, *see* Electronic Frontier Foundation, *Unintended Consequences: Five Years under the DMCA*, available at http://www.eff.org/IP//DMCA/20031003_unintended_cons.php (last modified Sept. 24, 2003).
- 43 144 Cong. Rec. S11887 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft).
- 44 *See* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673 (2000).
- 45 *Huntsman v. Directors Guild of America*, Case No. 02-M-1662 (D. Colo. 2002)
- 46 *See* http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Print&PressRelease_id=1083&suppresslayouts=true, visited June 21, 2004