THE DIGITAL MILLENNIUM COPYRIGHT ACT : PROTECTION OF CREATIVE CONTENT OR A TOOL FOR UNFAIR COMPETITION ?

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INTRODUCTION

The Digital Millennium Copyright Act (the "DMCA"), among other things, added § 1201 to Title 17, creating a federal cause of action against those who circumvent technological measures that control access to a work,[1] manufacture and offer to the public any technology that is primarily designed for the purpose of circumventing a technological measure that effectively controls access to the work,[2] and manufacture and offer to the public any technology that is primarily designed for the purpose of circumventing a technological measure that effectively protects a right of a copyright holder.[3] During its life as a bill, and, certainly, since its enactment, the "anti-circumvention" provisions have been controversial. Some say that the new provisions give the creators, publishers, and or holders of rights in works far too much power to control those works.[4] It has also been argued that the anti-circumvention provisions of the DMCA violate the Constitution,[5] and the right of the public to have access to a work, in essence, "the right to read."[6] Others maintain that even though there was not an express literal statutory right in the Copyright Act to control access to works, a right of access is inherently contained therein.[7]

This Article will examine the issue on both sides and look at some of the following questions. Whose right is more important, the right of the copyright holder to control access and uses, or the right of the public to have access and use the work? Is the "right of access" really anything new, or is it merely the "lock and key" that prevents unauthorized users and trespassers in a world in which the boundaries are no longer merely physical? Should a creator of copyrightable material be able to determine who gets access to a work and under what conditions? Owners and operators of movie theatres and concert halls "control access" all the time by charging admission and requiring tickets? Museums charge admission, and also refuse to allow individuals to photograph "public domain" works. Cable companies have for years prior to the enactment of the DMCA "scrambled" their content to prevent non-subscribers from having access. Federal law has prevented the manufacture, sale, or use of devices to circumvent the "scrambling." Yet, in general, there is no public outcry against these limitations to access.

In the non-digital world, it is easy to physically keep books, movies, and sound recordings away from the public. In the digital world, new concepts of property and trespass may have to be formulated. In a digital world, the boundaries between the proper application of state laws for violations of property rights and federal laws for unauthorized use will also have to be determined.

While limited access controls are acceptable in certain circumstances, broad prohibitions against the creation, distribution, and use of anti-cir-cumvention

technologies or devices goes way too far.

I. THE SCOPE OF COPYRIGHT LAW

Article I, section 8, clause 8 of the United States Constitution authorizes Congress to "promote the progress of science and the useful arts," and to grant "exclusive rights" for "limited times" to "authors and their writings."[8] The number and scope of these rights has not been static. It has changed over time, as technologies and the realities of the marketplace have changed. For example, with the development of each new technology, litigation ensued and/or legislation was passed to attempt to deal with the changes.[9] Whenever a new medium for the creation and delivery of content is developed, copyright disputes arise soon thereafter. This has been true since the development of photography,[10] player piano rolls,[11] sound recordings,[12] television,[13] videocassettes,[14] compact discs,[15] mp3 music files,[16] digital video discs ("DVDs"),[17] and, of course, the Internet. Rights that we now consider commonplace, such as the right to control translations and retransmissions of television program were not considered to be rights in earlier Copyright Acts. In the early days of copyright protection, the late 18th and early 19th centuries, there were essentially two rights that were protected, the right of reproduction and the right of public performance.[18] Over time, as markets developed and means of distribution and technologies changed, the number of rights changed as well,[19] albeit greatly in the favor of copyright holders. Most of the rights that we today consider to be the "bundle of rights" under section 106[20] of the Copyright Act were nowhere at all within the "contemplation of the framers." It is especially important to notice that with respect to sound recordings, there is only a performance right in connection with "digital audio transmissions."[21] Under section 114, there is no performance right for sound recordings in forms other than "digital trans-missions."[22] Therefore, Congress has created a special right solely in connection with the digitization of the work.

In addition, the subject matter of copyright has changed dramatically over time. Under the first United States Copyright Act, the Copyright Act of 1790, copyright protection only extended to "books, maps, and charts."[23] Therefore, despite the language in the Constitution that Science and the Useful Arts were to be promoted, only a very narrow category of works, and many that were "non-artistic" and fairly utilitarian in nature were published. It is surprising that despite the fact that music, plays, paintings, sculpture, and prints were the result of the creative efforts of artists and "authors," that there was no protection. To a large extent, despite much discussion that the Statute of Anne, and the new American copyright act shifted the emphasis from "protection of publishers" to "protection of authors"[24] in reality, by protecting only books, maps, and charts, publishers were really still the main beneficiaries. The majority of works that were created by "authors," in the broad sense, were not protected by federal statute.[25] Over time, music, paintings, dramatic works, choreography, and architectural works were added to the list of copyrightable subject matter.

II. COPYRIGHT, MARKETS, AND MARKET FAILURE

There has been a great deal of debate over the purpose of copyright law, and over the meaning of the copyright clause. Two major reasons for copyright have emerged with two sets of beneficiaries: 1) To provide incentives and protection for authors; and 2) to benefit the public by ensuring that they will have a steady stream of information and entertainment. Despite much discussion regarding benefiting the public, modern copyright law is primarily about protecting commercial interests and secondarily about preventing suppression of speech by the powers that be.[26]

"Authors" will create regardless of the incentives. The majority of works that were considered to be great works of art and music were created during a time when there was not copyright protection of them. (In fact, in many ways, the arts flourished because of a lack of copyright.) For most people who create, incentives take a back seat to some need to be creative.

To illustrate this point, each year in my copyrights law class, I ask students the following question: "How many of you have created copyrighted works?" Initially, one or two who have played in bands and have written songs respond affirmatively. Then I ask the follow up questions: "Have any of you ever taken photographs?" "Have any of you ever drawn or painted?" "Have any of you ever written poetry?" The emergence of interest has dramatically shown that the need to create and to be heard often greatly outweighs the expectation of compensation for one's work. With the barriers to entry of publishing costs and distribution costs removed, it is amazingly easy for one to get her message across. The millions of non-commercial Internet sites speak for themselves in this issue.

It is only when commercial interests step in that the law creates rights. Collectively, there are lots to be made when production and distribution of many works can be pooled and controlled by single entities. Individuals do not have lobbyists, companies do. Many of the recent changes in the copyright art have been the result of various industry efforts to persuade Congress to protect their rights.

The rights of copyright holders have expanded over time in order to provide a royalty stream to companies from new forms of media. This expansion is market based. As the methods of reproducing and distributing material have changed, so too have the corresponding rights. In the days of the printing press, it was much easier to control reproduction and distribution. Hence, those were the primary rights. As times and technologies changed, and different and more efficient means of reproduction developed, rights expanded to cover those new forms of exploitation.

I will use music as an example. Initially, in the United States, there was no protection for musical compositions. Over time, protections extended to protection for the copying of the musical composition (the musical notation or the "sheet music"). There was no performance right. Eventually, a performance right for musical compositions entered the law. Prior to the advent of forms of mechanical reproduction of music — and actually for quite some time thereafter — mechanical reproductions of musical compositions were not within the scope of federal copyright protection. For example, in *White-Smith Music Publishing Co. v. Apollo Co.*,[27] the Supreme Court held that player piano rolls were not "copies" of the underlying musical compositions. This was based upon the player piano

rolls not being "traditional" types of copies.[28] This decision was reached under several rationales, including that player piano rolls were more or less "captured performances," and that since performances were not protected, neither should captured ones. In addition, the Court "reasoned" that the player piano rolls were not "human readable," and were

part of a machine. Because the rolls were not "copies" of the underlying compositions, the making and distribution of these "non-copies" could not be infringement. Although Congress did change the holding regarding whether or not the "mechanical reproductions" were "copies," Congress did provide for a new compulsory license for "mechanical reproductions" in section 1(e) of the 1909 Act.[29] This "logic" remained in the law with respect to all mechanical reproductions, including sound recordings until just a few years ago. The *Rosette v. Rainbo Record Mfg. Corp.*[30] litigation in the 1970s and the *La Cienega Music Co. v. ZZ Top*[31] litigation in the mid-1990s dealt with the related issue of whether the distribution of records constituted a "publication" of the underlying musical composition. An inter-circuit split ensued,[32] and for some unexplained reason, the Supreme Court did not grant *certiorari*. In November 1997, Congress clarified the law and enacted section 303(b), holding that the distribution of sound recordings prior to January 1, 1978 is not a "publication" of the underlying musical composition. Under the 1976 Act, in contrast, there is protection with respect to making recordings of musical compositions. Should one, without authorization, make and sell recordings of a song, several rights are implicated. There are, in fact, separate rights available to the holder of the copyright in the sound recording, as well as the holder of the rights in the musical composition.

Limitations on the users' rights, and expansion of the copyright holders rights in sound recordings were also provided in the change to section 109 regarding an exception to the first sale doctrine. Section 109 (b)(1)(A) provides in pertinent part:

> Notwithstanding the provisions of subsection (a), unless *authorized by the owners of copyright in the sound recording* (emphasis added) . . .and in the case of the sound recording in the musical works embodied therein, neither the owner of a particular copy of the phonorecord, may for the purpose of direct or indirect commercial advantage dispose of or authorize the disposal of,the possession of that phonorecord . . . by rental, lease, or lending, or by any other act in the nature of rental lease or lending.[33]

Once again, there is an effort to protect the copyright holders against erosion of a market. With respect to the rental of phonorecords, there is a presumption of copying that goes along temporary transference of the copy. The restriction on rental is, in essence, a restriction against unauthorized duplication. However, in our context, it is also a restriction against access, albeit not technological. Parties who wish to rent or borrow sound recordings may not do so without the authorization of the copyright holder.[34]

As digital technology expanded, despite the fact that there is, in general, no protection for the "performance" of a sound recordings — as opposed to the underlying musical compositions — there is now under section 106(6) a performance right with respect to "digital audio transmissions."[35] Copyright law was also expanded to prevent the unauthorized videotaping and audiotaping of live musical performances.[36]

The nature of rights and the balance was also addressed in the Audio Home Recording Act of 1992. Although owners of sound recordings have always made analogue copies of music — such as recording a cassette tape version of an album, copyright holders were worried that the advent of Digital Audio Tape ("DAT") would lead to a chain of events that would erode, if not destroy, the market for the distribution of sound recordings. Unlike analogue tape recordings, in which each "generation" of taping reveals lower and lower resolution, as well as "tape hiss," digital recordings do not degrade the sound of the source.[37] Each copy sounds like the original. Initially, the record companies were afraid that the market would be flooded with "perfect copies." There was very strong resistance to the sale, importation, etc. of both DAT players, and blank DATs.[38]

Under the compromise known as the Audio Home Recording Act, "digital audio recording device[s]"[39] and "digital audio recording medi[a]"[40] may be sold, provided that they incorporate copying controls, such as the Serial Copy Management System.[41] In order to compensate the copyright holder, royalties are collected on the sales of such media and devices, and are distributed to copyright holders.[42] Individuals are allowed to make "non-commercial" copies for "personal use."[43] Again, a balance has been achieved. Individuals may make convenience related "personal, non-commercial" copies; copyright holders receive a royalty. Again, legislation has been introduced in order to maintain a healthy market for the copyright holder's work.

III. THE ANTI-CIRCUMVENTION PROVISIONS OF THE DMCA

The Digital Millennium Copyright Act of 1998 (DMCA) added a new chapter to the Copyright Act that focuses on protecting anti-circumvention technology rather than adjusting the bundle of rights granted to a copyright holder.[44] The DMCA extended legal protection to the technological measures that copyright owners use to safeguard their monopoly privilege. In doing so, Congress went significantly beyond the narrow provisions in the AHRA and the Communications Act. The DMCA protects "technological measures that control *all access* to a work rather than access to transmissions (as in the Cable Act); and *all* technological measures that protect the rights of the copyright owner, rather than measures that prevent only serial copying, as in the Audio Home Recording Act."[45]

The DMCA's anti-circumvention measures are found in a new chapter twelve of Title 17, and contain three major provisions designed to protect the technology that copyright owners and/or content providers[46] use to restrict the access and use of their content. Section 1201(a)(1) states:

"No person shall circumvent a technological measure that effectively controls access to a work protected under this title."[47]

Section 1201(a)(2) prevents "manufacturing, importing, or otherwise trafficking in "any technology, product, service, device, component, or part thereof" that (A) is primarily designed to circumvent a technological protection measure that effectively controls access to a work, (B) "has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work," or (C) is marked with knowledge that it will be used to circumvent a techno-logical measure that effectively controls access to a work.[48]

This section prohibits manufacturing, distribution, or trafficking in circumvention technology that effectively controls access to a work whereas Section (a)(1) prohibits the use of circumvention technology to gain unauthorized access.

Section 1201 (b)(1) is in many ways similar to Section 1201(a)(2). This section prohibits manufacturing, distribution, or trafficking in any device that circumvents a protection measure that protects *a right of the copyright owner*. So while section 1201(a)(2) prohibits manufacturing, distribution, or trafficking in devices that provide unauthorized access to a copyrighted work (even if no copyright infringement takes place), section 1201(b)(1) prohibits trafficking in devices that circumvent a technological measure that, in theory facilitates copyright infringement regardless of whether access to the work is authorized.

For example, copyright owners or content providers[49] might include multiple technological measures in the same work. There could be protection against unauthorized access to the work, and also protection against unauthorized reproduction of the work, or protection against the ability to multiple reproductions after the first reproduction.[50] Section 1201(a)(2) prohibits the distribution of devices that defeat the first protection measure, while section 1201(b)(1) prohibits the distribution of devices that defeat the second protection measure. In addition, section 1201(a)(1) bans the use of devices prohibited by section 1201(a)(2).[51]

There is a serious problem with these provisions, expressly with section 1201(b)(1). For example, in many situations, circumventing the anti-copying software would *not* result in liability for infringement under the Copyright Act. For example, there should not be infringement either under section 1008 of the Audio Home Recording Act,[52] or under section 107 fair use,[53] if the user makes a copy of the CD for non-commercial personal use, such as having a backup copy or making a duplicate recording for the car or the office. So while the user may have the right under other sections of Title 17 to make lawful personal copies, the manufacture or distribution of the devices or technology that allows the user to make the lawful copies is prohibited.

There is no way of knowing, however, whether the technology or devices prohibited under sections 1201(a)(1) and 1201(b)(1) are going to be used for legitimate or unlawful purposes until they are actually employed by the end user. This is the inherent conflict

between the anti-circumvention provisions of the DMCA and the other provisions and policies of Title 17.

The anti-circumvention provisions of the DMCA were part of the United States' response to the World Intellectual Property Organization (WIPO) Copyright Treaty, passed in December1996.[54] The WIPO Copyright Treaty requires, among other things, that countries "provide 'adequate protection' against the circumvention of technical measures used by copyright owners to protect their works from infringement . . .."[55]

IV. ACCESS CONTROL AS A MEANS OF CONTROLLING CERTAIN USES

Not all access controls are unreasonable. Many are necessary in order to ensure that works are made available. In today's "wired world," the means for distributing works has dramatically changed from content being available solely in the form of tangible forms such as books, magazines, newspapers, journals, sound recordings, and videotapes to having all of the above mentioned types of works available on-line in the form of digital content. Today, everything exists as a "file." As the forms of works have changed, so, too, should the means of controlling access to the works. I do not think that anyone would question whether the owner of a bookstore, record store, or video store should have the right to determine when and how the contents of the store should be available to the public. If someone broke into a bookstore in the middle of the night in order to get access to a certain piece of copyrightable work, it would be hard to argue that the burglar's right to have access should take preference to the store owner's right to control access.

Museums have controlled access to public domain works by controlling how and when people may view the works contained inside. Museums control access by charging admission to see public domain works. Museums also often prevent photography or other reproduction of the works inside, many of which are in the public domain. In addition, museums control access by determining which works will be on display and when. An enormous number of works owned by museums are in storage at any given time. I have not heard a public outcry against museums for limiting access.

Not everyone has access to "57 stations with nothing on." If one wants to have access to more than the local snowy network stations, one must pay a fee for cable. In fact, cable presents an interesting and useful "access" paradigm. One pays for what one wants. The cost for "basic," is lower than the charge for all of the stations. If one wishes to subscribe to "premium" movie channels, such as HBO, Cinemax, Showtime, etc., one must pay a monthly subscription fee. Pay-per-view television allows access only for a single movie at a single time. Access controls allow parties to pay for what they use.

Protection of "technological measures that effectively control access" is nothing new. Cable television has carried "scrambled" signals of the premium and "pay-per-view" channels for years. In order to descramble, and therefore have access, one must purchase or rent the proper converter box from an authorized source. In order to receive 'basic" programming, one must have an authorized connection or satellite subscription. In order to meet the perceived threat of "black-boxes" or devices that unscramble television signals, Congress amended the Communications Act of 1934 to deal with the theft, i.e., unauthorized access, of television signals.[56]

It should be noted that some of the motion pictures on cable and broadcast television, especially older films on channels such as American Movie Classics or Turner Classic Movies are now in the public domain. I have not heard an argument that the use of "black boxes" or the tapping into neighbor's cable line should be allowed in order to gain access to this public domain programming.

We have all grown accustomed to cable and satellite and the fact that access is limited to those who pry for the services. The next step in content delivery after receiving cable and satellite television is delivery via the telephone lines, broadband, and/or DSL of programming on demand. Pay-per-view motion pictures are coming to your computers.[57] The benefit of this system is that one will be able to view movies whenever one desires. One may download the motion picture, store it on one's hard drive and view it at a convenient time. In this way, the delivery of motion pictures via digital files to a computer is more akin to a video or DVD rental. Again, access controls of some kind are necessary. Without them, people who have not paid will be get the motion pictures for free, and may reproduce and distribute them in competition with the movie studios and distribution companies.

All of us in this room have been using access-controlled material for years. Westlaw and/or LEXIS/NEXIS effectively control access by offering the material on a subscription basis. Pricing is a function of use. It costs more to do many multistate searches than it does to do a search of only the Supreme Court. It costs less to view than it does to print. Breaking into Westlaw's database for access, would be a violation; making additional copies of material legitimately downloaded form Westlaw involves issues of infringement, "fair use," and probably contract issues.[58]

V. CONTRACT AND DIFFERENTIAL PRICING AS CONTROLS

As discussed above, contracts may also be used as a means of determining or limiting use, albeit not as effectively as technological "lock-and-key" measures. If the markets were to truly reflect the value of a work, then the price should be set according to the kinds and amount of use. A site license is more expensive that an individual use license, but not on a per-user basis. A license that allows me to make unlimited copies of something is more expensive than one that only allows me to use my one copy for personal use. Copyright licenses that give numerous rights are, or should be more expensive than one that allows only a specific use at a specific place at a specific time.

Differential pricing allows a user to pay for what that party desires to use. The system of tiers in cable television accomplishes this. The problem is, of course, market failure. The content providers often do not price accordingly. Using the cable example, while it is less to have "basic cable" than "premium cable," I am unable to negotiate with the cable provider for only PBS, A&E, American Movie Classics, Turner Classic Movies, Discovery and Bravo (ok, also MTV!). I must take the other fifty or so channels that come with basic cable. If the market for content worked efficiently, then the pricing should reflect the uses. Sometimes it is cheaper to only get an entree on the menu than the "all you can eat special." Westlaw, for example, employs this kind of pricing. One pays a basic fee, and then a fee per search based upon the size of the database, etc.

Different systems of pay are easily illustrated in the non-intellectual property world

of mass transportation in New York by looking at taxis and the subway. The subway is a fixed price regardless of distance system. Those who take the subway from the West Village to Wall street pay the same fare as those who take the subway from Brighton Beach to the Bronx. For those who are unfamiliar with the geography of New York City, to say the least, the distance in the latter example is a major multiple of the former. In essence, the lower Manhattan riders subsidize the others. In a taxi, on the other hand, the fare is a function of the distance traveled. In monetary terms, it might at times make sense to take a cab from the Village to Wall Street. Unless one has money to burn, it does not make sense to take a cab from Brighton Beach to the Bronx

The pay per use model makes sense. One may have "access" for certain purposes, but not for others. For example, in *ProCD, Inc. v. Zeidenberg*,[59] the defendant purchased a commercial CD-ROM containing 95,000,000 telephone numbers. The shrink-wrap license permitted personal use, but not commercial use. When the defendant made the 95,000,000 names available to others on-line, he was in violation of the license. (It should be noted that because of *Feist*,[60] the only way that use of the telephone directories could be restricted was through contract.) The fee charged for the copy of the software, and the license, however, reflected the respective reasonable intentions of the parties. Imagine an arm's-length negotiation between Mr. Zeidenberg and a ProCD employee:

ProCD: Mr. Z. What are you intending to do with the 95,000,000 names and addresses, should we license them to you?

Z: Oh, I am going to go into business, and put the names on the Internet, and maybe even sell the names so that I can compete with you. Thank you very much for compiling them for me.

ProCD: Great! That will be $89.95 please! I can safely assume that if that were the gist of the conversation, Mr. Zeidenberg would never have been given access to the work at all.

It should also be noted that for the pricing per use model to work, the prices should be reasonable. It strikes me as unbelievable that the price of a newly released "e-book" in many situations is the same, or even at times more than the newly released hardcover. The publishers do not have paper costs, distribution costs, profits for the distributors and bookstores, etc to consider in their pricing. The same holds true for legitimate music download services. There are almost no hard costs. If the prices were reasonable and reflected costs in any way, anti-circumvention technologies might not be necessary. If it were only $1.00 per CD, there might not have been such an incentive to use services such as Napster!

V. PROBLEMS WITH THE CURRENT ACT: UNAUTHORIZED ACCESS OR AUTHORIZED COPYING?

Considering today's technologies, market, and rampant market failures, the right to control access is in some cases necessary to achieve the purposes of the constitutional mandate. In the total absence of a copyright holder's right to control access, the balance shifts too far away from the creators and/or publishers, and there is a danger that the incentives upon which we have relied may disappear. If there is widespread piracy,

certain works may not be created. Again, I stress that the balance between the right of the public to have a steady supply of information and creative material, and the right of the copyright holder to be compensated have shifted greatly over time. Given the trend of the United States Copyright law over the last 200 years, creating new rights, and covering more and more types of material under the scope of Copyright, the ability to control access often is really not that extreme a right.

That having been said, there are major problems with the anti-circumvention provisions in Section 1201. Sections 1201(a)(1) and 1201(a)(2) attach liability to activities related to circumventing technological measures related to "access."[61] While the analysis may be straightforward in cases in which an individual is utilizing technology to defeat an access code, such as those on files that are protected by passwords, how does one determine whether one is distributing a circumvention technology or device in order to obtain access when one has no authorization, or in order to make a copy of the work when one does indeed have authorized access?

For example, let's use the *Universal City Studios v. Reimerdes* (*Universal v. Corley on appeal)* scenario to illustrate. In *Universal*, the suit was not brought under section 1201(a)(1) against individuals who were themselves gaining unauthorized access to protected material. The action was brought during the two year waiting period that applied to section 1201(a)(1), the section dealing with individual acts of circumvention.

The action was brought instead under section 1201(a)(2). Section 1201(a)(2) provides:

> 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 to circumvent a technological
> protection measure that effectively controls access to a work, (B) "has
> only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work," or (C) is marked with knowledge that it will be used to circumvent a techno-logical measure that effectively controls access to a work.

The defendants in the case had made available over the Internet software called "DeCSS" that defeated the copy protection scheme in Digital Versatile Disks ("DVD"). They also provided links to other websites that contained the DeCSS code. Judge Kaplan rejected the statutory defenses and granted a permanent injunction. In reaching its analysis that there was a violation, the court held that none of the exemptions regarding "reverse engineering," "research" of "fair use" applied.

Under Section 1201(a)(2)(B), a party is liable, if the circumvention technology "has only limited commercial significant purpose or use other than to circumvent a technological measure that effectively controls access to a work."[62] The defendants argued that the purpose of the DeCSS software was to allow users to play DVDs on computers that were running a different operating system from Windows, namely Linux. They argued that the real purpose was not to gain unauthorized access, but to allow interoperability or compatibility with a different operating system. The court strongly rejected this argument, stating that all that was relevant was the fact that the software was being used to circumvent access controls; the reason it was being used was irrelevant.[63]

The court also rejected the defense under section 1201(f)[64] that allows reverse engineering for the sole purpose of achieving interoperability. The court found that the "sole purpose" was not to achieve compatibility with Linux.[65]

The court also rejected the fair use defense, despite the fact that section 1201(c) provides: 1) Nothing in this section shall effect rights, remedies, limitations, or defenses to copyright infringement, including fair use under this title."[66] The court noted that, in this case, the defendants were not being sued for copyright infringement, but for violation of the anti-circumvention provisions. This was not a copyright infringement action, but an unauthorized access action.[67] The court noted that when Congress was considering the issues involved in the DMCA, it came to the conclusion that fair use only applied provided that "the access is authorized."[68] The court also distinguished *Sony Corp. v. Universal City Studios, Inc.*, [69] by noting that *Sony* was a contributory infringement action for infringement. The court continued, "*Sony* does not apply to the activities with which the defendants here are charged. Even if it did, it would not govern here. *Sony* involved a construction of the Copyright Act that has been overruled by the later enactment of the DMCA to the extent of any inconsistency between *Sony* and the new statute."[70] In addition, Judge Kaplan rejected the defendants' First Amendment argument. While agreeing that computer code might be protectible speech, the court rejected the contention that as such it deserved any special protection. The court also rejected the argument that an injunction against the dissemination of the DeCSS code was a "prior restraint."[71] The Second Circuit affirmed the district court's holding

There are a few problems with the analysis and the application of the provision. One is the very real problem, especially in the case of the mere posting of the software which defeats the "technological measure," of determining how the software will be used. Will the circumvention software be used to allow one to gain unauthorized access to a work, or will the software be used to allow one who has authorized access to copy the work. Assume that I have purchased a copy of a DVD movie. (Actually, the other day I bought a the movie *Round Midnight* on DVD. I also bought the PBS box set of Ken Burns' *Jazz* which contains many clips of public domain film footage as well as public domain musical compositions.) I would like to make my own compilation of great jazz scenes and songs and use them to illustrate the concept of "compilations" and "collective works" in my Copyright Law class. My copy of the DVD is "copy protected," so I go to the 2600 website, or another that is posting the DeCSS software. Without it, I may not make the copy, despite the "fair use" doctrine, and possibly despite *Sony*.

A response that I have heard from several pro-DMCA — usually entertainment industry — attorneys is, "Well, you do not need to make copies from the DVD. You can rent videos and make copies from them,[72] or you can bring in the various disks and cue them t the right places and play them separately, etc." This misses the point. Although "fair use" does not guarantee the making of the most efficient copies, the DMCA should not mandate the most inefficient.

The courts need to thoroughly discuss and analyze the proper means of achieving the

balance between the rights of parties who have authorized access and would like to use the work in a fair manner, and the rights of copyright holders to restrict access. The present scheme, at least as interpreted by Judge Kaplan, and later the Court of Appeals for the Second Circuit, that appears to prevent any manufacture or distribution of circumvention technology goes way too far.

In fact, Judge Kaplan himself, in an address at American University on November 16, 2000, remarked, "The Internet makes a decryption program instantaneously available to both potential fair users and potential pirates alike."[73] In doing so, he is in essence invoking the "substantial non-infringing alternatives" concept, and admitting that there are legitimate uses of circumvention technology and devices. Of course, a violation of section 1201(a)(2) differs from the situation in *Sony* because the manufacture or distribution of circumvention technology or devices is a direct statutory violation, not possible contributory infringement.[74]

VI. FAIR USE, THE FIRST AMENDMENT, AND THE DMCA

The inclusions of sections 1201(c)(1)[75] providing an exemption for fair use and 1201 (c)(4)[76] providing an amendment for free speech concerns shows that Congress considered the rights of end users when it promulgated the DMCA.[77] The provisions regarding circumvention were not meant to be absolute.[78] The scope is, however, very unclear, and there have not been, as of yet, enough cases decided to allow one to sort through the confusion and arrive at a consensus interpretation of the exemption subsections of the statute.

In *Reimerdes,* Judge Kaplan, rejected all of the statutory defenses. Section 1201 (c)(1) provides an exemption for fair use. The question immediately arises as to whether or not fair use is a defense to circumvention of technological measures to control access. Some argue that despite the fact that the anti-circumvention provisions of the DMCA are included in Title 17 if the US Code, a violation of the DMCA is not copyright infringement. Therefore, section 1201 (c)(1)'s fair use exemption does not apply. Judge Kaplan agreed with this conclusion.[79] An argument can also be made based upon the language of the preamble to the fair use statute itself. Section 107, in relevant part provides, "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright."[80] The fact that section 107 only mentions sections 106 and 106A, and not section 1201 or its subsections, can lead some to the conclusion that fair use is not a defense to circumvention of access prohibition technologies.

A compelling argument can also be made that the language regarding fair use in section 1201(c)(1) must apply to violations of the anti-circumvention provisions in section 1201(a)(1) and 1201 (a)(2). If fair use does not apply to acts of circumvention, why include the language in that specific section. If fair use only applied to acts of copying once access was authorized, the language under section 107 would cover the defendant's activities. Adding a fair use provision in section 1201 shows that fair use was meant to be considered in situations involving circumvention technologies.

Again, one must consider the distinction between "access" and "copying." There

cannot be copying without access. The behavior or the intent of the parties must be considered instead of merely the technology. It is impossible to know, out of context, how circumvention technology will be used. Software or a "black box" may be used on legitimately obtained copy in order make a fair use excerpt for classroom use; it may be used to excerpt a portion of the original work in order to create a "transformative" new use[81]; it may be used to create a separate duplicate sound recording for personal use.[82]

There is also a strong argument that it is a lawful use to make complete copies of anything in digital form. The line that delineates "software" is becoming extremely fuzzy. Twenty-five years ago, when most software was computational in nature, and forms of entertainment content were distributed on paper, tape, and film, etc., it was easier to distinguish "software" from other storage and delivery media. Today, when everything is converted to combinations of "0" and "1" almost everything may fit into the definition of "software." Music, film, books are in the same form and on the same media as word processing or spreadsheet programs. On today's versions of consumer home personal computers, motion picture DVDs and music CDs are and recorded through the same built in drives by which one loads applications and copies word processing or PowerPoint files.

The Copyright Act defines "computer software" as "a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result."[83] Section 117(a)(1) of the Copyright Act provides:

> Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
> (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
> (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

If one tales the position that the "zeros" and "ones" on a compact disk or a digital versatile disk are what makes "software," then the making of back-up copies could be allowed under section 117(a)(2). One could even argue that under section 117 (a)(1) the following scenario could be allowed. Assume that in the future, a device that can record, store, and play store hundreds of DVD motion picture files on a hard drive is commercially available. There is no provision for direct play of a DVD. The DVD must first be stored on the internal hard drive of the unit. One inserts a CD into his or her computer and plugs the DVD storage-player into the USB port in the computer in order to transfer the files. Is this copying "an essential step in the utilization of the computer program in conjunction with a machine?"

On the other hand, it may also be used to crack the code preventing access to a work. People may use circumvention of technological measures to gain initial access to digital files without paying. People may use circumvention to gain access to password-protected

files that contain important private and confidential information. It is impossible to know the use of circumvention technology unless one concentrates on the behavior of the party using it.

To put it into the terms used by the Supreme Court, circumvention software devices or software, by themselves, are "capable of substantial non-infringing uses."[84] Therefore, unless it can be shown that the technology has been specifically created to gain unauthorized access, the manufacture, creation, and distribution of circumvention technology should, in many cases, be excused.

Even if it is held that section 1201(c)(1) does not apply to excuse certain circumvention, section 1201 (c)(4) may. Section 1201(c)(4) provides: "Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products."[85] Obviously, the term "free speech" is a synonym for "First Amendment considerations." This provision may also be a "back door" provision for fair use.

In order to balance the First Amendment's guaranteed freedoms with the restrictions imposed upon free speech by a copyright protection regime, limitations or exemptions to copyright must exist. Traditionally, courts have considered fair use, the "idea/expression merger" doctrine, and the dedication of the work to the public domain upon publication to be the First Amendment safeguards. Therefore, some of the acts discussed above may be allowed under section 1201(c)(4).

The First Amendment issue was also raised in a California "trade secrets" case in state court in *DVD Copy Control Ass'n v. Bunner*, 93 Cal. App. 4th 648, 113 Cal. Rptr. 2d 338 (6th Dist. 2001), *rev'd*, 75 P.3d 1 (Cal. 2003), superseded and reversed, 4 Cal. Rptr.3d 69 (Cal 2003), the plaintiffs brought the case under the Uniform Trade Secrets ActThe defendants has two major defenses: 1) the alleged "trade secret" was not obtained by improper means and 2) preventing its posting on the Internet would be an impermissible "prior restraint" under the First Amendment. [The prior restraint doctrine says that information may not be enjoined prior to its publication except in very limited circumstances.] The court of first instance issued an injunction against the publication of the DeCSS information on the website.

On appeal, the Court of Appeals, 6th District, noted that Cal. Civil Code 3426.1 defines "improper means" of obtaining a trade secret to include "theft, bribery, misrepresentation, breach of inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation shall not be considered improper means." Bunner provided information regarding the reverse engineering process by which Jon Johansen came up with DeCSS. However, the court concluded that Bunner did not use improper means to acquire the propriety information, he should have known that the DeCSS had been created through the unauthorized use of propriety information which was hacked.

More interesting is the court's analysis of what constitutes a "prior restraint." "Any prior restraint bears a heavy presumption against its constitutional validity" (emphasis included). With respect to the dual nature of the information, the California Court reached a completely different result from the Second Circuit. The Court stated, "the fact that a medium of expression has a functional capacity should not preclude constitutional protection . . . 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"

On appeal, the California Supreme Court reversed, and remanded the case for a decision on the full merits. In a lengthy opinion, the court held that preliminarily enjoining the publication of trade secrets was not a prior restraint and did not violate the First Amendment. The proposed injunction was found to be sufficiently tailored to prevent the possible damage.

The Court then noted that trade secrets do not fall into any of the traditional exceptions to free speech. "[I]t is not lewd, profane, obscene, libelous, nor does it involve fighting words." The court acknowledged that it had in the past enjoined the publication of trade secrets, but those all involved some duty or breach of a contractual terms, both of which were absent here. The DeCSS was allowed to be published. To not do so would have offended the First Amendment.

When the case was reheard by the Court of Appeals, the injunction was reversed, largely on the grounds that the DeCSS code was, by that time, so widely available, that it was unlikely that it was still a "trade secret" that deserved protection.

VII. THE DMCA AND THE PUBLIC DOMAIN

There is also a question regarding the language "protects access to a work "protected under this title" in both sections 1201(a)(1) and 1201(c)(2). A work that has fallen into the public domain, would not be protected by copyright, and therefore would not be "protected by this title." Merely repackaging a work or producing a work in a new medium does not necessarily mean that the work is protected by copyright.

A case involving photographic and digital reproductions of public domain works of art illustrates this point quite well. In *Bridgeman Art Library v. Corel Corp.*,[86] the Southern District of New York held that exact reproductions of art works that had fallen into the public domain were not sufficiently original to warrant protection. The court held that there was not a "distinguishable variation" between the originals and the photographic and/or digitized copies. Because the copies were not "original," appropriation of the images by a competing company was not copyright infringement. Therefore, if one transferred public domain motion pictures or public domain sound recordings of public domain musical compositions to digital format, these would not be "protected by this title." As such, the circumvention of these works should not be a violation of section 1201.

Making minor additions to a public domain work also would probably not help the publishers of that work. As was illustrated in the recent cases against West Publishing, merely adding a small amount of editorial changes or comment may not take the work out of the public domain. In *Matthew Bender & Co., Inc. v. West Publishing Co.*[87] copies of judicial opinions from West's computerized database were released on CD-ROM. The subsequent publisher did not include the material that was admittedly original to West, such as the syllabus and all of the "keynotes". The Southern District of New York held that the other material added by West, such as jump cites and parallel cites, editorial corrections, and the inclusion of attorneys' names were not sufficiently original. The selection, arrangement, and coordination of the cases, which was protected by the Eighth

Circuit over a decade earlier in *West Publishing Co. v. Mead Data Central, Inc.*,[88] was found to not be protected. There was not subjective judgment that went into the inclusion decisions. It was found to be merely a system that was effectuated by computer.

Strong arguments can be made that it is acceptable to circumvent technological measures in order to gain access to entirely public domain content. The same blanket argument cannot be made with respect to works that merely contain some public domain material. In that case, the work as a whole would be "protected by this title." In such cases, the use should be evaluated on a case-by-case basis.

The fact that a work is in the public domain does not mean, however, that the owner of the physical embodiment of the work is compelled to share it with everyone. It merely means that the owner may no longer control the copyrights. If an owner of a work wishes to not make it available, that is within the owner's rights. This is one of the areas in which the property rights of the owner of the chattel take precedence over the rights of the public to have access to public domain works. Actions over easements to gain access to works are very, very rare. One would expect that if there were an unlimited right for the public to have access to, and to reproduce, distribute, and/or display public domain works, that there would be more actions for easements and/or injunctions of such access. This has not occurred.

It has also been suggested that putting access controls on material that is public domain is like fencing in public land. This analogy does not work for me because of the dual nature attached to artistic and creative works. Both real property and intellectual property rights attach to artistic and literary works.

We all know that the copyrights are distinct from the chattel.[89] As the owner of a public domain painting, a piece of sculpture, a book, I can decide who sees it, when, under what conditions. What I may not do is bring a copyright infringement action against one who reproduces or distributes the work. I may bring a breach of contract action for violation of the terms of the "access agreement."

Returning to the "public land" analogy, where certain lands may be public, but there are still many conditions applied that control the access or use, I may only be allowed on "public land" at certain hours, I may have to pay to have access to certain areas that are "public," and I may be prohibited from engaging in certain activities. Thus, just as the "public" lands are not truly public to all at all times, so too, the "public domain" is not public to all at all times for all uses.

VIII. THE DMCA AND THE FIRST SALE DOCTRINE

In 1998, the Supreme Court decided *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*[90] and resolved an inter-circuit split over whether the right to control unauthorized importation of infringing goods under section 602 of the Copyright Act is extinguished under section 109's "first sale" doctrine. Prior to the Supreme Court's resolution of the case, an inter-circuit split of authority had developed between the Ninth Circuit and the Third Circuit. The Ninth Circuit, in *L'Anza Research International, Inc. v. Quality King Distributors, Inc.*[91] held that the first sale doctrine only applied to sales that

were made in the United States. In *L'Anza Research Int'l* because the sale occurred outside of the country, the copyright holder had the right to prevent importation. In contrast, the Third Circuit, in *Sebastian International, Inc. v. Consumer Contacts, Ltd.*,[92] held that the first sale doctrine does extinguish the right to prevent importation, and held that the country of the first sale is not relevant to the inquiry.

In March 1998, the Supreme Court reversed the Ninth Circuit's decision and followed the logic of *Sebastian*, holding that the first-sale doctrine applies to all sales, even importation.

> After the first sale of a copyrighted item "lawfully made under this title," any subsequent purchaser, whether from a domestic or from a foreign reseller, is obviously an "owner" of that item. Read literally, § 109(a) unambiguously states that such owner "is entitled, without the authority of the copyright owner, to sell" that item. Moreover, since § 602(a) merely provides that unauthorized importation is an infringement of an exclusive right "under section 106," and since that limited right does not encompass resales by lawful owners, the literal text of § 602(a) is simply inapplicable to both domestic and foreign owners of L'Anza's products who decide to import them and resell them in the United States.

After *Quality King*, legitimate versions of copyrighted material lawfully purchased overseas may be imported in to the country. In order get around the opinion, "regional codes" are being placed on DVDs that only allow a DVD to play on machines made for certain countries.[93] Therefore the importation of large numbers of DVDs from outside of the region will be deterred or even prevented. This also allows for different prices in different markets without the threat of legitimate yet "gray market" copies coming in.

IX. THE DMCA'S EFFECT ON ENCRYPTION RESEARCH

A rather serious effect of the anti-circumvention provisions of the DMCA is the chilling effect that it is likely to have on the progress of encryption research. Despite an exemption in the DMCA for "Encryption Research,"[94] several scientists are refraining from publishing or to presenting their findings regarding flaws in access control software and encryption research projects out of fear of being found civilly, and now potentially, criminally liable for violations of the sections 1201(a)(1),[95] 1201(a)(2)[96] and/or 1201(b)(1)[97] of the DMCA. I will discuss the "Encryption Research" exemption below.

Section 1201(g) provides:

> (g) Encryption research.— "(1) Definitions.—For purposes of this subsection—
> "(A) the term "encryption research" means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products; and . . ..
> "(2) Permissible acts of encryption research.—Notwithstanding the

> provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure as applied to a copy, phonorecord, performance, or display of a published work in the course of an act of good faith encryption research if— "(A) the person lawfully obtained the encrypted copy, phonorecord, performance, or display of the published work; "(B) such act is necessary to conduct such encryption research; "(C) the person made a good faith effort to obtain authorization before the circumvention; and "(D) such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud.

As we can see, there are numerous conditions that must be met before one can take advantage of the benefits of the section 1201(g) exemption. The researcher must attempt to have authorization prior to the encryption research. In addition, the subject matter being investigated must have been obtained lawfully. Finally, the encryption research must not constitute infringement under Title 17. I will address each in turn.

Assume the following scenario: Professor Poindexter ("PP"), a well known professor of Computer Science at Terrific Tech Univ. ("TTU") calls the president of SuperSoftware, Inc. ("SS") and requests an advance copy of their new combination Internet-Browser-Word-Processing-Video-Editing-Spreadsheet-Presentation-CD-Burning software. The program has not yet been released, however, there are rumors that the software contains not only access control software, but also identification software that is connected to the access software that immediately transmits all kinds of information to not only SS, but also to the FBI, the IRS, and to several marketing and credit card companies regarding every file that is accessed or used by the user of the multitasking software.

Professor Poindexter wants to see if this is really true, and would also like to do some research into how the reporting aspects of the protection software may be disabled. Most of us would probably agree that disabling the reporting function of the software has very high social beneficial utility. Guess what the answer from SS would be? If Professor Poindexter gets access to a copy, and engages in his research, he would be in violation. It is also not clear what is sufficient with respect to "good faith efforts to obtain authorization." Even if a copy has been lawfully obtained, it might not be the best thing in the world to put the owner of the original on notice that you are doing encryption research on his product.

The subsection regarding "does not constitute infringement under this title" is also potentially problematic. What is "infringement?" While there are a few cases involving "fair use" and computer programs,[98] there have not been many. While some reverse engineering may be allowed, are the limits reached. Is making a copy in RAM an infringement?[99] Is it an act of unauthorized reproduction for one researcher on a team to

make a copy of the program to send to another researcher on the team? Is giving a copy of all or part of the program to colleagues an unauthorized distribution? Does making changes or modifications to the program during the research constitute the creation of an unauthorized derivative work?[100]

It is also unclear whether the publishing or presenting of the results of successful attempts to circumvent technological measures would constitute "offer[ing] to the public . . . any technology, product, service, or device . . . that is primarily designed for the purpose of circumventing a technological measure that effectively controls access." under section 1201(a)(1) or "offer[ing] to the public. . .any technology, product, service, or device. . .that is primarily designed for the purpose of circumventing a technological measure that effectively protects a right of a copyright holder . . ." under section 1201(b)(1). These are all unanswered questions, and given the zeal with which companies, and now the U.S. Attorney for the Northern District of California,[101] are starting to go after computer scientists, many academics and computer scientists do not want to take the risk.

These fears became a reality on July 7, 2001 when a Russian computer programmer who was in the United States to deliver a presentation at a conference in Las Vegas was arrested and charged with violations of 17 U.S.C.§ 1201(b)(1)(A) and 18 U.S.C. § 2, "aiding and abetting." Interestingly, section 2 of Title 18 deals with crimes against the United States.

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

It is hard to see how participating in a violation of the DMCA is aiding or abetting a crime against the United States. It is especially strange since the DMCA, in section 1204, contains its own criminal penalties.[102]

The complaint was based upon complaints from Adobe Systems, Inc. that Elcomsoft, the Russian company for which Mr. Sklyarov works, was distributing a "key" that unlocked the copy protections for Adobe e-book files. It was also alleged that the "key" was available for sale on the Internet at the following address: http://www.elcomsoft.com/aebpr.html.[103]

The connection with Dmitry Sklyarov is as follows: Dmitry Sklyarov was identified as the copyright holder of the Elcomsoft program.[104] Adobe purchased a copy of the software for $99 through a United States company that Elcomsoft was using to process the orders, Register Now! (www.regnow.com).[105] Sklyarov was arrested at the Defcon-9 conference in Las Vegas.

Although, according to the Affidavit, Sklyarov is listed as the copyright holder, it is not clear whether he actually did anything in the United States. If he, himself, had actually sent code to the United States, or had given code to someone here, then

jurisdiction might be proper. If, however, all of his activities were done in a foreign country, and here merely was going to give a speech, then there are very troubling aspects to the case. First, there is a stronger First Amendment argument with respect to someone revealing the flaws in a technological protection scheme in a presentation or a speech, as opposed to someone distributing the actual program that breaks the code.

The "aiding and abetting" is also troubling. Technically, 18 U.S.C. § 2 deals with aiding and abetting crimes against the United States. While violations of the DMCA may be violations of federal law, it is really a stretch to claim that such behavior is a crime against America. It can also be argued that there is no such cause of action under the DMCA because Congress chose not to include a cause of action for "aiding and abetting" of for "contributory circumvention" in the DMCA. Congress most certainly did include such causes of action in sections 271(b)[106] ("active inducement of infringement) and 271(c)[107](contributory infringement) of the Patent Act. His arrest has provoked much controversy.[108] Ultimately, the defendants were acquitted for not acting with the requisite criminal intent.

Nonetheless, the "chilling effect" and possibility of facing the wrath of a zealous U.S. prosecuting attorney was quickly noticed by the computer community. The apprehension felt by many is expressed eloquently in an open letter written by the Dutch computer scientist, Niels Ferguson:

> I have written a paper detailing security weaknesses in the HDCP content protection system. I have decided to censor myself and not publish this paper for fear of prosecution and/or liability under the US DMCA law . . .. My name is Niels Ferguson. I'm a professional cryptographer. My job is to design, analyse, and attack cryptographic security systems, a bit like a digital locksmith. I work to make computer systems and the Internet more secure. . .. Recently I found the documentation of the High-bandwidth Digital Content Protection (HDCP) system on the Internet. HDCP is a cryptographic system developed by Intel that encrypts video on the DVI bus. The DVI bus is used to connect digital video cameras and DVD players with digital TVs, etc. The aim of HDCP is to prevent illegal copying of video contents by encrypting the signal. HDCP is fatally flawed. My results show that an experienced IT person can recover the HDCP master key in about 2 weeks using four computers and 50 HDCP displays. Once you know the master key, you can decrypt any movie. The flaws in HDCP are not hard to find. As I like to say: "I was just reading it and it broke." What do you do when you find a result like this? First, you have to write it down and explain it. Then you publish your paper so that the mistakes can be fixed, and others can learn from it. That is how all science works. I wrote a paper on HDCP, but I cannot publish it. There is a US law called the Digital Millennium Copyright Act (DMCA), that makes it illegal to distribute "circumvention technology," such as systems that break copyright protection schemes. HDCP is used to protect

> copyrights. There are lawyers who claim that a scientific paper like mine is a circumvention technology within the meaning of the DMCA, because it explains the weaknesses of a system. I have been advised by a US lawyer who works in this field that if I publish my paper, I might very well be prosecuted and/or sued under US law. This is outrageous. I travel to the US regularly, both for professional and for personal reasons, I simply cannot afford to be sued or prosecuted in the US.[109]

There have been other responses to the DMCA by computer scientists. On June 6, 2001, Edward Felton, an Associate Professor of Computer Science at Princeton and several of his colleagues initiated a declaratory judgment action in the District of New Jersey against the Recording Industry Association of America ("RIAA"), Secure Digital Music Initiative Foundation, Verance Corporation, and John Ashcroft, Attorney General of the United States. The plaintiffs, among other things, wanted a declaration that the presenting or publishing scientific and technical information (including computer code) related to access and copy control measures and copyright management information systems was protected under he First Amendment, and also a "[p]ermanent injunction enjoining the private Defendants, the Doe Defendants and their respective agents, employees, attorneys, successors in office, assistants and all persons acting in concert with them from initiating an action against the Plaintiffs and others for violating the DMCA by presenting or publishing scientific and technical information (including computer code) related to access and copy control measures and copyright management information systems."[110]

X. USE OF THE DMCA TO ELIMINATE COMPETITION IN PHYSICAL PRODUCTS

The most recent troubling use of the Anticircumvention provisions of the DMCA is in connection with the use of code to create deliberate incompatibilities between one companies products and the replacement parts of third parties. In *Lexmark Int'l v. Static Control Components, Inc.,* [111] the plaintiff, a company that manufactured printers and toner cartridges, included software on its cartridges and printers so that only brand new cartridges made by Lexmark would work with the printer. Cartridges that were manufactured by third parties, or even old and reconditioned Lexmark cartridges would not be able to complete the software "handshake", and therefore would not work with the printers. The defendant, a third party cartridge maker, was able to write code that got around the software that prevented access in order to enable the third party products to work in the printers. Lexmark sued, claiming that this was an example of behavior that fall perfectly under section 1201 of the Act.

The federal district court in Kentucky, Lexmark's home state, ruled in favor of Lexmark. The court noted that their were no exemptions to section 1201's coverage for physical products. In addition, the court found that the software that provided the access control was itself a copyrighted work, and therefore defeating the protection that prevented access to the components' code was a violation. The effect of this is what I will call a "technological tying arrangement." It is a use through technology that should not be allowed under antitrust and competition law. For example, assume that Lexmark had a contract with customers that provided: "If you wish to buy this printer, you must

agree to only use Lexmark replacement cartridges for however long a period of time that you own the machine. Any use of another cartridge shall be deemed a material breach of this Agreement. In the event that Lexmark discovers that you have used another cartridge, the printer must immediately be returned to Lexmark or its authorized agent, and you shall be liable for any damages suffered by Lexmark."

Such an agreement should be a violation of the Sherman Act and the Clayton Act. It is an attempt to monopolize and an agreement made in restraint of trade. The antitrust case books are filled with similar situations in which the purchase of one product was conditioned on the continued purchase of related products. Conditioning the purchase of IBM computers on the purchase of only IBM punch cards was a violation. Tying the sale of motion picture projectors with an agreement to only exhibit films made by the studio that owned the patent on the projector was a violation. Even conditioning the purchase of a fast-food franchise on the future purchases of spices and supplies was a violation. It should not matter whether the tying arrangement is made by contract or by technology. (It should be noted that Lexmark had what it called a "prebate" - basically a discount – for those customers who after they had already purchased the printer bought "single use" cartridges that had to be returned to Lexmark after they were empty. The conditions were in the documentation that came with the cartridges. While Lexmark made the argument that there was an agreement in fair exchange for a lower price, the price was not that much lower, and cartridges that did not have that condition are quite difficult to find.)

In contrast to the Lexmark case, in *Chamberlain Group v. Skylink Technologies, Inc.,* [112] a garage door and remote control garage door opener company brought a similar suit against a third party that manufactured "universal" remotes that it had programmed to also be compatible with the plaintiff's. The court noted that the purpose of the DMCA was to prevent piracy and to prevent access to a copyrighted work. It held that the plaintiff's construction of a "copyrighted work" to include the compatibility code of the garage door was stretching the definition beyond Congressional expectations. In addition, it noted that customers had an expectation of being able to use "universal" remotes. Moreover, the court noted, the plaintiff itself manufactured similar kinds of "universal" remotes. The court found the argument that garage doors should be only allowed to be opened by one remote a bit disingenuous in light of the market behavior of the party that brought the claim.

This area of drawing the line with respect to what does and what does not fall under the provisions of the DMCA will take time, and possibly Congress to work out.

CONCLUSION

When Congress passed the Digital Millennium Copyright Act and its component anti-circumvention provisions, Congress was well intentioned. It wanted to protect the creative content providers from massive piracy. However, the provisions are overly broad and are having the consequences of creating liability for previously legal behavior, and chilling other behavior. The DMCA has also recently been used by manufacturers to create deliberate incompatibilities and technological tying arrangements, that should be suspect under the antitrust laws.

Section 1201(a)(1), prohibiting actual acts of circumvention of technological measures that restrict access in many situations is needed. In many situations, some type of access restrictions are needed in order to preserve an initial market, and in order to

maintain confidentiality and privacy of files. Access controls, in and of themselves, are not inherently evil.

Sections 1201(a)(2) and section 1201(b)(2) restricting the manufacturing and distribution to the public of circumvention technology or devices are overly broad and restrictive. In many cases, it is impossible to know how and for what purpose the technology or devices will be used until they are used. If they are actually used for unauthorized access, then let section 1201(a)(1) govern. If they are used for the alleged violation of copyright, then the normal defenses to copyright infringement should apply. There is, after all, no analogue to section 1201(a) in the DMCA that prevents the actual circumvention of copy technology.

In interpreting the DMCA, courts must how to distinguish between "genuine" unauthorized access, which should be actionable, and "disguised" unauthorized access, which is really unauthorized copying. Plaintiffs will tend to characterize all actions as unauthorized access. As an example, is circumventing the region code on a DVD that one already owns unauthorized access or unauthorized display or reproduction?

Courts must also seriously consider the exemptions that Congress included with respect to reverse engineering, encryption research, and most importantly the "free speech" concern addressed in section 1201(c)(4). The DMCA is new, and there have been few cases. It will take time for there to be agreement with respect to its proper scope.

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1 17 U.S.C. § 1201(a)(1) (2000).

2 17 U.S.C. § 1201(a)(2) (2000).

3 17 U.S.C. § 1201(b)(1) (2000).

4 *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anticircumvention Regulations Need to Be Revised,* 14 BERKELEY TECH. L.J. 519 (1999) [hereinafter Samuelson I]; *see also*, Pamela Samuelson, *Toward More Sensible Anti-Circumvention Regulations*, CYBERSPACE L., July/ Aug. 2000, at 2; Jason Sheets, *Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & Innovative Markets*, 23 HASTINGS COMM & ENT L.J. 1 (2000); *See generally,* Matt Jackson, Technology's Threat to Transformative Works, presented to the Washington Area Lawyers for the Arts Second Annual Arts & Entertainment Law Symposium, Nov. 10, 2000.

5The constitutionality of the anti-circumvention provisions of the DMCA is an issue in *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000). The case is currently on appeal to the Second Circuit. On June 6, 2001, Edward Felton, an Associate Professor of Computer Science at Princeton and several of his colleagues initiated a declaratory judgment action in the District of New Jersey against the Recording Industry Association of America ("RIAA"), Secure Digital Music Initiative Foundation, Verance Corporation, and John Ashcroft, Attorney General of the United States. The plaintiffs, among other things, wanted a declaration that the presenting or publishing scientific and technical information (including computer code) related to access and copy control measures and copyright management information systems was protected under he First Amendment, and also a "[p]ermanent injunction enjoining the private Defendants, the Doe Defendants and their respective agents, employees, attorneys, successors in office, assistants and all persons acting in concert with them from initiating an action against the Plaintiffs and others for violating the DMCA by presenting or publishing scientific and technical information (including computer code) related to access and copy

control measures and copyright management information systems." Felton v. RIAA Complaint, filed June 6, 2001 (D.N.J).

6 *See generally,* Jessica Litman, *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT.L. J. 29 (1994). It should be noted that Professor Litman's article predates the DMCA by four years. Her article presents a persuasive case for the rights of the public, as opposed to the rights of the corporate interests that usually are able to lobby Congress.

7 *See* Jane C. Ginsburg, From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law, Columbia Law School Public Law & Legal Theory Working Group, Paper No. 8 (2000), at 6 n.13, *available at* http://papers.ssrn.com/paper.taf?abstract_id=222493.

8 U.S. CONST. art. I, § 8, cl. 8.

9 *See* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 965 (1990); *see also*, Jessica Litman, *Copyright, Compromise, and Legislative History,* 72 CORNELL L. REV. 857 (1987); Howard Coble, *Copy-right's Past and Its Application to Copyright's Future*, 47 J. COPR. SOC'Y 1 (2000); ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT 3-12 (1999). For an interesting discussion of the pre-Constitutional copyright laws of the various colonies, *See* Francine Crawford, *Pre-Constitutional Copyright Statutes*, 47 J. COPR. SOC'Y 167 (2000).

10 *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (holding that a photograph was a "writing of an author" and therefore the proper subject matter for copyright protection).

11 *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908) (holding that a player piano roll was not a "copy" of the underlying musical composition).

12 *See* Rosette v. Rainbo Mfg. Corp., 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff'd*, 546 F.2d 461 (2d Cir. 1976) (holding that the distribution of a sound recording was not a publication of the underlying musical composition); *but see* La Cienega Music Co. v. ZZ Top, 53 F.3d 950 (9th Cir.), *cert. denied*, 516 U.S. 927 (1995) (rejecting *Rosette* and holding that the sale of sound recordings was the act of "publication" of the underlying musical composition). In November 1997, Congress endorsed the holding in Rosette, and overruled *La Cienega* by enacting section 303(b), which provides that the sale of sound recordings prior to January 1, 1978 — the effective date of the Copyright Act of 1976 — does not constitute a publication of the underlying musical composition. *See* 17 U.S.C. § 303(b) (2000). For a discussion of the issue, see generally, Landau, *supra* note 12.

13 *See* Bartsch v. Metro-Goldwyn-Mayer, Inc., 270 F. Supp. 896 (S.D.N.Y. 1967) In *Bartsch*, the Southern District of New York held that there could be no recovery by the plaintiff for the television broadcast of a motion picture based upon his work since the 1930 conveyance of motion picture rights authorizing defendant to "project, transmit and otherwise reproduce certain musical play or any adaptation or version thereof visually and audibly by act of cinematography or any process analogous thereto" transferred television rights and since plaintiff's predecessor in interest transferred all interests he had obtained from his grantors and thus did not retain television or any other rights.

14 *See* Sony Corp. Am. v. Universal City Studios, Inc., 464 U.S. 417(1983) (holding that Sony was not liable for contributory infringement for the manufacture and sale of the Betamax videotape recorder).

15 The Audio Home Recording Act of 1992 was enacted to resolve a dispute between the record companies and the manufacturers of digital audio recorders and digital audio recording media. *See* 17 U.S.C. § 1001 *et seq*. (2000).

16 *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (holding that the uploading and downloading of digital music files was copyright infringement; case was remanded for purposes of fashioning a more narrow injunction); *see also* UMG Recordings, Inc. v. MP3.com, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding that the copying and storage of copyrighted musicfiles by mp3.com was infringement, even though the end users actually owned copies of the recordings); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624 (C.D.Cal.1998) (holding that the manufacture and sale of a portable device for storing mp3 music files was not contributory infringement; also holding that a personal computer was not a "digital audio recording device" under the AHRA).

17*See* Universal City Studios, Inc v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

18 *See* Ginsburg, *supra* note 7, at 6 n.13.

19 *See* Paul Edward Geller, *Copyright History and the Future: What's Culture Got To Do With It?*, 47 J. COPR. SOC'Y 209, 230-233 (2000) (discussing the expansion of early copyright law to cover the then

newly emerging technologies.)

20 Section 106 of the Copyright Act provides: Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work by means of a digital audio transmission. 21 *See* 17 U.S.C. §106(6) (2000).

22 *See, e.g*., Agee v. Paramount Communications, Inc., 59 F.3d 317 (2d Cir. 1995) (discussing the difference between the performance right and the reproduction right in connection with sound recordings).

23 *See* GORMAN & GINSBURG, *supra* note 9, at 3-12.

24 *See* Marci A. Hamilton*, Historical and Philosophical Underpinnings of the Copyright Clause,* 5 OCCASIONAL PAPERS IN INTELL. PROP. FROM BENJAMIN CARDOZO SCH. OF L.1, 9 (1999); *see also* L. Ray Patterson*, Understanding the Copyright Clause*, 47 J. COPY. SOC'Y 365 (2000). Professor Patterson provides an interesting and thorough examination history and scope of the early copyright laws.

25 To a certain extent, it can be argued that in the arts, the ideology of "standing on the shoulders of giants" was endorsed by allowing parties to utilize and learn from the artistic and musical creations of others in order to perfect their crafts.

26 Jessica Litman has written very good pieces regarding the legislative process and the competing interests. *See* Jessica Litman, *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT. L. J. 29 (1994); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 965 (1990); Jessica Litman, *Copyright, Compromise, and Legislative History,* 72 CORNELL L. REV. 857 (1987).

27 209 U.S. 1 (1908).

28 For a discussion of the issue of "publication" and musical compositions, see

Landau *supra* note 12.

29 *See* 17 U.S.C. §115 (2000).

30 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff'd*, 546 F.2d 461 (2d Cir. 1976).

31 53 F.3d 950 (9th Cir), *cert. denied*, 516 U.S. 927 (1995)*, superseded by* 17 U.S.C.

§ 303(b) (2000).

32 The issue of inter-circuit splits of authority of federal law is one of my favorite topics. For a discussion of inter-circuit disagreement, see Michael Landau and Donald Biederman, *Eliminating the Jurisdictional Advantage: The Need for a Specialized Copyright Forum*, 21 HASTINGS COMM. & ENT. L.J. 717 (1999).

33 *See* 17 U.S.C. §109(b)(1)(A) (2000). It should be noted that the same prohibition applies to computer programs. For illustrative purposes, I limited the statutory language to that regarding phonorecords.

34 A few years ago, I saw an advertisement in the back of a stereo magazine for a company that rented CDs. Out of curiosity, I wrote to them. I received the following reply (actually, I am paraphrasing):
Dear Customer:
It has come to our attention that under United States copyright law, the rental of sound recordings is illegal. We, therefore, no longer offer that service. We now offer a 100% satisfaction guarantee policy on all CDs that you purchase from us. In the event that you are not satisfied, and would like to return your CD within thirty days, we will offer a full refund, minus a $2.50 restocking fee per CD returned.

35 *See* 17 U.S.C. § 106(6) (2000).

36 *See* 17 U.S.C § 1101 *et seq.* (2000).

37 I will not get into the old "vinyl v. CD" argument at this time. There is a group

of hard-core audiophiles, the author included, who contend that the sound of a vinyl album, played on a good turntable "blows away" the sound of a CD played on a good CD player. The author will also disclose that he is of the camp that believes tunes are superior to transistors.

38 Do I hear "It's deja BETA all over again?" The DAT medium did not do well.

On the other hand, blank recordable CDs have taken off like wildfire! 39 *See* 17 U.S.C. § 1001 (2000). 40 *See id*; *see also* Recording Indus. Ass'n of Am. v Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999) (holding that a computer and a hard drive are not the types of devices and media, respectively, that the AHRA was meant to cover). This issue was also addressed in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). 41 *See* 17 U.S.C. § 1002 (2000). 42 *See* 17 U.S.C. § 1003 (2000). 43 *See* 17 U.S.C. § 1008 (2000). The section 1008 was also raised — unsuccessfully — in the Napster case. I personally question whether the activity in Napster is "non-commercial" or "commercial, yet non-cash."

44 Pub. L. No. 105-304, 112 Stat. 2860 (1998)

45 *See* Jackson, *supra* note 4, at 17.46 I am using the terms "copyright owners and content providers" to illustrate a situation that is at the basis of one of the controversies regarding the constitutionality of the provisions. In many situations, such as in the presentation of CDs or DVDs of material that has already fallen into the public domain, the party that is commercializing the new version may not be a "copyright holder." This is probably more true in the case of those marketing sound recordings that had previously fallen into the public domain (with, of course, also public domain musical compositions). They have been merely transferred from a master recording or from older vinyl to a digital form. If no new material has been added, then there should not be any copyrightable interest in the version in the newer digital media. In many cases, however, "previously unreleased material" or "bonus tracks" have been added in order to create, or to attempt to create, a new compilation or collective work. In the case of motion pictures on DVD format, new material is almost always added, thereby creating a new work. For a discussion of new electronic works and compilations, *see* New York Times Co., Inc. v. Tasini, 121 S.Ct. 2381 (2001); *see also* Greenberg v. Nat'l Geographic Soc'y, 244 F.3d 1267 (11th Cir. 2001)(discussing the creation of "new works" by adding additional material to CD-ROMs of "National Geographic" magazine); Michael Landau, The Importance of Electronic Rights Revisited, *available at GigiLaw.com — Legal Information for Internet Professionals* (Aug. 2001) http://www.gigalaw.com/articles/2001/landau-2001-08-p1.html.

47 This subsection did take effect until November of 2000, after a rulemaking by the Librarian of Congress determined whether any users of any specific "class of works" will be adversely affected in their ability to make noninfringing uses of that particular class of works. According to the House Report, the purpose of the delay in the enactment of this clause and the requirement that a rulemaking take place every three years was to ensure the "availability of works in the marketplace for lawful uses." *See* H.R. REP. No. 105-551, pt. 2, at 37 (1998).

48 The DMCA contains numerous exemptions, none of which were applied in *Reimerdes*. For an analysis of all of the anti-circumvention provisions, *See* Samuelson I, *supra* note 4, at 573-43 (1999); David Nimmer, *A Riff on Fair Use*, 148 U. PA. L. REV. 673, 702-38 (2000); *see also*, H.R. Rep. No. 105-190, 105th Cong., at 18 (1998);

49 I amusing the term "content provided" because in some cases, the work that has been digitized is not covered by copyright. If, for example, a copy of a public domain book has merely been scanned and digitized, it would be hard to argue that there is any new "original expression" that has been added to the work. *Cf.* Maljack Prods., Inc. v. UAV Corp., 964 F. Supp. 1416 (C.D. Cal., 1997) ("pan and scan" video version of public domain motion picture held to be an original "derivative work").

50 This would be a scheme that is similar to Serial Copyright Management.

51 *See* Jackson, *supra* note 4, at 18-19.

52 17 U.S.C. § 1008 (2000).

53 17 U.S.C. § 107 (2000).

54 WIPO Copyright Treaty, adopted by the Diplomatic Conference on Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996) [hereinafter WIPO Copyright Treaty]. 55 *See* Samuelson I, *supra* note 4; *see also* Nimmer, *supra* note 48, at 702-38 (discussing the legislative history in detail).

56 The prohibition against the theft of cable services is codified in section 552 of the Communications Act and the prohibition against the theft of wireless and satellite television signals is codified in section 605. 47 U.S.C. § 553(A) provides: "(1) No person shall intercept or receive or assist in intercepting or receiving any communication service authorized over a cable system . . .
(2) the term "assist in intercepting or receiving" shall include the manufac-turer or distribution of equipment intended. . . for unauthorized reproduction [of cable service]." 47 U.S.C. § 605(e)(4) provides: "Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any . . . device or equipment knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption [of satellite broadcasting or programming] shall be fined not more than $500,000 . . . or imprisoned for not more than 5 years for each violation, or both.
57 See Rick Lyman, Hollywood, Eye on Privacy, Moves to Rent Movies Online, N.Y.TIMES, Aug. 17, 2001, at A1.

58 The agreements which most universities and law schools have with West is "For Educational Purposes Only." Were I to make a deal with a law firm to provide them with research and unlimited copies of cases downloaded from Westlaw, at a fraction of the cost the West charges, I would be in violation of my contract.

59 86 F.3d 1447 (7th Cir. 1996).
60 Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340, (1991).

61 17 U.S.C. §§ 1201(a)(1), 1201 (a)(2) (2000).
"(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
"(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title [17 U.S.C. . §1 et seq.]; or
"© is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

62 17 U.S.C. § 1201(a)(2)(B) (2000).

63 *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp.2d 294, 319-20 (S.D.N.Y. 2000)., *aff'd sub nom,* Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).
64 17 U.S.C. § 1201(f).
65 *See Reimerdes*, 111 F. Supp.2d at 320.
66 17 U.S.C. § 1201 ©(1) (2000).
67 *See Reimerdes*, 111 F. Supp.2d at 321-24.
68 *Id*. at 323, citing H.R. REP. NO. 105-551, *supra* note 47, at 18.
69 464 U.S. 417 (1984).
70 *See Reimerdes*, 111 F. Supp. 2d at 323.
71 *See id*. at 333-34.
72 This assumes that the videocassettes are not copy-protected, as well. 73 Lewis A. Kaplan, et al., *Keynote Address: Resolving Tensions Between Copyright and the Internet*, 50 AM. U. L. REV. 409, 417-18 (2000).
74 It should be noted that while there is no direct statutory provision relating to contributory infringement in copyright law, there are express provisions in patent law for both active inducement (35 U.S.C. § 271 (b) (2000)) and contributory infringement (35 U.S.C. § 271(c) (2000)).
75 Section 2101©(1) provides, "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title [17 U.S.C. § 1 *et seq*. (2000)]."
76 Section 1201©(4) provides: "Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products."
77 *See* Samuelson I, *supra* note 4, at 573-43 (1999); *see also*, H.R. Rep. No. 105190, 105th Cong., at 18 (1998); Nimmer, *supra* note 48, at 702-38 (discussing the legislative history in detail).
78 Kaplan, *supra* note 73, at 420-21 (2000) (discussing exemptions).

79 *Reimerdes,* 111 F. Supp.2d at 321-24.
80 17 U.S.C. § 107 (2000).
81 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); *see also* Pierre Leval, *Toward a Fair Use Standard,* 103 HARV. L. REV. 1105 (1990) (advocating that "transformative uses" should be fair). 82 This assumes that the record companies have added technological measures that prohibit the making of any copies, instead of serial copies.

83 17 U.S.C. § 101 (2000).
84 *See* Sony Corp. Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
85 17 U.S.C. § 1201©(4) (2000).
86 36 F. Supp. 2d 191 (S.D.N.Y.1999).
87 42 U.S.P.Q.2d 1930 (S.D.N.Y. 1997), *aff'd*, 158 F.3d 674 (2d Cir. 1998), *cert denied*, 526 U.S. 1154 (1999).
88 789 F.2d 1219 (8th Cir. 1986).
89 *See, e.g.*, Forward v. Thorogood, 985 F.2d 604 (1st Cir. 1993) (record producer who owner a band's "demo" tape held to now own the copyrights in and to the musical compositions).
90 523 U.S. 135 (1998).
91 98 F.3d 1109 (9th Cir. 1996).
92 847 F.2d 1093 (3d Cir. 1988).
93 There are a certain number of times, usually five, however, that the codes in computers and DVD players may be changed to accommodate temporary uses of foreign DVD. For example, if I am going to be in Europe for the summer, I can adjust the setting on my PowerBook to allow me to play DVDs that I have purchased "on the continent." I cannot, however, assemble a library of European disks along with my North American disks, for I cannot infinitely change back and forth between regional codes.
94 *See* 17 U.S.C. § 1201(g) (2000).

95 17 U.S.C. § 1201(a)(1) (2000).
96 17 U.S.C. § 1201(a)(2) (2000).
97 17 U.S.C. § 1201(b)(1) (2000).
98 *See, e.g.*, Sega Enters., Ltd. v. Accolade, Inc., 997 F.2d 1510 (9th Cir. 1992).
99 *See, e.g.*, MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (the loading of a computer program into RAM was the creation of an infringing copy). 100 *See, e.g.*, Vault v. Quaid, 847 F.2d 255 (5th Cir. 1988) (program to modify plaintiff's program so as to defeat the anticopying software was not a derivative work).

101 On July 7, 2001, a criminal complaint was filed against a Russian programmer in the United States for a conference, for violations of section 1201(b). *See* United States v. Sklyarov, No. 5 01 257P (N.D. Cal., July 7, 2001). The case is discussed above.
102 Section 1204 provides as follows: a) In general.—Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain—

> $1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense. "(b) Limitation for nonprofit library, archives, educational institution, or public broadcasting entity.—Subsection (a) shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity (as defined under section 118(g). "(c) Statute of limitations.—No criminal proceeding shall be brought under this section unless such proceeding is commenced within 5 years after the cause of action arose.

103 I hope that I, too, will not be liable for directing people to the Webster with the software. I got the address directly from the Affidavit In Support of Criminal Complaint, at 2, which I downloaded after being encouraged to do so by a link on the U.S. Attorney's website at http://www.usaondca.com/ press/assets/applets/2001_07_17_sklyarov.pdf. There is also a link on the U.S. Department of Justice's *Cybercrime* website at http:// www.cybercrime.gov/sklyarov. For additional information on United States v. Sklyarov, see the Electronic Freedom Foundation's website, http;// www.eff.org/IP/DMCA/US_v_Sklyarov; *see also* http://freesklyarov.org. 104 Affidavit in Support of Criminal Complaint, United States. v. Sklyarov, at 3-4. 105 Affidavit in Support of Criminal Complaint, United States v. Sklyarov, at 3.
106 35 U.S.C. § 271(b) (2000). 107 35 U.S.C. § 271(c) (2000).

108 *See, e.g.,* Lawrence Lessig, *Jail Time in the Digital Age*, N.Y. TIMES, July 30, 2001, at A21; *see also* http://freesklyarov.org.

109 Niels Ferguson, *Censorship In Action: Why I Don't Publish My HDCP Results*, Aug. 15, 2001, *available at* http://www.macfergus.com/niels/dmca/index.html

110 Felton v. Recording Indus. Ass'n of Am., Complaint, filed June 6, 2001 (D.N.J). The complaint and other information about the case is available through the Electronic Freedom Foundation, *available at* http://www.eff.org/ IP/DMCA/Felten_v_RIAA.

[111] 253 F.3d 943 (E.D. KY. 2003).
[112] 381 F.3d 117 (Fed Cir. 2004).