

## NOTES

# The Digital Millennium Copyright Act: Preserving the Traditional Copyright Balance

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### INTRODUCTION

Technological developments have routinely been regarded warily by the entertainment industries because of the increased risk of piracy perceived as accompanying such developments.<sup>1</sup> Jack Valenti, the president of the Motion Picture Association of America (hereinafter “MPAA”), perhaps best illustrated this point with his comment before the House Judiciary Committee in 1982.<sup>2</sup> Valenti stated that the videocassette recorder “is to the American film producer and the American public as the Boston Strangler is to the woman alone.”<sup>3</sup>

Of course, as noted in the *New York Times*, “the woman in this instance survived, and even flourished.”<sup>4</sup> The VCR did not spell doom for the film studios; rather, it provided the film industry with a new market to exploit through videotape sales and rentals.<sup>5</sup>

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<sup>1</sup> See generally *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (discussing the advent of the video cassette recorder and the effects the new technology would have on copyright owners); *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908) (discussing ramifications of the introduction of the player piano).

<sup>2</sup> Adam Liptak, *Is Litigation the Best Way to Tame New Technology?*, N.Y. TIMES, Sept. 2, 2000, at B9.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *id.*

Despite this success, the potential opportunities created by new technological innovations are invariably met by the copyright owners' instinctual fear of infringement.<sup>6</sup> This pervasive fear has resurfaced once again with the advent of digital technology.<sup>7</sup> But is the fear again unfounded? Digital technology arguably introduces new and unprecedented threats of piracy.<sup>8</sup> Digitally stored works can be repeatedly reproduced with each copy retaining near perfect quality.<sup>9</sup> The Internet provides an instantly accessible and vast global audience for digitally pirated works.<sup>10</sup> Furthermore, advancements in file compression programs guarantee faster and easier transmission of digital works in the future.<sup>11</sup> The analog world presents no such dangers.<sup>12</sup>

In response to the unique aspects of the digital environment, Congress enacted the Digital Millennium Copyright Act of 1998 (hereinafter "DMCA").<sup>13</sup> Indeed, the DMCA was designed "to make

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<sup>6</sup> See generally *Sony*, 464 U.S. 417; *White-Smith*, 209 U.S. 1 (illustrating how these fears have led to litigation).

<sup>7</sup> See *infra* note 8.

<sup>8</sup> See *Intellectual Property Rights: The Music and the Film Industry: Hearings Before the Subcomm. on Int'l Economic Policy and Trade of the House Int'l Relations Comm.*, 105<sup>th</sup> Cong. (1998) (statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks) [hereinafter *Lehman Statement*] ("[a]dvances in digital technology and the rapid development of electronic networks and other communications *technologies* raise the stakes much higher. Any two-dimensional work can be 'digitized' . . . [t]he work can then be stored and used in that digital format. This dramatically increases: the ease and speed with which it can be copied; the quality of copies (both the first and the hundredth); the ability to manipulate and change the work; and the speed with which copies of it—both authorized and unauthorized—can be 'delivered' to the public.").

<sup>9</sup> *Id.*

<sup>10</sup> See CRAIG JOYCE ET AL., COPYRIGHT LAW 53-54 n.80 (2000) (describing characteristics of digital technology such as "ease of transmission and multiple use," which allows a single pirate copy to be "hooked up to a network of computers or a network of users . . . each of whom can have ready and virtually simultaneous use of the same copy" (citing Pamela Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 RUTGERS COMPUTER & TECH. L.J. 323 (1990))).

<sup>11</sup> See *id.* ("By comparison with books and other traditional media, works in digital media do not take up much space. . . . The compactness of digital data will . . . allow new assemblages of materials that in a print world would be unthinkable.").

<sup>12</sup> See *supra* notes 7-10; see *infra* note 42 and accompanying text.

<sup>13</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 U.S.C. §§ 1201-1205 (Supp. IV 1998)).

digital networks safe places to disseminate and exploit copyrighted materials.”<sup>14</sup> In order to accomplish its stated goal, the DMCA incorporated provisions to “provide . . . protection against circumvention of technological measures used by copyright owners to protect their works.”<sup>15</sup> Thus, the DMCA prohibits circumventing technological measures in order to merely *access*, not just copy, digital copyrighted works.<sup>16</sup>

Because the DMCA limits access in this way, it has been criticized as unjustly expanding the monopoly of copyright owners and the control they can exert over their work.<sup>17</sup> Generally, the rights of the copyright owner include control over the reproduction, distribution, performance and display of the copyrighted work.<sup>18</sup> In barring access, Congress has been criticized as having, in practical terms, extended copyright law to also cover “use,” an area historically considered beyond the scope of the copyright owner’s authority.<sup>19</sup> Likewise, critics have argued that by prohibiting technological circumvention to access a digital work, Congress has effectively extinguished the defense of fair use.<sup>20</sup>

This Note takes the position that the anti-circumvention provisions were a necessary response to the unique threats posed by digital innovations. Moreover, these provisions were necessary to maintain an equitable balance between the rights of copyright owners and the rights of consumers. The realities of file sharing and the recent,

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<sup>14</sup> S. REP. NO. 105-190, at 2 (1998), as quoted in David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 681 (2000).

<sup>15</sup> *The Digital Millennium Copyright Act of 1998*, U.S. COPYRIGHT OFFICE SUMMARY, Dec. 1998, at 3 [hereinafter SUMMARY].

<sup>16</sup> 17 U.S.C. § 1201.

<sup>17</sup> See *infra* notes 136-37 and accompanying text (discussing relationship between access and use in digital environment and perceived threat of a “pay per view” world).

<sup>18</sup> See *infra* note 26 and accompanying text (discussing exclusive rights granted to copyright owner).

<sup>19</sup> See Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium”*, 23 COLUM.-VLA J.L. & ARTS 137, 143 (1999).

<sup>20</sup> See generally *infra* notes 137-38 and accompanying text.

well-publicized flurry of litigation concerning this issue<sup>21</sup> only underscore the necessity of the new legislation.

Part I of this Note will provide a legal background for the copyright issues explored by discussing the general rights of the copyright owner—and the limits on these rights—primarily through the concept of fair use. In addition, Part I introduces the relevant provisions of the DMCA in more detail. Part II examines both sides of the conflict surrounding the anti-circumvention provisions by exploring both the congressional and scholarly debate regarding its enactment, and by examining the case *Universal City Studios, Inc. v. Reimerdes*.<sup>22</sup> Part III argues that the threats of a “pay-per-use” world<sup>23</sup> are largely speculative, and that extending the concept of fair use beyond the statutory exceptions would defeat the purpose of the DMCA protections and render them useless.

## I. LEGAL BACKGROUND

### A. Copyright Act of 1976

The Copyright Clause of the Constitution authorizes Congress “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.”<sup>24</sup> To this end, Section 106 of

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<sup>21</sup> See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000) (holding balance of harms supported grant of preliminary injunction in music industry plaintiff’s copyright infringement action against Internet start-up which allowed users to download MP3 music files due to evidence of massive, unauthorized downloading and uploading of plaintiff’s copyrighted works); see also *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 346 (S.D.N.Y. 2000) (holding defendant’s links to websites providing formulae to de-encrypt plaintiff film industry’s DVD’s constituted violation of DCMA and warranted granting of preliminary injunction).

<sup>22</sup> 111 F. Supp. 2d 294 (S.D.N.Y. 2000)

<sup>23</sup> See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 710-39 (2000) (discussing threat of “pay-per-use world”—in which one would always need to pay for access in an exclusively digital environment).

<sup>24</sup> U.S. CONST. art. I, § 8, cl. 8.

the Copyright Act of 1976 (hereinafter “the Act”)<sup>25</sup> provides the copyright owner with the “exclusive rights to do and to authorize” the reproduction, distribution, and performance or display of the copyrighted work.<sup>26</sup>

Providing the copyright owner with these exclusive rights benefits both the owner and the general public because “[p]rotection of works of authorship provides the stimulus for creativity, thus leading to the availability of works of literature, culture, art and entertainment that the public desires.”<sup>27</sup> Therefore, “[i]f these works are not protected, then the marketplace will not support their creation and dissemination, and the public will not receive the benefit of their existence.”<sup>28</sup>

However, the “exclusive” rights of the copyright owner are still subject to certain exceptions,<sup>29</sup> including, notably, the defense of fair use.<sup>30</sup> “Fair use” encompasses use “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.”<sup>31</sup> The defense “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>32</sup>

Section 107 of the Act delineates four non-exclusive factors to consider in determining whether a use is “fair.” The factors to be evaluated include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

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<sup>25</sup> See Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-803).

<sup>26</sup> *Id.* § 106.

<sup>27</sup> Information Infrastructure Task Force, *The Report of the Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure: The White Paper* (Sept. 1995) [hereinafter *White Paper*], reprinted in CRAIG JOYCE ET AL., *COPYRIGHT LAW* (5<sup>th</sup> ed. Supp. 2000) at 748.

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at 759 n.559 (stating that the exclusive right is subject to § 108).

<sup>30</sup> 17 U.S.C. § 107.

<sup>31</sup> *Id.*

<sup>32</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>33</sup>

It is well established that these factors must be weighed together and applied judicially on a case-by-case basis.<sup>34</sup> No single factor is determinative.<sup>35</sup> However, the Supreme Court, in *Campbell*, indicated that the fourth factor—the effect upon the potential market—is the most influential.<sup>36</sup>

### B. Background to the Digital Millennium Copyright Act

The purpose of the DMCA was to bring U.S. copyright law “squarely into the digital age.”<sup>37</sup> The world was making a steady transition from an analog to a digital environment due largely to the rapid growth and use of computer technology—in particular digitization.<sup>38</sup> Coupled with the advances in communications technology resulting from the development of the fiber optic cable, the new information infrastructure promised that separate communications networks would be “integrate[d] . . . into an advanced high-speed, interactive, broadband, digital communications system.”<sup>39</sup>

New methods for reproduction and dissemination of copyrighted works followed the shift to a digitally based economy.<sup>40</sup> With these new methods and opportunities came new risks.<sup>41</sup> As noted in the Clinton Administration’s “White Paper” on Intellectual Property:

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<sup>33</sup> 17 U.S.C. § 107.

<sup>34</sup> See *Campbell*, 510 U.S. at 577.

<sup>35</sup> See *id.* at 578.

<sup>36</sup> See *id.* at 590.

<sup>37</sup> S. REP. NO. 105-190, at 2 (1998), as quoted in Nimmer, *supra* note 23, at 680 (2000).

<sup>38</sup> See *White Paper*, *supra* note 27, at 744.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (discussing what these new methods are).

<sup>41</sup> See generally *supra* notes 1-12 and accompanying text (illustrating how technological developments can lead to increased risks).

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[T]he NII [National Information Infrastructure] can provide benefits to authors and consumers by reducing the time between creation and dissemination . . . [however] [j]ust one unauthorized uploading of a work onto a bulletin board, for instance—unlike, perhaps, most single reproductions and distributions in the analog or print environment could have devastating effects on the market for the work.<sup>42</sup>

The DMCA was enacted to help eliminate these new risks posed by the digital environment.<sup>43</sup> Indeed, the DMCA was considered a necessary measure to ensure that copyright owners would take advantage of the new technology and disseminate their works to the public without having to fear the increased risks of digital piracy.<sup>44</sup>

### *C. The DMCA and the Anti-Circumvention Provisions*

A key part of realizing the goals necessary to make the digital world “safe” for copyright owners came in the anti-circumvention provisions of the DMCA.<sup>45</sup> These provisions came as a response to both the digital age and the international norms set forth in the World Intellectual Property Organization (hereinafter “WIPO”) treaty.<sup>46</sup>

The Clinton Administration viewed the implementation of the new legislation as necessary in bringing the U.S. into compliance with the WIPO treaty’s anti-circumvention norm.<sup>47</sup> The WIPO treaty’s anti-circumvention clause states:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors

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<sup>42</sup> See *White Paper supra* note 27, at 745-46.

<sup>43</sup> See *Lehman Statement, supra* note 8.

<sup>44</sup> See *Lehman Statement, supra* note 8 and accompanying text (discussing the increased risks of piracy associated with the digital format).

<sup>45</sup> See *infra* notes 53-55 (setting forth the § 1201 anti-circumvention provisions).

<sup>46</sup> See Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1717-18 (1999).

<sup>47</sup> See *id.*

in connection with the exercise of their rights . . . and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.<sup>48</sup>

It becomes evident, upon examining the anti-circumvention provisions of the DMCA, that the language of the WIPO treaty provision is clearly broader and more general than that used in its U.S. domestic counterpart.<sup>49</sup>

In enacting the DMCA, Congress heeded the advice set forth in the Administration's White Paper, which stated that "technological protection likely will not be effective unless the law also provides some protection for the technological processes and systems used to prevent or restrict unauthorized uses of copyrighted works."<sup>50</sup> To this end, the White Paper recommended that a chapter be included in the DMCA that would specify the prohibition of:

the importation, manufacture or distribution of any device, product or component incorporated into a device or product, or the provision of any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights under Section 106.<sup>51</sup>

The White Paper's recommendation was realized in the enactment of § 1201.<sup>52</sup>

Section 1201 broke the anti-circumvention violations down into three different types of violations: a basic provision,<sup>53</sup> a ban on

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<sup>48</sup> World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, art. 11, 36 I.L.M. 65, 71.

<sup>49</sup> See *supra* note 48; see *infra* notes 53-55.

<sup>50</sup> *White Paper*, *supra* note 27, at 744.

<sup>51</sup> *Id.*

<sup>52</sup> See *infra* notes 53-55 and accompanying text.

<sup>53</sup> 17 U.S.C. § 1201(a)(1)(A) ("No person shall circumvent a technological measure that

trafficking,<sup>54</sup> and additional violations.<sup>55</sup> The basic provision bars an individual from circumventing a technological measure that effectively controls access to a copyrighted work.<sup>56</sup> “Circumventing a technological work” is defined in the DMCA as encompassing actions as varied as de-scrambling, decrypting, or otherwise avoiding, bypassing, removing, deactivating, or impairing a technological measure, without authorization from the copyright owner, to gain access to the protected work.<sup>57</sup>

Section 1201 further defines a technological measure which effectively controls access to a work as a measure which requires the application of certain information, or a process or treatment, with the authority of the copyright owner, in order to gain access to the work.<sup>58</sup>

Both the ban on trafficking and the additional violations provision of § 1201 begin by providing that: “[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any

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effectively controls access to a work protected under this title.”).

<sup>54</sup> *Id.* § 1201(a)(2) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that— (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or (C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.”).

<sup>55</sup> *Id.* § 1201(b)(1) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that – (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or (C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.”).

<sup>56</sup> *Id.* § 1201(a)(1)(A).

<sup>57</sup> *Id.* § 1201(a)(3)(A).

<sup>58</sup> *Id.* § 1201(a)(3)(B).

technology, product, service, device, component, or part thereof<sup>59</sup> that falls into one of three main categories: (1) is primarily designed or produced to circumvent; (2) has only limited commercially significant purpose or use other than to circumvent; (3) is marketed for use in circumventing.<sup>60</sup>

The difference between the ban on trafficking and the additional violations provision is that the ban on trafficking applies to circumventing a technological measure that controls *access* to a work,<sup>61</sup> while the additional violations provision applies to circumventing protection of a technological measure that protects a *right* of a copyright owner.<sup>62</sup> Namely, § 1201 divides technological measures into two categories: “those that bar unauthorized *access* to a copyright-protected work and those that bar unauthorized *copying* of a protected work.”<sup>63</sup>

Moreover, as noted by Nimmer, “the additional violations appear in their own statutory paragraph [§ 1201(b)], separate from the preceding paragraph of section 1201[(a)] that contains both the basic provision and the ban on trafficking . . . [a]ccordingly, there is a marked contrast between the two schemes.”<sup>64</sup> As Nimmer set forth:

As to prohibited access, the person engaging in that conduct has violated the basic provision; anyone assisting her through publicly offering services, products, devices . . . to achieve the prohibited technological breach is separately culpable under the ban on trafficking. By contrast, a person who engaged in prohibited usage of a work to which he has lawful access does not run afoul of any provision of section 1201. It is only someone who assists him through publicly offering services, products,

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<sup>59</sup> *Id.* § 1201(a)(2) and (b)(1).

<sup>60</sup> SUMMARY, *supra* note 15, at 4.

<sup>61</sup> 17 U.S.C. § 1201(a)(2).

<sup>62</sup> *Id.* § 1201(b).

<sup>63</sup> SUMMARY, *supra* note 15, at 4.

<sup>64</sup> Nimmer, *supra* note 23, at 689.

devices, etc., to achieve the prohibited technological breach who becomes culpable under the additional violations.<sup>65</sup>

The Copyright Office contends that this “distinction was employed to assure the public will have the continued ability to make fair use of copyrighted works.”<sup>66</sup> However, the question remains how one could make fair use of a work when it is illegal to gain access to it.

#### *D. Statutory Exceptions within Section 1201*

The anti-circumvention provisions are subject to an ongoing administrative rule-making process<sup>67</sup> to determine whether the impact of the anti-circumvention provisions is adversely affecting individuals seeking to make non-infringing uses of copyrighted works.<sup>68</sup> Moreover, section § 1201 is subject to a number of listed exceptions.<sup>69</sup> Perhaps the most significant with regard to fair use is section § 1201(d), which provides an exemption for the nonprofit library, archive and educational institution, establishing the so-called “shopping right.”<sup>70</sup> The shopping right permits such nonprofit and

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<sup>65</sup> *Id.* at 689-90.

<sup>66</sup> SUMMARY, *supra* note 15, at 4.

<sup>67</sup> *Id.* at 5 (“[P]eriodic rulemaking by the Librarian of Congress, on the recommendation of the Register of Copyrights, who is to consult with the Assistant Secretary of Commerce for Communications and Information.”); 17 U.S.C. § 1201(a)(1)(C) (The factors to be considered in determining the adverse effect of § 1201 include the following: “(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian [of Congress] deems appropriate.”).

<sup>68</sup> 17 U.S.C. § 1201(a)(1)(C). *See also supra* note 67 and accompanying text (describing factors involved in making a determination of whether there has been an adverse effect).

<sup>69</sup> 17 U.S.C. § 1201(d)-(j).

<sup>70</sup> *Id.* § 1201(d) (“Exemption for nonprofit libraries, archives, and educational institutions. — (1) A nonprofit, library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in

educational or archival institutions to circumvent solely for the purpose of making a good-faith determination regarding whether they wish to obtain authorized access to the work.<sup>71</sup> However, this exemption exists only when “an identical copy of that work is not reasonably available in another form.”<sup>72</sup> Other important exemptions listed in § 1201 include reverse engineering to achieve interoperability,<sup>73</sup> encryption research,<sup>74</sup> protecting personal privacy,<sup>75</sup> and security testing.<sup>76</sup>

In addition, § 1201 includes a general savings clause which provides that “[n]othing in this section should affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”<sup>77</sup> However, it is important to interpret the anti-circumvention provisions in § 1201 as constituting a violation separate and distinct from copyright infringement.<sup>78</sup> Thus, fair use, the traditional defense to copyright infringement, does not apply to technological circumvention.<sup>79</sup> Indeed, a violation of the anti-

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conduct permitted under this title shall not be in violation of subsection (a)(1)(A).”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* § 1201(d)(2).

<sup>73</sup> *Id.* § 1201(f) (exception which permits circumvention by “a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs. . .”).

<sup>74</sup> *Id.* § 1201(g) (permits circumvention of access control measures to identify flaws in encryption technologies).

<sup>75</sup> *Id.* § 1201(i) (permits circumvention when the technological measure, or the work it protects, is capable of collecting or disseminating personally identifying information about the online activities of a person).

<sup>76</sup> *Id.* § 1201(j) (permits circumvention for the purpose of testing the security of a computer system or network).

<sup>77</sup> *Id.* § 1201(c)(1).

<sup>78</sup> *See id.*

<sup>79</sup> *See The On-Line Copyright Liability Limitation Act and the WIPO Copyright Treaties Implementation Act: Hearings on H.R. 2180 and H.R. 2281 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1997) (statement of Mary Beth Peters, Register of Copyrights, discussing the inapplicability of fair use to the act of circumvention) [hereinafter *Peters Statement*]; see also *id.* (“[T]he [savings] clause does not establish fair use as a defense to the violation of section 1201 in itself . . . the fair use provision in section 107 by its terms applies only to infringement of copyright rights.”).*

circumvention provisions is deemed a violation regardless of whether it even results in infringement.<sup>80</sup>

## II. FAIR USE: STRIKING A BALANCE WITH THE DMCA

This part presents the arguments set forth by critics of the DMCA, as well as the arguments made in favor of the perceived “greater” protection afforded by the DMCA.<sup>81</sup> In addition, this section will examine how the Southern District of New York interpreted § 1201 in *Universal City Studios, Inc. v. Reimerdes*.<sup>82</sup>

### A. Section 1201 as an Improper Expansion of the Copyright Monopoly

#### 1. Section 1201 is Unnecessarily Broad

In enacting the DMCA, Congress is charged with pandering to Hollywood and the demands of the copyright industry giants.<sup>83</sup> The stated goals of the DMCA, namely, to bring the U.S. into compliance with the WIPO treaty and to bring U.S. copyright law “squarely into the digital age,”<sup>84</sup> arguably did not require measures as stringent as those reflected in the DMCA’s anti-circumvention provisions.<sup>85</sup> The anti-circumvention provisions drafted into the DMCA certainly

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<sup>80</sup> See *id.*

<sup>81</sup> See *infra* Part II.A-B.

<sup>82</sup> 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

<sup>83</sup> Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 523 (1999) (“[B]y colorful use of high rhetoric and forceful lobbying, Hollywood and its allies were successful in persuading Congress to adopt the broad anti-circumvention legislation they favored. . .”).

<sup>84</sup> See S. REP. NO. 105-190, at 2 (1998).

<sup>85</sup> See Samuelson, *supra* note 83, at 563 (arguing that the stringent measures seen in section 1201 comes as the result of bad judgment on the part of the Clinton Administration and not from any flaws in the WIPO Treaty, Samuelson maintains that the “diplomatic conference had the good sense to adopt only a general norm on circumvention, leaving nations free to implement this norm in their own way.”); see also *supra* note 48 and accompanying text (setting forth the corresponding WIPO provision).

exceeded the corresponding provision in the WIPO treaty.<sup>86</sup> In fact, according to Secretary William Daley of the Department of Commerce, “[F]or the most part the [WIPO] treaties largely incorporate intellectual property norms that are already part of U.S. law.”<sup>87</sup> Indeed, “[t]he U.S. could have pointed to a number of statutes and judicial decisions that establish anti-circumvention norms.”<sup>88</sup> In addition, “[w]ith U.S. copyright industries thriving in the current legal environment, it would have been fair to conclude that copyright owners were adequately protected by the law.”<sup>89</sup>

The copyright industries, however, demanded that the DMCA provide them with stronger protection,<sup>90</sup> a request that was considered premature by some critics.<sup>91</sup> Even if new legislation was in fact necessary, Pamela Samuelson argues that the anti-circumvention provisions that were enacted go far beyond what was required to make the world safe for copyrighted works in the digital era: “the Administration might have . . . proposed to make it illegal to circumvent a technical protection system for purposes of engaging in or enabling copyright infringement. This, after all, was the danger

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<sup>86</sup> See *The World Intellectual Property Organization Copyright Treaty and The World Intellectual Property Organization Performances and Phonograms Treaty: Hearings on H.R. 2180 and 2281 Before the Senate Foreign Relations Comm.*, 105th Cong. (1998) (statement from the Digital Future Coalition arguing that “[i]t is . . . the opinion of many experts that enactment of adequate and effective measures against special purpose ‘black boxes’ would, in itself, be sufficient to satisfy a contracting nation’s obligations in this regard.”).

<sup>87</sup> S. REP. NO. 105-190, at 6 (1998).

<sup>88</sup> Samuelson, *supra* note 83, at 532.

<sup>89</sup> *Id.*

<sup>90</sup> See *The On-Line Copyright Liability Limitation Act and the WIPO Copyright Treaties Implementation Act: Hearings on H.R. 2180 and H.R. 2281 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Jack Valenti, President of the Motion Picture Association of America, extolling the virtues of the copyright industries and their importance to the national economy in producing more than \$50 billion of revenue abroad, providing roughly four percent of the GDP, and employing people at twice the rate of the national average).

<sup>91</sup> See *Intellectual Property: Hearings on H.R. 2281 Before the Telecommunications, Trade and Consumer Protection Subcomm. of the House Comm. on Commerce*, 105th Cong. (1998) (statement of Hilary Rosen, President and C.E.O., the Recording Industry Association of America) [hereinafter *Rosen Statement*].

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that was said to give rise to the call for anti-circumvention regulations in the first place.”<sup>92</sup>

In contrast, the DMCA makes it illegal not just to infringe upon a copyrighted work, but also to circumvent a technological measure in order to gain access.<sup>93</sup> In fact, the device or service which circumvents the measure need not be designed or produced to do so.<sup>94</sup> The DMCA prohibits any device that has only “limited commercially significant purpose or use other than to circumvent.”<sup>95</sup> A potential plaintiff need only demonstrate that the device is capable of circumvention; hence, there is no need to prove even one instance of actual infringement.<sup>96</sup> The legislation is thus regarded as extreme because it punishes the circumvention devices themselves, rather than the individual bad acts.<sup>97</sup>

*B. Section 1201 Contradicts the Sony Decision and Extinguishes Fair Use*

Opponents of § 1201 have further questioned how the DMCA squares with the seminal decision regarding fair use reached in *Sony Corp. v. Universal City Studios*.<sup>98</sup> In *Sony*, the Supreme Court explored the effect of home videotape recorders on the rights of copyright owners.<sup>99</sup> Respondents (copyright owners) filed suit against petitioners (VCR manufacturers) alleging that some individuals had used petitioners’ VCR’s to record respondents’ copyrighted programs which had been exhibited on commercially sponsored television.<sup>100</sup> As a result, respondents asserted that their

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<sup>92</sup> Samuelson, *supra* note 83, at 533.

<sup>93</sup> 17 U.S.C. § 1201(a).

<sup>94</sup> *Id.* § 1201(a)(2)(B).

<sup>95</sup> *Id.*

<sup>96</sup> See Samuelson, *supra* note 83, at 556 (“[t]his creates a potential for ‘strike suits’ by nervous or opportunistic copyright owners who might challenge (or threaten to challenge) the deployment of a new information technology tool whose capabilities may include circumvention of some technical protection system . . . [t]he mere potentiality for infringement will suffice to confer rich rewards on a successful plaintiff.”).

<sup>97</sup> See *id.*

<sup>98</sup> 464 U.S. 417 (1984). See *infra* notes 113-16 and accompanying text.

<sup>99</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 428-34 (1984).

<sup>100</sup> *Id.* at 419-20 (respondents own copyrights on some television programs broadcast on

copyrights had been infringed.<sup>101</sup> Respondents further asserted that by marketing the VCR's to the public, petitioners' were liable for the alleged infringement.<sup>102</sup>

In its 5-4 decision<sup>103</sup> the Court ultimately held that "time-shifting," defined as the recording of a television broadcast to be watched at a later time, constituted a "substantial non-infringing" use, and was therefore a fair use.<sup>104</sup> In the opinion delivered by Justice Stevens, the Court held that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, *it need merely be capable of substantial non-infringing uses.*"<sup>105</sup> The Court found that one potential use of the VCR—private, noncommercial time-shifting in the home—satisfied the substantial non-infringing use standard.<sup>106</sup>

In order to challenge such a noncommercial use, the Court stated that the respondent must prove either that such a use would be harmful or that if the noncommercial use were to become widespread, "it would adversely affect the potential market for the copyrighted work."<sup>107</sup> The Court supported the District Court's finding that there was no basis to the assumption that live television audiences would decrease as a result of Betamax tapes.<sup>108</sup> Moreover, the Court observed that respondents might in fact benefit from the public's use of Betamax since it might allow more people to actually view their broadcasts.<sup>109</sup> Thus the Court dismissed respondents' claim that time-shifting presented any likelihood of harm to the value of their copyrighted works.<sup>110</sup>

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public airwaves).

<sup>101</sup> *Id.* at 420.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 457 (Justice Blackmun filed a dissenting opinion in which Justice Marshall, Justice Powell, and Justice Rehnquist joined).

<sup>104</sup> *See Sony*, 464 U.S. at 456.

<sup>105</sup> *Id.* at 442 (emphasis added).

<sup>106</sup> *See id.*

<sup>107</sup> *Id.* at 451.

<sup>108</sup> *See id.* at 452-55.

<sup>109</sup> *See Sony*, 464 U.S. at 454.

<sup>110</sup> *See id.* at 456.

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The Court further noted that copyright protection has never accorded the copyright owner complete control over all possible uses of his work.<sup>111</sup> Individual consumers still retain the ability to reproduce a copyrighted work in order to make a fair use.<sup>112</sup>

The relevance of the decision in *Sony* was questioned during congressional hearings on the DMCA.<sup>113</sup> Gary Shapiro, President of Consumer Electronic Manufacturers, argued that “[p]roponents of section 1201 should simply admit that it nullifies the [*Sony*] Betamax holding:

[N]ow, section 1201(b) would ban [the VCR], upon a finding that it, or any component or part, is designed, used or marketed for the purpose of failing to respond to any so-called ‘technical protection’ measure.<sup>114</sup>

In short, under § 1201, the VCR would be considered a circumvention device which should be banned from being sold despite the fact that it also provides a legitimate non-infringing use.<sup>115</sup> When before the House Judiciary Committee, the Digital Future Coalition echoed the same concern:

[S]pecifically, we have argued that to preserve the availability of multi-purpose consumer electronic devices (such as VCR’s and PC’s) it is essential that prohibitions on technology contained in any new digital intellectual property legislation should be limited to those devices which are specifically designed or marketed to defeat owners’ efforts at technology self-help. The over breadth of the technology regulations contained in ‘digital

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<sup>111</sup> *See id.* at 432-33.

<sup>112</sup> *See id.* at 433.

<sup>113</sup> *See infra* notes 114-16 and accompanying text.

<sup>114</sup> *See The On-Line Copyright Liability Limitation Act and the WIPO Copyright Treaties Implementation Act: Hearings on H.R. 2180 and H.R. 2281 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Gary Shapiro, President of Consumer Electronic Manufacturers) [hereinafter *Shapiro Statement*].

<sup>115</sup> *See id.*

copyright' bills introduced in the 104th Congress, prior to the conclusion of the WIPO treaties, was a principle basis of DFC's [Digital Future Coalition's] opposition to those proposals.<sup>116</sup>

Thus, the broadness of the anti-circumvention provisions may limit the ability of technology companies to create innovative devices, and, to some degree, will allow the copyright industries to control the "design and manufacture of all information technologies that can process digital information."<sup>117</sup>

Concerns about the broad language used in the anti-circumvention provisions of the DMCA are not limited to members of the technology community.<sup>118</sup> An individual creating a circumvention device solely for the purpose of acquiring access to make a "fair use" of a digital work—e.g., helping a library circumvent a technological measure to make use of its "shopping right" in order to determine if the library might want to acquire a particular digital work—would also violate the statute.<sup>119</sup> The fair use doctrine is not a defense to the act of circumvention.<sup>120</sup> Thus, as Nimmer states in his recent article, "section 1201 produces a most curious state of affairs. It safeguards various rights to users but simultaneously bars third parties from assisting them to take advantage of those safeguarded rights."<sup>121</sup>

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<sup>116</sup> *The World Intellectual Property Organization Copyright Treaty and The World Intellectual Property Organization Performances and Phonograms Treaty: Hearings on H.R. 2180 and H.R. 2281 Before the Senate Foreign Relations Comm.*, 105th Cong. (1998) (statement of Peter Jaszi, Professor of Law, The American University, representing the Digital Future Coalition, noting that the Digital Future Coalition represents "43 national organizations collectively committed to the appropriate application of intellectual property laws in the emerging networked digital information environment.") [hereinafter *Jaszi Statement*].

<sup>117</sup> Samuelson, *supra* note 83, at 534.

<sup>118</sup> See Ginsburg, *supra* note 19, at 143 (prohibiting devices which facilitate access to copyrighted works, in addition to prohibiting authorized uses of such works, § 1201 arguably limits the general public's ability to make fair use of copyrighted works).

<sup>119</sup> See *id.*

<sup>120</sup> See SUMMARY, *supra* note 15, at 4.

<sup>121</sup> See Nimmer, *supra* note 23, at 733.

It is well settled that access, in the digital environment, is a necessary prerequisite to use.<sup>122</sup> Thus, it follows that if one cannot invoke fair use while attempting to access a work in order to use it for legitimate purposes, then the defense of fair use is pre-empted.<sup>123</sup> Within this new framework, the copyright owner now exercises control over the *use*, not just the reproduction, distribution, or performance of the copyrighted work.<sup>124</sup> In this way the DMCA upsets the traditional balance afforded by the 1976 Copyright Act.<sup>125</sup> The new balance, it is argued, tilts decidedly toward the desires of the content providers (i.e., copyright owners) to the detriment of the public's ability to access works,<sup>126</sup> and also to the detriment of the information technology sector in advancing new technological innovations.<sup>127</sup> The copyright industries, Pamela Samuelson concludes, "seem to believe they are so important to America that they should be allowed to control every facet of what Americans do with digital information."<sup>128</sup>

Legislators grappled with this apparent imbalance while the DMCA was still working its way through various committees.<sup>129</sup> While the bill was under review in the Commerce Committee, Representative Bliley noted that "copyright law is not just about protecting information. It's just as much about affording reasonable access to it as a means of keeping our democracy healthy."<sup>130</sup> The Commerce Committee voiced its concern about the proposed legal framework and its potential to create a "pay-per-use" society.<sup>131</sup> "[I]t would be ironic," as the consumers' Union stated in a letter to the Commerce Committee, "if the great popularization of access to

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<sup>122</sup> See Ginsburg, *supra* note 19, at 143 ("because 'access' is a prerequisite to 'use,' by controlling the former, the copyright owner may well end up preventing or conditioning the latter.").

<sup>123</sup> *See id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See generally id.*

<sup>126</sup> *See* Samuelson, *supra* note 83, at 533-34.

<sup>127</sup> *See id.*

<sup>128</sup> *Id.* at 534.

<sup>129</sup> *See, e.g., supra* notes 91, 114, 116.

<sup>130</sup> 144 CONG. REC. H7094 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley), *as quoted in* Samuelson, *supra* note 83, at 542-43.

<sup>131</sup> *See* H.R. REP. NO. 105-551, pt. 2, at 26 (1998).

information, which is the promise of the electronic age, will be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information.”<sup>132</sup>

In contrast to the analog world, if a work is distributed digitally and a physical copy does not exist, then it is possible to envision a scenario where in order to even browse a particular work, one would need to pay for each such use.<sup>133</sup> Such a scenario could restrict the free flow of information and tip the balance in favor of content providers.<sup>134</sup> To avoid such an outcome, the Commerce Committee included various measures designed to strike a suitable balance between the goals of advancing electronic commerce and still protecting intellectual property in a digital setting.<sup>135</sup> Among these measures, the congressional press release on the issue cited the inclusion of strong fair use provisions, such as the shopping right for educational and other similarly situated institutions, and the provisions calling for administrative review of those adversely affected users.<sup>136</sup>

As Nimmer notes, however, it is unclear whether § 1201 effectively protects fair use and, for that matter, whether § 1201 successfully prevents the risk of a pay-per-use world.<sup>137</sup> Nimmer illustrates the inadequacy of the user exemption with the following example:

Sally is to be hired to aid someone [Harry, who lacks the technical expertise to circumvent himself] who has every right under section 1201 to circumvent the technological protections in order to obtain access. It would seem,

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<sup>132</sup> *Id.*

<sup>133</sup> See Jennifer Burke Sylva, *Digital Delivery & Distribution of Music & Other Media: Recent Trends in Copyright Law; Relevant Technologies; and Emerging Business Models*, 20 LOY. L.A. ENT. L. REV. 217, 228-29 (2000) (discussing risk that only people who pay will benefit from creative works if access is limited by means of “technological gates and digital envelopes.”).

<sup>134</sup> *See id.*

<sup>135</sup> See Congressional Press Release, Tom Bliley, House Approves Commerce Committee Bill Protecting Consumer (Aug. 4, 1998).

<sup>136</sup> *See id.*

<sup>137</sup> Nimmer, *supra* note 23, at 726.

therefore, that her conduct should not only be exempt under the statute, but that it should be positively applauded—for it is necessary to vindicate the statute’s policies, with respect to all but the most technically sophisticated users of copyrighted materials. Nonetheless, the statute as drafted bars Sally from aiding Harry because the user exemption applies solely to the basic provision and not to the coordinate trafficking ban.<sup>138</sup>

Therefore, though Sally would only be circumventing in order to aid Harry, an individual who will make a legitimate “fair use” of the work, she would still be culpable under the DMCA.<sup>139</sup> Technically, by helping Harry, Sally is “providing her services,” which arguably: (1) are primarily designed for the purpose of circumventing; or, (2) have only limited commercial significance, purpose, or use other than to circumvent a technological measure; or (3) are marketed by or in concert with that person with his or her knowledge for use in circumventing a technological measure.<sup>140</sup> Short of developing the technical expertise on his own, Harry requires the services of another to gain access; nevertheless, these services are defined in the statute as trafficking.<sup>141</sup> Because the user exemption only applies to the basic provision and not the ban on trafficking, Harry may not legally gain access.<sup>142</sup> As a result, “the reach of the trafficking ban is unjustifiably broad; Congress should have reconciled the trafficking ban with the exemptions that it placed on the basic provision.”<sup>143</sup>

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<sup>138</sup> *Id.* at 735-36.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 736.

<sup>141</sup> *Id.* at 735-37.

<sup>142</sup> Nimmer, *supra* note 23, at 735-37.

<sup>143</sup> *Id.* at 737.

*B. Section 1201: A Necessary Enhancement of Copyright Protection for the Digital Age*

*1. Is Section 1201 Too Broad?*

In enacting the DMCA, Congress was well aware that it had to strike a balance between fair use and the anti-circumvention provisions of the DMCA controlling access to copyrighted works.<sup>144</sup> In the end, the prevalent view in Congress reflected that of the White Paper, asserting that stronger protection was necessary in order for copyright holders to be able to exploit their works digitally.<sup>145</sup> Without these stronger protections, the risk of piracy would overshadow the benefits of entering the digital market for copyright owners.<sup>146</sup>

The digital age, and the new threat of piracy which accompanies it,<sup>147</sup> demands a new legal framework in order to preserve the traditional rights of copyright owners.<sup>148</sup> Far from expanding the monopoly of exclusive rights held by content owners, the DMCA ensures only that copyright owners retain their preexisting rights.<sup>149</sup> The digital world is so different from the analog world that imposing meaningful protection requires a readjusting of the copyright balance.<sup>150</sup> Indeed, the new digital environment requires that “[m]eaningful protection for copyrighted works . . . proceeds [sic] on two fronts: the property rights themselves, supplemented by legal assurances that those rights can be technologically safeguarded.”<sup>151</sup> The Copyright Office has refuted the idea that § 1201 should cover

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<sup>144</sup> See *supra* notes 129-32 and accompanying text.

<sup>145</sup> See *supra* notes 50-52 and accompanying text.

<sup>146</sup> S. REP. NO. 105-190, at 8 (1998) (discussing the need for new legislation “[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurances that they will be protected against massive piracy.”).

<sup>147</sup> See *supra* notes 8, 146 and accompanying text.

<sup>148</sup> S. REP. NO. 105-190, at 8 (1998).

<sup>149</sup> See generally 17 U.S.C. §§ 1201-1205.

<sup>150</sup> See *Peters Statement, supra* note 79 (discussing the inadequacy of previous legal protection in dealing with new technologies).

<sup>151</sup> *Id.*

only bad acts, i.e., infringement, as opposed to extending it to the marketing and/or distribution of devices capable of circumvention.<sup>152</sup> Such an interpretation has been rejected by the Copyright Office as inadequate because of the “difficulty involved in discovering and obtaining meaningful relief from individuals who engage in acts of circumvention.”<sup>153</sup> Therefore, a more expansive prohibition that reaches the individuals providing the means for circumvention is “necessary to make the protection adequate and effective.”<sup>154</sup> The Register of Copyrights has further noted that “the conduct of commercial suppliers is what actually enables and ultimately results in large-scale circumvention.”<sup>155</sup>

Certain critics, such as the Digital Future Coalition, suggest that § 1201 be amended to make the standard for a violation conjunctive, as opposed to disjunctive.<sup>156</sup> According to this view, the three possible ways in which one could violate § 1201 should be strung together so that one must do *all* three: (1) the device must have been primarily designed or produced to circumvent; *and* (2) the device must have only a limited commercially significant purpose; *and* (3) the device must be marketed for use in circumventing—in order to violate the statute.<sup>157</sup> However, as discussed below, requiring the violation of all three categories would greatly reduce the effectiveness of § 1201 as it now stands.<sup>158</sup>

The alleged “broadness” of § 1201 is a necessary reaction to the manner in which circumvention devices may end up on the market. As Hillary Rosen from the Recording Industry Association of America (hereinafter “RIAA”) explained during her statement before the House Commerce Committee, such a construct of § 1201 “assumes a singular chain of command in the way products are placed in the marketplace.”<sup>159</sup> However, since there is no single

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See *Peters Statement*, *supra* note 79 (discussing the inadequacy of previous legal protection in dealing with new technologies).

<sup>156</sup> See *Jaszi Statement*, *supra* note 116.

<sup>157</sup> 17 U.S.C. § 1201(a)(2).

<sup>158</sup> See *infra* notes 160-64 and accompanying text.

<sup>159</sup> *Rosen Statement*, *supra* note 91.

chain of command, § 1201 had to be drafted as a disjunctive test to have the desired effect on the different players along the distribution chain.<sup>160</sup> The first proscribed category—that of primarily designing a circumvention device—speaks to the manufacturers of the technology.<sup>161</sup> The second proscribed category—banning devices that have only a limited commercially significant purpose other than circumvention—is a catch-all intended to weed out otherwise useless products that end up causing harm.<sup>162</sup> The third, and final, proscribed category—that of marketing a circumvention product—speaks to the retailers and distributors.<sup>163</sup> If the statute required that all three elements be combined, the standard would be “effectively impossible to meet and [would be] a road map for pirates.”<sup>164</sup>

The purpose of these proscriptions is to keep circumvention devices off the market.<sup>165</sup> As Jane Ginsburg noted in a recent article: “[b]y outlawing the general distribution of post-access circumvention devices, Congress has . . . adjusted the technological status quo in favor of copyright owners, and, at least for now, set the copyright ‘balance’ against unauthorized convenience copying.”<sup>166</sup> In the analog world, copyrighted works were “not amenable to effective copy protection” and thus “convenience copying” was tolerated to some extent.<sup>167</sup> In the digital world, however, the dangers of such “convenience copying” are immeasurably direr for the copyright owners,<sup>168</sup> thus warranting legal protection for the actual technological protection given to digital copyrighted works.<sup>169</sup>

Indeed, “if in the past low technology imposed a tolerance for widespread copying, this state of affairs should not be confused with

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*; 17 U.S.C § 1201(a)(2)(A).

<sup>162</sup> *Rosen Statement, supra* note 91.

<sup>163</sup> *Id.*; 17 U.S.C § 1201(a)(2)(C).

<sup>164</sup> *Rosen Statement, supra* note 91.

<sup>165</sup> *See* Ginsburg, *supra* note 19, at 144.

<sup>166</sup> *Id.* at 155.

<sup>167</sup> *Id.* at 154.

<sup>168</sup> *See supra* note 8 and accompanying text (discussing reasons why piracy is a much greater threat in the digital era).

<sup>169</sup> *See id.*

a legal right to engage in widespread convenience copying.”<sup>170</sup> Accordingly, as § 1201(a)(2) sets forth, devices which enable such convenience copying must effectively be kept off the market.<sup>171</sup> In this way, the proscriptions of § 1201(a) are not overly broad, but in fact are well tailored to respond to the new threats posed by the digital environment.

## 2. Section 1201 Does Not Disturb Fair Use

Proponents of the DMCA have rebutted the claim that § 1201 does not preserve the defense of fair use.<sup>172</sup> The Copyright Office clearly set out in its summary of the new legislation that the distinction between the prohibitions against access and the prohibitions against infringement were specifically adopted to preserve fair use.<sup>173</sup> Therefore, an individual cannot cry fair use to escape liability and thus emasculate the anti-circumvention provisions when he or she has unlawfully obtained access; fair use applies only with lawful access.<sup>174</sup> Supporters of the DMCA provisions argue that lawful access has always been a prerequisite to fair use, thus the anti-circumvention provisions do not truly constitute a change in the manner in which fair use is invoked.<sup>175</sup>

Furthermore, proponents of § 1201 assert that the balance has not shifted since “it has long been accepted in U.S. law that the copyright owner has the right to control access to his work, and may choose not to make it available to others or to do so on only set terms.”<sup>176</sup> This principle is illustrated by a myriad of real-life examples, including situations in which a copyright owner may choose to never publish a work, or when a movie theater or museum charges admission and bans the recording (be they audio, video, or photographic recordings)

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<sup>170</sup> Ginsburg, *supra* note 19, at 154.

<sup>171</sup> 17 U.S.C. § 1201(a)(2).

<sup>172</sup> See, e.g., *Peters Statement*, *supra* note 79.

<sup>173</sup> SUMMARY, *supra* note 15, at 4.

<sup>174</sup> See *id.*; see also *Peters Statement*, *supra* note 79.

<sup>175</sup> *Peters Statement*, *supra* note 79.

<sup>176</sup> *Id.*

of the works presented.<sup>177</sup> Thus the copyright owner traditionally has both controlled and conditioned the access of copyrighted works afforded to the public, with users generally paying for access.<sup>178</sup> The Administration's White Paper noted that "the fair use doctrine does not require a copyright owner to allow or to facilitate unauthorized access or use of a work."<sup>179</sup> If this were the case, then "even passwords for access to computer databases would be considered illegal."<sup>180</sup>

The anti-circumvention provisions embodied in § 1201 simply continue this practice, and have been analogized to a law against breaking and entering: "Under existing law, it is not permissible to break into a locked room in order to make fair use of a manuscript kept inside."<sup>181</sup> Similarly, one cannot circumvent technological protections without authorization in order to make a fair use of a digital work.<sup>182</sup>

Not only does § 1201 preserve fair use, but its proponents contend that the standard built into § 1201—namely, that of proscribing circumvention devices which have only a limited commercially significant purpose other than to circumvent—in fact builds upon the "substantial non-infringing" standard set forth in *Sony*.<sup>183</sup> While the *Sony* standard in itself is ineffective in addressing the problem of circumvention,<sup>184</sup> the "[standard from section 1201] makes the [*Sony*] standard more meaningful."<sup>185</sup> The Register of Copyrights further claims that that § 1201 is helpful because it refers:

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<sup>177</sup> See *White Paper*, *supra* note 27, at 762-63.

<sup>178</sup> See *Peters Statement*, *supra* note 79.

<sup>179</sup> *White Paper*, *supra* note 27, at 762-63.

<sup>180</sup> *Id.* at 763.

<sup>181</sup> *Peters Statement*, *supra* note 79.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See *id.* ("[m]ost devices for circumventing technological measures, even those designed or entirely used for infringing purposes, will be capable of substantial non-infringing uses since they could potentially be employed in the course of a fair use, or in the use of a public domain work. It is therefore not surprising that the *Sony* standard, in practice, has been ineffective in addressing the circumvention problem.").

<sup>185</sup> *Id.*

to the extent to which the product is actually *used* for legitimate purposes, rather than its *capability* to be used for such purposes. At the same time, it is consistent with Sony in that it does not prohibit products with a substantial non-circumventing use, only those with merely limited commercially significant non-circumventing use.<sup>186</sup>

Thus, in contrast to the arguments set forth by the DMCA's critics,<sup>187</sup> § 1201 preserves the availability of multi-purpose consumer electronic devices so long as such products are actually used for, and are not merely capable of, substantial non-circumventing use.<sup>188</sup>

### *C. Case Study: Universal City Studios, Inc. v. Reimerdes*

The anti-circumvention provisions of the DMCA were put to the test in *Universal City Studios, Inc. v. Reimerdes*.<sup>189</sup> In the early 1990's, the major film studios explored the possibility of releasing films to the home market in the form of digital versatile disks (hereinafter "DVD").<sup>190</sup> Noting the increased threat of piracy that accompanied the release of films in a digital format, the major film studios adopted an encryption system (known as "CSS," a content-scrambling system) to protect each DVD.<sup>191</sup> In turn, the motion picture studios licensed the technology necessary to decrypt the DVD files to consumer electronic manufacturers.<sup>192</sup> The end result

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<sup>186</sup> *Id.* (emphasis added).

<sup>187</sup> *See supra* notes 114-16 and accompanying text.

<sup>188</sup> *See supra* notes 183-86 and accompanying text.

<sup>189</sup> 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

<sup>190</sup> *Id.* at 309.

<sup>191</sup> *Id.* at 309-10.

<sup>192</sup> *Id.* at 310.

was that DVD's could be played, but not copied, on licensed players and computer drives.<sup>193</sup>

In September 1999, a Norwegian teenager by the name of Jon Johansen, with the help of two friends, reverse engineered<sup>194</sup> a licensed DVD player and unlocked the key to the CSS encryption algorithm.<sup>195</sup> With this new information, the teenagers created "DeCSS," a program enabling non-compliant computers to both play and copy DVD files to the computer's hard drive.<sup>196</sup> Johansen posted the DeCSS program on the web, and it quickly became available on a variety of websites.<sup>197</sup>

In January 2000, the Motion Picture Association of America (hereinafter "MPAA") brought suit against a website known as 2600.com, which both posted the DeCSS program on its site and provided links to other websites posting the program.<sup>198</sup> In February of 2000, the Southern District of New York issued a preliminary injunction against the defendants and ordered them to remove the DeCSS posting from their website.<sup>199</sup> The defendants complied, but still supported links to other websites with DeCSS.<sup>200</sup> The MPAA promptly filed suit against the defendants under the DMCA, alleging that by providing links to websites with DeCSS, the defendants were violating § 1201(a)(2) by making available certain technologies "developed or advertised to defeat technological protections against unauthorized access to a [copyrighted] work," in violation of § 1201(a)(2) (banning trafficking).<sup>201</sup> In other words, the defendants

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<sup>193</sup> *Id.*

<sup>194</sup> 17 U.S.C. § 1201(f) (defining "reverse engineering" as "analyzing elements in order to achieve interoperability with other programs.").

<sup>195</sup> *Reimerdes*, 111 F. Supp. 2d at 311.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 312.

<sup>199</sup> *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (granting plaintiffs' motion for a preliminary injunction against defendants' posting of the DeCSS program on their website).

<sup>200</sup> *See Reimerdes*, 111 F. Supp. 2d at 312.

<sup>201</sup> *Id.* at 316.

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were continuing to do indirectly what they were enjoined from doing under the injunction.<sup>202</sup>

Judge Kaplan cited as the “inescapable facts” of the case the following: “(1) CSS is a technological means that effectively controls access to plaintiffs’ copyrighted works, (2) the one and only function of DeCSS is to circumvent CSS, and (3) defendants offered and provided DeCSS by posting it on their web site.”<sup>203</sup> Moreover, “[w]hether defendants [posted DeCSS] in order to infringe, or to permit or encourage others to infringe, copyrighted works in violation of other provisions of the Copyright Act simply does not matter for the purposes of section 1201(a)(2).”<sup>204</sup>

In response to the charges from the MPAA, the defendants raised the affirmative defense of fair use, arguing that it is improper to construe § 1201 in a manner which would impede making a fair use of plaintiffs’ copyrighted works, i.e., DVD’s.<sup>205</sup> Accordingly, the defendants asserted that § 1201 did not apply to their activities, which simply enabled users of DeCSS to make fair uses of plaintiffs’ works.<sup>206</sup> In substance, the defendants contended, “the anti-trafficking provision leaves those who lack sufficient technical expertise to circumvent CSS themselves without the means of acquiring circumvention technology that they need to make fair use of the content of plaintiffs’ copyrighted DVDs.”<sup>207</sup> In addition, defendants claimed that because DeCSS may be used for the purpose of gaining access to copyrighted works in order to make a fair use, DeCSS is capable of a “substantial non-infringing use”<sup>208</sup> and is thus permissible under the holding in *Sony*.<sup>209</sup>

Judge Kaplan, in ruling on the issue, stated that “[a] given device or piece of technology might have a ‘substantial non-infringing use,

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<sup>202</sup> *See id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *See Reimerdes*, 111 F. Supp. 2d at 322-23.

<sup>206</sup> *Id.* at 322.

<sup>207</sup> *Id.* at 336.

<sup>208</sup> *Id.* at 323 (quoting *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, \*8 (W.D. Wash. Jan. 18, 2000) (citation omitted)).

<sup>209</sup> *See supra* text accompanying notes 104-06 (discussing holding of *Sony*).

and hence be immune from attack under *Sony's* construction of the Copyright Act—but nonetheless still be subject to suppression under section 1201 . . . Congress explicitly noted that section 1201 does not incorporate *Sony*.”<sup>210</sup> Moreover, as Judge Kaplan observed, fair use is not a defense to a § 1201(a)(2) violation since the defendants are not being sued for copyright infringement.<sup>211</sup>

Furthermore, Judge Kaplan reasoned, those wishing to make a fair use of plaintiffs' DVD's are not precluded from doing so.<sup>212</sup> As he explained, fair use of a motion picture necessarily implicates one of the following three uses: (1) quoting words from the script; (2) listening to the soundtrack; and (3) viewing of the actual images.<sup>213</sup> He concluded that while “[a]ll three of these types of uses now are affected by the anti-trafficking provision of the DMCA,” they are affected “only to a trivial degree.”<sup>214</sup> First, all films available on DVD are also available on videotape.<sup>215</sup> Second, even assuming that films will one day only be available digitally, Judge Kaplan asserted the impact on lawful use would still be limited since “[c]ompliant DVD players permit one to view or listen to a DVD movie without circumventing CSS in any prohibited sense. The technology permitting manufacture of compliant DVD players is available to anyone on a royalty-free basis and at a modest cost.”<sup>216</sup>

As Judge Kaplan noted, the anti-circumvention provisions could significantly impact technology that copies portions of a DVD, since the design of compliant DVD players prevents copying.<sup>217</sup> It is the

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<sup>210</sup> *Reimerdes*, 111 F. Supp. 2d at 323-24 (citations omitted).

<sup>211</sup> *See id.* at 322 (noting that defendants “are sued for offering and providing technology designed to circumvent technological measures that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act. If Congress had meant the fair use defense to apply to such actions, it would have said so.”).

<sup>212</sup> *See id.* at 322-23.

<sup>213</sup> *See id.* at 337.

<sup>214</sup> *Id.*

<sup>215</sup> *Reimerdes*, 111 F. Supp. 2d at 337.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

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rights of these individuals upon whom the defendants most heavily rely.<sup>218</sup> However, there is no evidence that the rights of such third parties are implicated in the case at hand.<sup>219</sup>

Stating that “in an age in which the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing,”<sup>220</sup> the court held that the DMCA weighed in on the side of the MPAA and accordingly, entitled the film studios to injunctive and declaratory relief.<sup>221</sup>

### III. DMCA AS A PROPER RESPONSE TO THE PRESENT REALITY

#### A. *Analysis of Reimerdes*

Many in the legal community anticipated the decision in *Reimerdes* since it represented one of the first cases in which a federal court would apply the DMCA.<sup>222</sup> *Reimerdes* established important legal precedent and reframed the debate over fair use.<sup>223</sup>

In their Post-Trial Memorandum of Law, defendants criticized Judge Kaplan’s interpretation of the DMCA, arguing that such a construction would grant copyright owners the power to abolish the fair use of digital works by furnishing them with control over all physical means to display or copy those works.<sup>224</sup> Defendants

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<sup>218</sup> *See id.* at 338.

<sup>219</sup> *Id.*

<sup>220</sup> *Reimerdes*, 111 F. Supp. 2d at 345.

<sup>221</sup> *Id.* at 346 (“In our society . . . clashes of competing interests like this are resolved by Congress. For now, at least, Congress has resolved this clash in the DMCA and in plaintiffs’ favor.”).

<sup>222</sup> *See, e.g.*, Carl S. Kaplan, *Tough Court Fight Expected Over DVD Code*, N.Y. TIMES CYBER LAW JOURNAL, (Feb. 11, 2000), available at <http://www.nytimes.com/library/tech/00/02/cyber/cyberlaw/11law.html> (“[*Reimerdes*] could well prove to be more legally significant because it represents one of the first cases in which a federal court will attempt to interpret the Digital Millennium Copyright Act.”).

<sup>223</sup> *See supra* notes 189-93, 195-98, 200-21 and accompanying text.

<sup>224</sup> *See* Respondents’ Post-Trial Memorandum of Law, *Universal City Studios, Inc. v. Corley*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (No. 00-277).

further protested that while DeCSS allows forms of fair uses, such as brief quoting, excerpting, scientific study, or academic archiving, plaintiffs' authorized DVD players deliberately do not permit such uses.<sup>225</sup> The fact that they were not being sued for infringement should not, according to defendants, allow the court to ignore the radical effect the DMCA has on the potential fair uses of DeCSS.<sup>226</sup>

However, the fact that defendants are not being sued for infringement, but rather for providing an anti-circumvention device, was precisely the purpose behind the enactment of the DMCA, and specifically § 1201(a)(2).<sup>227</sup> Section 1201(a)(2) creates a new right for copyright owners by providing them with the right to guard the technological system which protects copyrighted content in a digital format.<sup>228</sup> As legislative history makes abundantly clear, fair use is not a defense to a § 1201(a)(2) violation.<sup>229</sup> According to Congress, this "new right" was an appropriate response to the changing digital environment.<sup>230</sup> The fact that § 1201 stands as a distinct violation from infringement is crucial.<sup>231</sup> Otherwise:

the § 1201 anti-trafficking provisions would be meaningless, because a plaintiff would have to wait until copyright infringement has occurred to bring an action, and infringement was already unlawful before the DMCA was enacted. Congress could not have intended a statute

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<sup>225</sup> *See id.*

<sup>226</sup> *See id.*

<sup>227</sup> *See id.*

<sup>228</sup> Trial Transcript at 4, *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (No. 00-0277) [hereinafter *Trial Transcript*] (the DMCA "created . . . a new right that a copyright owner would have if he had to protect the system, a technology which would protect his copyrighted material. He got the right to that safety device and the right not to have it circumvented as a matter of federal law. So this is like a guard or a moat surrounding the house, the protected material.").

<sup>229</sup> *See Peters Statement, supra* note 79.

<sup>230</sup> S. REP. NO. 105-190, at 8 (1998).

<sup>231</sup> *See* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 839-40 (2001).

enacted after such extensive consideration to be interpreted as mere surplusage [sic] to an already existing right to sue for copyright infringement.<sup>232</sup>

Even assuming fair use was an applicable defense, the defendants in *Reimerdes* are far from eligible for the exception. As Mary Beth Peters, the Register of Copyright, stated in her statement before the House Judiciary Committee, the DMCA builds upon the meaning of *Sony*, the seminal case on fair use, by referring to the extent to which the product (in this case DeCSS) is *actually* used for lawful purposes, as opposed to its *capability* to be used for lawful purposes.<sup>233</sup> Thus, while defendants argue that DeCSS permits certain forms of fair use, its mere potential to be used for legitimate purposes does not satisfy the necessary standard.<sup>234</sup>

There is no evidence that DeCSS has actually been used for such legitimate purposes. However, it was clear from defendants' website that the hyperlinks to other sites with postings of DeCSS were, at the very least, marketed with the knowledge they could be used to circumvent technological measures that control access to a protected work.<sup>235</sup> While Jon Johansen may have developed DeCSS with the legitimate intent of enabling non-compliant computers to play DVD's, the defendants in *Reimerdes* plainly did not market the device as such.<sup>236</sup> Likewise, the DMCA does not allow them to hide behind the alleged legitimate intent of the manufacturer in defense.<sup>237</sup> Instead, *Reimerdes* illustrates why the anti-circumvention provisions require disjunctive, as opposed to conjunctive, language to serve

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<sup>232</sup> Appellants' Post-Trial Brief at 6, *Universal City Studios, Inc. v. Corley*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (No. 00-277).

<sup>233</sup> *Peters Statement*, *supra* note 79 and accompanying text.

<sup>234</sup> See Ginsburg, *supra* note 19, at 152 (arguing that allowing a device to be "exculpated simply because it is capable of being put to fair use . . . [would] as a practical matter [allow] the fair use tail [to] again wag the copyright infringement dog.").

<sup>235</sup> See *Trial Transcript*, *supra* note 228, at 13 (noting that the defendants' website stated, "Yes, you can trade DVD movie files over the Internet" and "Notice the DVD Copy Control Association are cocksuckers.").

<sup>236</sup> *Id.*

<sup>237</sup> See generally 17 U.S.C. § 1201 (omitting intent as a prerequisite to determining if an anti-circumvention measure is in violation of the DMCA).

their purpose.<sup>238</sup> If a violation of § 1201 required that the circumventing device be primarily designed to circumvent *and* possess only a limited commercially significant purpose other than circumvention *and* be marketed as a circumvention device, then § 1201 would be riddled with ways by which distributors could avoid liability. Namely, it would enable one to hide behind what the device was *designed* to do, a standard bearing no relationship to how a device will ultimately be marketed and, most importantly, put to use. In *Reimerdes*, the DMCA served its purpose by holding the defendants accountable for marketing DeCSS as a circumvention product which would allow individuals to bypass the encryption system protecting DVD's.<sup>239</sup>

*B. Analysis of DMCA Anti-Circumvention Provisions: Is Section 1201 Too Broad?*

The DMCA allows copyright owners to control digital distribution.<sup>240</sup> The argument that the DMCA thereby created a new right for copyright owners, a right to control access to copyrighted works, is not accurate. While it is true that the DMCA prohibits both the infringement of a copyrighted work and the circumvention of a technological measure in order to gain unauthorized access to the work, this right to control "access" is not a new one.<sup>241</sup> As discussed earlier, the copyright holder traditionally has controlled and conditioned access to their works by charging the public for such access (for example, charging admission to a movie or an art exhibit).<sup>242</sup> In this way, the copyright owner has always had "the right to control the manner in which members of the public apprehend the work."<sup>243</sup>

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<sup>238</sup> See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

<sup>239</sup> See *Reimerdes*, 111 F. Supp. 2d at 317-18.

<sup>240</sup> See 17 U.S.C §§ 1201-1205.

<sup>241</sup> See *supra* notes 176-78 and accompanying text.

<sup>242</sup> See *supra* note 177-78 and accompanying text.

<sup>243</sup> Jane C. Ginsburg, *From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law*, in U.S. INTELLECTUAL PROPERTY: LAW AND POLICY (Hugh Hansen ed., 2000).

Scholars such as Jane C. Ginsburg argue that this “access” differs from the conception of reproduction or communication rights “to the extent that . . . the user may purchase a digital copy such as a CD ROM, but the user may not ‘open’ the work to apprehend (listen to or view) its contents, unless the user acquires the ‘key’ to the work.”<sup>244</sup> Professor Ginsburg argues that this differs from conventional rights since traditionally, “once a particular copy was sold, the copyright law did not constrain the purchaser’s further disposition of that copy.”<sup>245</sup> However, the relevance of this fact may have more to do with the limitations inherent in analog works as opposed to digital works.<sup>246</sup> The differences between the two formats mandate a re-examination of what rights are required to maintain a copyright balance.<sup>247</sup> Furthermore, even some critics who claim that the DMCA is overbroad concede that a so-called access right is necessary to maintain any meaningful exclusive copyright rights in the digital era.<sup>248</sup>

Pamela Samuelson argues that § 1201 should have been drafted more narrowly, punishing only those attempting to circumvent protections for the purposes of copyright infringement, and not those circumventing to gain access (as barred by the ban on trafficking).<sup>249</sup> However, § 1201 was not designed just to punish individual bad acts, as the Copyright Act already does, but had the larger goal of keeping circumvention devices off the market.<sup>250</sup> Because the language is disjunctive, § 1201 also bans devices that are designed, primarily used, or marketed for use in circumventing a technological measure that controls access.<sup>251</sup> The DMCA was developed to respond to the

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> See *supra* notes 167-69 and accompanying text.

<sup>247</sup> Ginsburg, *supra* note 243, at 8 (“[E]ven if an ‘access’ right does not precisely correspond to either of the traditional copyright rights of reproduction or public performance, it does respond to what is becoming the dominant way in which works are in fact exploited in the digital online environment.”).

<sup>248</sup> See *id.* at 9 (“[W]ithout an access right, it is difficult to see how in a digital era authors can maintain the ‘exclusive Right’ to their ‘Writings’ that the Constitution authorizes Congress to ‘secure’.”).

<sup>249</sup> See Samuelson, *supra* note 83.

<sup>250</sup> See *supra* notes 152-55 and accompanying text.

<sup>251</sup> See *supra* notes 156-58 and accompanying text.

unprecedented characteristics of the digital environment—characteristics which demonstrate that once a circumvention device becomes available on the market, it may be too late to control widespread copyright infringement.<sup>252</sup> Unlike in the analog world, digital copying can become widespread virtually overnight, acquiring an instant global audience.<sup>253</sup> These unique risks are precisely why Congress did not make it necessary to prove infringement in order to stop a circumvention device from becoming available to the public.<sup>254</sup>

Additionally, opponents of the anti-circumvention provisions argue that by barring anyone from designing or marketing a device that can circumvent an access control measure, and further, not allowing fair use as a defense to a violation of this ban on trafficking, § 1201 effectively extinguishes fair use.<sup>255</sup> According to these critics, if one strictly followed the language of § 1201, it would be impossible for one who did not possess the technical expertise to circumvent to legally gain the access necessary to make a fair use of the work.<sup>256</sup>

This argument is only persuasive in a futuristic world that produces exclusively digital copies, since only digital works are protected by a technological measure. Thus, the term “access,” as used in § 1201, is only a prerequisite to use to the extent that a non-digital alternative does not exist. While it is certainly an interesting academic question, it is unsupportable as an underlying premise by which to advocate the emasculation of § 1201.

Furthermore, the ban on trafficking bars individuals only from gaining unauthorized access.<sup>257</sup> If fair use could be introduced as a defense against the ban on trafficking, then individuals would be able to use it as a defense to unlawfully obtaining access. However, even

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<sup>252</sup> See *supra* notes 153-55 and accompanying text.

<sup>253</sup> See *Lehman Statement*, *supra* note 8.

<sup>254</sup> S. REP. NO. 105-190, at 2 (1998).

<sup>255</sup> See *supra* notes 137-38 and accompanying text.

<sup>256</sup> See *supra* notes 137-43 and accompanying text (discussing Nimmer’s hypothetical analyzing the liability of an individual hired by another individual who lacks the technical expertise to circumvent a technological measure on his own in order to make a fair use).

<sup>257</sup> 17 U.S.C. § 1201.

the traditional notion of fair use has never allowed unauthorized access.<sup>258</sup> Lawful access has always been a prerequisite to fair use.<sup>259</sup>

### CONCLUSION

Ironically, both the proponents and the critics of the anti-circumvention provisions of the DMCA rely on the same policy arguments to advance their positions—that the ultimate goal should be to allow the public to benefit from the digital dissemination of copyrighted works.<sup>260</sup>

Proponents of the DMCA claim that without enacting proper safeguards for copyright owners, there would be no incentive for them to risk the increased threats of piracy existing in the digital world by distributing works digitally.<sup>261</sup> Likewise, critics of the DMCA argue that because § 1201 flatly prohibits circumvention devices, the public will not have the necessary access to digital works in order to make fair use of such works.<sup>262</sup> Therefore, in a future where copyrighted works may be available exclusively in digital format, the public will benefit less from copyrighted works because access is a prerequisite to fair use, and § 1201 bars access.

However, the latter argument relies entirely on unsupported assumptions about the future, primarily, that a time will come when works are exclusively available in digitally encrypted format.<sup>263</sup> The hypothetical scenarios surrounding such a world neglect today's realities. Today, as well as in the foreseeable future, it is the

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<sup>258</sup> See *supra* notes 176-79 and accompanying text.

<sup>259</sup> See *id.*

<sup>260</sup> Compare Samuelson, *supra* note 83, with Ginsburg, *supra* note 19.

<sup>261</sup> See *supra* note 44 and accompanying text.

<sup>262</sup> See *supra* notes 120-23 and accompanying text.

<sup>263</sup> See Ginsburg, *supra* note 19, at 153-54 (stating the argument that copyright owners will be able to lock up works of authorship without descramblers assumes “that works will be available only in encrypted formats. . . . [E]ven where works are susceptible to effective technological protections, copyright owners may not choose to restrict access to every copy. Moreover, copies will often still be available for anonymous consultation (and limited copying) in places such as public libraries (who . . . are entitled to circumvent access and anti-copying codes, under appropriate circumstances).”).

copyright owner who is imperiled, not the individual attempting to make a fair use. Without proper protections there will be no digital works of which to make a fair use. In this reality, the law must “reinforce the copyright owner’s efforts to prevent unauthorized (and unmonitored) copying,”<sup>264</sup> as opposed to leaving technology and the market to what has been dubbed an “encryption arms race.”<sup>265</sup>

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<sup>264</sup> *Id.* at 153.

<sup>265</sup> *Id.*