Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & (and) Innovative Markets

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Copyright Misused: The Impact of the DMCA Anti-circumvention Measures on Fair & Innovative Markets

by
JASON SHEETS*

I. The Balancing Act of Copyright Policy ............................................ 3
II. The Delicate Balance is Threatened ............................................... 5
   A. Industry Trends ............................................................................. 5
   B. The Judicial Response ................................................................. 7
      1. Fair Use ...................................................................................... 7
      2. Copyright Misuse ...................................................................... 11
III. The DMCA is Anti-innovation and Unconstitutional .................. 15
   A. Industry Hopes and Fears Spawned a Legislative Monster .............. 15
   B. Copyright Policy Takes a Wrong Turn ......................................... 19
   C. The DMCA Encourages Misuse ..................................................... 21
   D. The Unconstitutionality of the DMCA ........................................ 25
IV. Conclusion .................................................................................. 27

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Introduction

Copyright law has always been a response to technological change. In fact, the purpose of copyright law is to promote technological change or innovation. Congress and the judiciary have pursued this policy goal by maintaining a delicate balance between incentives for innovators and access for the public. As a result of new innovation in digital technology, however, copyright law is currently experiencing growing pains.

The purpose of this article is to describe the delicate balance of copyright policy and demonstrate how modern trends, coupled with congressional action, threaten that balance. More specifically, this paper seeks to demonstrate that the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) threaten to undermine the economic justification of copyright law.

For better or worse, courts and scholars have adopted the social science of modern economics as the preferred way to analyze how intellectual property laws affect innovation. This approach recognizes that copyright law, more than many other types of legislation, intervenes in the natural state of the market place. The breeding ground for innovation begins in a state of market failure because intangible knowledge and expression are public goods incapable of exclusion. Copyright law intervenes in the market place for innovation by creating an incentive to pursue activities that result in innovation. The incentive is a limited legal monopoly otherwise known as a copyright. Copyright law is used to exclude certain uses of another's expression. Because copyright law intervenes in the market place, enacting copyright law requires extreme caution to avoid upsetting the market in ways that obliterate competition and stymie

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1. This paper is concerned with copyrights in digital technology. This includes software and other forms of digital technology, such as the firmware most often associated with dedicated systems. When the term "industry" is used, it is in reference to all industries involved in the market for digital technology.
3. It might be argued that copyright law does not intervene in the market place, but rather creates or facilitates the market place. Cf. Broadcast Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) (Antitrust cases where horizontal agreements effecting trade were given rule of reason treatment, rather than being deemed per se illegal because the agreements were viewed as facilitating the creation of a market). This position, however, begs the question by assuming the beneficial result of enacting copyright law. The better approach is to view copyright law as an intervention, which, if executed properly, facilitates the market place by correcting a market failure.
innovation. Managing the complex relationship between incentives for innovation and public access to new technologies requires discretion and foresight. Nevertheless, Congress has been swift and imprudent in response to changing technologies. The DMCA anti-circumvention measures fundamentally change copyright law in a way that is sure to crush innovation.

Part I of this Comment describes the historical balance struck by copyright law between incentives for authors and access to creative works. Part II explains how this balance is threatened by various modern trends, culminating in the enactment of the DMCA. Part III argues that the anti-circumvention provisions of the DMCA hinder innovation and are unconstitutional. Part IV concludes that regardless of the constitutionality of this act, the anti-circumvention measures are poor public policy because they thwart competition and innovation in an otherwise expanding technological marketplace.

I

The Balancing Act of Copyright Policy

The Constitutional basis for, and limits of, the Copyright law are found in Article I, Section 8, clause 8, which provides: "The Congress shall have Power...To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

This grant of power, found within the Enumerated Powers clause of the United States Constitution, is unique because it expressly provides a policy purpose. The only purpose for which limited monopolies may be granted is to promote the progress of innovation.

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4. The Copyright and Patent clause differs significantly from other clauses within Article I, Section 8; most clauses do not contain express limitations or limiting purposes. Furthermore, the traditional construction given to the limiting language of the Copyright and Patent clause is different than the treatment given to the apparently limiting language in the Necessary and Proper clause, also found within Article I, Section 8. In McCulloch v. Maryland, the Supreme Court applied a structuralist approach that stripped the term "necessary" of meaning by holding that Article I, Section 8 contains only grants of power, not limits of power. 17 U.S. 316 (1819). The language of the Copyright and Patent clause, however, has been given different treatment by the Supreme Court and virtually all commentators. See James D. White, Misuse or Fair Use: That is the Software Copyright Question, 12 Berkeley Tech. L.J. 251, 255 (1997) (noting that the grant of power in the Copyright and Patent clause is unusual in that drafters included a limiting purpose). For a full treatment of the Enumerated Powers clause see also William Patry, The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision, 67 George Wash. L. Rev. 359 (1999).

5. See White, supra n. 4.

6. Patry, supra n. 4, at 362 and 381 (arguing that Article I, Section 8, Clause 8
Justice Stevens explained in *Sony Corp. of America v. Universal City Studios*:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.  

This constitutionally mandated policy goal has often been described as a delicate balance between the rights granted to copyright owners and the rights of the public. The risk in underprotecting the rights granted to copyright holders is the possibility that the incentive mechanism will be eroded, resulting in a loss of creative innovation. Overprotecting the rights granted to copyright holders creates the risk inherent in monopolies; monopoly power will impede competition and creative innovation.

When drafting the Copyright and Patent clause, the framers were well aware of the dangers of English monopolies. They also realized that the "sciences" and "arts" are susceptible to piracy and in need of protection. In other words, knowledge and learning are public goods prone to free-riding by others and incapable of exclusion without the force of law. The Copyright & Patent clause is a response to the problem of piracy. Today, we describe piracy and monopolies in contains both positive and negative rights, and characterizing the clause as "bimodal" because it balances the positive rights in the authors and the negative rights in the public).

9. White *supra* n. 4, at 255; Patry *supra* n. 4, at 370.
terms of market failures, and we use economic language to justify copyright law.\textsuperscript{11}

II
The Delicate Balance is Threatened

A. Industry Trends

Several modern trends threaten to upset the balance of copyright policy. Intellectual property law, private contract, and technological innovation have mitigated, if not extinguished, the threat of market failure by way of free-riding. However, efforts to combat free-riding have induced another market failure. Unlimited, \textit{de facto} monopolies in intangible information and ideas are being created.

First, Congress opted to extend copyright protection to cover computer programs as literary works.\textsuperscript{12} It is clear that Congress created a quandary regarding the appropriate scope of protection to afford software.\textsuperscript{13} The Copyright Act expressly prohibits the protection of any idea, procedure, process, system, or method of operation, yet mandates that computer programs are appropriate subject matter for protection.\textsuperscript{14} Computer programs are essentially processes or methods of operation and are primarily valued for their functional aspects. Nevertheless, copyright protection has been extended over the source code and object code of applications and operating systems.\textsuperscript{15} The decision to extend copyright protection to computer programs upsets the balance of copyright policy in a way that is not fully appreciable until viewed in the context of the

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} at 471 n.25 (explaining that the term ‘market failure’ refers to situations where market transactions do not achieve the most efficient, socially optimal allocation of resources and includes free-riding, monopolies, externalities, and information asymmetries).
\item \textsuperscript{12} 17 U.S.C. § 101 (2000).
\item \textsuperscript{13} See Andrew R. Jaglom, \textit{Computer Related Distribution Issues: Current Developments in On-line, Copyright Protection, Software Distribution, and Licensing}, SD62 ALI-ABA 679, 694 (1999) (describing the question of appropriate scope of protection for software as an “unsettled morass of conflicting Court of Appeals decisions”). The related issues of whether to pursue alternative approaches to protecting computer programs, such as using patent law or a \textit{sui generis} approach, is beyond the scope of this comment.
\item \textsuperscript{14} 17 U.S.C. § 102(b), § 101 (2000), respectively.
\end{itemize}
industry's prevalent use of private contracts and technological safeguards.

The second trend placing pressure on the balance of copyright policy is the prevalent use of "click-through" contracts by the copyright industry. These "click-through" agreements are non-negotiable adhesion contracts designed to protect the interests of copyright owners by restricting various uses of their works. "Click-through" licenses routinely require users to refrain from various activities which would otherwise be allowed as a fair use, such as reverse engineering, parody, or criticism. The use of "click-through" contracts has become a wide spread industry practice. Moreover, this practice has been legitimized by Judge Easterbrook's decision in ProCD, Inc. v. Zeidenberg. ProCD and its progeny hold that these agreements are generally enforceable. The use of "click-through" contracts may be a result of modern business realities, but it also affects the balance of copyright law. The use of "click-through" contracts is particularly troubling when used in conjunction with technological protection measures.

The third trend is the advent of technological protection measures which are also known as trusted systems, lock-out systems, rights management systems, and copyright management systems (CMS). Technological protection measures come in various shapes and sizes. Digital envelopes, time-bombs, self-reporting software, encryption devices, watermarks and spiders are just a few examples of technological innovations currently used to regulate the access and use of digital works. Like the use of "click-through" licenses, technological protection systems are designed to protect the interests of copyright owners by preventing various uses of their works. Technological safeguards can be effectively used by the industry to prevent uses that are statutorily privileged. Professor Julie Cohen explains:

17. 86 F.3d 1447 (7th Cir. 1996).
18. "Shrink-wrap" and "click-through" contracts are enforceable, not withstanding invalidation for public policy reasons, if notice is provided and an opportunity to return the product is given. See, e.g., Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); M.A. Mortenson Co. v. Timberline Software Corp., 93 Wash. App. 819 (Wash. App. 1999); Micro Data Base Systems, Inc. v. Dharma Systems, Inc., 148 F.3d 649 (7th Cir. 1998).
Ultimately, digital CMS will allow content owners to insist on greater protection than copyright law would afford . . . [F]or example, by requiring payment for any excerpting of a digital work regardless of the reader's purpose, or by conditioning access to the work on acceptance of a contractual provision prohibiting parodies . . . copyright owners will be able to implement contractual restrictions prohibiting reuse of the ideas, facts, or functional principles contained in a work . . . or prohibiting reuse of formerly copyrighted expression that has fallen into the public domain. 20

These technologies used in combination with "click-through" licenses, if unchecked, will result in de facto monopolies over that which belongs in the public domain. 21

B. The Judicial Response

The congressional decision to protect computer programs by copyright law, coupled with industry practice of using "click-through" adhesion contracts and technological protection measures, results in inefficient markets. The courts have responded to this changing balance in copyright law by using equitable doctrines.

I. Fair Use

The doctrine of fair use permits uses of works that are beneficial to the public and ensures public access to works by combating overreaching practices by the industry. 22 Industry overreaching occurs when the industry attempts to control markets that they are not entitled to control. Private adhesion contracts, digital protection measures, and enforcement actions are the primary means by which the industry overreaches. Overreaching copyright owners seek to prevent competitors from reverse engineering their product, that is prevent them from engaging in the "process of starting with a finished product and working backwards to analyze how the product operates

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21. For a robust conceptualization of the public domain, see Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354 (1999). See also Madison, supra n. 16, at 1092-1107 (arguing that the public domain is a doctrinal representation of "open space" and further noting that despite the implicit existence of a public domain in the copyright statute and the Constitution, there is lack of express statutory or constitutional support for the concept of the public domain).
22. Traditionally, the focus has been on the defendant’s activities, but as Sega Enterprises Ltd. v. Accolade, Inc. indicates, it is extremely easy for courts to justify a finding of fair use by denouncing the plaintiff’s abhorrent activities. 977 F.2d 1510, 1523-24 (1992).
Copyright owners are concerned with reverse engineering because it can result in the development of competing products. Reverse engineering of software code requires intermediate copying. Copyright owners who desire to restrict competition claim that those intermediate copies constitute infringement. By acknowledging that reverse engineering, including intermediate copying, can constitute a fair use activity, the courts create the possibility of market entry.

Fair use is an affirmative defense to a claim of copyright infringement codified in the 1976 Copyright Act, 17 U.S.C. § 107. The statute requires courts to balance four factors in the determination of whether a defendant's activities constitute a fair use. A court conducting a fair use analysis must consider (1) the purpose and character of the use, (2) the nature of the work, (3) the amount and substantiality of the portion used in proportion to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The first sentence of §107, sometimes inaccurately termed the "preamble," provides a list of activities that are typically considered fair uses. The list includes criticism, comment, news reporting, teaching, scholarship, and research. Although this list does not include reverse engineering, Sega Enterprises Ltd. v. Accolade, Inc.
makes clear that reverse engineering, under certain circumstances, is now considered a fair use activity.\textsuperscript{30}

In \textit{Sega}, the Ninth Circuit invoked the equitable doctrine of fair use in response to (1) the challenge of determining the appropriate scope of protection to be afforded computer software and (2) the industry trend of using technological protection measures.\textsuperscript{31} The plaintiff, Sega, held a copyright in the Genesis console, a platform used for running video game applications.\textsuperscript{32} Sega was in the business of selling consoles and various games; it was also in the business of licensing the right to make games for the console to willing third parties.\textsuperscript{33} In order to prevent unauthorized competitors from building their own compatible games, Sega used a technological "lock-out" measure.\textsuperscript{34} The defendant, Accolade, reverse engineered the console, making intermediate copies of the console in the process.\textsuperscript{35} Sega sued for copyright infringement,\textsuperscript{36} but the court held that reverse engineering is a fair use when it is necessary to gain access to unprotectable, functional elements.\textsuperscript{37}

The court's holding in \textit{Sega} is shaped by copyright policy focused on public interests. The court wrote:

In determining whether a challenged use of a copyrighted material is fair, a court must keep in mind the public policy underlying the Copyright Act. The immediate effect of our copyright law is to secure a fair return for an author's labor. But the ultimate aim is... to stimulate artistic creativity for the general public good. When technological change has rendered an aspect... of the Copyright Act ambiguous, the Copyright Act must be construed in light of this basic purpose... [T]he fact that computer programs are distributed for public use in object code form often precludes public access to ideas and functional concepts contained in those programs, and thus confers on the copyright owner a \textit{de facto} monopoly over those ideas and functional concepts. That result defeats the fundamental purpose of the Copyright Act...\textsuperscript{38}

The court pursued the public policy underlying copyright law by

\textsuperscript{30} 977 F.2d at 1527-1528 (holding that making copies of protected works for the purposes of reverse-engineering is a fair use when there is no other means of gaining access to the functional aspects of the underlying work). \textit{See also supra} n. 22.

\textsuperscript{31} \textit{Sega}, 977 F.2d at 1519-20, 1524.

\textsuperscript{32} \textit{Id.} at 1514.

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.} at 1515.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} In \textit{Sega}, the court also rejected a claim of trademark infringement and false designation of origin. \textit{Id.} at 1514

\textsuperscript{37} \textit{Id.} at 1527-1528.

\textsuperscript{38} \textit{Id.} at 1527.
conducting a fair use inquiry and finding that Accolade's act of reverse engineering constituted a fair use. The court's treatment of the fair use factors is of particular interest. When analyzing the first factor, the purpose and character of Accolade's use, the court noted that Accolade's objective was not simple piracy, but rather achievement of program compatibility. The court further noted that the "public benefit" resulting from this use was the "growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works . . ." When analyzing the fourth factor, the effect of the use upon the market, the court noted the difference between market usurpation and mere entry into the market. The court also distinguished between the market for the console and the market for the games, and noted that Accolade's games did not infringe Sega's copyright in the console. The court then turned to Sega's culpable behavior in overreaching; the court concluded that, "an attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression. . . ." The fair use analysis conducted by the court was basically market analysis; the court's goal was to preserve competition and innovation. By invoking the fair use doctrine, the court prevented Sega from excluding competitors from a market in which it held no exclusive rights, i.e. the market for game applications. The analysis in Sega comes full circle in Sony Computer Entertainment Inc., v. Connectix Corp., a recent case dealing with similar issues. Like Sega, Sony was in the business of selling consoles and various games; Sony was also in the business of licensing the right

39. Id. at 1522.
40. Id. at 1523.
41. Id.
42. Id.
43. Id. at 1523-1524.
44. It is interesting to note that the court could have applied a copyright misuse analysis in this case. Of course, in 1992, the doctrine of copyright misuse was not yet robust. See Karen E. Georgenson, Reverse Engineering of Copyrighted Software: Fair Use or Misuse?, 5 Alb. L.J. Sci. & Tech. 291 (1996) (arguing that courts like the Sega court distort the statutory guidelines of §107 by applying fair use, when misuse could be used to pursue the appropriate policy analysis); White, supra n. 4 (arguing that misuse is the best way to retain the balance of copyright law when the creators of a class of works, e.g. computer programs, gain excessive power).
45. Clearly, copyright law does not grant Sega the right to mandate what games the public can choose to play, by virtue of a copyright in a console.
46. 203 F.3d 596 (9th Cir. 2000).
to make games for the console to willing third parties. Connectix reverse engineered a Sony console and developed emulator software that allowed Sony's games to be played on personal computers, rather than Sony's console. Sony sued Connectix for copyright infringement. The court held for Connectix, relying primarily on the Sega decision.

Of primary interest in assessing these two cases is the manner in which the fair use analysis is applied. The only notable difference between Sega and Connectix is the way in which the courts define relevant markets while conducting the inquiry into the effect of the use on the market. In Sega, the relevant market was the market for platforms; Accolade was only making game applications that were compatible with Sega's platform. In Connectix, the relevant market was the market for game applications; Connectix only produced a platform that was compatible with Sony's game applications. After the Connectix decision, it does not matter how the relevant markets are parsed, the issue is whether the defendant was reverse engineering to build a compatible, non-infringing product. For the court in Connectix, the issue was access for the sake of market competition and, presumably, innovation. Fair use has been a useful tool in combating the industry's overreaching, which might otherwise result in the establishment of de facto monopolies beyond the original grant of the copyright.

2. Copyright Misuse

Whereas fair use is a venerable doctrine, copyright misuse is a relatively new concept. In fact, copyright misuse is a direct response to the decision to extend copyright protection to computer programs. With computer programs, the risk that copyright owners will pursue business practices with exclusionary tendencies is more prevalent than with other subject matter. Aaron Xavier Fellmeth writes:

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47. Id. at 598.
48. Id. at 598-99.
49. Id.
50. Id. at 602-03.
With the penetration of copyrightable software into every aspect of our lives, from grocery stores to product design and manufacture, digital answering machines...and obviously, the ubiquitous personal computer, the potential for the copyright to confer monopoly power has increased logarithmically. The dramatic increase in the use of copyright misuse defense in the realm of software illustrates this phenomenon.53

Like the doctrine of fair use, the doctrine of copyright misuse helps courts police anti-competitive, and presumably anti-innovative practices by copyright owners.

In 1990, the Fourth Circuit in Lasercomb America, Inc. v. Reynolds, became the first court to expressly recognize the defense of copyright misuse.54 In Lasercomb, the plaintiff developed and marketed a copyrighted software program.55 The license agreement prohibited the licensee from developing its own competing software. Additionally, the term of the agreement was for 99 years, which extends beyond the lifetime of the copyright.56 The plaintiff protected its software from unauthorized access by using a technological protection device.57 The defendant did not agree to the license terms, but rather circumvented the technological protection device. The defendant then made infringing copies of the software and proceeded to market its own infringing version of the software.58

Analogizing from patent misuse, the court recognized the existence of copyright misuse as a defense, and found for the defendant.59 The court held that although the defendant had not agreed to the terms of the license, the license agreement had an adverse effect on the public interest in contravention of the policy of copyright law.60 The court in Lasercomb used the doctrine of copyright misuse to conduct a market analysis by asking the question: did the plaintiff's conduct have an anti-competitive effect on the

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54. 911 F.2d 970 (4th Cir. 1990).
55. Id. at 971.
56. Id. at 972-73.
57. Id. at 971.
58. Id.
59. Id. at 976, 979. This analogy is fairly strong considering that the constitutional justification and purpose for patent law and copyright is the same: Article I, Section 8, Clause 8.
60. Id. at 978.
market outside the protection of the copyright? The court thus used copyright misuse as a means of responding to the need to define the appropriate scope of protection for software and the need to limit the use of abusive private contracts and technological measures to exclude competitors.

Shortly after Lasercomb, courts all over the United States began to rely on the doctrine of copyright misuse. Although the viability of the copyright misuse doctrine is now widely accepted by the legal community, the scope of the defense is still debatable. This is not nearly as problematic as many commentators would suggest; the scope of fair use was at issue even after codification in 1976. Copyright misuse will eventually become a venerable doctrine, much like its counterpart, fair use.

Despite the fact that the copyright misuse doctrine is in flux, there are some elements of copyright misuse that are well settled. First, copyright misuse is only a defense; it has never been recognized as a cause of action. Second, copyright misuse does not invalidate the copyright; it only bars enforcement until the misuse has been purged. Third, although a contract can be and often is the manner in which copyright misuse occurs, copyright misuse is not a defense to breach of contract. Finally, Lasercomb and commentators make clear that copyright misuse does not require an antitrust violation.

In Lasercomb, the court wrote:

61. Id. This inquiry is not unlike the inquiry required by the fourth factor of a fair use analysis.

62. See, e.g., DSC Commun. Corp. v. DGI Technologies, Inc., 81 F.3d 597 (5th Cir. 1996); Prac. Mgt. Info. Corp. v. AMA, 121 F.3d 516 (9th Cir. 1997); Qad v. ALN, 770 F. Supp. 1261 (N.D. Ill. 1991). See also Fellmeth, supra n. 53, at 21 (noting that the Supreme Court has referred to the possibility of using the copyright misuse defense, but has not expressly validated the existence of the defense and noting that most circuits recognize the copyright misuse defense).

63. Fellmeth, supra n. 53, at 5, 11.

64. Id. at 11 (citing Broad. Music, Inc. v. Hearst/ABC Viacom Ent. Servs., 746 F. Supp. 320, 328 (S.D.N.Y. 1990)).


66. See Fellmeth, supra n. 53, at 10-11; however, a court may choose not to enforce these contracts as unconscionable or void for public policy. For an excellent discussion regarding the use of unconscionability, preemption, copyright misuse, and federal and state public policy to void contracts, see Mark Lemely, Beyond Preemption: The Law and Policy of Intellectual Property Licensing, 87 Cal. L. Rev. 111 (1999).

67. See Lasercomb, 911 F.2d at 978; Prac. Mgt. Info. Corp., 121 F.3d at 521; Fellmeth, supra n. 53, at 36-37 (arguing that courts should engage in copyright misuse analysis in order to consider copyright policy before engaging in a distinctly separate antitrust analysis); Georgenson, supra n. 44, at 317-18 (presenting a hypothetical that demonstrates a scenario in which a plaintiff's actions run counter to copyright's policy regarding
So while it is true that the attempted use of a copyright to violate antitrust law probably would give rise to a misuse of copyright defense, the converse is not necessarily true—a misuse need not be a violation of antitrust law in order to comprise an equitable defense to an infringement action. The question is not whether the copyright is being used in a manner violative of antitrust law . . . but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.68

The distinction between antitrust analysis and copyright misuse may be a subtle distinction, but it is also an important distinction. Antitrust laws are designed to protect competition while copyright laws are designed to promote innovation. The key difference is between competition and innovation; competition and innovation do not necessarily go hand-in-hand.

Competition is often used in copyright case law as a proxy for innovation.69 Courts and commentators use competition as a proxy because it is a useful concept. First, it is easier to analyze the effect of an activity on competition than it is to analyze the effect of an activity on innovation. Secondly, there is some relation between competition and innovation. Competition is a catalyst for, but not sufficient for, innovation. Where there is competition, often there is also innovation. Where there is no competition, innovation is stagnant.

The doctrine of copyright misuse may still be developing, but it is nonetheless an important tool available to combat anti-innovative behavior. Fair use has also been available to protect would-be innovators from infringement claims. Under either doctrine, copyright's constitutional policy is pursued and the delicate balance of copyright may be maintained or restored. Unfortunately, these equitable mechanisms have been made unavailable by a new and unwise law—the anti-circumvention provisions of the DMCA.

68. 911 F.2d at 978.

69. See generally, Hanna, supra n. 51, at 424-425 (unlinking the relationship between competition and innovation). Hanna’s position is well made, even though her conclusion is too extreme.
III
The DMCA is Anti-innovation and Unconstitutional

A. Industry Hopes and Fears Spawned a Legislative Monster

Professor Yochai Benkler pointed out that the copyright industry actively sought the enactment of the DMCA anti-circumvention measures because of its hopes for and fears of digital technology.\footnote{See Benkler, supra n. 21, at 422.} The industry’s fear was that the ease with which digital works can be copied and distributed would enable piracy. The industry’s hope was that the same technology could be used to establish an unavoidable tollbooth at every use of the work.\footnote{See Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised, 14 Berkeley Tech. L.J. 519, 521, 533-534 (1999) (arguing that the DMCA reflects Hollywood’s preferences to the detriment of the public).} This certainly describes Hollywood’s support for the DMCA; Hollywood wants to prevent online piracy of its movies in digital formats.\footnote{See id.} Furthermore, Hollywood wants to control both the market for movies in digital formats and the manner in which the movies are viewed. Congress was also motivated by its own hopes for and fears of digital technology when it enacted the DMCA.\footnote{See Samuelson supra n. 72, at 522 (“With the enactment of the anti-circumvention provisions of the DMCA, the Administration may have had more success in achieving imbalance in digital copyright law than Congress may have realized.”).} The legislative history indicates that Congress was also fearful of international piracy.\footnote{74. 144 Cong. Rec. H7099 (daily ed. Aug. 4, 1998) (statement of Rep. Berman); 144 Cong. Rec. S4884 (daily ed. May 14, 1998) (statement of Sen. Hatch); 144 Cong. Rec. S4887 (daily ed. May 14, 1998) (statement of Sen. Ashcroft).} Congress thus actualized the industry’s hopes when it enacted the DMCA.\footnote{75. See Samuelson supra n. 72, at 522.}

The anti-circumvention provisions of § 1201 of the DMCA generally prohibit two kinds of activities: (1) circumventing a technological measure that controls access to a copyrighted work and (2) manufacturing, importing, providing, or trafficking in...
circumvention devices. Specifically, § 1201(a)(1) provides that "no person shall circumvent a technological measure that effectively controls access to a work protected under this title."77 Section 1201(a)(2) and (b)(1) are anti-device provisions.78 Section 1201(a)(2) targets devices that circumvent technical measures that control access, while § 1201(b)(1) targets devices that circumvent technical measures that protect the rights of a copyright owner. The DMCA anti-circumvention provisions create express rights that are only indirectly tied to copyrights;79 an underlying copyright infringement is not required to make a § 1201 claim.80 The creation of new rights and duties like this can have a major effect on the equilibrium of the market.

Comforting statements, wishful thinking, and deceptive drafting obscured the expansive impact of these anti-circumvention provisions.81 The act purports to not alter any existing defenses to copyright infringement; § 1201(c) provides that, "nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." While it may be true that defenses to copyright infringement are not altered, a violation of § 1201 is not an infringement of a copyright. Therefore, defenses to copyright infringement probably do not apply to § 1201 claims.82

Consider the availability of the equitable defense of fair use. The statute could have expressly provided for the fair use defense by requiring an underlying copyright infringement. Alternatively, the statute could have provided that no liability would arise when a lock was circumvented for the purpose of engaging in a fair use activity. Instead, the statute is at best ambiguous, and at worst silent, on the availability of the fair use defense for § 1201 claims.83

76. The DMCA conspicuously fails to define the term 'technological measure'. See, 17 U.S.C. § 1201(a) and (b) (Supp. IV 1998).
77. Id. at § 1201(a)(1).
78. Id. at § 1201(a)-(b).
79. Section 1201(a) prohibits the circumvention of a measure that controls access “to a work protected under this title” and § 1201(b) prohibits the manufacture of a device that can be used to circumvent a copy control that “effectively protects a right of the copyright owner under this title.”
80. See Benkler, supra n. 21, at 420.
81. Samuelson, supra n. 72, at 536.
82. See Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 219 (S.D.N.Y. 2000) (court grants preliminary injunction and notes that the fair use defense is not available because there is no claim of copyright infringement in the § 1201 action).
83. The only place where the term “fair use” appears is 17 U.S.C. § 1201(c).
The legislative history on the subject is not much help; most of it reads like a ruse. Representative Bliley stated the DMCA contains a "strong fair use provision to ensure that consumers as well as libraries and institutions of higher learning will be able to continue to exercise their historical fair use rights." It is not clear which statutory provision he is referencing; the only mention of 'fair use' in reference to the anti-circumvention provisions is in § 1201(c), the above quoted savings clause. Representative Bliley continues:

The Committee considered it particularly important to ensure that the concept of fair use would remain firmly established in the law. Section 1201(a)(1) is one of the most important provisions of this legislation... It was crafted by the Commerce Committee to protect "fair use" and other users of information now lawful under the Copyright Act.\(^\text{85}\)

Representative Bliley's intent seems clear; unfortunately the text of the DMCA does not reflect Representative Bliley's intent. Representative Boucher's approach is also of little help. He opined:

The Administration had considered originally... no specific provision on fair use, since Section 107 of the Copyright Act would, of course, continue to exist after enactment of the legislation.... As it was introduced, H.R. 2281 contained two important safeguards for fair use. First, the bill dealt separately with technological measures that prevent access and technological measures that prevent copying. As to the latter, the bill contained no prohibition on the act of circumvention itself, leaving users free to circumvent such measures in order to make fair use copies. Second, the savings clause in subsection 1201(d) ensures that defenses to copyright protection, including fair use, are unaffected by the prohibitions on circumvention.\(^\text{86}\)

Representative Boucher's approach is entirely disingenuous. While it is true that an individual is not prohibited from circumventing technical measures that control copying, an individual doing so must first gain access to the work. The act of circumventing a measure that controls access to a work for the sake of engaging in a fair use is still prohibited.

Senator Ashcroft offered, "[i]n my opinion, this bill achieves a fair balance by taking steps to effectively deter piracy, while still allowing fair use of protected materials." The legislative history makes it apparent that Congress was concerned with fair use; yet their intent is not clearly reflected in the statute. Were the drafters concerned that fair use be preserved? Were they concerned that it

85. Id. at H7094.
might be preserved to the chagrin of the industry? Were they worried about opposition to the bill if it was apparent that fair use was being whittled away?

If the defense of fair use is not available for a § 1201 claim, then other defenses to copyright infringement, such as copyright misuse, are also likely to be unavailable. Thus, equitable doctrines that help the courts maintain the balance of copyright policy by allowing activities that result in competition and innovation are essentially made unavailable by the DMCA.

The DMCA does provide some narrow exemptions from the general prohibition on circumvention.88 Section 1201(f) purports to allow for reverse engineering of access controls, but this exemption is hollow for several reasons.89 First, the exemption is too narrow because it does not allow reverse engineering for the production of non-infringing works that are not designed to be inter-operative.90 Second, § 1201(b) effectively eclipses the exemption because the practice of reverse engineering requires devices that are primarily designed to circumvent. Section 1201(f)(2) of the exemption does allow individuals who engage in reverse engineering to develop a “technological means” to circumvent access controls, but the exemption does not provide the right to distribute devices used for circumvention of copy controls.91 Furthermore, the language of the exemption requires that the circumvention be for the “sole purpose”

88. See Samuelson, supra n. 72, at 548-549 (noting the odd construction of exemptions).
90. Section 1201 prohibits acts that are considered fair use under Sega and Connectix. Even under the most limiting interpretation of these holdings, circumventing copy controls and reverse engineering is considered a fair use if it remains the only viable means of gaining access in order to design a non-infringing work. The dicta of Sega and Connectix suggest that the intent of reverse engineering must be to design an interoperable program, however, the goal of interoperability should not be relevant. What is important is whether or not the end product infringes. Copyright law does not protect ideas; copyright law protects expression. Copyright owners are only entitled to exclude competitors who copy their protected expression; they are not entitled to use the copyrights to exclude competitors who use their unprotectable ideas. Interoperability is not a test for determining whether the competitor appropriated ideas or expressions. Through reverse engineering a competitor might design a program that is not interoperable, which does not incorporate any of the protectable expression of the original work. Likewise, a competitor might develop an interoperable program that consists of so much protectable expression that it constitutes an infringing derivative work.
91. Presumably, the “technical means” in § 1201(f)(2) is the same thing as a “technology, product, service, device, component, or part thereof” found in § 1201(a)(2) and (b). This presumption is made because it is difficult to imagine what the difference would be considering that both terms are extremely broad.
of analyzing elements necessary for achieving interoperability. Few useful reverse engineering tools could ever meet this standard because they often serve more than one function, and if they can be used to circumvent access controls, they may be able to be used to circumvent copy controls as well. Despite the § 1201(f) exemption, § 1201(b) will effectively destroy the legal market for these technological means of circumvention. Scientists will have to reinvent the wheel every time they attempt to reverse engineer a work. The exemption in § 1201(f)(2) is thus difficult to use and inefficient.

The DMCA also does not provide any exemptions for circumventing technological protection systems for the purpose of engaging in parody, criticism, or news reporting. In addition to these fair uses, there are many other possible fair uses and innovative activities for which the DMCA does not provide exemptions. Essentially, the statute does not provide many viable defenses.

The anti-circumvention provisions can, and will, be used to block competition and the introduction of new technologies. The DMCA protects locks that were developed for and are primarily used to exclude unauthorized third parties from reverse engineering the owner's product. Most § 1201 claims will not be raised against hackers or those intending to make infringing products; most § 1201 claims will be levied against competitors, including competitors making non-infringing products.

B. Copyright Policy Takes a Wrong Turn

Copyright policy is made available and governed by a constitutional mandate. As the Supreme Court has held, "[t]he primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'" Copyright is designed to promote innovation. All other policy goals are secondary.

94. Samuelson, supra n. 88.
95. See Julie Cohen, Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of "Lock-Out" Programs, 68 S. Cal. L. Rev. 1091, 1094 (1995) (arguing that before the advent of the DMCA, reverse engineering was the reason lock-out programs were developed.)
Professor Julie Cohen describes the DMCA as a "radical departure from existing copyright law."\[^{98}\] The departure is so radical that it may not even be a "copyright" law. When enacting this legislation, the drafters treated it as a copyright act. It is included in title 17 and "amends" the Copyright Act of 1976 by adding "a new chapter to U.S. copyright law."\[^{99}\] The legislation is even titled the "Digital Millennium Copyright Act." However, as Representative Bliley put it, the DMCA creates "entirely new rights for content providers that are wholly divorced from copyright law."\[^{100}\] Since the defenses to copyright infringement that are made available to infringement claims by the rest of the Copyright Act are not available, it may be proper to assume that the DMCA is not actually part of the Copyright Act. The DMCA is not linked to infringement and, as discussed below, it runs counter to the "purpose" requirement of the Copyright and Patent clause by actually retarding progress and innovation.

Professor Mark Lemley argues that "the primary purpose of the DMCA is to intervene in the innovation marketplace, by imposing what one might call 'unilateral technological disarmament' on designers of encryption-breaking systems."\[^{101}\] In the field of encryption, innovation is effectively outlawed. The anti-circumvention provisions of the DMCA specifically prohibit decryption.\[^{102}\] Additionally, § 1201(b) freezes the market for decryption technology by prohibiting the manufacture or traffic in technologies designed to circumvent copy controls.\[^{103}\] This, of course, occurs only within the United States. There is no reason to assume that the rest of the world is going to unilaterally terminate all encryption research. These provisions cripple the American industry for encryption research.

Innovation is further damaged because of the direct reduction in access that results from the DMCA.\[^{104}\] Knowledge is cumulative;

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\[^{103}\] 17 U.S.C. § 1201(b)

\[^{104}\] Julie Cohen has repeatedly advocated for the conceptualization of an affirmative right of access to information. See, e.g., Cohen, *Intellectual Privacy and Censorship of the Internet*, 8 Seton Hall Const. L.J. 693, 701 (1998); see also Patry, supra n. 4.
creative works build on previous creative works.\textsuperscript{105} However, the DMCA protects mechanisms that are designed to prevent access to knowledge.

Furthermore, the protection afforded these technological locks can be used in a number of inappropriate ways. First, an individual can simultaneously place a lock over a copyrighted work and a work that is not capable of copyright protection, thus extending the power to exclude over works that existing copyright law does not protect. Second, technological protection systems can be used to hide other copyright or patent infringements. Circumventing these technological mechanisms to police other copyright and patent rights is not expressly allowed under the DMCA. Finally, when combined with contracts, technological protection systems can be used to prohibit creative uses of the work, such as parody, criticism, news-reporting, and reverse engineering.\textsuperscript{106} The DMCA will result in legally protected \textit{de facto} monopolies over functional aspects of computer programs, ideas, and materials that were formerly in the public domain.\textsuperscript{107}

C. The DMCA Encourages Misuse

The DMCA stifles innovation by creating an incentive to engage in the monopolistic practices of misuse.\textsuperscript{108} The DMCA creates an incentive to engage in copyright misuse regardless of whether the use of a technological protection system to prevent access to public domain material is considered a misuse. Prior to the DMCA, the availability of the copyright misuse defense and fair use defense provided the copyright owner reasons to avoid engaging in a misuse; protection by the copyright law was conditioned upon not engaging in a misuse. After the DMCA a copyright owner has every reason to actively pursue a policy of copyright misuse.\textsuperscript{109} Breach of contract claims and § 1201 claims are not barred by engaging in activities that

\textsuperscript{105} See Reichman and Uhlir \textit{supra} n. 8, at 813.
\textsuperscript{106} See \textit{supra} text accompanying nn. 20-21.
\textsuperscript{107} The Supreme Court has held that, as a constitutional matter, patents may not remove existent knowledge from the public domain. \textit{Bonito Boats, Inc. v. Thunder Craft Boats}, 489 U.S. 141, 168 (1989). See discussion infra Part III.D.
\textsuperscript{108} Interestingly, the DMCA provides incentive for the industry to engage in both copyright and patent misuse. The interplay between the DMCA and patent law has not yet been explored in the legal literature and is beyond the scope of this comment.
\textsuperscript{109} The battle over Java demonstrates the ingenuity corporations will utilize in order to ensure that interoperability will not occur if that interoperability occurs at the risk of market competition. See \textit{United States v. Microsoft Corp.}, 84 F. Supp. 2d 9, 14 (D.D.C. 1999).
constitute a misuse of the copyright monopoly. The owner loses nothing by engaging in behavior that contravenes public policy.

Nevertheless, the inquiry into when the practice of using a technological lock constitutes copyright misuse remains worthy of pursuit. Lasercomb established that a contract that extends a copyright by preventing others from creating innovative works or effectively extends the term of the copyright beyond the term provided in the statute can alone constitute a misuse. Can using a technological protection system by itself constitute copyright misuse? Computer programs always have at least a portion of functional code that is fundamentally unprotectable, but owners of copyrighted software do have interests that deserve protection. In fact, it seems that the law encourages a healthy amount of self-help. The use of a technological protection system, by itself, is probably not a misuse. However, it may be copyright misuse to use the lock to extend monopoly power over knowledge clearly in the public domain. Furthermore, it may also be copyright misuse to use a legally protected technological protection system in combination with a license to stymie competition.

Consider the options available to a potential market entrant who desires to pursue a fair use activity. Prior to the DMCA, the copyright owner relied on the protection of private contract coupled with a technological lock. The market entrant had a choice of (1) agreeing to contract provisions that, in all likelihood, prohibited the desired fair use and then risking contract liability by breaching the agreement and engaging in the fair use anyway or (2) circumventing the technological lock and then risking copyright liability. Assuming that the market entrant wanted to engage in a fair use of the work, the market entrant would choose the second option and rely on equitable defenses such as copyright misuse or fair use if sued. This approach was followed by Accolade in the Sega case.

After the DMCA, the second option is foreclosed. If written

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110. A possible answer to this dilemma may be to expand the copyright misuse defense to bar contract claims.
111. Lasercomb, 911 F.2d at 972, 977-979.
112. See Julie Cohen, supra n. 95, at 1195-1198 (arguing that lock-out programs alone should not constitute copyright misuse).
114. For example, simultaneously placing a technological lock over a protectable JPEG image and an unprotectable JPEG image. It is much easier to identify where the protectable material begins and where it ends. With a single piece of software, the inquiry is inextricable.
115. 977 F.2d at 1517-18.
today, the *Sega* decision would likely come out differently. The copyright owner would sue the market entrant under § 1201(a)(1) for circumventing an access restriction, § 1201(a)(2) for manufacturing the device which was used to reverse engineer the console, and § 1201(b) for manufacturing the device which was used to circumvent the technological system which protect the copyrights in the console. Accolade, relying on § 1201(f), is likely to prevail on the § 1201(a) claims, but lose on the § 1201(b) claim.

Section 1201(a)(1) and (2) prohibit the circumvention of access controls and the manufacturing of devices designed to circumvent access controls, but Accolade's activities are likely to be exempt under § 1201(f). However, § 1201(f) does not allow the development of a technological means to circumvent a system that protects the rights of a copyright owner. Manufacturing devices that circumvent copy controls is prohibited by § 1201(b) and Accolade's activities are not exempt from § 1201(b) claims by virtue of § 1201(f). In order to reverse engineer Sega's console, Accolade manufactures a device that bypasses a technological protection measure. If the technological measure that is bypassed by Accolade's device serves both as an access control and as a copy control, then Accolade will violate § 1201(b).

Section 1201(b)(1) prohibits the manufacture of any technology or device that circumvents a technological measure that "effectively protects a right of a copyright owner under this title . . ."116 Section 1201(b)(2)(B) explains that "a technological measure "effectively protects a right of a copyright owner under this title" if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title."117 The rights of a copyright owner under this title are expressly provided in §107 of the Copyright Act.118 One of the enumerated exclusive rights is the right of reproduction.119 All technological protection measures, at some level, prevent others from reproducing the underlying work. Copies of the underlying work cannot be made if access to the code is not available. Therefore, whether the mechanism is an "access control" or a "copy control" is effectively irrelevant under the plain meaning of the statute.

There is no reason to assume that the technological measure

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117. Id. at § 1201(b)(2)(B).
118. Id. § 107.
119. Id.
cannot serve two purposes, preventing unauthorized access and protecting the reproduction right or derivative work right. Even assuming that all devices can be classified as either prohibiting unauthorized access or protecting a copyright owner's rights, how can one tell the difference between a device that controls access and a device that protects the rights of a copyright owner? Moreover, Sega could simply add a technological device that is clearly designed to impede reverse engineering by controlling the ability to copy the program. Accolade would thus violate the DMCA if they manufactured a circumvention device in order to engage in reverse engineering. Therefore, Accolade's creative, innovative, and competitive activities are prohibited by the DMCA. Accolade's only alternative would be to not engage in circumvention or reverse engineering. The result is that competition is stifled and new innovative works are not produced.

This outcome is not a stretch of the imagination. Consider the outcome of a recent preliminary injunction hearing regarding DVD protection measures. Defendants had distributed an algorithm that circumvented the digital encryption measures used to prevent DVD viewing on unauthorized platforms. Specifically, defendant's software application made plaintiff's copyrighted digital works compatible with the Linux platform. In *Universal City Studios, Inc. v. Reimerdes*, the district court granted owners of copyrights in DVD movies a preliminary injunction against defendants. Unlike the courts in Sega and Connectix, this court saw little value in interoperability. This case illustrates how the DMCA can be used by owners of copyrights in DVD movies to extend their copyright monopoly in digital movies over the market for platforms. These owners are gaining patent-like protection in the platform; they are given the *de facto* right to grant

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120. Some copyright controls prevent access to copying functions. See Steffik, *supra* n. 19.

121. The relationship between fair use and the language of § 1201(b) regarding "a right protected under this title" is unclear. One may argue that a technological protection measure does not protect a "right protected under this title" to the extent that copyright owners do not have an exclusive right to prohibit fair uses. This position is strengthened if engaging in fair uses is considered a user's right. The counter position holds that fair use is only an affirmative defense assessed after the determination of an infringement of an express copyright. Ultimately, this unsettled argument results in a chilling effect; would-be competitors will not risk a failing fair use defense, much less a fair use defense failing in the context of a § 1201 dispute.

122. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 226-27 (S.D.N.Y. 2000) (order granting preliminary injunction). N. that this is not a § 1201(b) claim, but rather a § 1201(a)(2) claim wherein the court found it likely that the defendant's activities fell outside the § 1201(f) exemption. *Id.* at 217-18.
licenses in something they do not own, despite the express statutory and constitutional limits of their monopoly.

D. The Unconstitutionality of the DMCA

Congress does not have a general power to pass laws; the Constitution must first authorize Congress to act. Every act of Congress is a hat that must find an appropriate Constitutional hook. When enacting the Copyright act, Congress used Article I, Section 8, Clause 8, of the Constitution as a hook. As already noted, this portion of the Constitution contains a “purpose” requirement. Article I, Section 8, Clause 8 does not justify the anti-circumvention provisions of the DMCA. The provisions are not only outside the scope of the Copyright and Patent clause, but also run counter to the constitutionally required “purpose.” The DMCA outlaws certain technological innovations, stunting the growth of encryption sciences. Furthermore, it makes unavailable defenses traditionally used to balance copyright policy, and results in misuse and de facto monopolies over functional aspects of computer programs. The DMCA does meet the hopes of the industry, but it does not meet the requirements of the Constitution.

The DMCA creates new rights that directly and immediately protect technological mechanisms without any requirement of originality in the mechanism itself. The kind of rights that are created by the anti-circumvention provisions are not copyrights afforded authors of original writings, but rather, are more like property rights based on effort and “sweat of the brow.” They are rights based on the decision to use a technological mechanism. Section 1201(a) of the DMCA states that “no person shall circumvent a technological measure that effectively controls access to a work protected under this title.” This extends protection to technological measures, not to copyrighted materials, and goes beyond the scope of the ‘purpose’ requirement of Article I, Section 8, Clause 8. Section 1201(b) of the DMCA likewise prohibits the development of any technological measure which “effectively protects a right of a copyright owner under this title.” This section actually curtails the development of the arts and sciences under the guise of protecting the rights of copyright owners, once again going beyond the scope of

123. This is an indisputable constitutional principle. See The Trademark Cases, 100 U.S. 82, 93 (1879).
124. See Feist, 499 U.S. at 340.
Article I, Section 8, Clause 8. The anti-circumvention provisions are not designed to promote innovation; they are designed to prevent others from reaping where they have not sown.

This kind of congressional approach has been invalidated before. In The Trademark Cases, the Supreme Court invalidated a trademark law that was premised on the Copyright and Patent clause, Article I, Section 8, Clause 8. The Court held that trademark laws, premised on the Copyright and Patent clause are invalid because they have no necessary relation to innovation. Likewise, the anti-circumvention provisions of the DMCA, premised on the Copyright and Patent clause, are invalid because the provisions are not related to promoting progress in the arts and sciences.

The DMCA removes, or enables the removal of, material from the public domain. In Bonito Boats, Inc. v. Thunder Craft Boats, Inc., a unanimous opinion, the Supreme Court wrote that, “Congress may not create patent monopolies of unlimited duration, nor may it ‘authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” If Congress may not use patent law to remove existent knowledge from the public domain, Congress should not be allowed to achieve the same result by using copyright law. Copyright law has the same constitutional limitations as patent law. The DMCA anti-circumvention provisions violate the constitution by authorizing the removal of public domain knowledge.

Supporters of the DMCA might turn to the Necessary and Proper clause for constitutional support of the anti-circumvention measures DMCA. However, the Necessary and Proper clause of the Constitution cannot save the anti-circumvention provisions from their constitutional infirmities. The Necessary and Proper Clause provides a liberal standard for review; the test is “reasonableness”. However, the allegedly “reasonable” legislative activity must be in pursuit of another express grant of power. The Necessary and Proper Clause defines the congressional scope of power after a constitutional grant of power has been located within the Constitution. The DMCA does not pursue the express grant found in Article I, Section 8, Clause 8.

127. 100 U.S. 82 (1879).
128. Id. at 94.
The DMCA is a legislative hat without a constitutional hook. The Copyright and Patent Clause is not related to the policy that the DMCA pursues, and it cannot provide the needed grant of power to support the DMCA.132

IV
Conclusion

In addition to the unconstitutionality of the anti-circumvention measures of the DMCA, these measures are anti-competitive and reflect poor policy making. Limited legal monopolies on knowledge will become unlimited de facto monopolies. Competition and innovation are damaged by the approach taken by the DMCA and the economic justification of copyright law is destroyed. The historical intent of copyright law as well as the traditional defenses to copyright infringement claims have been set aside entirely by the DMCA. If the DMCA anti-circumvention measures are maintained as drafted, the balance of copyright law will be unwisely rendered askew.

132. Nor can the DMCA anti-circumvention provisions be justified by the Commerce Clause. The argument is not ripe because the DMCA is not an act of congressional power based on the Commerce Clause; the statute amends the copyright code. Furthermore, the Commerce Clause cannot override express limitations found in other portions of the Constitution. See Malla Pollack, The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment, 17 Cardozo Arts & Ent. L.J. 47, 56 (1999) (arguing that extending protection to databases cannot appropriately be based on the Commerce Clause).