Fair Use No Longer: How the Digital Millennium Copyright Act Bars Fair Use of Digitally Stored Copyrighted Works

Denis T. Brogan
NOTES

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INTRODUCTION

The United States Constitution grants Congress the power to confer upon authors an exclusive right to their writings for limited times.\(^1\) This exclusive right, however, is further limited

\(^1\) U.S. CONST. art I, § 8, cl. 8 (stating interests of copyright 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 . . .”). See Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (asserting that copyright achieves important public purpose and intended to motivate creative activity of authors and inventors through rewards, yet allows public access after limited period of exclusive
by the “fair use” exception to copyright protection. Originally a judge-made doctrine, the doctrine of fair use is now codified under § 107 of the 1976 Copyright Act. This exception permits the reasonable appropriation of a work, provided that the material used from the copyrighted work in some way benefits the public, without substantially impairing the present or control has expired); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (stating rights conferred by copyright are designed to assure contributors fair return for their labors); Donaldson v. Beckett, 98 Eng. Rep. 257, 262 (1774) (overruling Millar v. Taylor, Eng. Rep. 201 (1769)). See generally Howard B. Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 WAYNE L. REV. 1119, 1156-71, 1188-91 (1983); Francine Crawford, Pre-Constitutional Copyright Statutes, 23 BULL. COPYRIGHT SOC'Y 11, 11-37 (1975) (discussing pre-Revolutionary War copyright laws in American thirteen colonies that were governed by 1710 Statute of Anne); Karl Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 GEO. L.J. 109 (1929).

2 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (arguing “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . .” (citations omitted); see also H.R. REP. NO. 94-1476, at 65-66 (1976) (explaining “[t]he claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it.”); H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY, 260 (1944) (defining fair use as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent”); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, 13.05 [B][3] (reviewing Supreme Court decisions on scope of fair use doctrine).

3 See Campbell, 510 U.S., at 576 (claiming “although the First Congress enacted [the] initial copyright statute, . . . without any reference to doctrine of ‘fair use,’ it was recognized by American courts nonetheless.” ); see also SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264 (11th Cir. 2001) (stating fair use was originally judge-made affirmative defense); Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986) (“The fair use doctrine was initially developed by courts as an equitable defense to copyright infringement”).

4 17 U.S.C. § 107 states in full:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies and phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use[,] the factors to be considered shall include[:]

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 fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Section 107 was intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. H.R. REP. NO. 94-1476, at 65-66 (1976).
potential economic value of the first work.\(^5\) The courts have viewed it as a “safety valve” that accommodates the exclusive rights conferred upon authors by copyright law while balancing them against the freedom of speech and of the press guaranteed by the First Amendment.\(^6\)

The recent explosion of digital technology, however, has enabled authors to digitally store their works and encrypt them, so that making a fair use of a digitally stored and encrypted work is impossible without first decrypting the work.\(^7\) Granted, this is not a problem for a work that is not digitally stored, such as a book or magazine, because expression fixed in those types of media can be accessed easily and copied even more readily, most

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6 See Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 546 (1985) (reminding that Framers intended copyright to be engine of free expression by establishing marketable right to the use of one’s expression; thus copyright supplied economic incentive to create and disseminate ideas); see also Harper & Row, 471 U.S. at 546 (stating essential thrust of First Amendment is prohibiting improper restraints on voluntary public expression of ideas by shielding individuals who want to speak or publish when others wish them to be quiet and that this freedom not to speak publicly has same ultimate end); Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981) (recognizing that copyright, especially right of first publication, are valuable to First Amendment); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp 2d 294, 322 (S.D.N.Y. 2000) (explaining “[t]he doctrine] has been viewed by courts as a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First Amendment”); Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 348 (1968) (stating copyright law is in place to protect expression and ideas of authors by encouraging and protecting intellectual labor). See generally Wooley v. Maynard, 430 U.S. 705, 714 (1977) (Burger, C.J.) (stating freedom of thought and expression “includes both the right to speak freely and the right to refrain from speaking at all”); Sobel, Copyright and the First Amendment: A Gathering Storm?, 19 ASCAP Copyright Law Symp. 43, 78 (1971); Comment, Copyright and the First Amendment: Where Lies the Public Interest?, 59 Tulane L. Rev. 135, 136 (1984) (arguing copyright law balances authors’ interests in their writings and society’s interest in flow of ideas and information).

7 See Amy Harmon, New Economy: With Music Widely Available Online, Is It Now Time To Tighten Copyright Laws Or Consider Rewriting Them To Reflect Reality?, N.Y. Times, Oct. 2, 2000, at C4 (chronicling case of company found guilty of copying some 80,000 CD’s onto its own computers for purpose that did not fall under “fair use” doctrine, and arguing existing copyright law did not envision mass scale copying made possible by Internet); Randall E. Stross, Chill, Hollywood, Chill: Let The People Watch What They Want When They Want To, U.S. News & World Report, Oct. 2, 200 at 46 (warning that as digital media becomes more prominent, loss of noncommercial “fair use” is going to be more manifest). Cf. Amy Harmon, Judge Rules Against MP3 On CD Copying, N.Y. Times, Sep. 7, 2000, at C1 (discussing ruling that online music start-up company “willfully infringed” copyrights by distributing music through its music trading service website); Amy Harmon, Technology Briefing: E-Commerce; Copyright Measure Introduced, N.Y. Times, Sep. 27, 2000, at C11 (reporting introduction of bill in United States House of Representatives that would legalize online music swapping).
commonly by means of a photocopier. Nor has such a problem arisen in copyright law hitherto — although before the explosion of the Internet in the mid-to-late 1990s, the invention of the photocopier, ubiquitously known as the "Xerox" machine, allowed copying to be performed so much more cheaply and readily that courts struggled to apply the fair use doctrine to this new technology because for the first time copying amounted to much more than just a few handwritten copies of articles.

Consequently, in order to access a book or magazine stored entirely in digital form, a user must either (a) possess decryption technology on his or her own that would enable a fair use to be made of the digitally stored copyrighted work, or (b) pay the copyright owner every time access to the so stored work is desired (a "pay-per-use" system), even if the user intends only to make a fair use of the work. The 1998 Digital Millennium Copyright Act (the "DMCA"), however, expressly banned the distribution of decryption or "anti-circumvention" technology,
precluding one from navigating around digital firewalls— even if one wished merely to access encrypted works to make a fair (albeit digital) use of that work.12

As we move rapidly into the digital world of the twenty-first century, we stand poised to enter what most likely will become a world in which massive numbers of copyrighted works (and colossal amounts of information in general) are stored almost exclusively in digital form.13 Electronic storage of books cuts down on library shelf space, reduces costs, saves paper, and allows quick and easy access to and retrieval of information from electronic search engines and databases via the Internet. Better yet, a copy of a digitally stored work is not any less true to the original, i.e., with photocopies of books or pages from books, or copies of movies recorded on magnetic tapes, each subsequent copy made from a copy of the original deteriorates in quality.14 Digital copies, however, are exact replicas of the original and do

12 See 17 U.S.C. § 1201(2001); Nimmer, supra note 11, at 683 (quoting House Committee on Commerce that Congress has achieved constitutional objectives for copyright by regulating information use— not devices or means— and by ensuring appropriate balance between interests of copyright owners and information users); see also H.R. REP. NO. 105-551, pt. 2, at 22 (1998) (concluding that digital environment poses unique threat to rights of copyright owners, and so protection against devices that undermine copyright interests, i.e., decryption devices, is warranted). See generally Eddan Elizafon Katz, RealNetworks, Inc. v. Streambox, Inc. & Universal City Studios, Inc. v. Reimerdes, 16 BERKELEY TECH. L.J. 53, 54-56 (providing overview of DMCA and its various provisions).

13 See Amy Harmon, Ideas & Trends: Copyright and Copying Wrongs: A Web Rebalancing Act, N.Y. TIMES, Sep. 10, 2000, § 4, at 4. (noting “[a]s books and movies follow music from the physical to the digital realm, some legal experts argue that a new balance must be struck between copyright holders and the users of their works if copyright is to continue to drive economic and creative development.”); see also Kristi Nelson, Exhibit Halls Transformed Into High Tech Haven ELECTRONIC MEDIA April 16, 2001 (discussing wealth of digital technology that is now available to media and news companies); Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised, 14 BERKELEY TECH. L.J. 519, 520 (1999) (arguing that “...anti-device provisions of DMCA should be clarified and a more minimalist approach taken to the regulation of technologies with circumvention-enabling uses so that the ambiguity and overbreadth of the existing provisions will not cause harm to innovation and competition in the information technology sector.”).

14 See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 309 (discussing major movie studios exploration of distribution to home market in digital format, which offered higher audio and visual quality and greater longevity than video cassette tapes and that this technology, known today as DVD, brought increased risk of piracy by virtue of fact that digital files, unlike video cassettes, can be copied with degradation from generation to generation) (emphasis added); infra, note 79; see also David A. Petteys, The Freedom to Link?: The Digital Millennium Copyright Act Implicates the First Amendment in Universal City Studios, Inc. v. Reimerdes, 25 SEATTLE UNIV. L. R. 287, (arguing that Internet provides both excellent opportunities and major difficulties with regards to dissemination of information, particularly in realm of copyrighted material).
not experience any significant decay in quality or value. This feature enables copy after digital copy to be made and passed along the Internet while the sender retains possession of a copy that is virtually identical to the original document in all respects. Thus, while digital storage and retrieval systems may be an enormous technological gain for humankind, contributing to the "marketplace of ideas," they pose a unique problem for authors of copyrighted works who do not want their works misappropriated or overtly stolen in their entirety over the Internet.

Although there always will exist books and other tangible media in which copyrighted works can and will be stored, this Note rests on the prospect that digital technology will prove to be the medium of choice in the twenty-first century. As a result, it addresses the foreseeable decline, and indeed death, of "fair use" as a defense to copyrighted works stored in a digital medium. In fact, as the 1976 Copyright Act (as amended by the 1998 DMCA) reads today, fair use is point blank unavailable as a defense to

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15 [In principle, the digital world is very different. Once a decryption program like DeCSS is written, it quickly can be sent all over the world. Every recipient is capable not only of decrypting and perfectly copying plaintiff's copyrighted DVDs, but also of retransmitting perfect copies of DeCSS and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear. Indeed, the difference is illustrated by comparison of two epidemiological models describing the spread of different kinds of disease.]

16 See Universal City Studios, 111 F. Supp. at 331 (citations omitted).


18 See RealNetworks, Inc. v. Streambox, Inc., 2000 U.S. Dist. LEXIS 1889, *19 (W.D. Wash. 2000) (describing plaintiff RealNetworks' "Copy Switch" located on its RealServer computer, which permitting copying of works that copyright owners made available through RealNetworks for purpose of having them copied); Lunney, Jr., supra note 16, at 818 (noting this copying technology creates potential for widespread private copying, which although individually trivial, widespread private copying in aggregate could radically reduce incentive to create any given work of authorship); see also Neil Weinstock Netane, From the Dead Sea Scrolls to the Digital Millennium; Recent Developments in Copyright Law, 9 Tex. Intell. Prop. L.J 19, 22 (2000) (discussing technology used by defendants in RealNetworks).
making use of a digitally stored and encrypted Digital Versatile Disk (DVD), Compact Disc (CD) or electronic book (e-book).\footnote{19} This Note focuses, therefore, on the unavailability of fair use as a defense, and the potential problem it shall pose in this new century, especially in light of First Amendment considerations.\footnote{20} Part I outlines the anti-circumvention measures adopted by Congress in the 1976 Copyright Act as amended by the Digital Millennium Copyright Act, which effectively proscribe the use of fair use as a defense by banning measures necessary to access such a work in the first place. Part I examines the Congressional intent and purposes of the pertinent provisions as well. Part II discusses the rise of fair use as a defense to a charge of unauthorized copying before the explosion of digital technology, and hypothesizes an application of the fair use doctrine to new technologies including photocopiers and digital storage and retrieval systems. Part III examines case law, including one of the first cases to be brought under the DMCA,\footnote{21} and looks at arguments in favor of rewriting the copyright laws; these arguments find support in the contention that the Internet and digital technology are changing faster than Congress can tailor its laws to balance the Constitutional requirement to benefit the public with protecting the property interests of authors.\footnote{22}

\footnote{19} The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding [three]-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title...\footnote{17 U.S.C. § 1201(a)(1)(B)}


\footnote{21} See, e.g., Amy Harmon, New Economy: With Music Widely Available Online, Is It Now Time To Tighten Copyright Laws Or Consider Rewriting Them To Reflect Reality?, N.Y. TIMES, Oct. 2, 2000, at C4 (asking whether copyright law envisioned modern ease of copying on mass scale made possible by Internet and whether laws should be modified); Randall E. Stross, Chill, Hollywood, Chill: Let The People Watch What They Want When They Want To, U.S. NEWS, Oct. 2, 2000, at 46 (warning that as digital media becomes more prominent, loss of noncommercial "fair use" becomes more manifest); Patrick Ross,
Finally, Part IV proposes a solution, a prediction really, that soon enough the law will have to change in order to accommodate the distribution of digitally stored copyrighted works on and over the Internet, given the landmark Supreme Court case that did the same for home video recording, *Sony Corp. of America v. Universal City Studios, Inc.*

**THE ANTI-CIRCUMVENTION PROVISIONS OF THE 1998 DIGITAL MILLENIUM COPYRIGHT ACT**

Section 1201 of the Digital Millennium Copyright Act provides that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title..." Moreover, the statute includes a ban on trafficking in these types of measures. The provisions are intended to prevent someone from gaining unauthorized access to a digitally stored work protected under the copyright laws of Title 17.

*Boucher Attempts MOCA Hearings but Markup Is Seen Unlikely, WASHINGTON INTERNETDAILY, Jan. 8, 2002* (outlining Virginia Congressman's attempt to amend DMCA which collides with "fair use" law).

23 464 U.S. 417 (1984) (holding "time shifting" of televised programs for later viewing was not infringing activity).

24 17 U.S.C. 1201 (a)(1)(A). This subsection also states that this prohibition takes effect at the end of a two-year period from October 28, 1998. *Id.*

25 17 U.S.C. 1201(b) lists "additional violations" as:

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that –

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection –

(A) to 'circumvent protection afforded by a technological measure' means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure 'effectively protects a right of a copyright owner' under this title if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

26 See H.R. REP. No. 105-551, pt. 1, at 17-18 (1998); Paul Sweeting, *Legal Tender*, VIDEO BUSINESS, Jan. 7, 2002, at 12 (stating "law permits copyright owners to use encryption to bar redistribution of work by thirds parties"); Order Barring Posting and
Although extremely effective against outright theft of copyrighted material, the problem is that if a work is digitally stored, the only way one can gain any access to it whatsoever is by means of a “technological measure” that would circumvent the protection barring access! Thus, if a college film professor desired to take even a still frame of a digitally recorded movie, or a student wished to quote a line from a digitally stored novel, both professor and student would have to effectively violate this statute in order to make a fair use of the work on their own.

The provisions, in their haste to stamp out the rampant theft of copyrighted material accessible on the Internet, are thus somewhat overbroad because they impinge upon the “right” of an alleged infringer to argue the defense of fair use for a work stored in any type of digital medium.

The legislative intent in drafting these provisions seems to fall on two sides. On one side is the “property-maximizing,” “pay-per-use” view of the House Judiciary Committee, which argued for absolute liability against those who lack authorized access, though recognizing that fair use is permissible when access is


Nimmer argues that the reason why there is no prohibition on conduct in § 1201, as opposed to a prohibition on circumvention conduct is that prior to the Digital Millennium Copyright Act, the conduct of circumvention was never before made unlawful. See NIMMER, supra note 9, at 691. For a discussion on other statutory exemptions in § 1201 besides the defense of fair use, NIMMER, supra note 9, at 692-702 is a good source. See generally David Nimmer, Back From the Future: A Proleptic Review of Digital Millennium Copyright Act, 16 BERKELY TECH. L. J. 855, 864 (2001); Dana J. Parker, Cease and DeCSS: DVD’s Encryption Code Cracked, Nov. 4, 1999, available at http://www.emediapro.net/news99/news111.html (last visited August 25, 2002).

See NIMMER, supra note 9, at 17 (stating circumventing technological protection placed by copyright owner to control access is electronic equivalent of breaking into locked room to obtain books); John Naughton, Now You can’t Make a Copy. Is This a Record?, THE OBSERVER, Jan. 13, 2002, (stating fair use allows quotations for education or learning); see also Dave Wilson & Jon Healey, CDs That Block Copying May Herald a Revolution, L.A. TIMES, Jan. 6, 2002, A1 at 1 (asserting that under DeCSS, people cannot loan used books).

See Symposium, And the Shirt Off Your Back: Universal City Studios, DeCSS, and the Digital Millennium Copyright Act, 27 RUTGERS COMPUTER & TECH. L. J. 371, 384 (2001) (claiming DMCA’s fair use exemption is “illusory right”); Parker, supra note 27 (claiming DeCSS only intended to prevent “casual copying” and thereby prevent ordinary person’s fair use). But see Universal City Studios, Inc. v. Reimerdes, 111 F. Supp.2d 294, 337 (S.D.N.Y. 2000) (discussing defendants’ overbreadth claim, concluding that “those wishing to make lawful use of copyrighted movies by viewing or listening to them are not hindered in doing so in any material way by the anti-trafficking provision of the DMCA.”); Universal City Studios, 111 F.Supp.2d at 346 (opining that defendants “have raised a legitimate concern about the possible impact on traditional fair use of access control measures in the digital era.”).
authorized.\textsuperscript{30} On the other side lies the "fair use" view of the House Commerce Committee, which argued that digital technology could eventually whittle away fair use to no use whatsoever.\textsuperscript{31} The compromise that resulted in the existing law shows that the Commerce Committee acquiesced in concluding that the digital environment poses a unique threat to the rights of copyright owners, and as such necessitates protection against devices that undermine copyright interests.\textsuperscript{32}

One stipulation contained in § 1201, ostensibly cognizant of the problem of having fair use whittled away to no use at all, was that the statute would not go into effect pending a ruling issued by the Library of Congress, which oversees the Copyright Office.\textsuperscript{33} After the office held hearings for almost two years, it

\begin{itemize}
\item \textsuperscript{30} See H.R. REP. NO. 105-551, pt. 1, at 18 (1998); Princeton Univ. Press v. Michigan Document Serv., 99 F.3d 1381 (6th Cir. 1996) (Martin, J., dissenting) (believing that requiring defendant to pay permission fees or "pay-per-use" is inconsistent with primary mission of Copyright Act); Princeton Univ. Press, 99 F.3d at 1393 (stating fair use doctrine, which requires unlimited public access to published works in educational settings, is one essential check on otherwise exclusive property rights given to copyright holders); see also John R. Therien, Comment, Exorcising the Specter of a Pay-Per-Use Society: Toward Preserving Fair Use and the Public Domain in the Digital Age, 16 BERKELEY TECH. L. J. 979, 983-84 (2001) (stating Congress is aware DMCA system favored copyright owners over fair users).
\item \textsuperscript{32} See NIMMER, supra note 2, at 683-84; see also Samuelson, supra note 31. See generally Lawrence Jordan and Richard Herman, Aces—Content Regulation: Copyright, Rights of Publicity, And Other Doctrines, 78 MI BAR J. 1272, 1272-1274 (1999) (giving general overview of approaches to digital technologies copyright law).
\item \textsuperscript{33} 17 U.S.C. § 1201 (a)(1) (A) states that the anti-circumvention provision contained in § 1201(a)(1)(A) "shall take effect at the end of the two-year period beginning on the date of the enactment of this chapter [enacted Oct. 28, 1998]." Moreover, § 1201 (a)(1)(C) delineates the role of the Librarian of Congress in determining whether persons who are users of copyrighted works may be adversely affected by § 1201(a)(1)(A), which states:

During the [two]-year period described in subparagraph (A), and during each succeeding [three]-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary of Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted
issued a ruling stating that the proponents of various kinds of exemptions had not demonstrated evidence that there would be "substantial harm" if an exemption was not granted. The provisions of the DMCA "as is" then went into effect on October 28, 2000.\(^{34}\) In the interim, groups like the Association of American Universities, the American Library Association and the Commerce Department's National Telecommunications and Information Administration had maintained that broad exemptions were necessary to preserve the "fair use" rights of individuals.\(^{35}\) Media companies like Sony and Time Warner, however, argued that the DMCA's anti-circumvention provisions were necessary to protect their digital material, like computer games and movies, from widespread unauthorized use.\(^{36}\) Since it seems that, at least for now, media conglomerates have won out, it remains to be seen whether such conglomerates like Sony,
though adversely affected by such widespread unauthorized use today, will eventually have an economic interest behind them in arguing exactly the reverse, namely that if a market can be found for decryption technology and "home use" in the same manner in which the VCR made its way into homes, the DMCA's anti-circumvention provisions will actually prove to hamper such companies' economic interests in the long-term digital future.37

FAIR USE AS A DEFENSE TO WHAT AMOUNTS TO OTHERWISE UNAUTHORIZED COPYING

The Doctrine of Fair Use Pre-Codification in the 1976 Copyright Act

The defense of fair use has existed as far back as the 1710 Statute of Anne,38 where English courts held that "fair abridgements" would not infringe upon an author's rights.39 Although not always known under its present appellation, the doctrine nevertheless has been upheld by American courts at least since the first federal copyright statute was enacted in 1790.40 In fact, in 1845 Justice Story recognized that "[e]very


40 Act of May 31, 1790, 1 Stat. 124 (accordng protection to authors or his assignis of any "map, chart or book" for fourteen years upon recording title with clerk's office of district court where author or proprietor resided; and publishing copy of said record in one or more newspapers for four weeks; and depositing copy of work itself in office of Secretary of State within six months after publication). See Campbell, 510 U.S. at 577 (stating fair use doctrine "permits and requires courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is
book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." So even in the age before the Internet, digitally stored copyrighted works, and the photocopier, fair use in some sense has been implicitly recognized as part of Congress' constitutional duty "[t]o promote the Progress of Science and useful Arts..." Early copyright statutes enacted by the newly independent thirteen colonies had, in their various preambles, three major reasons for the underlying rationale for copyright. The majority or "positive" approach was to promote learning and encourage writing. The practical or "negative" approach was to stop the theft of copyrighted works. The middle or third approach treated the protection of intellectual property as a natural right, in a similar fashion to the way in which civil law designed to foster." (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)); ROBERT A. GORMAN AND JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS, 5 (5th Ed. 1999) (asserting privilege of renewal of copyright for fourteen more years was granted to author on condition of again entering title and publishing record as long as author survived first term).


43 Francine Crawford, Pre-Constitutional Copyright Statutes, 23 BULL. COPYRIGHT SOCY 11, 13, 16 (1975) (stating original 13 American Colonies took different approaches on subject of who should be protected, what was included, and how suits should be brought; but all colonies had unified wish to encourage scholarship and protect intellectual property rights).

44 See Crawford, supra note 43, at 14 (stating Massachusetts was primarily concerned with "the improvement of Knowledge, the progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, [which] greatly depend on the efforts of learned and ingenious Persons in the various Arts and Sciences. . ." (quoting Acts and Laws of the Commonwealth of Massachusetts 143 (1782))); see also Doris Estelle Long, First, "Let's Kill All The Intellectual Property Lawyers!": Musings on the Decline and Fall of the Intellectual Property Empire, 34 J. MARSHALL L. REV. 851, 854 (stating that, historically, intellectual property laws in the United States have served to encourage and protect human innovation and creativity).

45 See Crawford, supra note 43, at 15 (stating Pennsylvania, for example, used straightforward approach in wording of its language, which protected authors and publishers from financial damage from theft), see also Lloyd L. Weinreb, Copyright For Functional Expression, 111 HARV. L. REV. 1149, 1212 (1998) (stating that courts more often used author's rights over public good as justification for patent rights).

46 See Crawford, supra note 43, at 14 (stating New York considered copyright protection as natural right, stating that "... it is agreeable to the principles of natural equity and justice, that every author should be secured in receiving the price that may arise from the sale of his or her works . . .").
countries view the right to intellectual property, and the copyright statutes so enacted simply codified that right. Thus, fair use has become a part of these reasons and has come to promote the "positive" approach by permitting writers to build successively upon one another's works, and to promote the "negative" approach by stopping fair use from becoming unfair, overt appropriation.


Compare Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24 (2d Cir. 1976) ("Monty Python" case), where the court drew a distinction between American copyright law and copyright law in civil law countries, stating:

This cause of action, which seeks redress for deformation of an artist's work, finds its roots in the continental concept of droit moral, or moral right, which may generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it.

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law, . . . or the tort of unfair competition . . . " (emphasis added) (citations omitted), with Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997), which explained that:

No European version of droit moral goes this far. Until recently it was accepted wisdom that the United States did not enforce any claim of moral rights; even bowdlerization of a work was permitted unless the modifications produced a new work so different that it infringed the exclusive right under § 106(2) [i.e., the right to prepare derivative works based upon the underlying copyrighted work]. The Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5123-33, moves federal law in the direction of moral rights, but the cornerstone of the new statute, 17 U.S.C. § 106A, does not assist [the plaintiff Lee]. Section 106A(a)(3)(A) gives an artist the right to 'prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.'

with WGN Continental Broadcasting Co. v. United Video, Inc., 639 F.2d 622 (7th Cir. 1982) which held that no displacement of programming was threatened by requiring cable television systems to carry teletext to be viewed in conjunction with news programs because the same channel would carry the teletext and news programs.


See generally Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 546 (1985) (stating "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors") (emphasis added); see also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (stating that balance must be struck between rewarding private work and promoting public availability to arts).
Fair Use As Codified in the 1976 Copyright Act

The 1976 Copyright Act codified the defense of fair use in the form of four factors to be employed by the courts in determining exactly what is a "fair use." For example, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that 2 Live Crew's commercial parody of Roy Orbison's song "Oh, Pretty Woman" could be found to be a fair use in spite of the parody's commercial character and excessive borrowing of Orbison's song. Parody as a fair use is thus an example of permissible comment or criticism.

The first factor includes the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes (e.g., commercial use cuts against a finding of fair use, although not dispositive. 17 U.S.C. § 107. Under this factor, a transformative use cuts in favor of a finding of fair use, although that is also not dispositive. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The second factor involves the nature of the copyrighted work (i.e., fair use of works with greater value to the public, such as scientific journals). 17 U.S.C. § 107. This factor is more likely to be upheld than fair use of works with a low public value, such as a screenplay and the scope of fair use is undoubtedly wider when information conveyed relates to matters of high public concern. Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983). The third factor looks at the amount and substantiality of the portion used in relation to the copyrighted work as a whole, i.e., quality and quantity. 17 U.S.C. § 107. The fourth factor includes the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. For this factor, the court must consider whether the use will adversely affect the market for the plaintiff's copyrighted work, or even for a potential market as exhibited in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2d Cir. 1998).

Lower Federal courts have not applied *Campbell* consistently, e.g., *Dr. Seuss Enters., LP v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), which denied parody defense to publisher of a book that used familiar lyrics of the "Cat in the Hat" to describe O.J. Simpson murder trial. The court in *Dr. Seuss Enters.*, held such lyrics as "[a] plea went out to Rob Shapiro, Can you save the fallen hero? And Marcia Clark, hoary, hoary, was called in with a justice play" and "[a] man this famous never hires, lawyers like, Jacoby-Meyers... When you're accused of a killing scheme, you need to build a real Dream Team" as infringing. *Campbell*, 510 U.S. at 594 (holding that "[n]o such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one."). *See Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (noting that difference in purpose is not synonymous with transformation and that *Campbell* holds that transformativeness is critical question under this factor); *Storm Impact v. Software of the Month Club*, 13 F. Supp. 2d 782, 788 (N.D. Ill. 1998) (stating that transformative works more often promote science and arts, whereas works which only copy original are likely to be held to be infringements of copyrighted piece). *Cf.* *Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986) (holding "When Sonny Sniffs Glue" parody of "When Sunny Gets Blue" is fair use); *Elsmere Music, Inc. v. National Broadcasting Co., Inc.*, 482 F. Supp. 741, 746 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (holding "I Love Sodom" television parody of defendant's "Saturday Night Live" television program fair use of "I Love New York" theme song); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (rejecting defense of fair use for defendants' bawdy cartoon magazine that pictorially depicted characters originated by plaintiff, e.g., Mickey Mouse and Donald Duck, engaged in sexual situations and using drugs, court stated that defendants took "more than was necessary" to recall the Disney characters).
of a copyrighted work. The author's consent to a reasonable use of his work has always been implied by the courts in order to promote the constitutional requirement of promoting science and the useful arts, since prohibiting fair use would hamper writers from improving upon their peers' works. There seems to exist no better example of a permissible form of fair use than parody, in that the constitutional safeguards of free speech and freedom of the press have traditionally allowed criticism of and comment upon private as well as public figures and officials as protected speech under the First Amendment.

52 See e.g., Robert P. Merges, Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright, 21 AIPLA Q.J. 305, 312 (1993) (defining true parody as one that really criticizes or comments on original in some meaningful sense); Richard A. Posner, When Is Parody Fair Use?, 21 J. LEGAL STUD. 67 (1992) (defining parody as take-off on another work or genre of works); Alfred C. Yen, When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law, 62 U. COLO. L. REV. 79, 84 (1991) (stating that "[t]he long string of cases commits the courts to the principle that parodists are entitled to borrow more from an author's work than other users."); Geri J. Yonover, Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use, 14 CARDOZO ARTS & ENT. L.J. 79, 117 (1996) (noting that "[b]ecause parody relies on recognition of the host work, it necessarily 'copies' at least enough of that work to conjure it up for the viewing or listening public.").

53 H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944). Accord Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 550 (1985) (stating that reviewer may fairly cite largely from original work, if his design be really and truly to use passages for purposes of fair and reasonable criticism, but it is clear that if he thus cites most important parts of work, with view, not to criticize, but to supersede use of original work, and substitute review for it, such use will be deemed piracy (quoting Justice Story in Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C. D. Ma. 1841) (No. 4,901)).

54 See New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (announcing "actual malice" standard for libel involving public figures); see also Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 759 (1985) (addressing speech on matters of private concern); Gertz v. Robert Welch, Inc., 418 U.S. 323, 346-47 (1974) (holding private person does not have to meet Times "actual malice" standard). See generally Janice E. Oakes, Copyright and the First Amendment: Where Lies the Public Interest?, 59 TUL. L. REV. 135, 140 (1984) (noting that in situations where access to ideas alone is not sufficient to allow author to express his own ideas, and rights of free speech and free press demand access to particular form of expression contained in copyrighted work, doctrine of fair use provides means by which to balance exclusive rights of copyright owner against public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry); Lionel S. Sobel, Copyright and the First Amendment: A Gathering Storm?, 19 COPYRIGHT L. SYMP. ASCAP 43, 50-51 (1971) (stating that fair use is exception to copyright grounded on public policy and based on Constitution itself in that it promotes "Progress of Science and useful Arts").

55 See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (formulating modern incitement test whereby constitutional guarantees of free speech and free press do not permit states to forbid or proscribe advocacy of use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action thereby likely to incite or produce such action); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (holding that preaching on street, considered in light of constitutional guarantees, is protected speech and is not inciting breach of peace); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that ultimate good desired is better reached by free trade in ideas—best test of truth is power of thought to get itself accepted in competition of market for truth is only ground upon which one's wishes can be safely
If a work happens to be unpublished, as was President Gerald Ford's "purloined" manuscript in *Harper & Row Publishers, Inc. v. Nation Enterprises*, its unpublished nature will cut against a finding of fair use, though alone such nature cannot be the sole factor in a finding against fair use. Courts merely use its unpublished nature along with the four factors in determining whether the use is fair. For works transformative in nature, such a characteristic will cut in favor of a finding of fair use, although again it will not be dispositive.

carried out). *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (listing certain well-defined, narrowly limited classes of speech, prevention and punishment of which have never been thought to raise any Constitutional problem, including lewd and obscene, profane, libelous, insulting or "fighting" words—those by which their very utterance inflict injury or tend to incite immediate breach of peace, having no essential part of expression of ideas and of negligible social value); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (invoking clear and present danger test to identify substantive evils that may be present in speech and which Congress has right to prevent). *See generally Paul Goldstein, Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (noting that safeguard afforded by first amendment is central to maintenance of functions and values of democratic society); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (opining that marketplace of ideas would be utterly bereft, and democratic dialogue largely stifled if only ideas which might be discussed were those original with speakers).

*Harper & Row*, 471 U.S. at 549 (holding use of copyrighted manuscript, even stripped to verbatim quotes conceded by defendant, *The Nation*, to be copyrightable expression, was not fair use within meaning of Copyright Act).

*Harper & Row*, 471 U.S. at 552 (stating Copyright Act eliminated publication of material "as a dividing line between common law and statutory protection"); *see also* 3-12A NIMMER ON COPYRIGHT § 12A.04 (stating that exemptions from anti-circumvention violations only apply to "commercially exploited copyrighted work," thus excluding unpublished works from its scope); William F. Patry, *The Fair Use Privilege in Copyright Law*, 542 (BNA Books 2d ed. 1995) (1985); Joseph R. Re, *The Stage of Publication as a "Fair Use" Factor: Harper & Row, Publishers, Inc. v. Nation Enterprises*, 58 ST. JOHN'S L. REV 597, 613 (commenting that fact work is unpublished is critical element of its "nature").

See *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984) (holding that fair use is best described as mixed question of law and fact); 4-13 NIMMER ON COPYRIGHT § 13.05 (noting that courts use four factors to be considered for purpose of determining whether use is fair use, however, no steadfast rule may automatically be applied in deciding whether any particular use is "fair"); *see also* Robert A. Gorman & Jane C. Ginsburg, *Copyright for the Nineties: Cases and Materials*, 579-81 (The Michie Company 4th ed. 1983) (1981) (commenting on several post-*Harper & Row* decisions and pointing out that decisions followed Supreme Court's indication that unlicensed disclosure of expression of unpublished work would rarely be held fair); *New Era Publs. Int'l v. Henry Holt & Co.*, 873 F.2d 576, 577 (2d Cir. 1989) (finding that extensive reproduction of published and unpublished writings of L. Ron Hubbard, founder of Church of Scientology, amount to infringement of copyrights and that use of unpublished material cannot be held to pass fair use test); *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987) (holding that Salinger has right to protect expressive content of his unpublished writings for term of his copyright, and that right prevails over claim of fair use under "ordinary circumstances"); *Cf* 17 U.S.C. § 107 (2001) (adding in 1992 that fact that work is unpublished shouldn't bar fair use finding if such finding is upon consideration of all factors.

*See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 569 (stating that
Fair Use and Its Application To Mass Copying Made Possible By New Technologies

Two cases that predate the explosion of digital technology and the now ballooning problem of exploitation of digitally stored copyrighted works are Princeton University Press v. Michigan Document Services, Inc.,\(^60\) and American Geophysical Union v. Texaco, Inc.\(^61\) Both cases, nevertheless, are particularly applicable to the problem because they involve the critical fourth factor, which measures "the effect of the [alleged infringer's] use upon the potential market for or value of the [plaintiff's] copyrighted work," a market or value that could be detrimentally affected by too much borrowing or a more than fair taking of the underlying work.\(^62\) Whole takings of copyrighted phonorecords (CDs) and DVD movies over the Internet are what have prompted legal actions by some of the largest American and overseas corporations,\(^63\) remarkably reminiscent of when transformative use, such as parody, cuts in favor of fair use, but is not dispositive, because only one factor to be considered. \textit{Cf.} Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (holding "When Sonny Sniffs Glue" parody of "When Sunny Gets Blue" is fair use); Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y. 1980), \textit{aff'd}, 623 F.2d 252 (2d Cir. 1980) (holding "I Love Sodom" television parody of defendant's "Saturday Night Live" television program fair use of "I Love New York" theme song); Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (rejecting defense of fair use for defendants' bawdy cartoon magazine that pictorially depicted characters originated by plaintiff engaged in sexual situations and using drugs, because court stated that defendants took "more than was necessary to recall" Disney characters).\(^60\) 99 F.3d 1381 (6th Cir. 1996) (en banc), \textit{cert. denied}, 520 U.S. 1156 (1997). \(^61\) 60 F.3d 913 (2d Cir. 1995).

\(^{62}\) See 17 U.S.C. §107(4) (2001); \textit{see also} Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 145 (2d Cir. 1998) (stating that main concern in considering fourth factor of 17 U.S.C. §107 is whether secondary use "usurps or substitutes" marketing for original work); Paramount Pictures Corp. v. Carol Publishing Group, Inc., 11 F. Supp. 2d 329, 336 (S.D.N.Y. 1998), \textit{aff'd}, 181 F.3d 83 (2d Cir. 1999) (opining that "function of the fourth element of the fair use inquiry is to determine whether the copyright holder will be harmed because the infringing book acts as a market substitute for either the original or a derivative work"); \textit{Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.}, 996 F.2d 1366, 1378 (2d Cir. 1993) (holding that book about Twin Peaks television series that discusses show's popularity, characters, actors, plots, creator, music, and poses trivia questions about show is not fair use); \textit{Salinger v. Random House}, 811 F. 2d 90, 99 (2d Cir. 1987) (positing that "the need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime."); Benjamin E. Marks, \textit{Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered}, 72 N.Y.U. L. REV. 1376, 1399-1400 (1997) (discussing court's recognition of privacy-based exception).

\(^{63}\) See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000) (stressing that fair use defense does not apply to "technology designed to circumvent technological measures that control access to copyrighted works"); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (denying defendant's fair use defense to its facilitation of compact disc recordings over Internetas
Universal Studios first sued Sony as a contributory infringer for making the videocassette recorder, because Universal feared the market for its movies would dry up if people could record for free. Now, as we can see with the growth of Blockbuster video stores and the home viewing market, Universal and others in its stead are ostensibly more than happy that Sony opened up a new market. It is submitted that the Internet will do the same, provided fair use of digitally stored works is not permitted to be whittled away, but instead is protected by the very forces that oppose it today; it will be an economic necessity for many of the major corporations involved in digital media. Hence, as soon as these large corporations can figure out how to embrace the new technology of the Internet and allow decryption of digitally stored books and movies in a manner that will not amount to mass misappropriation, they will most likely lobby for a change in §1201 of the DMCA, precisely because it will then be in their best interests—in at least a few years down the road.


In Princeton, the defendant was a commercial copyshop that reproduced substantial parts of copyrighted textbooks and treatises, etc., and bound them into "coursepacks" to sell to students at the University of Michigan. The defendant never obtained permission from the copyright holders to reproduce the works it copied. The court upheld the district court's holding that the exploitation of the copyrighted works was not a fair use. In making its determination, the court treated the fourth factor as *primus inter pares*, and concluded that the alleged infringer failed to satisfy his burden of proof, which rested on him since the use was commercial in nature. The court considered that under *Harper & Row*, "[t]o negate fair use, one need only show that if the challenged use 'should become widespread, it would adversely effect the potential market for the copyrighted work.'" On this ground the court found that the

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68 *Princeton University Press*, 99 F.3d at 1391 (affirming district court's finding that it was not fair use for the copyshop to copy over 30% of copyrighted works); see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994), (stating "fair use doctrine permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster" (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1536 (S.D.N.Y. 1991) (holding Kinko's copyshop violated copyright statute by creating and selling coursepacks without permission from publishing houses that held copyrights to copied works).

69 See *Princeton University Press* v. Michigan Document Services, Inc. 99 F. 3d 1381, 1381 (6th Cir. 1996) (quoting *Sony*, 464 U.S. at 417, 451 (1984) that burden of proof as to market effect rests with the copyright holder if the challenged use is if a 'noncommercial' nature and that alleged infringer has burden if challenged use is 'commercial' in nature, but finding that strength of *Sony* presumption may vary according to context and presumption disappears entirely when challenged use is one that transforms original work into new artistic creation; see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590-91 (1994) (stating that there is presumption of market harm where use is commercial in nature).


defendant’s copying of copyrighted material to sell in coursepacks to students did not amount to a fair use.\textsuperscript{72}

The holding in \textit{Princeton} could be applied to the new technology of digital media, for it seems likely that a court would hold that if what the defendant did with a photocopier he had done with digitally stored works, that too would not be a fair use. Yet what if a professor simply wanted to photocopy a few articles from works of scholarship for use in an educational setting and not for commercial profit?\textsuperscript{73} If the works were digitally stored, the professor could not make a fair use of them at all without violating § 1201; instead, the professor would have to pay for use of each and every article. The dissent in \textit{Princeton} argued against such a result, believing that requiring the defendant to pay permission fees ("pay-per-use") is inconsistent with the primary mission of the Copyright Act.\textsuperscript{74} The majority agreed otherwise, explaining that even if the copying had been performed by a "nonprofit educational" institution, or by the students themselves, and had constituted fair use, "it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself."\textsuperscript{75} The conflict here between the majority and the dissent


exhibits the problem posed by the development of faster means of copying permitted by the photocopier; the scale upon which copying on the Internet with digital technology is permitted is millions of times greater.\textsuperscript{76} Granted that in Princeton a commercial copyshop should be required to at least get authorization from the copyright holders to make its coursepacks, yet what if students and professors had been the ones making the coursepacks for themselves to obviate the need to purchase textbooks? Surely they possess a stronger argument for fair use in line with the true purpose of the copyright laws, though the adverse impact on copyright holders, in the form of zero or reduced compensation for their works, must be mitigated as well.\textsuperscript{77}

\textsuperscript{76} Gorman \& Ginsberg, supra note 58, at 674 states that with the application of the fair use doctrine to new technologies:

\begin{quote}
The advent and wide availability of the photocopy machine, and more recently, of personal computers, have posed important challenges to the enforcement of copyright law. They have also compelled reconsideration of the role of the fair use doctrine in shielding personal and educational copying... [T]he ever-expanding availability and storage capacity of digital media and copying devices promise to supplant the photocopier as the major means of private and institutional copying.

Historically, the development of faster, more effective means of copying has obliged the copyright system to respond to the new technology. The photocopier affords one illustration. Copying by hand was sufficiently arduous to carry its own limitations as to both length of copied passages and the number of copies. The same was true of copying by typewriter and even by early forms of duplicating machines, such as the mimeograph (where the prototype had to be generated by typewriting and could only be used a limited number of times). Wide use of the photocopy machine brought the capacity to generate copies unlimited in length and number. Copymaking became so widely dispersed throughout businesses, schools, libraries and even homes as to be largely beyond the reach of practicable monitoring. Of course, much of what was photocopied would have been unprotectible by copyright, such as eighteenth century poetry and federal court opinions. Just as obviously, much of what has been copied is material that is protected by the law of copyright.

See generally Jessica Litman, Copyright and Information Policy, 55 Law \& Contemp. Probs. 185 (1992); Jessica Litman, Copyright and Technological Change, 68 Or. L. Rev 275 (1989) (discussing revisions in copyright law); Jessica Litman, Revising Copyright Law for the Information Age, 75 Or. L. Rev. 19 (1996) (discussing copyright law and new technology).
\end{quote}

\textsuperscript{77} [Student and professor's] access to books, and their commitment to dissemination of knowledge, induce schools and libraries to use photocopying in aid of what they view as their fundamental and valuable social purposes. This nonprofit status (for the most part) contributes to the plausibility of their reliance on the fair use defense. On the other hand, the volume of photocopying done by such institutions (particularly colleges and universities), the large potential adverse impact upon copyright owners, and the visibility
In *American Geophysical*, defendant Texaco was charged with unauthorized copying because its 400 to 500 research scientists regularly and systematically photocopied scientific journals in their day-to-day work. Although the work of the scientists themselves is considered noncommercial and in the public interest, which would cut in favor of fair use, the court reasoned that Texaco itself was directly benefiting from the work of the scientists as employees, and hence the copying was deemed commercial in nature and therefore cut against a finding of fair use. The court concluded that Texaco would have to either subscribe to more copies of scientific research journals, or have its scientists share copies, but what it was doing was definitely not a fair use.

To analogize, if what Texaco was doing with photocopiers it had instead performed with its computers over the Internet, it most likely would not have been held by a court to be a fair use. The fact of the matter is that § 1201 is designed to prevent exactly what Texaco did with photocopiers from someone doing the same over the Internet on an even more massive scale. This danger of exponentially increased unauthorized copying on the Internet is precisely the present-day problem that Congress has

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GORMAN & GINSBERG, *supra* note 58, at 674.


79 See *American Geophysical*, 60 F.3d at 921-923 (discussing whether use by scientists was commercial or noncommercial).

80 See *American Geophysical*, 60 F.3d at 931; see also Jonathan Evan Goldberg, *Now That The Future Has Arrived, Maybe The Law Should Take A Look: Multimedia Technology And Its Interaction With The Fair Use Doctrine*, 44 AM. U.L. REV. 919, 950 (1995) (explaining that corporation's dispersion of "free" copies resulted in plaintiff's loss of revenue and was determinative against finding fair use privilege); Steven D. Smit, Esq., "Make A Copy For The File . . .": Copyright Infringement by Attorneys, 46 BAYLOR L. REV. 1, n.184 (1994) (noting court's decision that because licensing program could yield authorized copies at reasonable price, copying done by defendants was not fair use).

81 See generally Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L. J. 1, 42 (1998) (noting that several courts have held that making of temporary copy through online browsing may infringe copyright); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 10 (1987) (highlighting that by extending traditional copyright to new technology doctrinal issues emerged); DanThu Thi Phan, *Will Fair Use Function on the Internet?*, 38 COLUM. L. REV. 169, 186-206 (1998) (exploring unique characteristics of Internet upon copyright scheme and fair use doctrine and some proposals on how to manage new medium).
tried to eliminate in the short term.\textsuperscript{82} Let us turn now to how Congress’ answer has not only provided an airtight solution to this problem on the Internet, but also effectively fettered its own mandate to promote the progress of science and the useful arts by blocking any type of fair use of works stored in digital media.\textsuperscript{83}

**THE UNAVAILABILITY OF FAIR USE AS A DEFENSE TO ACCESSING AND COPYING DIGITALLY STORED COPYRIGHTED WORKS**

In *Universal City Studios, Inc. v. Reimerdes*,\textsuperscript{84} eight major United States motion picture studios sought an injunction against a number of computer hackers from posting decryption technology on their Internet website.\textsuperscript{85} The studios sell Digital Versatile Disks (DVDs)\textsuperscript{86} containing digitally stored motion pictures, which are protected by an encryption system called CSS.\textsuperscript{87} The studios generally first release the movies in theatres


\textsuperscript{84} 111 F.Supp. 2d 294 (S.D.N.Y. 2000).

\textsuperscript{85} See generally Hillary Rosner, *Hollywood vs. The Hacker*, N.Y. MAG., Oct. 23, 2000, at 55 (recounting story of defendant and suit against him, including his plans to take case to Supreme Court, if necessary); Harmon, *supra* note 7, at C1 (explaining judge’s ruling that MP3.com had willfully infringed copyrights when it allowed users to listen to music from connected computer after indicating they possessed CD); Stross, *supra* note 7, at 46 (discussing story of journalist who was sued for publishing descrambling code).

\textsuperscript{86} DVDs are five-inch wide disks capable of storing more than 4.7 gigabytes of data, and can be used to hold full-length motion pictures in digital form. *See Reimerdes*, 111 F. Supp. 2d at 307; *see also* Michael Spink, *Authors Stripped of Their Electronic Rights in Tasini v. New York Times Co.*, 32 J. MARSHALL L. REV. 409, 416 (1999); Eric W. Young, *Universal City Studios, Inc. v. Reimerdes: Promoting the Progress of Science and the Useful Arts by Demoting the Progress of Science and the Useful Arts?*, 28 N. KY. L. REV. 847, 848 (2001).

\textsuperscript{87} The Court defined CSS as:

\texttt{"...Content Scramble System, ... an access control and copy prevention system}
nationwide, and subsequently release them in DVD format for "home video" exhibition. The decryption technology posted on defendants' website, called DeCSS, enabled the decryption of a movie protected by CSS. Since the DVDs were encrypted, they could only be viewed on a DVD player or drive containing CSS, which is a decryption key enabling one to access the DVD's content and thereby play the movie on a home DVD player.

The defendants argued, *inter alia*, that their use was non-

for DVDs developed by the motion picture companies, including plaintiffs. It is an encryption based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, *but not copy*, motion pictures on DVDs. The technology necessary to configure DVD players and drives to play CSS-protected DVDs has been licensed to hundreds of manufacturers in the United States and around the world."


On the development of DVD and CSS, the court summarized:

Motion pictures first were, and still are, distributed to the home market in the form of video cassette tapes. In the early 1990's, however, the major movie studios began to explore distribution to the home market in digital format, which offered substantially higher audio and visual quality and greater longevity than videocassette tapes. This technology, which in 1995 became what is known today as DVD, brought with it a new problem - increased risk of piracy by virtue of the fact that digital files, unlike the material on video cassettes, can be copied with degradation from generation to generation. In consequence, the movie studios became concerned as the product neared market with the threat of DVD piracy.

Reimerdes, 111 F.Supp.2d at 309; see also supra, note 14; Katz, supra note 86, at 59.

The Court provided some background on how DeCSS was born:

In late September 1999, Jon Johansen, a Norwegian subject then fifteen years of age, and two individuals he 'met' under pseudonyms over the Internet, reverse engineered a licensed DVD player and discovered the CSS encryption algorithm and keys. They used this information to create DeCSS, a program capable of decrypting or 'ripping' encrypted DVDs, thereby allowing playback on non-compliant computers as well as the copying of decrypted files to computer hard drives. Mr. Johansen then posted the executable code on his personal Internet website and informed members of an Internet mailing list that he had done so. Neither Mr. Johansen nor his collaborators obtained a license from the DVD [Copy Control Association].

Reimerdes, 111 F.Supp.2d at 311.

The defendants also claimed that their posting of DeCSS on their Internet website was solely to achieve interoperability with the Linux software operating system, so that they could play DVDs on such a system. Reimerdes, 111 F.Supp.2d at 320. This claim is a claim of reverse engineering, which, if the court had concluded what really was the defendants' true purpose in decrypting CSS, would have provided a valid exemption for the defendants under 17 U.S.C. § 1201(f) of the DMCA. Cf. Sega Enterprises, Ltd. v. Accolade, Inc., 977 F.2d 1510, 1510 (9th Cir. 1992) (holding that 1976 Copyright Act permitted defendants, who were neither copyright holders nor licensees, to disassemble, i.e., reverse engineer, copyrighted computer program in order to gain understanding of unprotected functional elements of program); Atari Games Corp. v. Nintendo of America, 975 F.2d 832 (Fed. Cir. 1992); Computer Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).
infringing, because decryption technology like DeCSS is necessary in order to make a fair use of the digitally encrypted works.\textsuperscript{91} The Court held to the contrary, however, stating that CSS effectively controls access to the plaintiff’s copyrighted works, and that the defendant’s statutory fair use argument was entirely without merit.\textsuperscript{92} The Court reiterated that the defendants were not being sued for copyright infringement, for which an argument of fair use would be appropriate.\textsuperscript{93} Instead, the defendants were being sued for violating §1201(a)(2) of the DMCA for providing “technology primarily designed to circumvent technological measures that control access to copyrighted works.”\textsuperscript{94} The Court concluded that the Digital Millennium Copyright Act clearly covered defendants’ violation of the anti-circumvention provisions stated therein.\textsuperscript{95}

\textsuperscript{91} See Reimerdes, 111 F. Supp. 2d at 304.

\textsuperscript{92} See Reimerdes, 111 F. Supp. 2d at 321, 324.

\textsuperscript{93} Judge Lewis A. Kaplan interestingly, yet cautiously, pointed out that:

\begin{quote}
[s]ociety increasingly depends upon technological means of controlling access to digital files and systems, whether they are military computers, bank [or] . . . academic records, copyrighted works or something else entirely. There are far too many who, given any opportunity, will bypass those security measures, some for the sheer joy of doing it, some for innocuous reasons, and others for more malevolent purposes. Given the virtually instantaneous and worldwide dissemination widely available via the Internet, the only rational assumption is that once a computer program capable of bypassing such an access control system is disseminated, it will be used . . .
\end{quote}

There was a time when copyright infringement could be dealt with quite adequately by focusing on the infringing act. If someone wished to make and sell high quality but unauthorized copies of a copyrighted book, for example, the infringer needed a printing press. The copyright holder, once aware of the appearance of infringing copies, usually was able to trace the copies up the chain of distribution, find and prosecute the infringer, and shut off the infringement at the source.

In principle, the digital world is very different. Once a decryption program like DeCSS is written, it quickly can be sent all over the world. Every recipient is capable not only of decrypting and perfectly copying plaintiff’s copyrighted DVDs, but also of retransmitting perfect copies of DeCSS and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear. Indeed, the difference is illustrated by comparison of two epidemiological models describing the spread of different kinds of disease.

\textsuperscript{94} See id. at 331.

\textsuperscript{95} The \textit{Reimerdes} court continued “[i]f Congress had meant the fair use defense to apply to such actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate.” \textit{Reimerdes}, 111 F.Supp.2d at 322. \textit{See} Amy Harmon, \textit{Copyright Office Backs Ban on Code-Breaking Software}, N.Y. TIMES, Oct. 30, 2000, at C16 (noting when judge issued ruling, law did not prohibit actual use of such device by individuals and was pending review by copyright office because Congress had asked copyright office to determine whether any exemptions were necessary to ensure that rights of the users of
The defendants further argued that the DMCA was unconstitutional as a violation of the First Amendment because it blocks the distribution of DeCSS, a computer program that constitutes free speech. Assuming, *arguendo*, that the executable code of DeCSS was indeed expression, the Court reasoned that such code was more functional than expressive, and that the anti-trafficking provision of the DMCA was a "valid exercise of Congress' authority." In fact, the Court made a strong argument that the DMCA was more in furtherance of the goals of copyright law than not, by stressing the DMCA's functionality and not its suppression.

Yet in holding that there was no impingement on the First Amendment rights of the defendants, the *Reimerdes* court relied in part on *Junger v. Daley*, which held that encryption software in the form of source code is merely functional and not expressive, protected speech. This decision was reversed, copyrighted works were balanced with those of copyright holders).


97 *See* Reimerdes, 111 F. Supp. 2d at 332. The court qualified its holding on this issue, however, stating that:

...it is important to emphasize that this is a very narrow holding. The restriction the Court here upholds, notwithstanding that computer code is within the area of First Amendment concern, is limited (1) to programs that circumvent access controls to copyrighted works in digital form in circumstances in which (2) there is no other practical means of preventing infringement through use of the programs, and (3) the regulation is motivated by a desire to prevent performance of the function for which the programs exist rather than any message they might convey. One readily might imagine other circumstances in which a governmental attempt to regulate the dissemination of computer code would not similarly be justified.

Id.

98 *Reimerdes*, 111 F.Supp.2d at 329. As another court has noted, the DMCA was enacted "both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for "passive" and "automatic" actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider." For the proposition that the DMCA was enacted to strike a balance between the protection afforded a copyright owner and society's access to information, see Eddan Elizafon Katz, *Reanetworks, Inc. v. Streambox, Inc. & Universal City Studios, Inc. v. Reimerdes*, 16 BERKELEY TECH. L.J. 53, 53 (2001).

99 8 F. Supp. 2d 708 (N.D. Ohio 1998), rev'd, 209 F.3d 481 (6th Cir. 2000). The *Junger* court found that while exporting encryption source code may occasionally possess expressive elements, First Amendment protection does not necessarily attach to it. *Id.* at 716-717. The court in *Reimerdes* found that even assuming that DeCSS possessed expressive content, such content was minimal when compared to its essentially functional component. *See* Reimerdes, 111 F.Supp. 2d 335.
however, four months after the decision in \textit{Reimerdes}.\footnote{See \textit{Junger v. Daly}, 209 F.3d 481 (2000). The \textit{Junger} court, citing \textit{Hurley v. Irish-American Gay, Lesbian and Bisexual Group}, 515 U.S. 557, 569 (1995), explained that: The issue of whether or not the First Amendment protects encryption source code is a difficult one because source code has both an expressive feature and a functional feature. The United States does not dispute that it is possible to use encryption source code to represent and convey information and ideas about cryptography and that encryption source code can be used by programmers and scholars for such informational purposes. Much like a mathematical or scientific formula, one can describe the function and design of encryption software by a prose explanation; however, for individuals fluent in a computer programming language, source code is the most efficient and precise means by which to communicate ideas about cryptography.

The district court concluded that the functional characteristics of source code overshadow its simultaneously expressive nature. The fact that a medium of expression has a functional capacity should not preclude constitutional protection. Rather, the appropriate consideration of the medium's functional capacity is in the analysis of permitted government regulation.

The Supreme court has explained that “all ideas having even the slightest redeeming social importance,” including those concerning “the advancement of truth, science, morality, and arts” have the full protection of the First Amendment... This protection is not reserved for purely expressive communication.

The Supreme Court has expressed the versatile scope of the First Amendment by labeling as “unquestionably shielded” the artwork of Jackson Pollock, the music of Arnold Schoenberg, or the Jabberwocky verse of Lewis Carroll, [citing \textit{Hurley}]. Though unquestionably expressive, these things identified by the Court are not traditional speech. Particularly, a musical score cannot be read by the majority of the public but can be used as a means of communication among musicians. Likewise, computer source code, though unintelligible to many, is the preferred method of communication among computer programmers.

Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.

\textit{Junger}, 209 F.3d at 481-485. The \textit{Junger} court was not alone in holding that computer source code can merit First Amendment protection. The court in \textit{Bernstein v. United States Dept of State}, 922 F. Supp. 1425, 1434-1436 (N.D. Cal. 1996) found that computer source code qualifies as speech for First Amendment purposes).\footnote{\textit{Junger}, 209 F.3d at 481-485. The exemptions provided for in the DMCA have been criticized for falling short of “conventional understandings of fair use.” Robert C. Denicola, \textit{Mostly Dead? Copyright Law in the New Millennium}, 47 J. COPYRIGHT SOCY USA 193, 203 (2000). The DMCA has also been criticized for failing to protect the fair use rights of contents users. David Nimmer, \textit{A Rift on Fair Use in the Digital Millenium Copyright Act}, 148 U. Pa. L. Rev. 673 (2000). For the argument that the DMCA as enacted does not provide adequate safeguards to protect the fair use of digital media, see John R. Therien, \textit{Exorcising the Specter of a “Pay-Per-Use” Society: Toward Preserving Fair Use and the Public Domain in the Digital Age}, 16 BERKELEY TECH. L.J. 979 (2001).}

Although it is conceded here that had \textit{Junger} been available to the \textit{Reimerdes} court, \textit{Reimerdes} would likely have had the same result, it goes to the weight of the argument that fair use as applied to digital media is in significant danger of wasting away.\footnote{See Hillary Rosner, \textit{Hollywood vs. The Hacker}, N.Y. MAG. Oct. 23, 2000, at 56 (quoting defendant’s lawyer as stating that this was first case brought under Digital Copyright Act).} What is important about \textit{Reimerdes} — the first case to be brought under the DMCA\footnote{See \textit{Hillary Rosner}, \textit{Hollywood vs. The Hacker}, N.Y. MAG. Oct. 23, 2000, at 56 (quoting defendant’s lawyer as stating that this was first case brought under Digital Copyright Act).} — is that the court recognized how
"technological means of controlling access to works creates a risk, depending on future technological and commercial developments, of limiting access to works that are not protected by copyright[,] such as works upon which copyright has expired." 103 Although the defense of fair use raised by the defendants in this case was inappropriate, 104 this concession nevertheless reflects the potential problem with the DMCA's bar of the use of technological means to decrypt an encrypted work for a fair use. 105

In RealNetworks, Inc. v. Streambox, Inc. 106 the court granted an injunction against the defendant's "VCR" product that was programmed to trick the plaintiff's "RealNetwork" server


103 See Reimerdes, 111 F. Supp. 2d. at 322 n.159 (concluding defendants "have raised a legitimate concern about the possible impact on traditional fair use of access control measures in the digital era."). See generally Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. REV. 354, 421 (1999) (explaining DMCA allows copyright holders to "extinguish the privileges reserved to users under background copyright law"); Nimmer, supra note 9, at 738-40 (arguing that user exemption provisions in DMCA have failed to secure balance between user and owner rights); Hannibal Travis, Comment, Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment, 15 BERKELEY TECH. L.J. 777, 861 (2000) (criticizing DMCA for providing copyright holders with virtually complete control over access and use of their works); Tiffany D. Trunko, Note, Remedies for Copyright Infringement: Respecting the First Amendment, 89 COLUM. L. REV. 1940, 1942 (1989) (proposing that courts bifurcate their analysis of liability and remedy in copyright infringement cases).

104 See Reimerdes, 111 F. Supp. 2d at 322 (explaining defendants were not sued for copyright infringement, but rather for offering and providing technology designed to circumvent technological measures that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act); see also Realnetworks, Inc. v. Streambox, Inc., 2000 U.S. Dist. LEXIS 1889, at *17 (2000) (stating that claims arising under Section 1201 of DMCA occupy "a niche distinct from copyright infringement" and are removed from Act's definition of copyright infringement). See generally Jason Sheets, Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & Innovative Markets, 23 HASTINGS COMM. & ENT. L.J. 1, 16-18 (2000) (concluding legislative history of DMCA is "at best ambiguous, and at worse silent, on the availability of the fair use defense for § 1201 claims.").

105 See Jonathan Dowell, Comment, Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in a Digital World, 86 CALIF. L. REV. 843, 843 (1998) (concluding "notwithstanding copyright owner's ostensible ability to license these uses cheaply, fair use remains an essential tool to allow fragmented uses that will further copyright's major policy goals"). See generally Jessica Litman, Copyright and Information Policy, 55 LAW & CONTEMP. PROBS. 185 (1992); Jessica Litman, Copyright and Technological Change, 68 OR. L. REV. 275 (1989); Jessica Litman, Revising Copyright Law for the Information Age, 75 OR. L. REV. 19 (1996).

computer into thinking the VCR was a "RealPlayer," a software program located on an end-user's computer. Streambox reverse engineered the RealPlayer software and accessed the "secret handshake," a secret code comparable to CSS (in the same manner that the defendants in Reimerdes decrypted CSS to ascertain DeCSS), and determined the "secret handshake" that assures files hosted on a RealServer are sent only to a RealPlayer. The defendants were charged with violating §§ 1201(a)(2) (circumventing access protection) and 1201(b) (circumventing anticopying measure).

Streambox argued that the VCR permitted a consumer to make a fair use of RealMedia files and as such is a lawful technological device. The Court, though conceding that "Streambox's VCR is entitled to the same 'fair use' protections the Supreme Court afforded to video cassette recorders used for 'time-shifting' in Sony Corp. of America v. Universal City Studios, Inc."
concluded that copyright owners who have elected not to have their works copied, even though posted on RealServers, would have their rights infringed if Streambox were allowed to purposefully circumvent the Copy Switch technological measure put in place by RealNetworks, which blocks copying of streaming sound or video clips accessed by the consumer. The Court therefore concluded that an injunction against the defendant's VCR device would serve the public's interest because otherwise copyright owners would be reluctant to make their audio and visual works available on the Internet for fear that they could too easily be appropriated in their entirety.

RECONCILING A SOLUTION

In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court held in a 5-4 decision that "time shifting" was a circumvent technological measures that prevent consumers from gaining unauthorized access to or making unauthorized copies of works protected by the Copyright Act. Instead, Congress specifically prohibited the distribution of the tools by which such circumvention could be accomplished. The portion of the Streambox VCR that circumvents the technological measures that prevent unauthorized access to and duplication of audio and video content therefore runs afoul of the DMCA.


The Court reasoned that:

...under the DMCA, a product or part thereof 'circumvents' protections afforded a technological measure by 'avoiding[,] bypassing, removing, deactivating or otherwise impairing' the operation of that technological measure. 17 U.S.C. §§ 1201(b)(2)(A), 1201(a)(2)(A). Under that definition, at least a part of the Streambox VCR circumvents the technological measures RealNetworks affords to copyright owners. Where a RealMedia files stored on a RealServer, the VCR 'bypasses' the secret handshake to gain access to the file. The VCR then circumvents the Copy Switch, enabling a user to make a copy of a file that the copyright owner had sought to protect.


See *Sony*, 464 U.S. at 417. After citing subcommittee hearing, the Court defined
fair use of the plaintiff movie studios' copyrighted programs and that Sony was not liable as a contributory infringer. The movie studios alleged that home videotaping, made possible by Sony's manufacture of the Betamax video tape recorder, constituted an infringement of copyright. The Court rejected this argument on the basis that under § 107(2), time shifting for home use was not a commercial or profit-making purpose, and must be characterized as a noncommercial, nonprofit activity. Furthermore, the Court reasoned that under § 107(4), the "effect of the use upon the potential market for or value of the copyrighted work," the prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit. This landmark decision opened wide the home entertainment market for videocassette tapes. Now, with the advent of DVD players, it is submitted that the court's reasoning

"time shifting" as "the recording of a program that the VTR [video tape recorder, precursor to the videocassette recorder (VCR)] owner cannot view as it is being televised and the watching of the taped program at a later time . . ." Sony, 464 U.S. at 417.


See Sony, 464 U.S. at 449, 454-455 (holding time shifting as fair use of copyrighted material).


But see Michael Himowitz, U.S. Law Limits Digital Fair Use, BALTIMORE SUN, Jul. 23, 2001 at 1 (explaining how DMCA limits right to fair use); Frank Thorberg and Tom Spring, New Shackles on Your CD, Video Copying, PC WORLD, Jan. 1, 2002 at 20 (describing entertainment industry efforts to use technology which conflicts with consumer's right of fair use).
is applicable to using digital technology to time shift digitally broadcasted programs by recording them for later viewing, but that the DMCA has not only banned fair use by outlawing circumvention measures to access controls on digitally stored copyrighted works, but that *Sony* has in some respects been weakened as viable authority since defendants now have to avoid violating the DMCA and not merely a charge of copyright infringement. 121

The cases discussed thus far have not specifically involved an exact replica of the facts of *Sony*. Instead, they have involved violations of the anti-circumvention provisions of the DMCA. Some commentators have argued that the enactment of the DMCA means that *Sony* is not a viable defense for manufacturers of decryption devices because it is the violation of § 1201 that manufacturers must avoid, and not a charge of contributory copyright infringement. 122 This contention is literally true in the sense that the defendants in cases like *Reimerdes* and *RealNetworks* were charged with violating the anti-circumvention provisions of § 1201 of the DMCA and not with contributory infringement. 123 Yet this contention must not be taken out of context or be interpreted too broadly: the DMCA bars technological measures used to circumvent access controls

121 See 1 NIMMER ON COPYRIGHT (1999 Supp.), § 12A.181B:

[1]Those who manufacture equipment and products generally can no longer gauge their conduct as permitted or forbidden by reference to the *Sony* doctrine. For a given piece of machinery might qualify as a stable *sic* item of commerce, with a substantial noninfringing use, and hence be immune from attack under *Sony*’s construction of the Copyright Act – but nonetheless still be subject to suppression under Section 1201 . . . [E]quipment manufacturers in the twenty-first century will need to vet their products for compliance with Section 1201 in order to avoid a circumvention claim, rather than under *Sony* to negate a copyright claim.

[2]Those who manufacture equipment and products generally can no longer gauge their conduct as permitted or forbidden by reference to the *Sony* doctrine. For a given piece of machinery might qualify as a stable *sic* item of commerce, with a substantial noninfringing use, and hence be immune from attack under *Sony*’s construction of the Copyright Act – but nonetheless still be subject to suppression under Section 1201 . . . [E]quipment manufacturers in the twenty-first century will need to vet their products for compliance with Section 1201 in order to avoid a circumvention claim, rather than under *Sony* to negate a copyright claim.

122 See id.

123 See *Reimerdes*, 111 F.Supp.2d, at 322. (highlighting that defendants were not sued for copyright infringement); see also Columbia Pictures Indus. Inc. v. Redd Horne, Inc., 749 F.2d 154, 160 (3d Cir. 1984) (requiring defendant act in concert with infringer and know of infringing activity). But cf. *RealNetworks*, 2000 U.S. Dist. LEXIS 1889, at 21-22 (conceding that ‘Streambox’s VCR is entitled to the same ‘fair use’ protections the Supreme Court afforded to video cassette recorders used for ‘time-shifting’ in *Sony*).
on digitally stored copyrighted materials. In its purpose, the DMCA was meant to prevent overt appropriation of copyrighted works, especially of CDs and DVDs on the Internet, and Reimerdes and RealNetworks involve cases where the defendants violated the statutory provisions of the DMCA directly and hence were held liable for it. Surely Sony should not cease to be viable authority just because the newly enacted provisions of the DMCA ban circumvention measures in their aim to stop overt appropriation of copyrighted works. The DMCA does not seem to have been enacted to overrule Sony by banning home use of “time-shifting” for digital recording. If it were, it would directly and expressly be eradicating the fair use doctrine for good, which would provide more than an ample amount of fodder for this Note to be redundant. Instead, it is the implicit ban on anti-circumvention measures that spells the shrinking of the fair use doctrine as applied to digital media. For the DMCA itself, as a response to overt appropriation of CDs and DVDs on the Internet, has stamped out fair use for now as a response to this mass appropriation, and in turn has weakened claims of “home use” “time-shifting” that Sony has stood for in the last two decades of the twentieth century.

CONCLUSION

The fair use doctrine historically has stood the test of time as it has been applied to new technologies that have completely changed the way in which copyright infringement has been committed. From the invention of the printing press to the

124 17 U.S.C. § 1201(b) states in part:
(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—
   (D) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;
   (E) has only limited commercially significant purpose or use other to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or
   (F) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

mimeograph to the photocopier, and today with the digital technology accessible via the Internet, the fair use doctrine is again withstanding these ever more efficient and cheaper ways in which copying is performed.

The Digital Millennium Copyright Act has swiftly struck down copyright pirates on the Internet. It is an adequate and appropriate law by which Congress has decided to deal with Internet piracy. However, as noted herein, the perpetual pendulum that swings between the fair use rights of individuals, as part of Congress’ mandate “[t]o promote the Progress of Science and useful Arts...”\textsuperscript{126} and Congress’ power to confer upon authors a limited monopoly on their writings, has started with an unusually strong momentum towards the monopoly side. Although it may be too soon at the start of this new century to tell whether fair use will survive yet another new technological breakthrough, this Note has attempted to function as a prescient porthole into the high-speed, digital world that we are rapidly coming into. It is only with a look back at the constitutional safeguards and judicial precedents that have propelled us thus far that we can take the fair use rights of individuals with us into the new millennium.

\textsuperscript{126} U.S. CONST. art I, § 8, cl. 8.