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A NEW ARGUMENT FOR FAIR USE UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT

BRANDON GRZANDZIEL*

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I. INTRODUCTION

DVDs were first introduced to consumers in February 1997 as the successor to analog VHS tapes.¹ From the beginning, Hollywood studios considered the encryption and security of the discs to be of paramount concern. Originally slated to be released in time for the holiday season in autumn 1996, the delay grew out of concerns of Hollywood studios about the threats of copyright infringement and illegal duplication of the movie on the disc.² The DVD Copy Control Association (DVDCCA), an industry consortium, eventually adopted an encryption scheme called the Content Scrambling System (CSS).³ CSS was designed to “prevent[] movies from being illegally duplicated, protecting the intellectual property of the manufacturers, producers and writers from theft.”⁴ It works by using an algorithm to encrypt sectors on the disc that must then be decrypted using a special chip when the movie is played on a compatible player, whether it be a stand-alone player on top of a television or a computer drive.⁵ Using

¹ See Donald Liebenson, *Companies Testing the DVD Waters*, L.A. TIMES, May, 5, 1997, at F6.

² See, e.g., Peter M. Nichols, *Delay of the Disk*, N.Y. TIMES, July 26, 1996, Home Video, at 19.

³ Kilroy Hughes, *DVD Video Encryption Update: Hollywood, Having Cake and Eating It*, EMEDIA PROFESSIONAL, June 1, 1997, vol. 10.

⁴ DVD Copy Control Association, <http://www.dvdcca.org/faq.html> (last visited March 10, 2008).

⁵ Hughes, *supra* note 3.

CSS to encrypt a DVD accomplishes two things:⁶ it prevents the disc from being played in any device that does not have a CSS decryption chip, and it prevents disc copying. It is this use of CSS that prevents people from using popular and commercially available DVD creation software along with the DVD burner on their computer from copying protected discs.

Part II of this Note explores the historical origins of American copyright law, beginning with royally-granted monopolies in *Fourteenth Century* England and ending with the enactment of the first American copyright law in 1790. From inception, these monopolies were intended for the benefit of the public good, not for the benefit of the monopoly holder. Part III will focus on the Copyright Act of 1976 and the fair use doctrine, examining the legislative and judicial purposes behind the fair use doctrine and the reasons why it was codified. From there, I will analyze how the Supreme Court interpreted the fair use doctrine in three different cases and will try to sketch a brief but coherent image of its meaning, use, application, and consequences. I will show that the doctrine is a well-established, flexible, and, most of all, vitally important component in our copyright law. Part IV will focus on the Digital Millennium Copyright Act. I will analyze the purpose, intent, and meaning behind its three major provisions and how they relate to the fair use doctrine, both individually and collectively. In Part V, I will make a new argument for fair use under the Digital Millennium Copyright Act. Beginning with the supposition that the purpose of copyright is to advance the public good, I will rely heavily on the intent of the legislature and the text of the statute itself to show that the legislature intended a bridge over the "fair use gap" between the access control provisions of the Digital Millennium Copyright Act and the anti-infringement provisions of the rest of the copyright law. In Part VI, I will analyze the three major cases that have arisen under the Digital Millennium Copyright Act in its relatively young life to date. I will examine the courts' reasoning and show that my fair use approach is more viable and better able to protect both the interests of the copyright holders and the general public good. In Part VII, I conclude with a quick set of contrasting images and a plea to think about the future of information.

II. THE HISTORY AND PURPOSE OF AMERICAN COPYRIGHT LAW

A. *The English Ancestry*

Like many aspects of American law, to more fully appreciate the history and development of copyright law, it is helpful to look to its English origins.

⁶ See DVD Copy Control Association, *supra* note 4.

English copyright law, in turn, derives from English patent law. In 1331, King Edward III began issuing letters of patent protection for foreign tradesmen willing to come to England and train the English subjects in their trades.⁷ The first such letter patent, issued to John Kempe of Flanders, represented "the beginning of a deliberate and vigorous policy to expand English industry."⁸ This desire to expand English industry shows that even in the first government-issued monopoly, the King was ultimately concerned with the public good: the advancement of the English economy. By the time of Queen Elizabeth's reign,⁹ however, the monarch began issuing patents not for the introduction of new trades but as forms of political patronage.¹⁰ Despite the rulings of the King's Bench in cases like *Darcy v. Allin*¹¹ and *The Clothworkers of Ipswich*,¹² King James I¹³ continued to abuse the royal privilege of granting monopolies.¹⁴ This continual abuse of the monopolistic power led Parliament to pass the Statute of Monopolies¹⁵ in 1624 which, with certain exceptions, broadly declared that all monopoly grants were invalid¹⁶ and limited all future monopoly patents to a term of fourteen years.¹⁷ Two exceptions to the Statute of Monopolies were for Crown-chartered guilds,¹⁸ and for letters patent "of, for or concerning

⁷ Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History: 1550-1800*, 52 HASTINGS L.J. 1255, 1259 (2001).

⁸ *Id.* at 1259-60 (quoting Ramon A. Klitzke, *Historical Background of the English Patent Law*, 41 J. PAT. OFF. SOC'Y 615, 625 (1959)).

⁹ Elizabeth I reigned from November 17, 1558 to March 24, 1603.

¹⁰ Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y U.S.A., 675, 677-78 (2002).

¹¹ *Darcy v. Allin*, (1603) 74 Eng. Rep. 1131, 1139 (K.B.) (ruling in favor of Allin, upon argument made by his counsel, that "where any man by his own charge and industry, or by his own wit or invention doth bring any new trade into the realm, . . . for the good of the realm; that in such cases the King may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth; otherwise not.").

¹² *The Clothworkers of Ipswich*, (1615) 78 Eng. Rep. 147, 148 (K.B.) (holding "if a man hath brought in a new invention and a new trade within the kingdom . . . or if a man hath made a new discovery of any thing. . . [the King] may grant by charter unto him, that he only shall use such a trade or trafique [sic] for a certain time . . . but when that patent is expired, the King cannot make a new grant thereof; for when the trade is become common, and others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it.).

¹³ James I immediately succeeded Elizabeth I, and reigned from March 24, 1603 to March 27, 1625.

¹⁴ Ochoa & Rose, *supra* note 11, at 679.

¹⁵ 1624, 21 Jac., c. 3 (Eng.).

¹⁶ Ochoa & Rose, *supra* note 11, at 679.

¹⁷ 21 Jac., c. 3, § 6.

¹⁸ *Id.* § 9.

Printing."¹⁹ Almost 300 years after the first letter patent was granted, Parliament recognized that these monopolies were no longer being used to advance the public good but instead as political favors.

In 1662, Parliament passed the Licensing Act.²⁰ Consistent with the express exceptions for Crown-chartered guilds and printing, the Licensing Act provided that:

[N]o joyner, carpenter, or other person shall make any printing press, no smith shall forge any ironwork for a printing press, no founder shall craft any letters which may be used for printing for any person or persons whatsoever; [nor import or buy materials] belonging unto printing, unless he or they respectively shall first acquaint the . . . master and wardens of the . . . company of stationers . . . for whom the same presses, iron work or letters are to be made, forged, cast, brought or imported.²¹

That is, the Licensing Act prohibited any person from building or operating a printing press—and thus printing a book—without approval of the Stationers Company, which was a Crown-chartered guild. In addition, the Act made any printing press made or operated with such permission the property of the Stationers Company. These rights that the Stationers Company came to enjoy eventually became known as the “Stationers Copyright,”²² presumably because the Company, and not the authors, had the exclusive right to works it printed. Though the Licensing Act amounted to de facto censorship,²³ it is important to note that the 17th century English concept of censorship is not the same as the 21st century American concept of censorship.²⁴ The goal of the Act was only to deny public access to “heretical, schismatical, [sic] blasphemous, seditious and treasonable”²⁵ works.²⁶ Thus, the Act, while consistent with the Statute of Monopolies, was not seen as damaging the

¹⁹ *Id.* § 10.

²⁰ 1662, 14 Car. 2, c. 33 (Eng.).

²¹ *Id.* § 10.

²² Hideaki Shirata, *The Origin of Two American Copyright Theories: A Case of the Reception of English Law*, 30 J. ARTS MGMT. LAW & SOC'Y 193, 193 (2000).

²³ L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33, 33 (2002).

²⁴ See Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and The Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 76 (2003) (“The absolutist regimes of the Tudor and Stuart monarchs were characterized by pervasive regulation, and they were very different from the post revolutionary civic society in which copyright law emerged.”).

²⁵ 1662 14 Car. 2, c. 33 (Eng.).

²⁶ Patterson, *supra* note 24, at 34.

public good by keeping books from being published or sold, but rather protecting the public good by keeping "heretical, schismatical, [sic] blasphemous, seditious and treasonable" works from undermining the authority of the monarch after the Restoration.

The Licensing Act expired in 1695, and Parliament chose not to renew it. This threw the book trade into disarray,²⁷ as the Stationers Company no longer had a monopoly over the construction, operation, and ownership of printing presses. Parliament was sympathetic to the Stationers' claims about disorder in the book trade following the expiration of the Act, but it was not sympathetic to the Stationers' monopolistic practices, which had turned literary classics into private estates.²⁸ As a compromise Parliament passed the Statute of Anne²⁹ in 1710. This statute recognized that it was the authors themselves, not the Stationers Company (that is, the publisher), that owned the copyright to the works they produced. The Act provided "[t]hat the author of any book or books already composed, and not printed and published, or that shall hereafter be composed . . . shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years,"³⁰ with a provision that "after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years."³¹ This fourteen year term was in turn based on the fourteen year term in the Statute of Monopolies,³² enacted eighty-six years earlier. This Act struck at the heart of the Stationers Company's business model, as it no longer allowed them the exclusive rights over the works or the means used to print the works. The Stationers unsuccessfully lobbied Parliament twice to reform the Act, once in 1735 and again in 1737, the latter failing in the House of Lords, "which was particularly hostile to anything that smacked of monopoly."³³ Two years before the Colonies declared their independence, the House of Lords, acting in its capacity as the supreme court of Great Britain, rejected the claim of a common law theory of copyright, holding that the only basis for copyright was the Statute of Anne.³⁴

²⁷ Ochoa & Rose, *supra* note 11, at 680.

²⁸ *Id.*

²⁹ Statute of Ann, 1710, 8 Ann., c. 19 (Eng.). The Act was entitled "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." *Id.*

³⁰ *Id.* § 1.

³¹ *Id.* § 11.

³² Ochoa & Rose, *supra* note 11, at 681.

³³ *Id.* at 681-82.

³⁴ Donaldson v. Beckett, (1774) 98 Eng. Rep. 257 (H.L.).

B. *The Constitution and Early Republic*

The Constitution gives Congress the power “[t]o 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.”³⁵ The inclusion of what would become the Copyright Clause seems to be due, in part, to James Madison and an address he made to the Convention.³⁶ Entitled “Observations, April, 1787, on the Vices of the Political System of the United States,” Madison observed that there was a “want of uniformity in the laws concerning . . . literary property,” in part because the Articles of Confederation provided no national protection to authors or their works.³⁷ The Style Committee considered the matter and reported back to the Convention on September 12, 1787; without debate, the clause was adopted by the Convention.³⁸

The Copyright Clause is unique among Congress’ powers. Unlike Congress’ other enumerated powers in the Constitution, which “denominate a sphere of authority and leave the details to Congress, the Copyright Clause includes specific parameters for the content of copyright law.”³⁹ The inclusion of these narrowing parameters—that rights were to be given to authors, for limited times, to promote the sciences and arts—indicates that Congress’ power to regulate what modern society would term intellectual property matters is more restricted than Congress’ power in other enumerated areas.⁴⁰ Thus, it follows that not only is the purpose of the clause to protect intellectual property for the purpose of promoting progress but that the monopoly for this protection is limited in time and cannot be extended permanently.⁴¹ These stipulations appear to have been aimed at preventing the kinds of abuses that had prompted the Statute of Monopolies some 150 years earlier.⁴²

The ratification debates provide some illustration of the fears that some of the Founding generation held concerning what they viewed as the

³⁵ U.S. CONST. art. I, § 8, cl. 8.

³⁶ Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 113 (1929).

³⁷ *Id.*

³⁸ *Id.* at 114.

³⁹ Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, in 5 OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY 8 (Benjamin N. Cardozo School of Law, Yeshiva University, 1999).

⁴⁰ Thomas A. Mitchell, *Copyright, Congress and Constitutionality: How the Digital Millennium Copyright Act Goes Too Far*, 79 NOTRE DAME L. REV. 2115, 2119 (2004).

⁴¹ *Id.*

⁴² Ochoa & Rose, *supra* note 11, at 691.

Government's power to grant monopolies. At the Convention itself, George Mason (a delegate from Virginia) and Elbridge Gerry (a delegate from Massachusetts) refused to sign the draft Constitution, partly because in Mason's words, "[u]nder . . . construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce."⁴³ The ratifying conventions of Massachusetts, New Hampshire, and North Carolina all requested an amendment to the draft Constitution that prohibited Congress from granting "exclusive advantages of commerce" to certain companies of merchants; likewise, New York recommended an amendment that "the congress [sic] do not grant monopolies, or erect any company with exclusive advantages of commerce."⁴⁴ From the requests of these state ratifying conventions, it is clear that they had not forgotten the English monarchy's abuse of monopolies that led Parliament to enact the Statute of Monopolies, and later, the Statute of Anne.

In New York, a "Son of Liberty"⁴⁵ wrote that "[m]onopolies in trade [will be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right."⁴⁶ In Elbridge Gerry's home state of Massachusetts, "Agrippa"⁴⁷ wrote "[w]e hardly find a country in Europe which has not felt the ill effects of such a power [of granting monopolies] . . . in the British islands all these circumstances together have not prevented them from being injured by the monopolies created there. Individuals have been enriched, but the country at large has been hurt."⁴⁸ Like the state ratifying conventions, these anti-Federalists were wary of the Government's power to grant monopolies. Proponents of the Constitution responded to these criticisms, not by denying that monopolies were generally harmful, but by emphasizing the utilitarian justification for copy-

⁴³ *Id.* at 693 (quoting 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 45 (Merrill Jensen ed., 1976)).

⁴⁴ *Id.* at 694.

⁴⁵ A name taken, no doubt, to invoke those colonists who first opposed the Stamp Act two decades earlier, and then general opposition to what they saw as British tyranny.

⁴⁶ Ochoa & Rose, *supra* note 11, at 693 (quoting 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 482 (Merrill Jensen ed., 1976)).

⁴⁷ A pseudonym taken possibly to invoke Marcus Vipsanius Agrippa, a prominent Roman general and statesman who was primarily responsible the victory of Octavian's (later Augustus) over Marcus Antonius and Cleopatra at the Battle of Actium, and for the beautification and rebuilding of Rome following Augustus being named Emperor.

⁴⁸ Ochoa & Rose, *supra* note 11, at 693 (quoting 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 498 (Merrill Jensen ed., 1976)).

rights and patents, and the limitations placed upon them by the Copyright Clause.⁴⁹

In *The Federalist Papers*, Madison wrote of the Copyright Clause that “[t]he utility of this power will scarcely be questioned . . . [t]he States cannot separately make effectual provisions . . . and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.”⁵⁰ In Pennsylvania, the anti-Federalist “Centinel”⁵¹ wrote that “monopolies in trade or arts, other than to authors of books or inventors of useful arts, for a reasonable time, ought not to be suffered.”⁵² It is notable that even in acknowledging that some state-granted monopolies were acceptable, these monopolies should only have been granted “for a reasonable time.” Perhaps this “reasonable time” was fourteen years as in the Statute of Monopolies and the Statute of Anne; perhaps it was not. In any case, the Copyright Clause appeared to the proponents as a means to limit the duration and purposes for which monopolies could be granted.⁵³ In a posthumously published essay, James Madison wrote:

Monopolies though in certain cases useful ought to be granted with caution, and guarded with strictness against abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use. There can be no just objection to a temporary monopoly in these cases; but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given.⁵⁴

While no committee minutes exist that refer to the Copyright Clause, the words of four influential Founders support the idea that the main purpose of the clause was to promote science and the arts by limiting the term of monopoly. In a letter dated July 31, 1788, Thomas Jefferson wrote

⁴⁹ *Id.* at 694.

⁵⁰ THE FEDERALIST NO. 43 (James Madison).

⁵¹ Most probably Samuel Bryan, son of Pennsylvania Supreme Court judge George Bryan, to whom his essays were at first attributed.

⁵² Ochoa & Rose, *supra* note 11, at 694 (quoting 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 466 (Merrill Jensen ed., 1976)).

⁵³ *Id.* at 695.

⁵⁴ James Madison, *Aspects of Monopoly One Hundred Years Ago*, 128 HARPER'S MAG. 489, 490 (1914).

to James Madison about the impediments that monopolies erect to the progress of the arts and sciences. He wrote, "[t]he saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time. . . ; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."⁵⁵ On October 17, Madison replied, "[w]ith regard to Monopolies they are justly classed among the greatest nuisances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?"⁵⁶ This exchange may seem to be yet another disagreement between anti-Federalist Jefferson and the Federalist Madison, but a closer examination reveals that the two were actually in substantial agreement. Both men opposed monopolies that granted authors unlimited and perpetual rights over their writings. This much may be inferred from the letters. It was the extent of the monopoly, however, that characterized their disagreement. Jefferson believed that "even . . . limited monopolies" did more harm than good to foster progress.⁵⁷ Madison, though, did not take quite such an absolutist stance. Rather, he believed that as "encouragements to literary works," they are "too valuable to be *wholly* renounced."⁵⁸ That is, Madison also saw that an author's monopoly over his works would lead to impediments to literary and scientific progress. Furthermore, in a January 1790 address to Congress, George Washington indicated that the intent of the Framers at the Convention (of which he was elected President), in including the clause, was "to engender a marketplace in writings."⁵⁹ This statement suggests that Washington also favored the clause more as a way of promoting the arts and sciences than protecting authors.⁶⁰ An allusion made by Chief Justice Marshall thirty-four years later in *Gibbons v. Ogden*⁶¹ gives some indication that this viewpoint had not changed. In the course of the opinion, Marshall referred to the Copyright Clause as "that part of the

⁵⁵ Letter from Thomas Jefferson to James Madison (July 31, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON: 8 October 1788 to 26 March 1789, at 440 (Julian P. Boyd ed., 1958).

⁵⁶ Letter from James Madison to Thomas Jefferson (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON: 8 October 1788 to 26 March 1789, at 16, 21 (Julian P. Boyd ed., 1958).

⁵⁷ Letter from Jefferson to Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 442-43 (Princeton 1956).

⁵⁸ *Id.* (emphasis added).

⁵⁹ Hamilton, *supra* note 40, at 10 (citing GEORGE WASHINGTON, ADDRESS TO CONGRESS (Jan. 8, 1790), reprinted in COPYRIGHT OFFICE, COPYRIGHT IN PROGRESS, 1780-1904, at 115-16 (1976)).

⁶⁰ This is not to suggest in any way though, that Washington did not think that protecting the writings of authors was unimportant.

⁶¹ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

constitution [sic] which empowers Congress to promote the progress of science and the useful arts."⁶²

The Copyright Clause's emphasis on promoting literary and scientific discoveries can also be found in the Republic's first copyright law,⁶³ entitled "an Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned."⁶⁴ The title of this Act parallels the Copyright Clause itself. In the first clause, we learn that the Act was intended "for the encouragement of learning;" that is, the purpose of the act was to promote learning (emphasis added). In a similar vein, we also learn in the first clause of the Copyright Clause that its purpose is "[t]o promote the Progress of Science and useful Arts."⁶⁵ In the case of both the 1790 Act and the Copyright Clause, it is only after the grammatical break in the second clause that we learn how these purposes are to be brought about. Because the first clause naturally receives more emphasis than the second due to the fact of it being first, it is not unreasonable to believe that the Framers of the Constitution and the drafters of the 1790 Act deliberately emphasized the purposes of "promot[ing] the [p]rogress of [s]cience and useful[a]rts" and the "encouragement of learning" by placing each in the first clause. Again, the Supreme Court, through Chief Justice Marshall, reinforces this emphasis by referring to the Act as "the act for the promotion of useful arts."⁶⁶

The statute itself was modeled on the Statute of Anne. It took its title ("An Act for the Encouragement of Learning") directly from the English statute; except for the addition of maps and charts, the language was copied almost verbatim.⁶⁷ It provided, *inter alia*, that the author of any "map, chart, book or books . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books for the term of fourteen years."⁶⁸ It further provided that "any person or persons who shall print or publish any manuscript, without the consent and approbation of the author . . . shall be liable to suffer and pay to the said author . . . all damages occasioned by such injury."⁶⁹

⁶² *Id.* at 221 (explaining that because the Court's opinion was decided on different grounds, there was no need to consider the art. I, § 8, cl. 8).

⁶³ See Mitchell, *supra* note 41, at 2123.

⁶⁴ 1 Stat. 124 (1790).

⁶⁵ U.S. CONST. art. I, § 8, cl. 8.

⁶⁶ Evans v. Eaton, 16 U.S. (3 Wheat.) 454, 503 (1818).

⁶⁷ Ochoa & Rose, *supra* note 11, at 695.

⁶⁸ 1 Stat. 124(1).

⁶⁹ 1 Stat. 124(6).

III. THE FAIR USE DOCTRINE AND THE COPYRIGHT ACT OF 1976

Congress has made two major changes to modern copyright law: the Copyright Act of 1976 and the Digital Millennium Copyright Act. This section will show that, despite these revisions in the statutory law, the purpose of modern copyright law⁷⁰ has not changed and continues to be consistently interpreted by the courts.

A. *The Copyright Act of 1976*

Prior to the adoption of the Copyright Act of 1976,⁷¹ the copyright law then in force was "basically the same" as the copyright law that had existed in 1909 and was unable to adequately handle the technological progress that had taken place since then.⁷² The 1976 Act represented the conclusion of a major congressional reassessment of copyright doctrine.⁷³ One of the important changes wrought in enacting the 1976 Act was the codification of the fair use doctrine for the first time.⁷⁴ Prior to codification, the fair use doctrine had existed in the United States since at least the early 1840s⁷⁵ in the form of a judicially-created limitation on the exclusive right of copyright owners.⁷⁶ Traditionally, the fair use exception was defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."⁷⁷

The fair use doctrine is currently codified at section 107.⁷⁸ It states in pertinent part:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in

⁷⁰ In this sentence, the word "law" is used in its most general sense, not the specific sense of certain statutes or lines of cases.

⁷¹ 17 U.S.C. §§ 101-810 (2007).

⁷² H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660.

⁷³ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (1985).

⁷⁴ H.R. REP. NO. 94-1476, *supra* note 71, at 65.

⁷⁵ *Harper & Row*, 471 U.S. at 550 ("As early as 1841, Justice Story gave judicial recognition to the [fair use] doctrine in a case that concerned the letters of . . . George Washington." (citing *Folsom v. Marsh*, 9 F.Cas. 342, 344-45 (Cir. Mass. 1841) (No. 4901))).

⁷⁶ H.R. REP. NO. 94-1476, *supra* note 71, at 65. *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-76 (1994) (discussing the history and application of the fair use exception in England and the United States).

⁷⁷ *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944)).

⁷⁸ 17 U.S.C. § 107 (2007).

copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷⁹

Underneath the apparent plain meaning of the statute lay a bevy of interpretational problems, textual ambiguities, and conflicting precedents.⁸⁰ In drafting what was to become § 107, Congress acknowledged these underlying problems and attributed them to the fact that although “the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the [fair use doctrine] has ever emerged.”⁸¹ This was due in part to the doctrine’s existence “an equitable rule of reason,” and as such, “each case raising the question must be decided on its own facts.”⁸² Nevertheless, this admission that no coherent definition had ever emerged did not deter Congress from making a legislative finding that the different criteria which various courts had used throughout the years in adjudicating fair use claims “essentially . . . can all be reduced to the four standards which have been adopted in section 107.”⁸³

Perhaps most importantly, Congress showed great foresight and wisdom in codifying these factors by “endors[ing] the purpose and general scope of the judicial doctrine of fair use” while simultaneously stating its express “disposition [not to] freeze the doctrine in the statute, especially during a period of rapid technological change.”⁸⁴ Congress further expounded upon its purpose and intentions:

⁷⁹ *Id.*

⁸⁰ See generally Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1551–64 (2004). Madison analyzes the statute clause-by-clause, examining the historical and jurisprudential problems arising from the language. He concludes that “the facial emptiness of the statutory language means that alone, it is almost entirely useless analytically, except to the extent that it structures the collection of evidence that a court might think relevant to its decision.” *Id.* at 1564.

⁸¹ H.R. REP. NO. 94-1476, *supra* note 71, at 65.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 66.

Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.⁸⁵

The Supreme Court has had ample opportunity to "say what the law is" regarding § 107 since its enactment more than thirty years ago. The Court has unambiguously stated that "Congress meant § 107 'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication."⁸⁶

B. *Three Fair Use Cases*

1. THE BETAMAX CASE: SONY CORP. OF AMERICA V. UNIVERSAL CITY STUDIOS, INC.

The dispute in *Sony Corp. of America v. Universal City Studios, Inc.*⁸⁷ arose out of Sony's sale of Betamax videotape recorders to consumers, which allowed them to record copyrighted programs shown on television. Universal, along with several other studios, claimed that the act of recording the programs constituted copyright infringement and that Sony's act of selling the records to consumers constituted contributory copyright infringement.⁸⁸ Both parties conducted surveys to determine how consumers used the recorder. The surveys showed that the consumers' primary use was time-shifting,⁸⁹ the practice of recording a program, watching it at a later time, and then erasing it from the tape. However, the surveys also showed that many people had also used the recorders to record and accumulate a library of taped programs.⁹⁰ It is not clear how many of these accumulated programs were copyrighted. Although Universal's suit

⁸⁵ *Id.*

⁸⁶ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting H.R. REP. NO. 94-1476, *supra* note 71, at 66).

⁸⁷ 464 U.S. 417 (1984).

⁸⁸ *Id.* at 420.

⁸⁹ *Id.* at 423.

⁹⁰ *Id.*

was not against the owners of the Betamax recorders, it had to prove, *inter alia*, that they infringed upon Universal's copyrights in order to prevail.⁹¹

The Court began by observing that copyright protection "has never accorded the copyright owner complete control over all possible uses of his work. . . . Any individual may reproduce a copyrighted work for a 'fair use,' the copyright owner does not possess the exclusive right to such a use."⁹² Only when a person "trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, [17 U.S.C. § 106,]" does that person become "an infringer of the copyright."⁹³

Through Justice Stevens, the Court issued a two part holding. First, it held that Sony's "sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is used widely for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."⁹⁴ The Court reasoned that a balance must be struck "between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce."⁹⁵ On the facts, the Court distinguished *Kalem Co. v. Harper Brothers*,⁹⁶ upon which Universal placed its principal reliance. It explained that in *Kalem*, the producer who infringed upon the copyright did not simply supply the means to make the infringing movie, but he, in fact, had also supplied the movie itself.⁹⁷ In contradistinction, Sony merely sold a piece of equipment capable of recording a wide array of copyrighted and non-copyrighted programs, while it was actually Universal that supplied the copyrighted programs to the consumers via the consumers' televisions.⁹⁸

Second, relying heavily on the factual findings of the district court, the Supreme Court held that the Betamax machine is in fact "capable of substantial noninfringing uses."⁹⁹ The Court first discussed the recorder's use as an "authorized" time-shifting device, observing that it could be used for copying both non-copyrighted programs and copyrighted programs with the holder's consent,¹⁰⁰ with several examples of such uses in the district

⁹¹ *Id.* at 434.

⁹² *Id.* at 432-33.

⁹³ *Id.* at 433 (internal quotations omitted).

⁹⁴ *Id.* at 442.

⁹⁵ *Id.*

⁹⁶ 222 U.S. 55 (1911).

⁹⁷ *Sony Corp.*, 464 U.S. at 435-36.

⁹⁸ *Id.* at 436-38.

⁹⁹ *Id.* at 456.

¹⁰⁰ *See id.* at 443.

court's opinion.¹⁰¹ It warned that "an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law."¹⁰² The Court then turned its attention to "unauthorized" time shifting, introducing that part of the opinion by stating that "[e]ven unauthorized uses of a copyrighted work are not necessarily infringing."¹⁰³ Accepting the district court's factual findings and applying them to the four fair use factors enumerated in § 107, the Court found that time-shifting a movie using the Betamax recorder was a noncommercial, nonprofit activity,¹⁰⁴ and that Universal failed to show that its use as documented in the record was likely to have a demonstrable effect upon the potential market for, or value of, any one of the copyrighted works.¹⁰⁵ According to the Court, "an interpretation of the concept of fair use . . . requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law."¹⁰⁶

Interpreted technically and narrowly, the Court simply held that Sony was not liable for contributory infringement of Universal's copyrights by merely selling the Betamax recorder.¹⁰⁷ But to read this case in such a way is both intellectually dishonest and illogical. In outlining its analysis, the Court expressly and unambiguously declared that for Universal to prevail, it would "have the burden of proving that users of the Betamax had infringed . . . [its] copyrights."¹⁰⁸ This requirement is entirely consistent with reason and logic. Sony was being sued for contributory copyright infringement, but there can be no contribution on Sony's part unless there first exists an act of copyright infringement. In other words, the necessary condition for a contributory infringement claim against Sony is that infringement occur in the first place. In this way, fair use becomes the heart of the Court's decision. By weighing the four factors in § 107 (albeit giving more weight to one and four, than to two and three), the Court was able to decide the case "on its own facts" and to "come to an equitable rule of

¹⁰¹ See *id.* at 444-46.

¹⁰² *Id.* at 444.

¹⁰³ *Id.* at 447.

¹⁰⁴ *Id.* at 449.

¹⁰⁵ See *id.* at 450-53.

¹⁰⁶ *Id.* at 454.

¹⁰⁷ See *id.* at 456. At the outset, the Court said that "[t]he question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act." *Id.* at 420. It concluded that "Sony's sale of such equipment to the general public does not constitute contributory infringement of respondent's copyrights." *Id.* at 456.

¹⁰⁸ *Id.* at 434.

reason"¹⁰⁹ that the consumers' use of Betamax machines to record copyrighted programs fell within the scope of fair use.

2. HARPER & ROW PUBLISHERS V. NATION ENTERPRISES

Only a year after *Sony*, the Court had another chance to consider the fair use doctrine in *Harper & Row Publishers, Inc. v. Nation Enterprises*.¹¹⁰ As a result of contractual negotiations with former President Ford, Harper & Row held the exclusive rights to publish his memoirs in book form and to license prepublication excerpts of the book to organizations such as newspapers and magazines.¹¹¹ *Time* magazine bought the right to publish a 7,500 word excerpt one week before the book went on sale, paying \$12,500 in advance and \$12,500 at publication.¹¹² Two or three weeks before *Time* was scheduled to publish the excerpt, an unidentified person brought a copy of the Ford manuscript to an editor at *The Nation*, a political commentary magazine.¹¹³ In an attempt to "scoop" *Time*, the editor culled together "a real hot news story" consisting of quotes, facts, and paraphrases drawn exclusively from the manuscript, making no independent commentary, research, or criticism.¹¹⁴ *The Nation* published the article. *Time* cancelled its planned excerpt and refused to pay the remaining \$12,500 owed to Harper & Row, who then filed suit against *The Nation* for, *inter alia*, violations of the Copyright Act.¹¹⁵

Through Justice O'Connor, the Court held that *The Nation's* preemptive publication of the manuscript "was not a fair use within the meaning of the Copyright Act."¹¹⁶ Discussing the history and application of the doctrine, the Court concluded that an important, but not determinative, factor tending to negate a defense of fair use was the unpublished nature of a work.¹¹⁷ The Court then proceeded to swiftly reject the magazine's argument that it was protected by the First Amendment in disseminating news for the public good,¹¹⁸ by effectively characterizing the First Amendment and the Copyright Clause as having a symbiotic relationship and arguing that if the

¹⁰⁹ See H.R. REP. NO. 94-1476, *supra* note 71, at 65.

¹¹⁰ 471 U.S. 539 (1985).

¹¹¹ See *id.* at 542.

¹¹² See *id.* at 543.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *id.*

¹¹⁶ *Id.* at 549.

¹¹⁷ See *id.* at 554.

¹¹⁸ See *id.* at 555-56.

magazine's argument was accepted, the First Amendment would eviscerate the protections offered to the copyright holder.¹¹⁹

After rejecting *The Nation's* constitutional claim, the Court began its fair use analysis by weighing each of the statute's four factors within the context of the factual record and the applicable case law. In evaluating purpose, the Court agreed with the circuit court that *The Nation's* general purpose in publishing the excerpts was for "news reporting" and concluded that the magazine went beyond simply reporting uncopyrighted information, seeking instead to make a "news event" out of an unauthorized use of the copyrighted memoir.¹²⁰ The Court characterized these acts as "commercial" as opposed to "nonprofit," and explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."¹²¹ Additionally, in evaluating purpose, the magazine's stated intent to "scoop" *Time* cannot be ignored.¹²²

In evaluating the nature of the work, the Court returned to the fact that neither the *Time* excerpt nor the book itself had actually been published. That a book is unpublished "is a critical element of its nature" because the Court's "prior discussion establishes that the scope of fair use is narrower with respect to unpublished works."¹²³ Fair use is narrower in cases like this, because of the weight given to the author's right to control the first public appearance of his expression.¹²⁴

Evaluating the amount or substantiality of the portion of the book used, the Court succinctly quoted the district court: "*The Nation* took what was essentially the heart of the book."¹²⁵

Finally, the Court examined the effect on the market of *The Nation's* published excerpts. It began by declaring this factor to be "undoubtedly the single most important element of fair use" and, when "properly applied, [it] is limited to copying by others which does not materially impair the marketability of the work which is copied."¹²⁶ With *Time's* refusal to pay the remaining \$12,500 and its cancellation of the planned publication of the

¹¹⁹ See *id.* at 555-60.

¹²⁰ *Id.* at 561.

¹²¹ *Id.* at 562.

¹²² See *id.*

¹²³ *Id.* at 564.

¹²⁴ *Id.*

¹²⁵ *Id.* at 564-65.

¹²⁶ *Id.* at 566-67.

excerpts, the Court plainly stated that “[r]arely will a case of copyright infringement present such clear cut evidence of actual damage.”¹²⁷

While not a landmark decision in the same way as the *Betamax* case, *Harper & Row* was nonetheless an important affirmation and explanation of the Court’s fair use jurisprudence.

3. CAMPBELL V. ACUFF-ROSE MUSIC, INC.

In deciding *Campbell v. Acuff-Rose Music, Inc.*,¹²⁸ the Court relied heavily on its earlier decisions in *Sony* and *Harper & Row*. Campbell, a member of the rap group 2 Live Crew, wrote a song called “Pretty Woman.” It was a parody of the earlier Roy Orbison song “Oh, Pretty Woman,” and the group released it on one of their albums.¹²⁹ Acuff-Rose, the copyright holder of the Roy Orbison song, sued 2 Live Crew for copyright infringement.¹³⁰

Once again, the Court began by discussing the history and application of the fair use doctrine.¹³¹ Most importantly for the context of this case, it emphasized that § 107’s four factors may not be “treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”¹³² The Court proceeded to do exactly that.

In discussing the first factor, the profitable or nonprofitable purpose or character, the Court concluded that it was wrong for the court of appeals to give his issue “virtually dispositive weight.”¹³³ Citing *Sony*, the Court reiterated that fair use under § 107 requires a balancing of interests, not hard evidentiary presumptions.¹³⁴ Quoting *Harper & Row*, the Court recognized a tension because *Sony* also stood for the proposition that the “fact that a publication was commercial as opposed to nonprofit is a . . . factor that tends to weigh against a finding of fair use.”¹³⁵ However, the Court was very careful to delineate this proposition, saying that “the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance.”¹³⁶

¹²⁷ *Id.* at 567.

¹²⁸ 510 U.S. 569 (1994).

¹²⁹ *See id.* at 572.

¹³⁰ *See id.* at 572-73.

¹³¹ *See id.* at 574-78.

¹³² *Id.* at 578.

¹³³ *Id.* at 584.

¹³⁴ *Id.* (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984)).

¹³⁵ *Id.* at 585 (quoting *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 562 (1985)).

¹³⁶ *Id.*

The Court gave very little consideration to the second factor, the nature of the copyrighted work. It explained that this factor does not help in a parody case "since parodies almost invariably copy publicly known, expressive works."¹³⁷ Because parodies by their nature bear a resemblance to copyrighted works, this resemblance cannot be used to prove that the creator of the parody purposefully meant to infringe upon the copyright.

The Court then moved to the third factor, the amount and substantiality of the portion to the whole. As with the second factor, the Court observed that parody presented a difficulty; parody must be able to:

[C]onjure up at least enough of that original [work] to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend . . . on the extent to which the song's overriding purpose and character is to parody the original, or in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.¹³⁸

The Court concluded that the court of appeals erred in ruling that 2 Live Crew's parody copied too much from Orbison's song.¹³⁹ Invoking *Harper & Row*, the Court stated that "[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart."¹⁴⁰

The Court then came to the fourth factor, the effect of the use upon the market or value of the copyrighted work. After a somewhat convoluted discourse on presumptions, burdens, and economic harm,¹⁴¹ the Court states simply that neither party introduced evidence on the effect of 2 Live Crew's parody upon the market for Orbison's original song.¹⁴²

Through Justice Souter, the Court issued a two part holding. First, in the context of transformative use, "[i]t was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of 'Oh,

¹³⁷ *Id.* at 586.

¹³⁸ *Id.* at 588.

¹³⁹ *See id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 590-93.

¹⁴² *See id.* at 593.

Pretty Woman' rendered it presumptively unfair."¹⁴³ Second, "[t]he court [of appeals] also erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use."¹⁴⁴ As a result, the Supreme Court reversed the judgment of the court of appeals and remanded the case for further proceedings.¹⁴⁵

C. *The Fair Use Doctrine on the Eve of the Digital Millennium Copyright Act*

Sony, *Harper & Row*, and *Campbell* are the three major cases in which the Supreme Court considered the fair use doctrine during the three decades between the enactments of the Copyright Act of 1976 and the Digital Millennium Copyright Act. The Court has adjudicated these cases with the fundamental supposition that the purpose of copyright law is to promote the public good. But what is the public good? And how does the Court know how to determine and protect it?

In the beginning of each of the three opinions, the Court stressed that the nature of the fair use doctrine required each case to be decided upon its own issues. This method of adjudication is a good thing. It is how the courts have been adjudicating fair use since the doctrine's inception over 150 years ago.¹⁴⁶ Moreover, this is how Congress envisioned the courts continuing to adjudicate the doctrine into the future while in the process of legislating the 1976 Act.¹⁴⁷ Something must be said for the continued stability and predictability of a branch of the federal government, not to mention the (unusual) deference of one branch toward the others in certain matters.

It is precisely this case-by-case approach, combined with the equitable nature of the fair use doctrine,¹⁴⁸ that allows the courts to promote the public welfare. Indeed, *Campbell* recognized that "the fair use doctrine . . . 'permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to

¹⁴³ *Id.* at 594.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4901). Riding circuit, Justice Story said that judges must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions." *Id.* at 348.

¹⁴⁷ See H.R. REP. NO. 94-1476, *supra* note 71, at 66 ("The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute . . . the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

¹⁴⁸ See *id.* at 65.

foster.”¹⁴⁹ The *Sony* Court employed this principle when it recognized that it would be an “unprecedented” and “harsh remedy” to “deprive the public” of the Betamax players (and by implication, any other device which could record copyrighted television programs) by issuing an injunction simply because the machines were capable of uses that infringe copyrights.¹⁵⁰ The Court was clear in its choice of words. By using the word “deprive,” it recognized that a rigid enforcement of the copyright law in this instance would cause an entire sector of the home entertainment market—personal video recorders—to become illegal almost overnight. Attendant effects would almost certainly include some job loss for those who manufactured and sold personal video recorders, as well as decreased income and revenue for merchants who could no longer sell them and perhaps even carriers who could no longer transport them. In the context of this case, the Court seems not only to be protecting the fair use rights of individuals, in terms of time-shifting and recording for personal non-commercial purposes, but also securing the welfare of the public, in terms of the secondary economic effects of suddenly removing the Betamax recorder from the market.

Additionally, it is important to keep in mind that the first Betamax player was introduced in 1975¹⁵¹ and that the original suit in the district court was filed in 1976.¹⁵² Thus, the technology at issue was still in its infancy during litigation, its full reach and potential not yet known. It is not a stretch to say that if the Court had decided against Sony, some of the technology taken for granted today either would not exist or would exist in very limited or functionally-reduced forms. Devices such as TiVo, because of its ability to record and time-shift copyrighted television programs; CD/DVD burners and their associated disc authoring software, because they collectively can be used to copy commercial music and movie releases; and even iPods, because they can be used for time-shifting individual tracks (i.e., making a playlist), all suddenly seem questionable under copyright law if Sony had gone the other way. Of course, we know this with the benefit of hindsight. Even so, on a macro level, it would not be an unfair modern reading of Sony to say that technological innovation and implementation, along with its attendant effects, are an aspect of the public good which can be engendered through the fair use doctrine. To be clear, this is not to say that we should read into the case things that are not there (i.e., TiVos, CD/DVD burners, and iPods), because to do so is sophistry. Nor should judges attempt to predict the

¹⁴⁹ *Campbell*, 510 U.S. at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

¹⁵⁰ See *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417, 444 (1984).

¹⁵¹ See Benny Evangelista, *Proposed Copyright Law Raises Controversy*, S.F. CHRONICLE, Apr. 8, 2002, at E1.

¹⁵² See *Sony Corp.*, 464 U.S. at 420.

future; obviously they should not. Rather, it simply means what it says. Technology evolves at a rapid pace in modern society, and technological innovation is part of the public good. When appropriate, this public good is advanced and protected in part through a judicious and scrupulous application of the fair use doctrine. In other words, as the Court recognized in *Aiken*, “[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”¹⁵³

As *Sony* and the subsequent history of home electronics demonstrate, the fair use doctrine can have profound consequences on society, whether or not they are seen. Of course, it goes without saying that although the application of the fair use doctrine may have profound consequences, it does not mean that fair use adjudication should not depart from its traditional method as practiced by the courts. The Court recognized this in *Harper & Row*,¹⁵⁴ not in the context of rapidly evolving technology, but in the dissemination of news and other public information. Though contextually different, the concept is still valid: fair use adjudication may have widespread results. “Regulating” the way by which news and information may be disseminated is arguably just as important, if not more so, than “regulating” new technology.

In *Harper & Row*, the Court categorically concluded that the fair use doctrine is not a valid defense to infringement of the copyright holder’s right of first publication, even for items of news, by rejecting *The Nation*’s argument that the public’s interest in learning the news contained within the (copyrighted) book outweighs the right of the author to control its first publication,¹⁵⁵ and concluding that it “would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure.”¹⁵⁶ It is no small matter to effectively declare a certain method of reporting the news illegal. The Court obviously does not say this in such plain terms but that is the practical effect of its decision. Under the guise of fair use, publishers can no longer take copyrighted news information and then “scoop” the copyright holder by publishing it before he does, simply because an item is deemed to be news. Perhaps, as the dissent warned, this rejection of *The Nation*’s argument has indeed subsequently “risk[ed] the robust public debate of public issues that is the essence of self government” and resulted in the ability of publishers to “monopolize information.”¹⁵⁷

¹⁵³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁵⁴ *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985).

¹⁵⁵ *See id.* at 556-57.

¹⁵⁶ *Id.* at 557.

¹⁵⁷ *Id.* at 604 (Brennan, J., dissenting) (internal quotations omitted).

Regardless of whether the majority saw this or simply disagreed with the dissent, the possibility of such drastic consequences did not cause the Court to deviate from its standard fair use jurisprudence.¹⁵⁸

Harper & Row also expanded upon the commercial-noncommercial distinction made by the *Sony* court. *Sony*'s analysis tended to conflate the purpose and nature of the work with its potential effect on the market. It concluded that:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown . . . What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.¹⁵⁹

Yet, while *Sony* explained the requirements of a challenge to a noncommercial use, it did not expressly define the difference between commercial and noncommercial uses. It simply accepted that the consumer's use of the Betamax recorder was noncommercial.¹⁶⁰ However, *Harper & Row* segregated its analysis of the purpose and character of the use from its effect upon the market. The *Harper & Row* court responded to *The Nation*'s argument that news reporting is not purely commercial by explaining that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."¹⁶¹ This critical factual distinction is what separates *Sony* from *Harper & Row*. The consumers in *Sony* were not looking to profit from the use of the recorded television programs,¹⁶² while *The Nation* "actively sought to exploit the headline value of its infringement, making a 'news event' out of

¹⁵⁸ See *id.* at 552 (majority opinion) ("[F]air use analysis must always be tailored to the individual case.").

¹⁵⁹ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

¹⁶⁰ See *id.* at 449 ("If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity."). The Court did say, however, that "[i]f the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated." *Id.* at 451.

¹⁶¹ See *Harper & Row*, 471 U.S. at 562.

¹⁶² See *Sony Corp.*, 464 U.S. at 449 ("[T]he District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.").

its unauthorized first publication.”¹⁶³ *Campbell* set itself apart from both *Sony* and *Harper & Row*. There was no dispute that the purpose of the use was commercial,¹⁶⁴ but the Court nevertheless concluded that a commercial use in and of itself did not amount to copyright infringement.¹⁶⁵ It explained that while *Sony* said “every commercial use of copyrighted material is presumptively . . . unfair,” the circuit court erred in giving the commercial nature virtually dispositive weight,¹⁶⁶ because *Sony* also “emphasized the need for a ‘sensitive balancing of interests’” and called for no hard evidentiary presumptions.¹⁶⁷

Campbell follows *Harper & Row* in segregating its analysis of the use’s nature and purpose from its effect on the market. But despite its reliance upon *Sony* in recognizing that fair use can encompass at least some commercial uses, its analysis of the effect of a use upon the market is inconsistent with *Sony*’s analysis. *Campbell* held that courts are required “to consider not only the extent of market harm caused by the particular actions of the alleged infringer but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original.’”¹⁶⁸ In contrast, *Sony* required “evidence of some meaningful likelihood of future harm” that “if it should become widespread, it would adversely affect the potential market for the copyrighted work.”¹⁶⁹ The difference between “a substantially adverse impact” and “adversely affect” may be impossible to quantify, but it is important nonetheless. *Campbell*’s formulation imposes a higher burden of proof on the party alleging infringement. Because of this “substantially” higher burden, *Campbell* effectively enlarges the scope of fair use by giving to those claiming it more room to act before they “substantially” affect the market. *Campbell* also introduces a greater degree of subjectivity into the court’s determination of whether the burden of proof has been met. While this subjectivity may lead to inconsistent decisions under some circumstances, it also forces courts to consider the individual case and its factual context more closely. This kind of consideration is a central tenant of fair use jurisprudence.

¹⁶³ See *Harper & Row*, 471 U.S. at 561.

¹⁶⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573-74 (1994) (describing how *Campbell* wrote and recorded a parody of “Oh Pretty Woman” and subsequently released it as a song on an album).

¹⁶⁵ See *id.* at 583-84.

¹⁶⁶ *Id.* at 584 (quoting *Sony Corp v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

¹⁶⁷ *Campbell*, 510 U.S. at 584 (quoting *Sony Corp.*, 464 U.S. at 455).

¹⁶⁸ *Id.* at 590 (quoting 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4] (1993)).

¹⁶⁹ *Sony Corp.*, 464 U.S. at 451.

Despite disagreement on the extent to which the market must be harmed, the Court remained consistent in suggesting that the market for a copyrighted work should be construed narrowly to mean the market for that work and only that work. *Sony* implicitly defined "market" within its factual context by relying on the district court's analysis of the alleged harm that Betamax would have caused: "[i]t rejected respondents' 'fear that time-shifting will reduce audiences for telecast reruns' . . . And it declared that respondents' suggestion 'that theater or film rental exhibition of a program will suffer because of time-shift recording of that program' 'lacks merit.'"¹⁷⁰ The Court indicates that the market for a television program is the propensity for an audience to watch that program again at some point in the future. Whether "reruns" refers to the re-airing of an episode itself or to the re-airing of the series of episodes that constitute the program is ambiguous but ultimately does not matter. It would be unreasonable and inconsistent with the concept of television reruns¹⁷¹ to interpret it as meaning two different programs. Similarly, the Court indicates that a market for a movie is the propensity of an audience to either see that movie in a theater or rent it at some later point in time.

In a similarly narrow interpretation, the market in *Harper & Row* was the appearance of prepublication excerpts of President Ford's memoirs in *Time*, not the publication of the book itself one week later. The Court observed that:

Time's cancellation of its projected serialization and its refusal to pay the \$12,500 were the direct effect of the infringement. . . . Rarely will a case of copyright infringement present such clear-cut evidence of actual damage. Petitioners assured *Time* that there would be no other authorized publication of *any* portion of the unpublished manuscript prior to April 23, 1979. *Any* publication of material . . . would permit *Time* to renegotiate its final payment.¹⁷²

As with *Sony*, it is possible to define the market based on the harm done to it.¹⁷³ Here, the Court is clearly concerned with the harm done to *Time's* right

¹⁷⁰ *Id.* at 453 (quoting *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 2d 429, 467-68 (C.D. Cal. 1979)).

¹⁷¹ "Rerun" is defined as "[a] repeat showing of a *motion picture*." OXFORD ENGLISH DICTIONARY (2d ed. 1989) (emphasis added).

¹⁷² *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 567 (1985) (italics added).

¹⁷³ To be sure, unlike in *Sony*, the Court found that there was actual harm in *Harper & Row*.

to publish excerpts prior to the book's public release, coming as a direct result of *The Nation's* intent to "scoop" *Time*.¹⁷⁴

Campbell presents what is perhaps the most narrow (and amusing) definition of a market. As with *Sony*, the extent of the market may be inferred from the alleged harm done to it. Because the purpose of the use was parody, *Campbell* analyzed the parody (2 Live Crew's "Pretty Woman") and the original (Roy Orbison's "Oh, Pretty Woman") partly against the background of derivative works.¹⁷⁵ The Court remanded the case, in part because of an "evidentiary hole," and noted that "[a]lthough 2 Live Crew submitted uncontroverted affidavits on the question of market harm to the original, neither they, nor Acuff-Rose, introduced evidence or affidavits addressing the likely effect of 2 Live Crew's parodic rap song on the market for a nonparody rap version of "Oh, Pretty Woman."¹⁷⁶ Although the parties were required to submit evidence on the possible impact of the parody on a hypothetical nonparody rap version of "Oh, Pretty Woman" because of the derivative works doctrine,¹⁷⁷ the Court's explanation is still valuable for expressly noting 2 Live Crew's "submitted" and "uncontroverted affidavits" on the market harm to "the original." By doing so, the Court confirmed that the market consists of only one song (and not, for example, the album containing the song) and impliedly reaffirmed the narrow construction given to determining the market for a copyrighted work.

The effect of a use upon the market for a work is in turn closely bound with the amount and substantiality of a copyrighted work used. While "amount" and "substantiality" might seem to be synonymous, they can convey substantially different meanings in fair use jurisprudence. In *Sony*, the consumers were using the Betamax recorders to record entire copyrighted shows so that they could either time-shift or archive them.¹⁷⁸ The Court considered the circumstances and reasoned that:

[W]hen one considers the nature of a televised copyrighted audiovisual work, and that [time-shifting] merely enables a viewer to see such a work which he had been invited to witness in its

¹⁷⁴ *Harper & Row*, 471 U.S. at 542 ("The piece was timed to 'scoop' an article scheduled shortly to appear in *Time* magazine.").

¹⁷⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-92 (1994) ("Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.").

¹⁷⁶ See *id.* at 593-94.

¹⁷⁷ See *id.* at 590 (The inquiry "must take account not only of harm to the original but also of harm to the market for derivative works.") (citing *Harper & Row*, 471 U.S. at 569).

¹⁷⁸ See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984).

entirety free of charge, the fact that the entire work is reproduced does not have its ordinary effect of mitigating against a finding of fair use."¹⁷⁹

The Court seems to say that, ordinarily, copying an entire work will tend to work against a finding of fair use. But because these consumers were acting in a nonprofit, noncommercial manner,¹⁸⁰ and because the consumers were able to view the television programs "free of charge," now the fact that they copied an entire program will not work against a finding of fair use. In other words, in this factual context, the amount or substantiality factor is neutral. These words do not convey different meanings. They convey no meanings.

This statement also has important implications, but they are wrapped up in its ambiguities. First, and foremost, the Court never elaborates on the "nature" of a "televised copyrighted audiovisual work" beyond the fact that a consumer is "invited" to watch such a work "in its entirety free of charge."¹⁸¹ But this description raises even more questions. The Court cannot possibly mean "free of charge" in its literal sense, as it is obvious that watching a televised program costs money, from the electricity that powers the television, to the cable subscription or antenna actually used to get content on the screen. Perhaps then, "free of charge" is used in the sense that, after all of these costs, the copyright holder does not charge the consumer an additional fee to view the copyrighted program. Contextually, this interpretation is reasonable. It is not very likely that Justice Stevens would have included random, errant words in the Court's opinion, nor is it likely that the members of the majority would be so out of touch with reality to know that getting a picture onto one's television screen is not, in fact, free. Perhaps, also, "free of charge" is used in the sense that paying for a cable subscription or an antenna gives one the legal right to have access to a copyrighted program shown on television, whereas a person who pirates cable or steals the signal from his neighbor's antenna does not have the legal right to have access to copyrighted programs shown on television. This is also a reasonable interpretation, especially given that stealing cable or other similar unauthorized reception is usually a punishable offense.

The ambiguities of this pronouncement are considerably eliminated when considered in the context of the case, its facts, and the other factors present in § 107. This is partly why the *Sony* court recognized that each case

¹⁷⁹ *Id.* at 449-50 (internal citations omitted).

¹⁸⁰ This is established in the sentence immediately preceding the quoted one. *See id.* at 449. It is also the basis of the purpose inquiry, discussed *supra*.

¹⁸¹ Grammatically, even this interpretation is strained.

"must" be decided on its own facts.¹⁸² Otherwise, such pronouncements would risk becoming overbroad generalizations that defeat the very purposes for which copyright law was originally enacted. One year later, the Court also recognized this principle of adjudication in *Harper & Row*.¹⁸³ It is the recognition of this principle that explains the seemingly anomalous outcomes between *Sony*, *Harper & Row*, and *Campbell*.

In *Sony*, there is no tension between amount and substantiality because amount subsumes substantiality. In recording the entire unadulterated program, the consumers must have, by definition, copied the substantial parts of that program as well. The tension between these two concepts only becomes apparent in *Harper & Row* and *Campbell*. In *Harper & Row*, out of a 200,000 word manuscript,¹⁸⁴ *The Nation* copied 300 words verbatim that were supposed to appear in *Time*'s exclusive 2,250 word article.¹⁸⁵ These 300 words constituted approximately thirteen percent of the article. The Court recognized that "[i]n absolute terms, the words actually quoted were an insubstantial portion of [President Ford's memoir,] 'A Time to Heal,'"¹⁸⁶ but nevertheless concluded that copying those 300 words was not protected under the fair use doctrine.¹⁸⁷ The Court explained:

[*The Nation*] took what was essentially the heart of the book. . . . A [*Time*] editor described the chapters on the pardon as "the most interesting and moving parts of the entire manuscript." The portions actually quoted were selected [by *The Nation*'s editor]. . . . as among the most powerful passages in those chapters . . . because they qualitatively embodied Ford's distinctive expression.¹⁸⁸

This description illustrates the difference between "amount" and "substantiality." Even though the Court describes the 300 words as an "insubstantial portion," it would be more accurate to say that only a small amount of the original copyrighted work was copied, but because this small amount contained what was "essentially the heart" of the work, it constituted a

¹⁸² See *Sony*, 464 U.S. at 450 n.31 ("[S]ince the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts . . . combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute.") (citing H.R. REP. NO. 94-1476, *supra* note 71, at 65-66).

¹⁸³ *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 552-53 (1985) ("[F]air use analysis must always be tailored to the individual case. The nature of the interest at stake is highly relevant to whether a given use is fair." (internal citations omitted)).

¹⁸⁴ *Id.* at 579 (Brennan, J., dissenting).

¹⁸⁵ See *id.* at 543, 569.

¹⁸⁶ *Id.* at 564.

¹⁸⁷ See *id.* at 565-66.

¹⁸⁸ *Id.* at 564-65 (internal citations omitted).

substantial portion. Thus understood, "amount" refers to the quantity or percentage value of the copied work to the copyrighted work, while "substantiality" refers to the quality or importance of the copied amount to the copyrighted work.

In these terms, that *The Nation* copied a small amount, but a substantial portion, of President Ford's memoir contributed to the Court's refusal to find that it was protected under the fair use doctrine. The reverse situation can also be true. In *Campbell*, Campbell copied a large portion of Roy Orbison's song "Oh, Pretty Woman," but the Court recognized that "[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart."¹⁸⁹ The Court quickly clarified however, that not everyone "who calls himself a parodist can skim the cream and get away scot free."¹⁹⁰ Nevertheless, the Court explicitly recognized that in some contexts, such as parody, fair use contemplates a person copying a substantial amount¹⁹¹ of the copyrighted original.

In sum, prior to the adoption of the DMCA, the fair use doctrine was regarded as flexible and adaptable to different sets of facts and circumstances. It required a close, individual, and case-by-case examination of the facts, which would then be analyzed in the context of the four nonexclusive factors set forth in § 107, with no one factor given dispositive weight. The case would be adjudicated with the purpose of advancing the public good, and to that end the interest of the copyright holder was carefully balanced against the public's interest in the use of the copyrighted material.

IV. THE FAIR USE DOCTRINE AND THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. *The Purpose and Origins of the Digital Millennium Copyright Act*

President Clinton signed the Digital Millennium Copyright Act (DMCA) into law on October 28, 1998.¹⁹² The DMCA was the first major revision of copyright law since the 1976 Act and was intended by Congress to update the law so as to protect a copyright holder's interest in his property in the face of technological change, especially with the digital online world.¹⁹³ In this sense, the 1976 Act and the DMCA are siblings.

¹⁸⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

¹⁹⁰ *Id.* at 589.

¹⁹¹ In this case, 2 Live Crew copied the song's first line and base riff. They also added other sounds however, and altered the drum beat. *See id.*

¹⁹² Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

¹⁹³ *See* H.R. REP. NO. 105-551, pt. 1, at 9 (1998).

More specifically, Congress drafted the DMCA so as to implement two World Intellectual Property Organization (WIPO) treaties to which the United States was a signatory nation, the "Copyright Treaty" and the "Performances and Phonograms Treaty."¹⁹⁴ This Note is only concerned with the Copyright Treaty,¹⁹⁵ which "[r]ecogniz[ed] the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works."¹⁹⁶ In so doing, the treaty required, *inter alia*, that: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights" and "restrict acts, in respect of [the author's] works, which are not authorized by the authors concerned or permitted by law."¹⁹⁷

The focus of this Note is § 1201 of the DMCA as codified, entitled "Circumvention of copyright protection systems."¹⁹⁸ Section 1201 in turn is divided into eleven subsections. The primary emphasis will be on § 1201(a), (b), and (c).

Perhaps the most important fact to remember throughout the rest of this Note is that the provisions of § 1201 are not copyright laws per se. They do not grant additional protection to a copyrighted work, nor do they give the copyright owner additional rights or interests in his work. Instead, the provisions make it illegal to circumvent the *protection measures* employed by copyright owners to protect their copyrighted works.¹⁹⁹ At least superficially, a violation of one or more of § 1201's anticircumvention provisions is a separate offense than the offense of actually infringing upon a copyrighted work, for which an individual may be held both civilly and criminally liable.²⁰⁰

¹⁹⁴ *Id.* pt. 2, at 20 (1998).

¹⁹⁵ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65.

¹⁹⁶ *Id.* at Preamble.

¹⁹⁷ *Id.* at art. 11.

¹⁹⁸ 17 U.S.C. § 1201 (2007).

¹⁹⁹ See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 686 (2000) ("Note that the gravamen here is not copyright infringement."); see also Eugene R. Quinn, Jr., *An Unconstitutional Disguise: Did Congress Overstep its Constitutional Authority in Adopting the Circumvention Prevention Provisions of the Digital Millennium Copyright Act?*, 41 BRANDEIS L.J. 33, 54 (2002);

²⁰⁰ See 17 U.S.C. §§ 1203-1204 (2007).

B. *Fair Use and Section 1201*

1. THE BASIC PROVISION: SECTION 1201(A)(1)

Section 1201(a)(1)(A) has been described as the "basic provision" at the "core" of the DMCA.²⁰¹ It provides that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title [sic]."²⁰²

Subsection (a) generally prevents the unauthorized access to a copyrighted work by prohibiting the circumvention of effective technological copyright protection measures.²⁰³ That is, it targets the *use* of a circumvention technology.²⁰⁴ The House explains that it "applies when a person has not obtained authorized access to a copy . . . of a work for which the copyright owner has put in place a technological measure that effectively controls access to his or her work."²⁰⁵ It does not apply "to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures."²⁰⁶ The Senate agrees with the House, using essentially similar language in its own Report.²⁰⁷ The House concludes by expressly stating that under this subsection, "an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully."²⁰⁸ This conclusion is important for two reasons. First, it is evidence that the drafters of the DMCA contemplated the existence and exercise of fair use under the terms of the DMCA, specifically § 1201(a)(1). Second, it shows the intent of the drafters to allow an individual who has lawfully acquired a work to circumvent the technological copy protections on that work so that he is able to make fair use of it.

²⁰¹ See Nimmer, *supra* note 197, at 684.

²⁰² 17 U.S.C. § 1201(a)(1)(A).

²⁰³ See S. REP. NO. 105-190, at 29 (1998).

²⁰⁴ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001).

²⁰⁵ H.R. REP. NO. 105-551, pt. 2, at 17 (1998).

²⁰⁶ *Id.*

²⁰⁷ See S. REP. NO. 105-190, at 28.

²⁰⁸ H.R. REP. NO. 105-551, pt. 1, at 17.

2. THE BAN ON TRAFFICKING: SECTION 1201(A)(2)

Section 1201(a)(2) is designed to prohibit “creating and making available certain technologies, products and services used, developed or advertised to defeat technological protections against unauthorized access to a work.”²⁰⁹ It provides that:

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.²¹⁰

This subsection “supplements the prohibition against the act of circumvention in paragraph (a)(1).”²¹¹ It “is drafted carefully to target ‘black boxes,’ and to ensure that legitimate multipurpose devices can continue to be made and sold.”²¹²

Subsections (a)(1) and (a)(2) have been artificially segregated here for organizational reasons and for ease of understanding. As a practical matter however, because both prohibition provisions fall under § 1201(a), and because (a)(2) “supplements” (a)(1) by providing “meaningful protection and enforcement,” they must be read jointly.

3. ADDITIONAL VIOLATIONS: SECTION 1201(B)(1)

The purpose of § 1201(b)(1) is to protect a copyright holder’s use of technological protection measures to protect his rights under Title 17 by prohibiting the manufacture or sale of the technological means to overcome

²⁰⁹ *Id.* at 18.

²¹⁰ 17 U.S.C.A. § 1201(a)(2) (2007).

²¹¹ H.R. REP. NO. 105-551, pt. 1, at 18.

²¹² *Id.*

those protections and thereby facilitate copyright infringement.²¹³ It provides that:

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.²¹⁴

Notice the substantially similar language to subsection (a)(2), except that the phrase “effectively controls access to a work protected under this title” is replaced in each of its three instances with the phrase, “effectively protects a right of a copyright owner under this title.” The focus of subsection (b)(1) is the circumvention of technologies designed to permit access to a work but also to prevent copying or otherwise infringing a copyright, while the focus of subsection (a)(2) is the circumvention of technology designed to prevent access to a work.²¹⁵ This subsection generally applies to those technological measures employed to protect the interest of a copyright owner in his work and does not, by itself, prohibit the circumvention of effective technological copyright protection measures.²¹⁶ This subsection is applicable when a person obtains authorized access to a copyrighted work protected by a technological measure the copyright holder of the work has put in place.²¹⁷

4. OTHER RIGHTS NOT AFFECTED

Section 1201(c)(1) expressly states that “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement,

²¹³ *Id.* at 19.

²¹⁴ 17 U.S.C. § 1201(b) (2007).

²¹⁵ *See Universal City Studios v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001).

²¹⁶ *See S. REP. NO. 105-190*, at 29 (1998).

²¹⁷ *See H.R. REP. NO. 105-551*, pt. 1, at 19.

including fair use, under this title.”²¹⁸ Subsection (c)(1) “is intended to ensure that none of the provisions in section 1201 affect the existing legal regime established in the Copyright Act and case law interpreting that statute.”²¹⁹

The court in *321 Studios v. MGM Studios, Inc.*²²⁰ quotes *Universal City Studios, Inc. v. Corley*²²¹ with approval when it construes this subsection to “ensure[] that the DMCA is not read to prohibit the ‘fair use’ of information just because that information was obtained in a manner made illegal by the DMCA.”²²²

C. Criticisms of the Digital Millennium Copyright Act

There has been no shortage of criticism leveled at § 1201. Much of that criticism has been directed at its perceived or actual lack of protection for fair use.²²³ Even courts interpreting the anti-circumvention and anti-trafficking provisions of § 1201 expressed concern that they could undermine the principles of fair use.²²⁴

At least one commentator is urging that care “be taken to distinguish the ban on trafficking from the similarly worded additional violations,”²²⁵ as the legislative history reveals that “the two sections are not interchangeable, and many devices will be subject to challenge only under one of the subsections.”²²⁶ And at least one other commentator is already suggesting that the distinctions between § 1201(a) and (b) are blurred because of judicial

²¹⁸ 17 U.S.C. § 1201(c)(1) (2007).

²¹⁹ H.R. REP. NO. 105-551, pt. 1, at 20; see also S. REP. NO. 105-190, at 30 (expressing the same intent using near-identical language).

²²⁰ 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

²²¹ 273 F.3d 429 (2d Cir. 2001).

²²² *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085, 1097 (N.D. Cal. 2004) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001)).

²²³ See, e.g., Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111 (2005) (arguing that none of the balancing measures set forth in § 1201 effectively protected fair use); see also Nimmer, *supra* note 197, at 693 (“Future marketplace realities could dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.”); see also Jeff Sharp, *Coming Soon to Pay-Per-View: How the Digital Millennium Copyright Act Enables Digital Content Owners to Circumvent Educational Fair Use*, 40 AM. BUS. L.J. 1 (2002) (arguing that the anticircumvention and antitrafficking provisions in § 1201 will eventually strangle the concept of academic fair use and lead to a situation where everything must be licensed by the content providers).

²²⁴ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322 (2000) (“The use of technological means of controlling access to a copyrighted work may affect the ability to make fair uses of the work.”).

²²⁵ Nimmer, *supra* note 197, at 689.

²²⁶ See *id.* (quoting S. REP. NO. 105-190, at 12 (1998)).

merger of the two provisions.²²⁷ While there are undoubtedly any number of ways in which § 1201(a) and (b) may become entangled, this Note attempts to keep them as distinct as possible.

V. THE ARGUMENT FOR FAIR USE UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. Section 1201(a): Fair Use Based on Purpose and Intent

1. SECTION 1201(A)(2): LEGISLATIVE INTENT AND PURPOSE

Section 1201(a)(2) contains three prohibitions. The first prohibits trafficking in any product that “is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.”²²⁸ The second prohibits trafficking in any product that “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.”²²⁹ The third prohibits trafficking in any technology that “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.”²³⁰

The House Judiciary Committee states that the purpose of these three prohibitions is “to provide meaningful protection and enforcement of the copyright owner’s right to control access to his or her copyrighted work.”²³¹ In order to provide this protection, subsection (a)(2) “supplements the prohibition against the act of circumvention in paragraph (a)(1) with prohibitions on creating and making available certain technologies, products and services used, developed or advertised to defeat technological protections against *unauthorized access to a work*.”²³²

²²⁷ See generally R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619 (2003) (exploring the possible impact on copyright holders, businesses, the law, and consumers of combined access and rights controls in light of the different levels of statutory protection afforded to the controls).

²²⁸ 17 U.S.C.A. § 1201(a)(2)(A) (2007).

²²⁹ § 1201(a)(2)(B).

²³⁰ § 1201(a)(2)(C).

²³¹ See H.R. REP. NO. 105-551, pt. 1, at 10 (1998).

²³² *Id.* (emphasis added); S. REP. NO. 105-190, at 28 (1998) (employing precisely the same language as the House Report).

2. SECTION 1201(A): PROHIBITING UNAUTHORIZED ACCESS, PERMITTING AUTHORIZED ACCESS

I. SECTION 1201(A): PERMITTING AUTHORIZED ACCESS

Notice that both Judiciary Committees agree that the purpose of subsection (a)(2) is to supplement subsection (a)(1) by prohibiting “unauthorized access to a work.” But what does Congress mean when it says “unauthorized access”? Section 1201(a) defines the phrases “circumvent a technological measure”²³³ and “effectively controls access to a work,”²³⁴ but it does not define the phrase “unauthorized access to a work.” This is hardly surprising, as prohibiting “unauthorized access” is Congress’ purpose in implementing subsection (a)(2) and defining these two phrases in the statute is but a means to achieve that purpose.

To define “unauthorized access,” it is necessary to explore further the legislative history and the relationship between subsections (a)(1) and (a)(2). First, recall subsection (a)(1) declares that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”²³⁵ However, the House expressly states its intent that “[p]aragraph (a)(1) does *not* apply to the subsequent actions of a person once he or she has *obtained authorized access* to a copy of a work protected under Title 17.”²³⁶ This statement makes logical sense when read in conjunction with the stated purpose of the three prohibitions found in subsection (a)(2). Since the purpose of those prohibitions is to prevent “unauthorized access” to a work, it rationally follows that if access to a work is indeed authorized, then it is not prohibited by the terms of subsection (a)(2). Put another way, because subsection (a)(2) is included in the statute to “supplement” subsection (a)(1) with “meaningful protection[s],” if subsection (a)(1) does not apply once an individual has obtained authorized access to a work, then the three prohibitions found in subsection (a)(2) cannot prohibit that person from accessing the work. With its intent expressly stated, the House then defines its scope: “[A]n individual would not be able to circumvent in order to gain unauthorized access to a work, but *would be able to do so* in order to make fair use of a work which he or she has acquired lawfully.”²³⁷

²³³ 17 U.S.C. § 1201(a)(3)(A).

²³⁴ § 1201(a)(3)(B).

²³⁵ § 1201(a)(1)(A).

²³⁶ See H.R. REP. NO. 105-551, pt. 1, at 18 (1998) (emphases added).

²³⁷ See *id.* (emphasis added). The Senate Committee implicitly agrees, stating “[t]his paragraph does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under title 17 [sic], even if such actions involve circumvention of other types

II. THE MANIFESTATION OF CONGRESSIONAL INTENT IN SECTION 1201(A)(2)(A), (B), AND (C)

The significance of this statement is hard to underestimate. It is the bridge that spans not only the fair use gap between the concepts of infringement and circumvention but also the fair use gap between the anti-circumvention and anti-trafficking provisions. It is Congress'²³⁸ express intent that, so long as an individual has lawfully acquired a work, that individual may circumvent in order to make fair use of that work. But, keeping in mind that the purpose of subsection (a)(2) is to supplement subsection (a)(1) by providing protection against "unauthorized access," this intent is meaningless unless it is manifested in subsection (a)(2).

Each of the three prohibitions in subsection (a)(2) refers to a distinct act regarding circumvention devices.²³⁹ However, it is crucial to recognize that each of these prohibitions applies only to "a technological measure that effectively controls access to a work protected under this title."²⁴⁰ While § 1201(a) defines "circumvent a technological measure" and effectively controls access to a work,²⁴¹ it does not define "a work protected under this title." The legislative reports are similarly silent.²⁴² Section 101²⁴³ does not define "a work protected under this title" among its laundry list of definitions, but § 102, entitled "Subject matter of copyright," does provide that "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression."²⁴⁴ Section 106 gives to copyright holders the "exclusive rights," protected by § 102. However, in doing so, it makes those rights "[s]ubject to section[] 107,"²⁴⁵ which by its very terms states that "the fair use of a copyrighted work . . . is not an infringement of copyright."²⁴⁶ The Supreme Court explained the relationship between these sections before:

of technological protection measures." See S. REP. NO. 105-190, at 28 (1998). The other technological protection measures found in § 1201(a) are, of course, the three prohibitions found in subsection (a)(2).

²³⁸ H.R. REP. NO. 105-551, pt. 1, at 18.

²³⁹ See 17 U.S.C.A. § 1201(a)(2)(A)-(C) (2007); see *supra* Part IV.E.2.i.

²⁴⁰ 17 U.S.C.A. § 1201(a)(2)(A)-(C) (emphasis added).

²⁴¹ § 1201(a)(3)(A), (B).

²⁴² See H.R. REP. NO. 105-551, pt. 1, at 19; S. REP. NO. 105-190, at 29 (1998).

²⁴³ 17 U.S.C.A. § 101. This section, along with subsequent sections, is applicable as a result of § 1201(c). See § 1201(c); see also *supra* Part IV.B.4.

²⁴⁴ 17 U.S.C.A. § 102(a). Needless to say, movies obviously fall within the scope of this section.

²⁴⁵ See § 106.

²⁴⁶ See § 107.

"Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work . . . "is an infringer of the copyright." Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes fair use of the work is not an infringer of the copyright with respect to such use.²⁴⁷

In light of the lack of any definition for the phrase "a work protected under this title," this relationship between sections 102, 106, and 107 must be interpreted to mean that a work is not protected under Title 17 if a fair use is made of it. This idea is not so radical as it may first seem. The Court has previously interpreted § 107 to mean that "[a]ny individual may reproduce a copyrighted work for a 'fair use;' the copyright owner does not possess the exclusive right to such a use."²⁴⁸ Moreover, every case arising under copyright law in which fair use is claimed as a defense²⁴⁹ implicitly recognizes it. In bringing suit, the copyright holder wants the court either to recognize or enforce one or more of his exclusive rights in his work for that use. But if the court finds the use to be fair, the copyright holder has none of his exclusive rights and therefore, no ability to enjoin the use or receive damages or compensation for the use. To be clear, the scope of this interpretation absolutely does not extend past the scope of fair use (subject to any other statutory exceptions). Once outside of the fair use exception, Title 17 does protect the copyright holder's exclusive rights.

Therefore, the definition of the phrase "a work protected under this title" is properly meant to exclude fair uses, because copyright holders are not protected against fair uses of their works under Title 17. Consequently, Congress' intent to allow circumvention under subsection (a)(1) for fair use purposes is manifested in each of subsection (a)(2)'s three prohibitions, as a limitation on the scope of those prohibitions.²⁵⁰ Because fair use falls

²⁴⁷ Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) (quoting 17 U.S.C. § 501(a)).

²⁴⁸ See *id.*

²⁴⁹ Or, more precisely, every case arising under copyright law in which fair use is used as a defense, except those in which fair use is claimed as a defense to the provisions of § 1201 (because those provisions have been wrongly interpreted as not subject to fair use) implicitly recognizes it.

²⁵⁰ The presence of subsection (a)(3)(B) is irrelevant and does not alter this analysis or conclusion. It defines how a "technological measure" "effectively controls access to a work." See 17 U.S.C. § 1201(a)(3)(C) (2007). However, this Note focuses its analysis on the completely different issue of what it means to be "a work protected under this title."

outside the scope of these three prohibitions, by definition Congress cannot prohibit products or activity that result in fair use.²⁵¹

3. THE REQUIREMENT OF INTENT FOR FAIR USE

The House Report stated that an individual would be able to circumvent "in order to make fair use of a work."²⁵² This statement, combined with the language excluding fair use from subsection (a)(2)'s prohibitions, necessitates that an individual show intent to make fair use of a work in order to circumvent the access controls.

In theory, the intent to make fair use is not the same as actually making fair use. Thus, two possibilities are present. It is possible to intend to make fair use of a work but ultimately infringe upon it, and it is possible to intend to make a fair use of a work and ultimately make fair use of it.

4. THE REQUIREMENT OF LAWFUL ACQUISITION FOR FAIR USE

The House Report stated that an individual would be able to circumvent to make fair use of a work "which he or she has acquired lawfully."²⁵³ This requirement obviously excludes things like theft or fraud. In the larger context, it seems to suggest things like purchase or assignment.

B. Section 1201(b): Fair Use

1. SECTION 1201(B)(1): PURPOSE AND APPLICATION

Section 1201(b)(1) has three provisions that prohibit trafficking in anything that "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,"²⁵⁴ anything that "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,"²⁵⁵ or anything that "is

²⁵¹ Cf. *Lexmark Int'l v. Static Control Components, Inc.*, 387 F.3d 522, 552 (6th Cir. 2004) (Merritt, J., concurring) ("Congress . . . sought to reach those who circumvented protective measures 'for the purpose' of pirating works protected by the copyright statute.").

²⁵² See H.R. REP. NO. 105-551, pt. 1, at 18 (1998).

²⁵³ See H.R. REP. NO. 105-551, pt. 1, at 18.

²⁵⁴ 17 U.S.C.A. § 1201(b)(1)(A) (2007).

²⁵⁵ § 1201(b)(1)(B).

marketed by that person or another acting in concert with that person or 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."²⁵⁶

The House and Senate agree that the purpose of § 1201(b)(1) is "to provide meaningful protection and enforcement of copyright owners' use of technological protection measures to protect their rights under title 17 [sic] by prohibiting the act of making or selling the technological means to overcome these protections [employed by the copyright holder] and thereby facilitate copyright infringement."²⁵⁷ Yet, they cannot agree as to when § 1201(b) applies. The Senate believes it "applies to those technological measures employed by a copyright owner that effectively protect his or her copyright rights in a work."²⁵⁸ Meanwhile, the House believes it "applies when a person has obtained authorized access to a copy . . . of a work, but the copyright owner has put in place technological measures that effectively protect his or her right under Title 17 to control or limit further use of the copyrighted work."²⁵⁹ The difference is actually quite striking. The language employed shows the House believes that § 1201(b) applies to a situation that arises only upon certain facts,²⁶⁰ while the Senate believes that § 1201(b) applies to the access control measures themselves.²⁶¹

The statute itself indicates that the view of the Senate has prevailed. Each of the three provisions of subsection (b)(1) prohibits doing some act with respect to "a technological measure that effectively protects a right of a copyright owner under this title in a work or portion thereof."²⁶² Like subsection (a)(2) however, the phrase of importance is not defined. The question is, what exactly constitutes "a right of a copyright owner under this title"? The legislative reports are silent on the issue. It is irrelevant that the statute defines the phrase "effectively protects a right of a copyright owner under this title."²⁶³ That provision is concerned with the ability of the technological measure to protect the work, not the rights it is supposed to actually protect.

²⁵⁶ § 1201(b)(1)(C).

²⁵⁷ S. REP. NO. 105-190, at 29 (1998); *See also* H.R. REP. NO. 105-551, pt. 1, at 19 (1998).

²⁵⁸ S. REP. NO. 105-190, at 29.

²⁵⁹ H.R. REP. NO. 105-551, pt. 1, at 19 (1998).

²⁶⁰ *Id.*

²⁶¹ *See* S. REP. NO. 105-190, at 29.

²⁶² *See* 17 U.S.C. § 1201(b)(1)(A)-(C) (2007).

²⁶³ *See* § 1201(b)(2)(B). This provision is slightly ambiguous at first. To be clear, the statute uses "prevents, restricts, or otherwise limits" in relation to third parties, not to the copyright holder. That is, the technological measure "prevents, restricts, or otherwise limits" the ability of third parties to exercise the right of a copyright holder, not the ability of a copyright holder to exercise his own right.

2. SECTION 1201(B)(2)(B): THE RIGHT OF A COPYRIGHT HOLDER

Answering the question "what constitutes a right of a copyright owner under this title" under § 1201(b)(2) results in the same process and answer as the question of "what constitutes a work protected under this title" under § 1201(a)(2).²⁶⁴ That is to say, in light of the lack of any definition for the phrase "a right of a copyright owner under this title," the relationship between sections 102, 106, and 107 must be interpreted to mean that a copyright holder does not have a right in the fair use of one of his works. The same justifications and reasons that applied to interpreting "a work protected under this title" apply to "a right of a copyright holder." It is not a radical idea, but rather implicitly recognized in all fair use defenses. Moreover, it makes logical sense. If copyright holders continued to have rights in fair uses of their works, or if a fair use continued to be protected under Title 17, then the doctrine of fair use would effectively cease to exist.

Some might object that there is a difference between interpreting "a work protected under this title" and "a right of a copyright owner under this title." They would be partially correct. There is a difference, but it arises out of the respective purposes of § 1201(a) and (b), and the end result is the same. The Senate Report explains that "[s]ubsection (b) applies to those technological measures employed by a copyright owner that effectively protect his or her copyright rights in a work, as opposed to those technological protection measures covered by subsection (a), which prevent unauthorized access to a copyrighted work."²⁶⁵ The difference is one of degree, not substance. Section 1201(b) contemplates specific uses of technological protection measures by specific copyright holders, so its terms are drafted in language such as "a right of a copyright owner under this title." Meanwhile, Section 1201(a) contemplates technological protection measures generally, so its own terms are drafted in language such as "controls access to a work protected under this title."

When the Court explains that "[a]ny individual may reproduce a copyrighted work for a 'fair use,' the copyright owner does not possess the exclusive right to such a use,"²⁶⁶ it is speaking on both levels. Although Section 1201(a) and (b) were drafted on two different levels, the end result is the same; a fair use of a work is excepted.

²⁶⁴ See *supra* Part V.A.2.ii.

²⁶⁵ S. REP. NO. 105-190, at 29.

²⁶⁶ Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984); see also *supra* Part V.A.2.ii.

3. SECTION 1201(B)(2): REQUIREMENT OF INTENT FOR FAIR USE

There is no explicit prohibition against circumvention of technological copyright protection measures in § 1201(b).²⁶⁷ Its terms prohibit only circumvention of access control technology, fair use excepted. But these prohibitions are similar to those of § 1201(b)(1) in that while circumvention for fair use lies outside the scope of the language, circumvention for other uses does not. Therefore, one must show intent to make fair use in order to circumvent the technological protection measures.

VI. THE FIRST GENERATION OF CASES UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. *Reimerdes* and *Corley*

The first significant interpretation of § 1201 was *Universal City Studios, Inc. v. Reimerdes*,²⁶⁸ which was affirmed under the name *Universal City Studios, Inc. v. Corley*.²⁶⁹ This Note deals largely with *Reimerdes* instead of *Corley* because it provides a fuller and deeper analysis of the law and because it is affirmed *in toto*.²⁷⁰ Whereas *Reimerdes* gives nine pages of analysis and discussion of the relevant copyright law,²⁷¹ *Corley* provides less than two.²⁷² This is not to say that the Note will ignore or discount *Corley*. Rather, it will only refer to it on issues to which it bears particular relevance or insight. However, because both opinions contain significant discussions on legal issues unrelated to, or outside the subject of, this Note, the discussion and analysis will be confined to matters relating to § 1201 and § 107.

The underlying facts of *Reimerdes* and *Corley* are relatively simple. In September 1999, a fifteen-year-old Norwegian computer hacker and two other unidentified individuals created a computer program called DeCSS, which was capable of breaking the CSS encryption algorithm movie studios used to provide protection against unauthorized DVD copying. None of these three had permission or authorization to decrypt the CSS algorithm.²⁷³ This program was put on the internet and in November 1999, defendant Corley began both offering the program for download on his website and

²⁶⁷ See S. REP. NO. 105-190, at 29.

²⁶⁸ 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

²⁶⁹ 273 F.3d 429 (2d Cir. 2001).

²⁷⁰ See *id.* at 459-60.

²⁷¹ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 315-26 (S.D.N.Y. 2000).

²⁷² See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443-45 (2d Cir. 2001).

²⁷³ *Reimerdes*, 111 F. Supp. 2d at 311.

linking to other websites that offered the program for download.²⁷⁴ Corley's was one of hundreds of websites that offered DeCSS for download.²⁷⁵ Several movie studios, through the Motion Picture Association of America (MPAA), sent out cease and desist letters and filed suit against Corley under the DMCA in January 2000.²⁷⁶

The court began by explaining that because Corley was accused not of actually infringing a copyright, but of making it possible for others to bypass a DVD's access controls by posting DeCSS to his website, the principal provision at issue was § 1201(a)(2).²⁷⁷ It should probably come as no surprise that the first issue the court analyzed was Corley's act of posting DeCSS on his website. It quickly concluded as "inescapable facts" that CSS is a technological means that "effectively" controls access to a DVD, that the singular function of DeCSS is to circumvent CSS's encryption scheme, and that Corley offered and provided DeCSS by posting it on his website.²⁷⁸

The court then considered whether Corley's actions fell into any of the statutory exceptions. As the focus of this Note is on fair use, the analysis will focus on the fair use exception. Corley argues that he posted DeCSS to his website simply as a means to enable its users to make fair uses of their own DVDs and that the DMCA cannot properly be construed to make it difficult or impossible to make any fair use of CSS-encrypted DVDs; thus, the DMCA does not reach their activities.²⁷⁹ The court observed that Corley "focused on a significant point. Access control measures such as CSS do involve some risk of preventing lawful as well as unlawful uses of copyrighted material."²⁸⁰

The court first looked at the language of § 107 and found that it "provides in critical part that certain uses of copyrighted works that otherwise would be wrongful are not infringements of copyright," and then repeated that Corley was "not here sued for copyright infringement. [He is] sued for offering and providing technology designed to circumvent technological measures that control access to copyrighted works."²⁸¹ The court implicitly concluded that "[i]f Congress had meant the fair use defense to apply to such actions, it would have said so."²⁸²

²⁷⁴ *Id.* at 312.

²⁷⁵ *Id.* at 311.

²⁷⁶ *Id.* at 312.

²⁷⁷ *Id.* at 316.

²⁷⁸ *Id.* at 319.

²⁷⁹ *See id.* at 322.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

The problem is Congress did say so. The House Report expressly contemplates that under § 1201(a), “an individual would not be able to circumvent in order to gain unauthorized access to a work, but *would be able to do so* in order to make fair use of a work.”²⁸³ The court does not recognize that the scope of § 1201(a)(2)(C) does not encompass fair use.²⁸⁴ So while the court is technically correct in saying that Corley cannot directly claim fair use as a defense, it errs in concluding that he may not, by virtue of legislative intent, claim that he intends fair use by posting DeCSS to his website. This is effectively what Corley did, when he claimed that “those who would make fair use of technologically protected copyrighted works need means, such as DeCSS, of circumventing access controls measures not for piracy, but to make lawful use of those works.”²⁸⁵ Whether Corley actually did act with intent to make fair use is a question that cannot be answered, either from *Reimerdes* or *Corley*. There is simply not enough information available in the opinion, which is unsurprising considering that the court did not consider intent to make fair use to be an issue.

Believing that fair use is not recognized in § 1201(a), the court goes on to describe three elements of the balance that Congress struck among competing interests in drafting the DMCA. The first element is the limitation of § 1201(a)(1)’s prohibition “of the act of circumvention to the act itself, so as not to ‘apply to subsequent actions of a person once he or she has obtained authorized access to a copy of a copyrighted work.’”²⁸⁶ By so limiting the scope of the prohibition, Congress “left ‘the traditional defenses to copyright infringement, including fair use fully applicable’ provided ‘the access is authorized.’”²⁸⁷ The court is correct in describing the limited nature of § 1201(a)(1). Of course, the court would be even more correct in describing that § 1201(a)(1) is also limited by the concept of fair use.²⁸⁸

The second element is irrelevant to this Note’s purpose. The third element Congress considered was a series of exceptions (sections 1201(d), (f), (g), and (j)) “for certain uses that Congress thought ‘fair.’”²⁸⁹ To call these exceptions “fair” in an attempt to equate or analogize them to the fair use doctrine is inaccurate. The court may think that these uses are fair, but Congress did not. While these subsections do in fact create exceptions, the statute and the legislative reports do not use the phrase “fair use,” or even the

²⁸³ H.R. REP. NO. 105-551, pt. 1, at 18 (1998) (emphasis added).

²⁸⁴ See *supra* Part V.A.2.ii.

²⁸⁵ *Reimerdes*, 111 F. Supp. 2d at 304.

²⁸⁶ See *id.* at 323 (quoting H.R. REP. NO. 105-551, pt. 1, at 18 (1998)).

²⁸⁷ See *id.* (quoting H.R. REP. NO. 105-551, pt. 1, at 18).

²⁸⁸ See H.R. REP. NO. 105-551, pt. 1, at 18; see *supra* Part V.A.2.i.

²⁸⁹ See *Reimerdes*, 111 F. Supp. 2d at 323.

words “fair” or “use” in any way in that may indicate that these provisions were meant as fair use provisions; indeed, the only time “fair” appears in § 1201 at all is in subsection (c)(1). Moreover, the language of the subsections themselves seems to suggest against a finding that Congress considered these exceptions to be “fair.” Section 107 is nonexclusive and flexible in its terms,²⁹⁰ and the Supreme Court stressed on more than one occasion the importance of this flexibility in adjudicating fair use cases.²⁹¹ It thus seems reasonable, especially in light of the legislative recognition given to fair use in drafting the DMCA,²⁹² that if the drafters wrote these subsections to constitute “fair” use as *Reimerdes* asserts, it would have included some modicum of flexibility to circumvent in the provisions. However, this is not the case. Instead, the language of the subsections in question is exclusive and strict.²⁹³

As presented by the court, with no fair use limitation on § 1201, these balances noticeably skew to the side of the copyright holders. Even assuming for the present argument that § 1201(d), (f), (g), and (j) constitute uses that are “fair,” the balances still inevitably skew to the copyright holders. The average individual could not raise a defense under § 1201(d) because it applies only to nonprofit libraries, archives, and educational institutions.²⁹⁴ Most likely, he would also not be able to raise defenses under either § 1201(g) because encryption research²⁹⁵ requires a highly advanced and developed knowledge of mathematics, or § 1201(f) and (j) because both the

²⁹⁰ See H.R. REP. NO. 94-1476, *supra* note 71, at 66 (“Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”).

²⁹¹ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The fair use doctrine thus ‘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.’” (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990))).

²⁹² *Reimerdes*, 111 F. Supp. 2d at 322.

²⁹³ See, e.g., 17 U.S.C. § 1201(d)(1) (2007) (“A copy of a work to which access has been gained . . . may not be retained longer than necessary to make such good faith determination.”); § 1201(f)(1) (An individual may reverse engineer “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.”). Subsections (g) and (j) are slightly more flexible than subsections (d) and (f), as different factors are provided to determine whether actions under those subsections are lawful. See § 1201(g)(2); § 1201(j)(3). However, these factors are still much more narrowly confined in theory and practice than the factors to constitute a “fair” use in any sense of the term.

²⁹⁴ See 17 U.S.C. § 1201(d)(1).

²⁹⁵ See generally *id.* § 1201(g) (stating that “encryption research” includes activities necessary to identify and analyze “encryption technology,” which is defined as the “scrambling and descrambling of information using mathematical formulas or algorithms”).

ability to reverse engineer²⁹⁶ and test computer systems for security²⁹⁷ require a highly advanced and developed knowledge in computer science and the acquisition of expensive software programs. In other words, the scope of these exceptions is so narrow and specialized that even if they were to constitute "fair" uses, the vast majority of people could never raise them as defenses because most people will never reverse engineer a computer program, security test a computer,²⁹⁸ or do encryption research. It can hardly benefit the public good to take away the fair use defenses that the majority of people would use but leave four that only a small fraction of the population would ever use.

Compare these limited exceptions on uses that are "fair" to the limitation on the act of circumvention. This limitation serves not as some kind of restraint upon the law or a restriction upon its scope but instead as an extra ground for civil or criminal liability. Suppose, for example, that the Roy Orbison song "Oh, Pretty Woman" in *Campbell* was protected with some kind of technological protection measure similar to CSS which allowed an individual to listen to the song, but not copy it. Campbell nevertheless decides to make a parody of this song, so he uses a program similar to DeCSS to copy some of the instrument tracks. Acuff-Rose then sues Campbell, not only for copyright infringement, but also for unauthorized circumvention under § 1201. Campbell can claim none of the four exceptions that the court characterized as "fair." Moreover, even if the actual use of the song is determined to be a fair use, Campbell still faces civil and criminal liability for circumventing the song's access protections. For the court to avoid absurd and unjust situations such as these, it need only accept that, consistent with the legislative history and statutory interpretation, fair use is an exception to § 1201.

Corley's final argument is that DeCSS might be used to gain access to a copyrighted work, in order to make a fair use of that work, and is thus protected under *Sony Corp. v. Universal City Studios, Inc.*²⁹⁹ The court rejects this argument on two different grounds. It first characterizes *Sony* as an infringement case, in which "the only question was whether the manufacturers could be held liable for infringement by those who purchased equipment from them in circumstances in which there were many non-infringing uses for their equipment."³⁰⁰ In Corley's case, however, the issue

²⁹⁶ See generally § 1201(f).

²⁹⁷ See generally § 1201(j).

²⁹⁸ The context indicates that this type of security research constitutes much more than an individual simply running the antivirus program that came with his computer. See *id.*

²⁹⁹ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000).

³⁰⁰ *Id.*

is “whether the possibility of non-infringing fair use by someone who gains access to a protected copyrighted work through a circumvention technology distributed by the defendants saves the defendants from liability under Section 1201.”³⁰¹ Second, even if *Sony* did apply, “it would not govern here” because it “involved a construction of the Copyright Act that has been overruled by the later enactment of the DMCA to the extent of any inconsistency between *Sony* and the new statute.”³⁰² Specifically, the court says that “[t]he *Sony* test of “capability of substantial non-infringing uses,” while still operative in cases claiming contributory infringement of copyright, is not part of this legislation.”³⁰³

First, the court misinterprets the scope of *Sony*. To read it as only a contributory infringement case is to construe Justice Stevens’ opinion much too narrowly. The “only question” in *Sony* was not, as the court describes the case, “whether the manufacturers could be held liable for infringement by those who purchased equipment from them in circumstances in which there were many noninfringing uses for their equipment.”³⁰⁴ This was a question, but it was not *the* question. For *Sony* to be liable for contributory infringement, the studios “have the burden of proving that users of the Betamax have infringed their copyright.”³⁰⁵ Fair use was raised as a defense against infringement based on unauthorized time-shifting,³⁰⁶ and the Court considered it. The resulting case law is the Supreme Court’s first interpretation of the newly codified § 107. As a result, *Sony* is just as much a fair use case as it is a contributory infringement case.

Second, just because *Sony*’s “substantial noninfringing uses test” was overruled by the DMCA, it does not automatically follow that *Sony* does not apply. It is important to remember that Corley was accused of trafficking in circumvention measures in violation of § 1201(a)(2), not of infringement, and that the court errs in not recognizing that the scope of § 1201(a)(2)’s language offers an exception for fair use.³⁰⁷ To avoid liability under the proper interpretation of § 1201(a)(2), Corley must show that his intent in posting DeCSS was to make fair use. Proving an individual’s own fair use intent is not even remotely related to showing that a product capable of infringement has substantial noninfringing uses. Thus, if under a proper interpretation of § 1201(a)(2) all Corley must prove is his fair use intent,

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 324 n.170.

³⁰⁴ *See id.* at 323.

³⁰⁵ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984).

³⁰⁶ *See id.* at 420-21.

³⁰⁷ *See supra* Part V.A.2.i-ii.

then there is no reason why he cannot cite to *Sony* in support of his fair use argument.

Reasoning thus, the district court erroneously concludes that Corley's fair use argument is "entirely without merit."³⁰⁸ Under a proper interpretation of § 1201(a), however, the court would have examined Corley's intent in posting DeCSS to his website. That is, did Corley intend for DeCSS to make fair uses of DVD, or did he simply intend to pirate them, or aid other people in pirating them?

B. *United States v. Elcom*

*United States v. Elcom*³⁰⁹ came two years after the *Reimerdes* decision. Its facts are also simple and straightforward, though it differs from *Reimerdes* and *321 Studios* in three respects. First, defendant Elcom was criminally prosecuted, not civilly sued, under the DMCA.³¹⁰ Second, the controversy arises from computer software, not DVDs. Adobe Systems sold a program called the Adobe eBook Reader.³¹¹ This program did two things. It allowed people to purchase and read electronic books (ebooks) on their computers, and it allowed the publishers of the ebooks to set certain usage restrictions on them, such as whether they could be printed or transferred to another computer.³¹² Elcom sold a Windows-based software program known as the Advanced eBook Processor (AEBPR) that allowed a user to remove these use restrictions and enabled the buyer "to engage in 'fair use' of an ebook without infringing the copyright laws."³¹³ Elcom was indicted for violating § 1201(b),³¹⁴ and this case came as a result of his motion to dismiss.³¹⁵

Early in the opinion, the court notes the inherent tension present in § 1201(b) due to its "use of the phrase 'effectively protects a right of a copyright owner'" in its definition of a prohibited device, "because the rights of a copyright owner are intertwined with the rights of others."³¹⁶ For a brief moment, the court seems as though it is going to seize upon the notion that

³⁰⁸ *Reimerdes*, 111 F. Supp. 2d at 324.

³⁰⁹ 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

³¹⁰ See 17 U.S.C. § 1204 (2007).

³¹¹ *Elcom*, 203 F. Supp. 2d at 1117.

³¹² *Id.* at 1117-18.

³¹³ *Id.* at 1118.

³¹⁴ *Id.* at 1119.

³¹⁵ *Id.* at 1117.

³¹⁶ See *id.* at 1121.

copyright holders have no rights in fair uses of their works,³¹⁷ yet it ends its theoretical discussion by quoting the four fair use factors in § 107.³¹⁸

Elcom seizes on this tension in his defense, which is the third way in which this case is different from either *Reimerdes* or *321 Studios*. He does not present a fair use defense. Rather, he argues that under the Due Process Clause of the Fifth Amendment, § 1201(b) "is unconstitutionally vague as applied to [him] because it does not clearly delineate the conduct which it prohibits."³¹⁹

Elcom makes a fairly intricate argument. He begins by reasoning that both "the legislative history and the language of the DMCA establish that Congress did not prohibit the act of circumventing usage control technologies."³²⁰ Because Congress did not prohibit this act, "it also did not ban *all* tools which might be used to circumvent usage control technologies."³²¹ Consequently, "Congress sought to prohibit only those tools which are intended to be used to circumvent usage control technologies for the purpose of copyright infringement" and thus, § 1201(b) "does not provide a constitutionally adequate notice of this prohibition."³²² The government argues in reply that § 1201(b) prohibits all tools that circumvent usage control, regardless of whether they are used to facilitate infringement or enable fair use.³²³ Consequently, the court must "determine whether the DMCA bans trafficking in all circumvention tools, regardless of whether they are designed to enable fair use or to facilitate infringement, or whether instead the statute bans only those tools that circumvent use restrictions for the purpose of facilitating copyright infringement."³²⁴ In the context of Elcom's due process argument, "[i]f all circumvention tools are banned, [then his] void-for-vagueness challenge necessarily fails."³²⁵

Elcom is undoubtedly correct in arguing that Congress did not prohibit circumvention of usage control technologies under § 1201(b); the Senate Report expressly confirms this argument.³²⁶ He is also correct in the next

³¹⁷ See *supra* Part V.B.2.

³¹⁸ *Elcom*, 203 F. Supp. 2d at 1121.

³¹⁹ *Id.* at 1122. This is similar to *Reimerdes* and *321 Studios*. However, Elcom also claims several First Amendment defenses, but these are outside the scope of this Note.

³²⁰ See *id.*

³²¹ See *id.*

³²² See *id.*

³²³ See *id.* at 1123.

³²⁴ *Id.*

³²⁵ See *id.*

³²⁶ S. REP. NO. 105-190, at 29 (1998) ("[W]here a copy control technology is employed to prevent the unauthorized reproduction of a work, the circumvention of that technology would not itself be actionable under section 1201.").

stage of his argument, that Congress “did not ban all tools which might be used to circumvent usage control technologies.” However, his underlying reasoning is faulty. Elcom reasons that Congress did not ban all circumvention tools because Congress did not ban the act of circumventing. This argument may be logical standing alone, but it is invalid within the context of Title 17. Instead, Congress did not ban all circumvention tools because Congress did not ban fair use. This much is evident from the language of § 1201(b)(1)(A)–(C).³²⁷ Elcom’s reasoning erases fair use from § 1201(b). Without fair use, the logical structure of the statute implodes on itself. The results of this will be seen very shortly.

Despite his faulty reasoning, however, Elcom correctly arrives at the third stage of his argument, that Congress sought to prohibit only those tools intended to circumvent for the purpose of infringement. Until this point, Elcom’s argument is nearly identical to the one advanced in Part V of this Note, the only difference being the stated reasons why Congress did not ban all circumvention tools. This is where Elcom’s proverbial house of cards comes crashing down. Because Congress only sought to prohibit circumvention tools intended to infringe, he argues, § 1201(b) does not provide an adequate notice of this prohibition because there is no way to know which tools are lawful. Of course the statute does not provide Elcom with adequate notice, because he has removed fair use from his analysis. The cornerstone-like status of fair use stems, in turn, from its requirement to show intent to make fair use. That is, if an individual circumvents intending to make fair use, then he knows he is not prohibited from doing so, because the provisions that otherwise would prohibit him do not encompass fair use. Likewise, if an individual circumvents intending to infringe, then he knows he is prohibited from doing so, because the provisions that prohibit him encompass infringement. If anything, the faulty reasoning in Elcom’s argument shows the importance and necessity of intent to make a fair use to § 1201(b)(1) and by implication, § 1201(a)(2).³²⁸

The court holds that § 1201(b) “imposes a blanket ban on trafficking in or the marketing of any device that circumvents use restrictions.”³²⁹ It reads sections 1201(b)(2)(B) and 106 together, concluding that the statutory language is clear enough in not distinguishing circumvention devices designed for fair use purposes from circumvention devices designed for infringement purposes.³³⁰ Because there is no ambiguity in the language, it

³²⁷ See 17 U.S.C. § 1201(b)(1)(A)–(C) (2007) (“[P]rotects a right of a copyright owner under this title. . . .”); see also *supra* Part V.B.2.

³²⁸ See *supra* Part V.B.2.; see *supra* Part V.A.2.ii.

³²⁹ *Elcom*, 203 F. Supp. 2d at 1124.

³³⁰ *Id.*

is unnecessary to consider the legislative intent behind the provisions in question.³³¹ Denying Elcom's motion for dismissal, the court writes that "[f]air use of a copyrighted work continues to be permitted, as does circumventing restrictions for the purpose of engaging in a fair use, even though engaging in certain fair uses of digital works may be made more difficult if tools to circumvent use restrictions cannot be readily obtained."³³²

The court correctly begins its analysis by reading § 106 in conjunction with § 1201(b) to determine the meaning of "right of a copyright owner." The court interprets § 1201(b)(2)(B) in conjunction with § 106 to mean that "a technological measure effectively protects a right of a copyright owner . . . if . . . in the ordinary course of its operation, [it] prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under [Section 106]."³³³ The court errs however, in not determining the meaning of the "right of a copyright owner under this title." Thus, the court only considers how the provisions serve the copyright owner, not how they serve the greater public. That is, the court recognizes that § 1201(b)(2)(B) prevents individuals from exercising the rights of a copyright holder, but it doesn't recognize that a fair use of a work, present in the phrase "under this title," prevents the copyright holder from exercising his rights against the people. Thus, it erroneously concludes that the statute does not distinguish devices designed to circumvent for fair use from those designed to circumvent for infringement.

C. *321 Studios v. MGM Studios, Inc.*

*321 Studios v. MGM Studios, Inc.*³³⁴ was decided four years after *Reimerdes*, in the same district as *Elcom*. As of this writing, it was also the last significant decision to interpret § 1201 in the context of DVD decrypting software. This case came before the court on seven different motions made by defendants and counterclaimants, including a motion for partial summary judgment and a motion for dismissal.³³⁵ The facts, however, are simple and unobtrusive. 321 Studios sold two software programs, DVD Copy Plus and DVD-X Copy, which allowed users to make backup copies of commercial DVDs by circumventing the DVD's CSS encryption.³³⁶ In 2002, 321 Studios filed a complaint for declaratory relief, seeking a judgment that its actions in selling

³³¹ *Id.*

³³² *See id.* at 1125.

³³³ *Id.* at 1124.

³³⁴ 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

³³⁵ *See id.* at 1090.

³³⁶ *See id.* at 1089.

the two software programs either did not violate the DMCA and the Copyright Act or that certain provisions of the DMCA were invalid.³³⁷ Naturally, the movie studios (referred to here as MGM for sake of simplicity and clarity) who owned the copyrighted material objected to judgment in favor of 321 Studios.³³⁸

The court first inquires into provisions specific to § 1201(a)(2). MGM argues that 321 Studios' software violates each of the three prohibitions of § 1201(a)(2).³³⁹ 321 Studios argues that it cannot violate § 1201(a)(2) because "circumvent by definition is done without the authority of the copyright holder," and it "does have the authority of the copyright holder because its product only works on original DVDs, and the purchaser of the DVD has authority of the copyright holder to bypass CSS."³⁴⁰ The court holds that "the purchase of a DVD does not give the purchaser the authority of the copyright holder to decrypt CSS."³⁴¹ It explains that this argument is the result of misreading § 1201(a)(3)(A), which "exempts from liability those who would decrypt an encrypted DVD with the authority of a copyright owner, not those who would view a DVD with the authority of a copyright owner."³⁴²

Whether 321 Studios has misread § 1201(a)(3)(A) is irrelevant; it did not have to read § 1201(a)(3)(A) at all. The *321 Studios* court, like the *Reimerdes* court, misread § 1201(a) by reading § 1201(a)(2) separately from § 1201(a)(1), not as supplementing it, as Congress intended.³⁴³ By reading § 1201(a)(2) separately from (a)(1), both 321 Studios and the court missed the House's express intent that "an individual . . . would be able [to circumvent] in order to make a fair use of a work which he or she has acquired lawfully."³⁴⁴ Then, as long as acted with the requisite fair use intent in selling its software, it would not have been liable under § 1201(a)(2) because of the limitations on the scope of the language.³⁴⁵ In addition, 321 Studios would not have to make the cumbersome argument that the purchaser of a DVD has the authority of the DVD's copyright holder to decrypt the DVD.

The court next inquires into provisions specific to § 1201(b)(1). 321 Studios makes a three step argument: First, CSS is not a copy control

³³⁷ See *id.* at 1089-90.

³³⁸ See *id.* at 1090.

³³⁹ See *id.* at 1096.

³⁴⁰ See *id.*

³⁴¹ *Id.*

³⁴² *Id.* (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001)).

³⁴³ See H.R. REP. NO. 105-551, pt. 1, at 10 (1998); S. REP. NO. 105-190, at 28 (1998); see *supra*

Part V.A.1.

³⁴⁴ See H.R. REP. NO. 105-551, pt. 1, at 18; see also *supra* Part V.A.2.i.

³⁴⁵ See *supra* Part V.A.2.ii.

measure since it controls access to DVDs but does not prevent copying DVDs; second, § 1201(b)(1) is concerned only with illegal copying; third, because the programs circumvent only CSS, and CSS is not a copy control measure, then § 1201(b)(1) does not apply at all to it.³⁴⁶ Concluding that 321 Studios both misreads the statute and misstates the purpose of CSS, the court holds that CSS is a copy control scheme and, therefore, § 1201(b)(1) does apply.³⁴⁷

321 Studios then argues that, even if § 1201(b)(1) does apply, its software does not violate it "because the primary and intended use of the software does not violate any right of the copyright holder."³⁴⁸ The court responds by saying that the plain meaning of the statute "makes it clear that its prohibition applies to the manufacturing, trafficking in and making of devices that would circumvent encryption technology, not to the users of such technology," and holds that the "downstream use" of the copyrighted material is not a defense to § 1201(b)(1).³⁴⁹

321 Studios may have started down the right street when it attempted to argue that § 1201(b)(1) was only concerned with illegal copying, and the primary use of its software did not violate any copyrights, but it soon turned down a wrong alley. It also tried to make the exact same arguments about CSS that Corley did in *Reimerdes*, and, as in *Reimerdes*, the court rejected them.³⁵⁰

321 Studios should have argued that because the prohibitions in § 1201(2)(b) only protect "a right of a copyright owner under" Title 17 and because the fair use of a work lies outside of the copyright holder's rights, the language of the three prohibitions does not encompass fair uses of a work.³⁵¹

321 Studios then argues that its software does not violate § 1201(b)(2) because it does not "circumvent" encryption.³⁵² The court replies that "while 321's software does use the authorized key to access the DVD, it does not have authority to use this key, as licensed DVD players do, and it therefore avoids and bypasses CSS," and holds generally that § 1201(b)(1) does apply to 321's DVD copying software.³⁵³

³⁴⁶ See 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085, 1096-97 (N.D. Cal. 2004).

³⁴⁷ *Id.* at 1097.

³⁴⁸ See *id.*

³⁴⁹ See *id.* at 1097-98.

³⁵⁰ See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 317-19 (S.D.N.Y. 2000).

³⁵¹ See *supra* Part V.B.2.

³⁵² 321 Studios, 307 F. Supp. 2d at 1098.

³⁵³ See *id.*

The court then inquires into the common provisions of § 1201(a)(2) and § 1201(b)(1). With regard to the first provision of both subsections, the court holds that because part of 321's software is "solely for the purpose of circumventing CSS, this portion of the software, therefore, violates 17 U.S.C. § 1201(a)(2)(A)."³⁵⁴ While 321 Studios claimed that this portion of the software was just one feature out of many, the court responded that "only that specific feature is challenged here, and all that it does and was designed to do is to circumvent CSS."³⁵⁵

With regard to the third provision of both subsections, 321 Studios claims that the prohibition on advertising violated its First Amendment rights.³⁵⁶ The court simply responds that the First Amendment does not protect commercial speech that involves illegal activity, and that it finds the CSS circumnavigation portion of the software to be illegal.³⁵⁷

Aside from any possible fair use defenses via the scope of the statutory language,³⁵⁸ this part of the court's opinion seems ominous for several reasons, not the least of which being that the court considered the prohibitions of § 1201(a) and (b) together, not separately. Perhaps this is only the beginning of the judicial blurring of these provisions.³⁵⁹ This blurring is especially troublesome in light of the fact that an individual can be sued civilly and criminally under § 1201(a) and § 1201(b), yet many actions will be subject to challenge only under one of the subsections.³⁶⁰

In addition, the court has set a dangerous precedent in interpreting § 1201(a)(2)(A) as strictly as it did. By allowing one feature of a larger software program to be called into question without the rest of it, the court has encouraged possible plaintiffs to be as hyper-technical as possible in defining what is and what is not at issue. This in turn could lead back to more line blurring between § 1201(a) and § 1201(b), as plaintiffs may be encouraged to sue under as many theories of liability as possible. But more presently, this urge to be hyper-technical in defining possible violations of the statute calls into question the House's own examples of a videocassette recorder or a computer as objects that are not primarily designed to circumvent

³⁵⁴ *Id.*

³⁵⁵ *See id.*

³⁵⁶ *See id.*

³⁵⁷ *Id.*

³⁵⁸ *See generally supra* Part V.

³⁵⁹ *See generally* Reese, *supra* note 225 (exploring the possible impact on copyright holders, businesses, the law, and consumers of combined access and rights controls in light of the different levels of statutory protection afforded to the controls).

³⁶⁰ *See* Nimmer, *supra* note 197, at 689 (quoting S. REP. NO. 105-190, at 12 (1998)).

technological provisions.³⁶¹ If one feature of a larger piece of software can be called into question, the same can be said for hardware.

VII. CONCLUSION

Copyright law is more than books, songs, or movies. It is about how we express ourselves in relation to society as a whole. The Digital Age has brought about great changes in consumer information and communication with others. And it shows even more promise.

For centuries, the goal of our copyright jurisprudence has been to enhance the public welfare by ultimately encouraging new ideas and ways of thinking. Four thousand years ago man wrote on stone; two thousand years ago he wrote on papyrus; a thousand years ago he wrote on parchment; and one hundred years ago he wrote on paper. Now we are writing on electronic paper with electronic ink, which is stored inside the computer as a series of positive and negative charges. We can read the inscriptions inside Egyptian pyramids and on Roman temples. But a DVD player purchased in England cannot play a DVD purchased in the United States.

As a society, we ought to continue to encourage the broad dissemination of ideas through all possible means. As a society, we ought also to continue to protect and compensate those who create and disseminate their ideas. But as a society, we cannot afford to lock away our ideas and expressions.

³⁶¹ See H.R. REP. NO. 105-551, pt. 1, at 10 (1998).