Hastings Communications and Entertainment Law Journal

Volume 30 | Number 2 Article 5

1-1-2008

The DMCA and the Privatization of Copyright

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Recommended Citation

Dave Hauser, *The DMCA and the Privatization of Copyright*, 30 Hastings Comm. & Ent. L.J. 339 (2008).
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol30/iss2/5

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The DMCA and the Privatization of Copyright

by
DAVE HAUSER*

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I. Introduction

Critics of the Digital Millennium Copyright Act (DMCA)[1] prevail on the internet, the forum the Act intended to serve.[2] Common sentiment bemoans the law as pushed by deep pockets to hold down the public

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1. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

2. *See, e.g.*, The Issue: U.S. Constitution, *Unintended Consequences*, http://www.anti-dmca.org/whats-wrong.html (last visited Jan. 20, 2008); Jonathan Bailey, *Punditry Saturday: Why I Hate the DMCA*, Plagiarism Today, Oct 8th, 2005 http://www.plagiarismtoday.com/2005/10/08/punditry-saturday-why-i-hate-the-dmca/.

through strong-arm content protection, often with the implicit suggestion that the DMCA is on shaky legal ground.[3] Critics point to a multitude of unintended side-effects, further implying that the DMCA is the leader in a parade of horribles.[4] What lies beneath critics' DMCA loathing is a sweeping anxiety over the privatization of copyright.[5]

Although highly criticized, the DMCA earned a unanimous Senate vote along with President Bill Clinton's signature in 1998.[6] Its goal was to bring U.S. copyright law "squarely into the digital age" by making "digital networks safe places to disseminate and exploit copyrighted materials."[7] The DMCA purported to create the "legal platform for launching the global digital online marketplace . . . ."[8]

Because deep pockets influence most modern legislation, scrutinizing the DMCA's lobbyist roots does little to distinguish it from other commercial laws. The vast majority of emotionally charged criticism fails to note that, despite its flaws, the DMCA may be a completely legitimate and valuable piece of legislation. Indeed, while consumer rights arguments flooded internet blogs, litigants and legal commentators made additional challenges to the Act on constitutional grounds.[9]

With the support of recent case law, statistics, and legal analysis, this note defends the DMCA and its copyright protection mechanisms. The DMCA should be readily acknowledged as a push toward the privatization of copyright. Furthermore, the vast amount of criticism surrounding the DMCA wrongly shifts the focus away from what its provisions have accomplished.

This note addresses three main challenges to the DMCA's constitutionality: (1) that it exceeds the scope of Congressional authority as restrained by the Intellectual Property Clause, (2) that it oversteps the boundaries of First Amendment protection, and (3) that the doctrine of fair use is unconstitutionally intruded. This note concludes that privatization of copyright under the DMCA is a constitutionally sound response to technology's outpacing of the law. Additionally, society should encourage

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3. *Unintended Consequences*, *supra* note 2. *See also* John Dvorak, *Free Speech at Risk*, PC Magazine Online, Oct. 13, 2003, http://www.pcmag.com/article2/0,4149,1335801,00.asp ("Mind you, this is in violation of an illegal law that Congress seems content to enforce.").

4. Electronic Frontier Foundation, *Unintended Consequences: Seven Years Under the DMCA*, April 2006, http://www.eff.org/IP/DMCA/unintended_consequences.php#Section7.

5. *See, e.g.*, Matt Jackson, *Using Technology to Circumvent the Law, The DMCA's Push to Privatize Copyright*, 23 Hastings Comm. & Ent. L.J. 607, 609 (2001).

6 Wikipedia, *Digital Millennium Copyright Act*, http://en.wikipedia.org/wiki/DMCA (last visited Nov. 12, 2007).

7. S. Rep. No. 105-190, at 1-2 (1998).

8. *Id.*

9. *See, e.g.*, *id.*; United States v. Elcom Ltd., 203 F.Supp.2d 1111 (2002).

the privatization of copyright to allow for optimal progress of the digital media industry.

II. Background

A. Napster

In 1999, Shawn Fanning released the original Napster peer-to-peer file sharing system.[10] Just as Johann Sebastian Bach's death marked the end of Baroque music, June 1, 1999 sufficiently marked the crest and beginning of the fall of music's physical distribution.[11] Through the 1990s, the total physical distribution of CDs rose steadily.[12] The peak technically came in 2000, although it was a mere 0.4% increase from 1999.[13] In 2005, total album sales were 30% below their 1999 levels,[14] which have fallen steadily each year since 2000.[15]

These statistics show that a sweeping change in the music business occurred at around 2000. In under a year, Napster went from having zero to 60 million users per month![16] The original Napster was the most conspicuous manifestation of a changing technological landscape. First and foremost, these 60 million users came because the music was *free*.[17] Consumers no longer had to go to a physical music store, or deal with creating cumbersome or poor quality copies dubbed from CDs to tapes, and the selection of music was at least good enough to keep them coming back for more.[18]

From a legal standpoint, the original Napster's fatal flaw was its central database for song titles.[19] This theoretically gave Napster supervision over what people were doing on the network.[20] When coupled

10. Wikipedia, Napster, http://en.wikipedia.org/wiki/Napster (last visited Nov. 12, 2007).

11. *Id.*

12. *The Recording Industry Association of America's 2000 Year-end Statistics* (on file with author).

13. *Id.*

14. Saul Hansell, *Putting the Napster Genie Back in the Bottle*, Nov. 20, 2005, N.Y. TIMES, Nov. 20, 2005, http://www.nytimes.com/2005/11/20/business/yourmoney/ 20fanning. html?ex=1290142800&en=847e39c379d344d5&ei=5088&partner=rssnyt&emc=rss.

15. *The Recording Industry Association of America's 2005 Year-end Statistics* (on file with author).

16. Marshall Brain, *How Gnutella Works*, http://www.howstuffworks.com/file-sharing.htm (last visited Jan. 20, 2008).

17. *Id.*

18. *Id.*

19. *Id.*

20. Katie Dean, *Videos Quick, Easy and Automatic*, WIRED, Jan. 11, 2005, http://www.wired.com/news/digiwood/0,1412,66231,00.html.

with a clear, centralized target, the Ninth Circuit had all it needed to shut Napster down.[21] All of Napster's attempted fair use defenses failed, and the court found it contributorily and vicariously liable for copyright infringement.[22] The court's conclusion rested heavily on "Napster's failure to police the system's 'premises.'"[23]

Statistics show that consumer demand for peer-to-peer file sharing was far too high to be wiped out by a Napster shut down. Soon a vast array of options developed to feed consumers' free music cravings. The Gnutella network is one of the most popular today, and has yet to be shut down despite a hostile legal climate.[24] Gnutella's survival is primarily due to two departures from the original Napster set-up: Gnutella does not have a centralized database, and it permits many different client applications to connect to the network.[25]

Decentralized file sharing systems are a major force in the music industry. In 2003, an average of 5.6 million people were logged onto the peer-to-peer networks at any given time.[26] By 2005 that figure had grown to 9.6 million people.[27] Thus, it should come as no surprise that concurrent to this growth record labels saw physical distribution sales crumble.

B. Legal Digital Distribution

MP3 technology forced the major record labels (Universal Music Group, Sony BMG, Warner, and EMI) to completely rethink their business models.[28] Emergence of the MP3 file format allowed consumers to easily compress and share digital music files, and common computer equipment permitted consumers to decode their CDs and turn them into MP3s.[29] Consumers could then "share[], cop[y], store[] on computers or even broadcast" music at sound quality levels nearly as high as that of CDs.[30] The original Napster facilitated swapping MP3 files between computers. With 57 million downloads of the Napster software between 1999 and

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21. *See* A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001).

22. *Id.* at 1022-1024.

23. *Id.* at 1024.

24. Brain, *supra* note 16.

25. *Id.*

26. P2P File Sharing, *P2P Use Continues to Grow*, http://www.p2p-weblog.com/50226711/p2p_use_continues_to_grow.php (last visited Jan. 20, 2008).

27. *Id.*

28. *See, e.g.*, Kostas Kasaras, *Music in the Age of Free Distribution*, FIRST MONDAY, Jan. 2002, http://www.firstmonday.org/issues/issue7_1/kasaras/index.html.

29. Michael Slinger & Amy Hillman, *Napster: Catalyst for a New Industry or Just Another Dot Com? The Ivey Case Study*, Ivey Bus. J., Vol. 66 No. 3, 45, Jan. 1, 2002.

30. *Id.*

2001, the prevalence of unlawful MP3 distribution gravely threatened the major labels' ability to enforce their copyrights.[31]

The potent combination of compression and file-sharing technology compelled major labels to find new sources of revenue without further threatening their copyrights. Their response—widely considered long overdue—was to make content available via legal digital distribution channels.[32] Because so many people were using cyberspace to steal copyrighted content as MP3s, major label executives refused to sell unprotected MP3s.[33] The labels were concerned that such a move would merely fan the piracy fire.[34]

The major labels ultimately agreed to make their content available online with copy protection in place.[35] In 2002, Universal made 43,000 music tracks available for sale via digital download, but decided against offering unprotected MP3s.[36] Apple CEO Steve Jobs affirmed the labels' concern; when he approached the major labels for licenses to digitally distribute their content, they were "extremely cautious."[37]

At the time, the solution seemed to be Digital Rights Management, commonly known as DRM.[38] DRM technology "focused on security and encryption [of digital files] as a means of solving the issue of unauthorized copying."[39] The idea was to remove control over digital content from the hands of its possessor and put a computer program in charge.[40] DRM allowed Apple "to negotiate landmark usage rights at the time, which include[d] allowing users to play their DRM protected music on up to 5 computers and on an unlimited number of iPods."[41] Universal, Sony, Warner and EMI control over 70% of the world's music, making the labels

31. *Id.*

32. *See* Amy Harmon, *Grudgingly, Labels Sell Songs Online*, N.Y. TIMES, July 1, 2002, http://www.nytimes.com/2002/07/01/technology/01TUNE.html?ex=1194062400&en=8df706641bc01e58&ei=5070.

33. *Id.*

34. *Id.*

35. *Id.*; Steve Jobs, *Thoughts on Music*, Feb. 6, 2007, http://www.apple.com/hotnews/thoughtsonmusic/.

36. DRM Watch, *Vivendi Universal Announces Music Trachs* [sic] *for Paid Download*, Nov. 19, 2002, http://www.drmwatch.com/ocr/article.php/3106941.

37. Jobs, *supra* note 35.

38. Heather McDonald, *Digital Rights Management Controversy*, http://musicians.about.com/od/resources/a/drmcontroversy_2.htm (last visited Jan. 20, 2008).

39. Renato Iannella, *Digital Rights Management (DRM) Architectures*, D-LIB MAGAZINE, June 2001, http://www.dlib.org/dlib/june01/iannella/06iannella.html.

40. Julia Layton, *How Digital Rights Management Works*, http://electronics.howstuffworks.com/drm.htm (last visited Jan. 20, 2008).

41. Jobs, *supra* note 35.

a critical gatekeeper for the proliferation of legal digital distribution.[42] For example, this level of clout helped the labels to insert a key provision in their agreements with Apple: reserving the right to withdraw their entire music catalogue should the DRM system fail and allow content to be available in unauthorized places.[43]

C. DRM and the DMCA

The most significant aspect of the DMCA, with respect to DRM, is the addition of Chapter 12 to the U.S. Copyright Act.[44] The opening sentence distills the chapter's essence: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."[45] Commonly known as the 'anti-circumvention provision,'[46] this clause brought the U.S. code in line with the World Intellectual Property Organization (WIPO) treaties by making it illegal to evade DRM protection.[47] This statutorily legitimizes the practice of swathing music with digital chains, and prevents anyone from tampering with those chains.

DMCA critics overwhelmingly argue that the DMCA gives media executives too much private control, rather than saving entertainment companies from the evils of Napster and the like.[48] Critics believe that the DMCA condones content-owning companies' use of self-help.[49] In particular, they are concerned that the DMCA gives licensors a far greater ability to regulate their content than that allowed by previous federal copyright law.[50] This is the privatization of copyright.[51] By allowing the industry to build digital fences around content using DRM, the DMCA reduces the communication utility of the internet and eliminates judicial oversight.[52] The privatization trend "is transforming the internet from a

42. *Id.*

43. *Id.*

44. *See* U.S. Copyright Act, 17 U.S.C. §1201-05 (2006).

45. 17 U.S.C. §1201(a)(1)(A).

46 *See, e.g.*, Bentley J. Olive, *Anti-Circumvention and Copyright Management Information: Analysis of New Chapter 12 of the Copyright Act*, 1 N.C. J.L. & Tech. 2 (2000).

47. *Id.*, World Intellectual Property Organization: Copyright Treaty, Art. 18 & 19, 36 I.L.M. 76, 86-87; World Intellectual Property Organization: Performances and Phonograms Treaty, Art. 18 & 19, 36 I.L.M. 76, 86-87.

48. *See* Jackson, *supra* note 5 at 610.

49. Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 Berkeley Tech. L.J. 1089, 1091 (1998).

50. *Id.*

51. Jackson sometimes refers to this as "reprivatization" of copyright. Jackson, *supra* note 5. However, since copyright in its pre-DMCA form has been federal law since 1790, the term "privatization" seems more appropriate.

52. *Id.* at 608.

two-way medium of active cultural participation among citizens into a one-way medium for content distribution to passive consumers."[53]

Yet someone in the business of selling music at the end of 2005 could not ignore the fact that, as compared to sales in 1999, the industry lost over $2.3 billion of business.[54] The rise of P2P networks coupled with the sharp decline in physical CD sales completely jarred the industry.[55] Executives were willing to do anything to cut their losses, and DRM facilitated what seemed to be the online solution.[56] In support, digital album sales between 2004 and 2005 increased by 198%.[57] The DMCA has roots in the recent past, but current legal interpretations significantly affect how the industry will move forward.[58] The present state of affairs raises questions about the perceived privatization of copyright under the DMCA.

III. The DMCA Prevails Under Constitutional Challenges

Bona fide legal challenges to the DMCA focus on three issues stemming from the U.S. Constitution. The first argument challenges the DMCA's extension (or privatization) of copyright protection by invoking the limitations of the Intellectual Property Clause.[59] Second, critics challenge the DMCA on the grounds that it violates the free speech protections of the First Amendment.[60] Finally, opponents argue that the DMCA unconstitutionally impinges upon copyright's fair use doctrine.[61]

A. Intellectual Property Clause Restraints

1. Boundaries

Before considering free speech and fair use, it is important to examine whether Congress even had power under the Constitutional to enact the DMCA. The Intellectual Property Clause grants Congress the power "to

53. *Id.*

54. The Recording Industry Association of America, *2005 Consumer Profile*, http://76.74.24.142/8230EB0F-3012-63C0-CCA5-AD966FAAF739.pdf (last visited Jan. 20, 2008).

55. Harmon, *supra* note 32.

56. McDonald, *supra* note 38.

57. The Recording Industry Association of America, *supra* note 15.

58. *See generally* United States v. Elcom Ltd., 203 F.Supp.2d 1111 (2002); Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001); 321 Studios v. MGM Studios, 307 F.Supp.2d 1085 (2004).

59. *See* Jason Hoppin, *DMCA Still Faces Its First Criminal Test*, THE RECORDER, March 27, 2002, *available at* http://www.law.com/regionals/ca/stories/edt0327b.shtml.

60. *See* Jackson, *supra* note 5, at 610.

61. *See* Electronic Frontier Foundation, *The Battle for Your Digital Media Devices*, http://www.eff.org/IP/fairuse/ (last visited Jan. 20, 2008).

promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[62] This clause places some limits on the extent to which copyright protection may be granted. For example, the Supreme Court requires that protected works exhibit a "minimal level of creativity,"[63] and the clause itself states that works can only be protected for "limited Times," which means that protection cannot be granted for an eternal period.[64] Opponents of the DMCA contend that because Congress wrote the law to amend Title 17, the federal *copyright* statute,[65] Congress must have based its authority on the Intellectual Property Clause.[66] Thus, in addition to fair use and First Amendment arguments, the broader argument is that "Congress overstepped its bounds" of the Intellectual Property Clause.[67]

2. *The Commerce Clause and* Elcom

The Supreme Court's interpretation the Intellectual Property Clause centers on the idea of balance.[68] The Court is reluctant to expand the scope of intellectual property protection on its own.[69] When the market is altered by technological innovation, the Court consistently defers to the judgment of Congress.[70] Congress, not the Court, should handle the difficult balance of control between the interests of copyright owners and the public with regard to creative works.[71]

In *United States v. Elcom Ltd.*, the defendant software company argued that the enactment of the DMCA exceeded Congressional authority with respect to limitations contained in the Intellectual Property Clause.[72] The court began by reiterating Congress' broad power under the Commerce Clause.[73] The Commerce Clause gives Congress the power to "prescribe the rule by which commerce is governed," a power that "may be exercised to its utmost extent, and acknowledges no limitations, other than are

62. U.S. Const., art. I, §8, cl. 8.

63. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358 (1991).

64. Congress, however, *does* have the power to extend the copyright term. *See* Copyright Term Extension Act (CTEA), Pub. L. 105-298, §102(b) and (d), 112 Stat. 2827-2828 (amending 17 U. S. C. §§302, 304). Affirmed in Eldred v. Ashcroft, 537 U.S. 186 (2003).

65. 17 U.S.C., titled "Copyrights."

66. Hoppin, *supra* note 59.

67. *Id.*

68. *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984).

69. *Id.*

70. *Id.*

71. *Id.*

72. United States v. Elcom, Ltd., 203 F.Supp.2d 1111, 1137 (2002).

73. *Id.* at 1138.

prescribed by the Constitution."[74] The court held that "Congress plainly has the power to enact the DMCA under the Commerce Clause" because the DMCA regulates activity that has a substantial effect on interstate and foreign commerce.[75]

The *Elcom* court next considered whether, despite sweeping Commerce Clause power, the DMCA oversteps limitations reserved by the Intellectual Property Clause.[76] To evaluate this interaction, the court employed the framework created in *United States v. Moghadam*,[77] which upheld an anti-bootlegging statute to protect live musical performances.[78] In *Moghadam*, the court validated the statute's Commerce Clause extension to prevent unauthorized recordings of live music, even though it remained uncertain whether a live musical performance is a "writing" within the meaning of the Intellectual Property Clause.[79] From *Moghadam*, the *Elcom* court extracted a rule whereby a statute is valid if it "'is not fundamentally inconsistent with' the Intellectual Property Clause," and is invalid if "irreconcilably inconsistent" with the Intellectual Property Clause.[80]

The *Elcom* opinion relies heavily on legislative history to hold that the DMCA is *not* fundamentally inconsistent with the Intellectual Property Clause.[81] Congress' impetus was precisely to protect the rights endowed by the Intellectual Property Clause for a new digital landscape.[82] Without DMCA protection "copyright owners will hesitate to make their works readily available on the internet . . . ."[83] Additionally, the court held that the DMCA is not irreconcilably inconsistent with the Intellectual Property Clause and buttressed its argument with an understated but important point: upon the expiration of copyright, technological protection (DRM) may in fact prevent an owner of a particular copy of the work from using it every way he prefers.[84] Nevertheless, this would still be in harmony with the Intellectual Property Clause because it is likely that the user *contractually*

74. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 553 (1995)).

75. *Id.* Congress stated expressly: "Constitutional authority for this legislation [the DMCA] is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes." H. Rep. No. 105-551(II), at 35.

76. *Id.* at 1138-42.

77. United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999).

78. *Elcom*, 203 F.Supp.2d at 1138-40.

79. *Moghadam*, 175 F.3d at 1281.

80. *Elcom*, 203 F.Supp.2d at 1139.

81. *Id.* at 1140.

82. *Id.*

83. *Id.* (internal citations omitted).

84. *Id.* at 1141.

acquiesced to the technological limitation.[85] Thus, *Elcom* upheld the constitutionality of the DMCA by finding that Congress has power under the Commerce Clause to enact such a statute, and that the DMCA is sufficiently within restraints compelled by the Intellectual Property Clause.[86]

Elcom laid a foundation for the relationship between the DMCA and the Intellectual Property Clause, as evidenced by its extensive quotation in a subsequent case, *321 Studios v. MGM Studios, Inc.*[87] By reasserting *Elcom's* opinion on the issue nearly verbatim, the cases make clear that the constraints imposed by the Intellectual Property Clause do not invalidate the DMCA's authority under the Commerce Clause.[88]

The way the opinions reconcile tension between the protection of digital commerce and constitutional restraints on that protection is the crux of judicial blessing for the privatization of copyright. They establish new protections from the DMCA as wholly necessary to implement the Intellectual Property Clause in the age of widespread digital piracy. These cases acknowledge that previous federal copyright protections were insufficient. Moreover, condoning the use of a contract with a user to implement a company's technological protection further pushes jurisprudence towards validating the privatization of copyright.

B. First Amendment Restraints

1. A Threat to Cultural Autonomy?

In addition to challenges under the Intellectual Property Clause, DMCA opponents have made a constitutional argument founded on freedom of speech.[89] DRM is like a security device or safe used to protect an owner's property, so, ostensibly, Congress may have the vast regulatory authority it would in the distribution of skeleton keys or combinations to safes.[90] The arguable difference however, is that people also view DRM (and the 'keys' that unlock it) as a form of communication through computer code, triggering certain free speech protection despite the

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85. *Id.* The contract typically employed is a software license agreement known as an "End User License Agreement," or EULA. *See* Wikipedia, EULA, http://en.wikipedia.org/wiki/Eula.

86. *Id.* at 1141-42.

87. 321 Studios v. MGM Studios, Inc., 307 F.Supp.2d 1085 (N.D. Cal. 2004).

88. Diane Barker, *Notes: Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 Berkeley Tech. L.J. 47, 56-57 (2005).

89. Dvorak, *supra* note 3.

90. Universal City Studios, Inc., v. Corley, 273 F.3d 429, 453 (2d Cir. 2001).

DMCA.[91] Critics, however, fear that the DMCA anti-circumvention provisions allow a copyright owner so much technological protection that it results in a privatized shelter where free speech is unconstitutionally encroached.

The primary flaw in such a complaint is that it relies on the presumption that pre-internet rights apply to the current models.[92] Instead, "[d]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."[93] Mild examples of chilling effects, which gain enormous attention, where the DMCA appears to encroach speech in ways that seem imprudent, may exist.[94] Most arguments, however, carry their implications too far. One commentator believes that the DMCA threatens "cultural autonomy" and says it "limits the ability of individuals to articulate their own meanings and thus to define their own culture."[95] Flowery declamations like this unfairly shift the focus away from the DMCA's *raison d'etre* and again make it the rogue of a seemingly ill-fated privatization.[96]

2. *The Corley Decision*

Universal City Studios v. Corley scrutinized the DMCA in connection with the First Amendment.[97] The case involved an internet website posting decryption computer code that allowed the circumvention of DRM on protected DVDs.[98] The issue was whether the First Amendment could exonerate the decryption program despite the program's patent violation of the DMCA.[99] The court first established the First Amendment's scope as applied to computer code.[100] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[101] The court posited that human beings often recognize computer code, and computer experts use computer code to communicate.[102] Therefore, even though

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91. *Id.*

92. *See, e.g.*, Rick Boucher, *Perspective: Time to Rewrite the DMCA*, Cnet News.com, Jan. 29, 2002, http://news.com.com/2010-1071-825335.html (discussing free speech threats involving web links). *See also* Dvorak, *supra* note 3.

93. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

94. *See* David Touretzky, *Free Speech Rights for Programmers*, COMMUNICATIONS OF THE ACM, vol. 4 no. 8, http://www.cs.cmu.edu/~dst/DeCSS/Gallery/cacm-viewpoint.html.

95. Jackson, *supra* note 5, at 610.

96. *Id.* ("The ultimate outcome of . . . attempts to reprivatize copyright . . . is a dramatic reduction in the utility of communication networks like the internet.").

97. Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).

98. *Id.* at 438-39.

99. *Id.* at 452.

100. *Id.* at 445.

101. U.S. Const. amend. I.

102. *Corley*, 273 F.3d at 449.

computer code instructs computers, it also qualifies as speech for purposes of First Amendment protection.[103]

The case turned first on whether the DMCA was 'content neutral' with respect to its restriction on speech.[104] In concluding the restriction was indeed content neutral, the court stated the regulation is "justified without reference to the content of regulated speech."[105] The court further supported using a content-neutral standard on the conclusion that computer code contains both speech and nonspeech elements.[106] In shaping its analysis of computer code this way, the court deliberately adapted its traditional First Amendment analytical framework to fit the DMCA's modern context.[107]

The court described the regulation as content-neutral "with an incidental effect on a speech component."[108] This is critical to standard-setting under the DMCA because the regulation need only "serve a substantial governmental interest" without burdening "substantially more speech than is necessary," as long as it remains unrelated to the suppression of free expression.[109] This standard gave the DMCA great deference in light of the realities of the Internet world, for posting the decryption program "makes it instantly available at the click of a mouse to any person in the world with access to the Internet."[110] To prevent access to the decryption program, the court expressly endorsed the level of protection Congress granted in the DMCA, even though it is accompanied by some communication impairment.[111] Therefore, the DMCA's prohibition on posting the program was constitutional because the regulation need *not* be the least restrictive means possible.[112]

Like *Elcom,* the Second Circuit's decision in *Corley* takes a deferential stance with respect to the DMCA. *Corley* acknowledges the difficult choices the government must make to protect digital media. *Elcom* demonstrated Congress' initial ability to regulate digital media, and *Corley* extended that ability to the point of allowing a constriction on speech in the

103. *Id.* at n. 23.

104. *Id.* at 451.

105. *Id.* (citing Hill v. Colorado, 530 U.S. 703 (2000)).

106. *Id.* at 451.

107. *Id.* ("Differences in the characteristics of new media justify differences in the First Amendment standards applied to them" (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969))).

108. *Id.* at 454.

109. *Id.*

110. *Id.*

111. *Id.* at 457-58.

112. *Id.* at 455.

interest of digital protection.[113] Although the government set the rule, protective constriction is ultimately done not by the government, but by private parties through security technologies like DRM. Thus, courts are setting the stage for a constitutionally sound shift toward the privatization of copyright under the DMCA.

C. Fair Use

The doctrine of fair use seeks to balance the protection of copyright with the desire to preserve public access to works under limited circumstances.[114] While an exhaustive discussion of fair use is beyond the scope of this note, courts' interpretation of fair use as it relates to the DMCA are relevant. Anti-DMCA extremists believe that content companies are "hoping to take away your fair use rights and sell them back to you."[115] This economic argument goes to the heart of privatization. Companies "aim to veto exciting new uses that may upset their existing business models."[116] By wrapping DRM around content, companies gain an unfair economic advantage and make consumers pay more to access more use-limited copyrighted works.[117] Furthermore, DMCA opponents invoke fair use to fulfill the Constitution's purpose behind the Intellectual Property Clause, which is "to promote the Progress of Science and the Useful Arts."[118] Progress comes about by social dialogue, resistance to the messages of traditional media systems, and transformation of copyrighted works into new expressions.[119] Fair use, the argument goes, is a necessary means to preserve progress under the Constitution, and is diminished by the DMCA's privatization of copyright.[120]

These concerns are legitimate, but like those regarding the First Amendment, they are not the primary concern of Congress or the courts.[121] Although legal arguments can easily intertwine fair use and First

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113. *See generally* United States v. Elcom, Ltd., 203 F.Supp.2d 1111 (2002); *Corley*, 273 F.3d 429.

114. *See* 17 U.S.C. 107. Examples of fair use include "criticism, comment, news reporting, [and] teaching." *Id.*

115. *The Battle for Your Digital Media Devices*, *supra* note 61.

116. *Id.*

117. *Id.*

118. U.S. Const., Art. I, § 8, cl. 8. n5.

119. Jackson, *supra* note 5, at 617.

120. *Id.* at 609-19.

121. *See generally* 321 Studios v. MGM Studios, 307 F.Supp.2d 1085 (2004); United States v. Elcom, Ltd., 203 F.Supp.2d 1111 (2002); Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).

Amendment issues,[122] the court in *321 Studios v. MGM Studios* held that the First Amendment does not provide a right to make fair use of copyrighted works.[123] The fair use doctrine is understood by courts to be an "equitable rule of reason."[124] *Elcom* states, "there is no direct authority for the proposition that the doctrine of fair use is coextensive with the First Amendment."[125] In fact, "the Supreme Court has never held that fair use is constitutionally required" at all.[126]

321 Studios, Elcom, and Corley are consistent in their affirmation of the DMCA in light of the fair use doctrine.[127] "We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original."[128] Many traditional fair uses of DVDs are not limited by the DMCA, including quoting a screenplay or commenting on it.[129] The courts are not sympathetic to the fact that a fair user might need to do so "the old fashioned way," which could mean hand-typing a piece of digital text.[130] The old fashioned way might even mean "recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie."[131] The court expressly rejected the proposition that fair use guarantees access to a work by the user's "preferred technique or in the format of the original."[132]

These holdings give enormous deference to the DMCA.[133] By invoking the 'old fashioned way' to make a fair use, [134] they are direct in their sanction of a law which allows copyright owners to privately limit access in unprecedented ways. The *Elcom* court believes "piracy of

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122. *See, e.g.*, TyAnna Herrington, *The Interdependency of Fair Use and the First Amendment*, *available at* http://kairos.technorhetoric.net/3.1/coverweb/ty/ff.html (last visited Jan. 20, 2008).

123. *321 Studios*, 307 F.Supp.2d at 1101.

124. *Elcom*, 203 F. Supp. 2d at 1134 n.4 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984)).

125. *Id.*

126. *Id.* (quoting *Corley*, 273 F.3d at 458).

127. 321 Studios v. MGM Studios, 307 F.Supp.2d 1085 (2004); United States v. Elcom, Ltd., 203 F.Supp.2d 1111 (2002); Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).

128. *Corley*, 273 F.3d at 459 (followed by *321 Studios*, 307 F.Supp.2d at 1101).

129. *Corley*, 273 F.3d at 459.

130. *Elcom*, 203 F.Supp.2d at 1131.

131. *Corley*, 273 F.3d at 459.

132. *Id.*

133. *See generally 321 Studios*, 307 F.Supp.2d 1085; *Elcom*, 203 F.Supp.2d 1111; *Corley*, 273 F.3d 429.

134. *Elcom*, 203 F.Supp.2d at 1131.

intellectual property has reached epidemic proportions."[135] Along with Congress, the judiciary is willing to prioritize the *protection* of copyright over its limitations, even if it means extending that protection to the technology of private parties.

IV. Digital Paradigms Can Develop Successfully Under The DMCA's Privatization

Though accurate conclusions are ultimately reached, the courts' fair use analysis does not do justice to an important hole in the DMCA's theoretical preservation of fair use.[136] The DMCA's anti-circumvention measures allow a *user* to circumvent a "technological measure that effectively protects a right of a copyright owner" (such as DRM) for the purposes of the fair use of that work.[137] Yet, the so-called "anti-trafficking" provision makes it illegal for *anyone* to "traffic in any technology" made primarily to allow circumvention.[138] The question is whether these potentially conflicting doctrines can be reconciled in a manner that preserves their respective purposes.

To illustrate, consider a Ph.D. candidate writing a dissertation who wishes to make a fair use of a quote from a book protected by a private party's (the publisher) technological measure.[139] Unless she happens to be an expert in reverse-engineering DRM technology, she would need an expert to create the software for her.[140] But when that expert develops or distributes the software in the United States, he commits a crime under section 1201(b)(1).[141]

Proposed DMCA reform legislation, the "Freedom And Innovation Revitalizing U.S. Entrepreneurship Act [FAIR USE Act]," contains provisions that seek to better effectuate fair use.[142] For example, the provisions include exemptions that allow users to make "a compilation of audiovisual works" for classroom use, and "access works in the public domain."[143] The critical missing link, however, is that the exemptions

135. *Id.* at 1132.

136. H.R. Rep. No. 105-551 (1998) ("The Committee on Commerce devoted substantial time and resources to analyzing the implications of this broad prohibition [anti-circumvention] on the traditional pnnciple of 'fair use.'").

137. 17 U.S.C. §§ 1201(b)(1)(A), 1201(c) (2001).

138. *Id.*

139. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 727 (Jan. 2000).

140. *Id.*

141. *Id.*; 17 U.S.C. § 1201(b)(1).

142. Tim Lee, *FAIR USE Act Analysis: DMCA Reform Left on the Cutting Room Floor*, Ars Technica, Feb. 28, 2007, http://arstechnica.com/news.ars/post/20070228-8942.html.

143. *Id.*

would not apply to "trafficking" in the software necessary for fair users to gain access in the first place.[144] Thus, the Ph.D. candidate will not likely be able to exercise her fair use right because trafficking in the software will remain a crime.

Nevertheless, as substantiated by Congress and the courts, the DMCA's privatization of copyright does not reach too far.[145] The Ph.D. student example is merely an outlier among an immense sea of online piracy. Remember that since Napster launched in 1999, music shipments dropped a painful 33%.[146] Once digital media became free, copyright owners needed a radical solution. Since federal copyright protection became virtually unenforceable, the DMCA's anti-circumvention measures allowed digital content owners to wrap media in their own private digital chains.[147] When critics cry out about outliers like the Ph.D. student, they unfairly portray the DMCA as a removal of rights by the government. This completely obfuscates the DMCA. Billions of rights were being infringed online, and the DMCA laid a framework for much needed effective protection of those rights.

Critics cite current piracy statistics as proof that the DMCA has failed. True, estimates for the number of illegally traded music tracks exceed 1 billion per month.[148] Steve Jobs, however, is quick to point out that the vast majority of music stolen online got there in the first place via an unprotected CD file.[149] CDs are the old world, digital files are the new. As the media world progresses further in the shift from physical to digital, a legal framework for success is already laid out by the DMCA. To harness the DMCA's power, copyright owners must release works that are *ubiquitously protected from the time of release*. This is a tough proposition for the music industry at the moment because the bulk of its revenue still comes from physical sales. But the declining physical sales and the explosion of the digital music industry are a clear signal. The world is going digital, and the fight against online piracy is far from conceded.[150]

144. *Id.*

145. *See generally* 321 Studios v. MGM Studios, 307 F.Supp.2d 1085 (2004); United States v. Elcom, Ltd., 203 F.Supp.2d 1111 (2002); Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001); Pub. L. No. 105-304, 112 Stat. 2860 (1998).

146. RIAA 2006 Year End Shipment Statistics, *available at* http://www.riaa.com/keystatistics.php (follow "2006 U.S. Manufacturers' Unit Shipments and Value Chart" hyperlink) (last visited Jan. 25, 2008).

147. Olive, *supra* note 46.

148. *P2P File Sharing Is Here to Stay*, P2Pnet.net, http://p2pnet.net/story/11257 (last visited Jan. 20, 2008).

149. Jobs, *supra* note 35.

150. 10,037 P2P lawsuits were filed by the RIAA between 2003 and 2005. Thomas Mennecke, *RIAA's Grand Total: 10,037 - What are Your Odds?*, May 2, 2005, http://www.slyck.com/news.php?story=769.

The DMCA is set up to allow *new* online rights to be fully protected. If the industry successfully shifts to a fully digital paradigm, the DMCA will support the secure distribution of content. Only at that point should Congress step in to carve out *ad hoc* exceptions for fair use circumvention software (the issue raised in the Ph.D. example). For now, threats to the content industry are too great, and progress is best encouraged through the DMCA's constitutionally sound privatization of copyright.

V. Conclusion

More than twenty years ago, the landmark decision in *Sony v. Universal* opened the door to home video tape recorders, a new technology that presented a significant threat to copyright holders.[151] Although the machines could record and make copies of copyrighted works, the Supreme Court held they were capable of substantial noninfringing uses, and were therefore legal under the doctrine of fair use.[152] The analysis in Section III reveals how different today's legal climate is from the time of *Sony*. *Elcom* and *Corley* are much less willing to make concessions to statutory or constitutional limitations of copyright. The industry is experiencing a drastic paradigm shift, while courts remain scrupulously in line with Congress's DMCA. The DMCA sanctions anti-circumvention, which in turn allows private copyright owners to use protective technology like DRM. This level of protection grants a privatized self-help where previous copyright law proved patently insufficient. Such protection is constitutional, and should be encouraged to the utmost until piracy is under control and the industry has fully instituted its new digital countenance.

151. Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

152. *Id.* at 456.

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