You Say You Want a Revolution:  
Music & Technology—Evolution or Destruction?  

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TABLE OF CONTENTS

I. YOU TELL ME THAT IT’S EVOLUTION—YEAH; WE ALL WANT TO CHANGE THE WORLD ........................................................... 248

II. CHANGE THE CONSTITUTION OR CHANGE YOUR HEAD .................................................. 250
   A. Axiom in the “Purpose”? .............................................................................. 251
   B. The Initial Debate: The Federalist Papers .............................................. 251
   C. Artists’ Rights Theories of Copyright Protection .................................. 253
   D. The “Social Planning” Approach ............................................................. 254
   E. The Reward Theory of Copyright Protection .......................................... 254
   F. Utilitarian Theories of Copyright Protection ........................................... 255
   G. The State of the Union ............................................................................ 256
   H. The Purpose of Fences: Copyright Boundaries that “Promote the Arts” ........................................................................... 257
      1. How “Limited Times” Serves the Public Interest ............................. 258
      2. The Originality Requirement: Property Lines Are Not Confined Around that Which Is Free for All .................................. 260
      3. Fair Use: The Public’s Right to Encroach ............................................ 261
   I. Distribution and First Sale: Limiting the Copyright Owner’s Boundary Line After Lawful Sale ............................................. 263

III. BUT WHEN YOU TALK ABOUT DESTRUCTION, DON’T YOU KNOW THAT YOU CAN COUNT ME OUT? ................................................. 266

1. THE BEATLES, Revolution 1, on The White Album (Capitol Records 1968).

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A. The Rhetoric of "Piracy": We Have Heard the Cries Before
   As the Salamander Eats Its Own Tail................................. 267
B. Anti-Piracy Measures: Release the Mechanical Hounds......... 269
C. Is Piracy Leading to the Destruction of Consumer Rights?..... 271

IV. IS THE INSTITUTION ASKING FOR A CONTRIBUTION OR SHOULD YOU
   FREE YOUR MIND INSTEAD?.................................................. 272
A. Sound Recordings Under Copyright Law ................................ 272
B. The Lay of the Land: Laws Surrounding Sound Recordings
   and Musical Performances .................................................. 273
C. Civil and Criminal Copyright Infringement Under
   the 1976 Act ...................................................................... 275
D. The Audio Home Recording Act ........................................... 276
E. The No Electronic Theft Act ................................................ 277
F. The Computer Fraud and Abuse Act..................................... 277
G. The Digital Millennium Copyright Act .................................. 278
H. High Fidelity: Where Is Consumer Fair Use in the DMCA?..... 280

V. YOU SAY YOU HAVE A REAL SOLUTION—WE'D ALL LOVE
   TO SEE THE PLAN .................................................................. 284
A. P2P Prevention ..................................................................... 286
B. The Balance Act .................................................................. 286
C. The Digital Media Consumers' Rights Act ............................ 287
D. Security Standards .............................................................. 288
E. Market Solutions ................................................................. 289
F. Strategic Alliances ............................................................... 289
   1. Artist Freedom ................................................................. 291
   2. The Pay-Per-Download Model .......................................... 292
   3. Licensing Options ......................................................... 292

VI. DON'T YOU KNOW IT'S GONNA BE ALRIGHT? ....................... 293

I. YOU TELL ME THAT IT'S EVOLUTION—YEAH;
   WE ALL WANT TO CHANGE THE WORLD

Gateway's recent "RipBurnRespect" advertising campaign subtly placed such
up terms as copyright protection, digital encryption, and fair use in the background of
sexy commercials playing during afternoon television programming. It seems that
even daytime programming has succumbed to the seduction of copyright law. Once a
tired, dust-covered text resting on the shelves next to the tax code, copyright law is in
the middle of glossy ads filled with vibrant colors and images flashing quicker than a

   ("Gateway's slogan of RipBurnRespect reflects its dual purpose of promoting consumers' rights to
   make personal copies of the songs they own without infringing on copyrights.")
beating heart. Tired and ignored, copyright law has been awakening with a vengeance, placing it on the list of nifty things to sound heady about over a scotch on the rocks. Yes, copyright law. We are all well-acquainted with the "copy" function in Microsoft Word and the ease of downloading images, text, music, and films online. It is not surprising that the ability to create a perfect copy with the click of a mouse has stirred the sleeping beast. In the realm of sound recordings, even one copy is equal to infringement.

In the wake of brilliantly written articles and books addressing the phoenix that is copyrights, this discussion humbly stops, looks back, and asks "Why?" merely as an exercise in masturbatory thinking. Nothing new or useful\(^3\) is likely to emerge from this discussion except possibly the ability to throw into the conversation fun words like "piracy" and "anti-circumvention." So, when it boils down to rip, mix, and burn or "RipBurnRespect,\(^4\) how should we adjust to the needs of the market and the needs of the consumer in light of the constitutional purpose behind the monopoly grant?

This discussion looks at whether the purposes behind the exclusivity grant are being served through recent copyright legislation. With regard to sound recordings, it argues that the economic incentive has shifted away from the incentive to create and towards an incentive to distribute.\(^5\) Although broad dissemination may serve the public good, that service is limited by access to monopoly-priced goods for an extended period of time and expansion of copyrights. The statistics used to support passage of legislation are related to piracy concerns, which are disincentives to distribution. The incentive to distribute sound recordings may conflict with the Constitution when the balance tips heavily in favor of the market and away from the public good. In light of the expanse of the copyright regime, this discussion explores whether laws should be passed on the reactive basis, in response to a specific technology, or instead on a proactive basis, founded on the principles that underpin copyright law.

In Part II, this discussion looks to the policies underpinning the copyright grant. Although other modalities exist, the United States consistently embraces a utilitarian philosophy. The ability to limit the rights of a copyright owner in order to provide the quid pro quo benefit to society is an important aspect of utilitarian copyright philosophy. In order to serve the purposes of the Constitution, copyright law doctrines such as the requirement for originality, limited times, fair use, and the first sale doctrine all combine to fence in the copyright holders' interests.

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\(^3\) This writing is not about patents; therefore new and useful is not required. Instead, possession of some creative spark is all that is required, "no matter how crude, humble or obvious it might be." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).


\(^5\) The incentive to create stems from the copyright grants, whereas the right to distribute is one of the exclusive rights afforded to copyright holders under 17 U.S.C. § 106(3) (2000).
In Part III, the discussion looks at the implications of sound recordings piracy and asserts that laws should parse out consumers from pirates. A lawful purchaser has rights upon transfer of a tangible good and their personal property right must be preserved in light of piracy legislation. The purpose of copyright law should then serve as a beacon of guidance to separate lawful from unlawful uses of sound recordings.

In Part IV, the existing legal framework of copyright enforcement is explored. Piracy enforcement tools already exist in the copyright law with built-in consumer protection until the passage of the Digital Millennium Copyright Act ("DMCA"). The DMCA raises the specter of overbroad legislation by sweeping together pirate and consumer, diminishing access to the public domain and potentially diminishing personal property interests in tangible goods.

Through looking at proposed legislation and the market response, Part V explores the ways that our society has responded. The need for new, technology-specific laws is lacking. Instead, the framework needs to enable consumer protection, fair use, and access while balancing the economic incentive to create. That is the constitutional quid pro quo reflected in years of jurisprudence. Full deference to the market will not ensure compliance with the constitutional purpose; instead, government intervention is appropriate when the purposes behind copyrights are undermined.

II. CHANGE THE CONSTITUTION OR CHANGE YOUR HEAD

What is the purpose behind granting a copyright? Through a totally unscientific poll, the following responses were given to that question:

"To protect the creator of material from getting 'ripped off. The writer, performer, painter... should be compensated for their time and effort before it gets used for a beer commercial, or to prevent it from being used in a way they object to." 8

"My general idea about the purpose of copyright is to protect the ideas of artists. Since artists should strive to produce "original" works (I guess that is more of an opinion), the copyright laws help people reach that end." 9

"I would say that the purpose of a copyright is to protect the ownership rights and privileges of non-tangible assets, such as music, and to provide

7. See id.
8. Thanks, Drew.
a basis to determine infringement or abuse, as well as to establish some sort of registry for reference.”

If it is not enough to hear what my friends think the purpose behind the copyright grant is, this discussion explores the historical purpose of the copyright grant. The U.S. Constitution provides that “Congress shall have Power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries....” This clause states a purpose: To promote the progress of “useful Arts,” which is fulfilled by securing exclusive rights for the author for a limited time. From the simple language of the Constitution, two conflicting views have been created—one regarding artists rights and the other regarding economic rights.

A. Axiom in the “Purpose”?

The plain meaning of “purpose” is defined as “an intended result, something for which effort is being made.” The “purpose” behind a governmental grant of an exclusive monopoly for a period of years shapes the subsequent formation and development of the law. If the purpose is solely for the author to reap the benefit, the legal regime will look much different than one with a purpose of providing societal benefit balanced against incentive. This discussion provides a quick look at the philosophical positions that underlie our copyright law, then discusses the approach that the courts have taken in the past.

B. The Initial Debate: The Federalist Papers

The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals.

10. And thanks, Laura.
12. Id.
14. To do justice to this area, a full exploration of all theories would be necessary. The author suggests using the law review articles cited infra as a spring board for further research.
The fear of a monopoly was overshadowed by the desire to permit society to improve on works in the public domain. As this article indicates, creativity is sparked when ideas are freely marketed, enabling subsequent improvement.

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature. . . . Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility. . . . Considering the exclusive right to invention as given not of natural right, but for the benefit of society, I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not.16

Jefferson eschewed the idea that copyrights could be property as counterinfluence to the free flow of information to society.17 In his view, the ability to restrict distribution of expression through monopoly pricing and limiting access was counterproductive to free exchange and the betterment of society.18

Madison noted that the Constitution had "limited them to two cases, the authors of Books, and of useful inventions."19 He thought that, in those two cases, a monopoly is justified because it amounts to "compensation for" an actual community "benefit" and the monopoly is "temporary"—the original term being fourteen years.20 Madison concluded that, under that limitation, a sufficient recompense and encouragement may be given.21 But he warned in general that monopolies must be "guarded with strictness against abuse."22

17. Id.
18. Id.
20. Id.
21. Id.
22. Id.
C. Artists’ Rights Theories of Copyright Protection

The Lockean labor approach to copyright law is premised on the idea that intellectual property is a natural right. Under this approach, copyrights are based on raw materials such as facts. Society holds raw facts in common or, in theory, these materials are unowned. In return, an author has a natural property right to the expression created from unowned or societal resources so long as no net harm results from the creation or “there is enough and as good left in the common for others.” This philosophy comports a duty to the government to enforce and protect the natural right.

Kant and Hegel’s “Personality” approach to copyright law embraces the property interest created because it is a satisfaction of some fundamental human need. Copyrights are justified for protection of “moral rights;” the author expresses their will by claiming externalities as individual property, which is an activity central to personhood. Moral rights in a copyright are an extension of the protection afforded to an individual’s identity. Under this approach, copyrights should not be in the control of someone other than the author. Copyright protection would enable social benefits to flow from creating a society conducive to creative endeavor. Under the Berne Convention, this is implemented through the existence of moral rights, which sit separate from other copyrights. These moral rights stay with the author even after the item is sold. The United States has not adopted moral rights in relations to sound recordings.

Under the constitutional grant and subsequent common law construction, the artists’ interests in their creations are secondary considerations to the goal of promoting the “Progress of Science and useful Arts.” The immediate effect of our

24. Id.
25. Id.
26. Id.
27. Id.
29. Id.
31. Id.
32. Fisher, supra note 23.
33. Roeder, supra note 30, at 556-57.
34. Id. at 556.
copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. The enactment of the 1909 copyright statute included language in the House Report rejecting a natural right theory underpinning a copyright grant.

D. The "Social Planning" Approach

Social Planning looks to the efforts of a government to create regulations that "advance a vision of a just and attractive culture." Although similar to utilitarian thought, social planning theory looks to a desirable society, which sweeps broader than concepts of social welfare. Factors other than economics drive the policy, including consumer welfare, artistic tradition, respect, and consumers being active participants in shaping the world of ideas and symbols. Copyrights serve the fostering of a robust society by "provid[ing] . . . incentive[s] for creative expression. . . . thus bolstering the discursive foundations for democratic culture. . . . The second function is structural. Copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.

E. The Reward Theory of Copyright Protection

Under a reward theory, the government would not grant a monopoly to the inventor, but instead it would pay the inventor a sum of money based on the invention. The reward system serves the twin, constitutional purposes of a governmental grant, namely the incentive to innovate balanced against optimal dissemination. Inventors are given incentive to create through the receipt of a monetary award such that society receives the invention at a cost lower than monopoly pricing. The government would then make the information available to everyone at the cost of dissemination and the invention falls into the public domain.

40. Id.
41. Id.
42. Id.
43. Calandrillo, supra note 38, at 306-07.
44. Id. at 307.
45. Id.
Since inventions are typically incremental improvements on other inventions, the reward system could remove the chilling effect of a monopoly on future inventions.

The original draft of what ultimately became the text of the Constitution indicated that government grant money could be offered instead of the government-conferred monopoly, but the quid pro quo limited monopoly prevailed.

F. Utilitarian Theories of Copyright Protection

Under the "utilitarian" approach, the ease of unauthorized copying of copyrightable material may chill the creators from further expression, out of fear that development costs of expression will not be recoverable when a pirate sells unauthorized copies much cheaper due to the lack of initial expense required. As a result, a consumer would buy the cheaper, unauthorized copy, leaving the creator in the cold for recovering money on the investment. Copyright law seeks to avoid this end result by enabling a legal monopoly in the creation of copies; the copyright owner then has the ability to recover initial costs without fear of unauthorized copying.

In short, the only boon, which could be offered to inventors to disclose the secrets of their discoveries, would be the exclusive right and profit of them, as a monopoly for a limited period. And authors would have little inducement to prepare elaborate works for the public, if their publication was to be at a large expense, and, as soon as they were published, there would be an unlimited right of depredation and piracy of their copyright.


48. Id.

The utilitarian approach seeks to create a balance between the costs and benefits of copyright protection. The benefit is the ability to provide incentives for creation through the grant of exclusivity balanced against the costs that flow as a consequence of granting a lawful monopoly. Specific to copyrights, monopoly costs may include low societal use due to high monopoly pricing, the deadweight caused by a monopoly, and the resources required for enforcement.

G. The State of the Union

The United States Supreme Court has arguably applied a utilitarian approach to copyrights in this area of jurisprudence. The goal of promoting the "useful Arts" has been seen as conferring a benefit on society through the protected release of creative expression. When one author releases his or her work, it stimulates others to view it and the surrounding world with a new perspective, ultimately prompting further creation. As a result, the Supreme Court has stated that the limited monopoly in Article I, Section 8 is not "primarily designed to provide a special private benefit."

Copyright law makes reward to the owner a secondary consideration. ... "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.

While some girls may listen and daydream of writing songs about boys like Britney Spears (or insert name of pop music chart topper here), others listen and respond directly by creating gritty, crunchy political works. The issue is not whether "creative genius" was released for the public, but instead whether adequate assurances exist that society is free to access all forms of works, to choose for itself what is "creative genius," and from what pool of inspiration(s) to draw upon. "Creative work is to be encouraged and rewarded, but private motivation must

51. Id.
52. Id.
54. Id. at 428-29.
55. Id. at 429 (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)).
ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.\textsuperscript{56}

In light of the expansion of rights, the duration to exercise those rights, and the ability to lock up material and prohibit access entirely, the reign of copyrights may seem to have become imperialistic. To stem the tide of imperialism, "Congress . . . has been assigned the task of defining the scope of the limited monopoly that should be granted . . . in order to give the public appropriate access to their work product."\textsuperscript{57}

In regard to copy protection and consumer rights, Landes and Posner noted: "Copyright protection . . . trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law."\textsuperscript{58}

Although related to patents, Justice O'Connor stated: "Taken together, the novelty and nonobviousness requirements express a congressional determination that the purposes behind the Patent Clause are best served by free competition and exploitation of either that which is already available to the public or that which may be readily discerned from publicly available material."\textsuperscript{59} Copyrights stem from the same constitutional grant and serve the same constitutional purpose. Although "usefulness," "novelty," and "enablement" are terms that copyright scholars may eschew, there are similar limitations found in copyrights, namely the exclusivity of rights for a limited time based on rewarding expression, not ideas and fair use. Taken together, these doctrines provide fences for copyrights.

H. The Purpose of Fences: Copyright Boundaries that "Promote the Arts"

The policies underpinning the public's access to works in the public domain and consumers' right to fair use provide significant fencing around the monopoly balance, as copyright does not accord the "owner complete control over all possible uses of his work."\textsuperscript{60} Instead, the act grants the "holder 'exclusive rights' to use and to authorize the use of his work in five qualified ways" subject to fair use and the public domain.\textsuperscript{61} Works in the public domain act as a defense to a plaintiff's showing of valid copyright ownership, whereas fair use acts as a defense to misappropriation.

\textsuperscript{56} Id. at 431-32 (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

\textsuperscript{57} Id. at 429.

\textsuperscript{58} Landes & Posner, supra note 47, at 326.


\textsuperscript{60} Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984).

\textsuperscript{61} Id. at 432-33.
1. How "Limited Times" Serves the Public Interest

"The realm of the public domain is a big thinker's sandbox, a place where ideas and thoughts lie around waiting to be used by a new generation.\textsuperscript{62} "The 'reward' is a means, not an end... the copyright term is limited so that its beneficiaries—the public—'will not be permanently deprived of the fruits of an artist's labors.'\textsuperscript{63} The quid pro quo for a "Limited Times" monopoly is the ability of the public to access the materials after the copyright expires and falls into the public domain.\textsuperscript{64} In James Madison's view, the grant is "a compensation for a benefit actually gained to the community as a purchase of property."\textsuperscript{65}

For present purposes, then, we should take the following as well established: Copyright statutes must serve public, not private, ends; that they must seek "to promote the Progress" of knowledge and learning; and that they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration of a copyright's "limited Tim[e]"—a time that (like "a limited monarch") is "restrain[ed]" and "circumscribe[d]," "not [left] at large."\textsuperscript{66}

The following quote indicates the importance of a public domain filled with pre-existing, protected materials, as opposed to the universe of facts not subject to protection. "The public domain refers to that creative content which anyone can use without the permission of the content's creator.... The public domain is important because it frees creators to build upon and cultivate our past without unnecessary or harmful restrictions."\textsuperscript{67}

The public domain can be viewed as either "belonging to the public as a whole"—"an area set aside by a government for public ownership.... in this case, [the government] represents the interest of the public."\textsuperscript{68} Another possible definition advanced is that the public domain is "a set of rights of access... information, the source of which is available to anyone."\textsuperscript{69} In the following discussion regarding the purposes of a copyright grant and the public domain, the incentive or reward provided to the author is a common theme.

\textsuperscript{63} Eldred v. Ashcroft, 123 S. Ct. 769, 802 (Breyer, J., dissenting) (quoting Stewart v. Abend, 495 U.S. 207, 228 (1990)).
\textsuperscript{64} Brief for Petitioner at 10, Eldred (No. 01-618-CFX).
\textsuperscript{65} Id. at 16 n.5 (quoting James Madison, \textit{Aspects of Monopoly One Hundred Years Ago}, 128 HARPER'S MONTHLY MAGAZINE 490 (1914)).
\textsuperscript{66} Eldred, 123 S. Ct. at 803-04 (Breyer, J., dissenting).
\textsuperscript{69} Id.
Utilizing a natural right purpose for granting copyright interests, as one author points out, a public domain is not equivalent to the Lockean common because "The Lockean common contains undeveloped materials, whereas a public domain is composed of developed goods." Instead, the Lockean common involves raw materials that may be developed, so long as the development leaves enough for the next person. It does not involve a collection of developed materials. As "property rights are usually regarded as legitimately the exclusive domain of the property owner as long as others have access to an amount of resources to maintain their production at the level before the property became private," the creator is entitled to exclusive control and exploitation. Under such an approach, the public domain would consist of ideas and facts, not pre-existing works. As such, the idea of incremental creativity developments would be difficult to construe, as society would not receive the benefits of a new invention. Indeed, society would not be in a better position than it was before. Another difficulty could be establishing the moment in time when the public domain was fixed.

The personality approach would not allow access to a public domain of pre-existing protected works. If the assumption behind personality type protection is "the idea that a creative act is an extension of an individual's identity and therefore ought to be completely controlled by the creator," the public domain of pre-existing work would not exist.

A supple public domain is the central justification for protecting intellectual property under a social planning approach. The development of a "just and attractive culture" nurtured by the government would require shortening copyright terms "thereby increasing the size of the 'public domain' available for creative manipulation." This addresses the public domain as a depository of pre-existing protected content. Under a rewards theory approach, public domain concerns would not be implicated, as, once the inventor is given their reward, the information falls into the public domain for further societal development.

71. Id.
73. Id.
74. See generally id.
75. See generally id.
76. See generally id. at 458-59.
77. See generally Cohen & Noll, supra note 50, at 457.
78. Id. at 455.
79. Fisher, supra note 23.
The underlying tenet of utilitarianism is "maximizing aggregate well being,"\textsuperscript{80} or "translating the Benthamite ideal of the 'greatest good of the greatest number,'"\textsuperscript{81} which requires a public domain of pre-existing content protected works. The utilitarian approach "regards intellectual property rights as both flowing from a stock of prior innovations and contributing to a common societal end."\textsuperscript{82} As such, access to the "stock of prior innovations" is a necessary element of the copyright grant served through the limited times requirement of a lawful monopoly.\textsuperscript{83} By default, under a utilitarian approach, the "limited times" requirement makes the public domain an area "set aside by a government for public ownership" since, without the limited monopoly, the public would have an unfettered "right of access."\textsuperscript{84}

The Supreme Court recently upheld the Copyright Term Extension Act ("Copyright Act") based on factors such as copyright harmonization under the Berne Convention and the fact that a limited time is a defined term of years.\textsuperscript{85} However, Justice Stevens' dissenting opinion noted:

We have recognized that these twin-purposes of encouraging new works and adding to the public domain apply to copyrights. . . . By failing to protect the public interest in free access to the products of inventive and artistic genius—indeed, by virtually ignoring the central purpose of the Copyright/Patent Clause—the Court has quitclaimed to Congress its principal responsibility in this area of the law.\textsuperscript{86}

Once the presence of a utilitarian purpose is manifest, the debate turns to the scope of protection granted in the name of the "twin purposes." "Distinctions, however, are often matters of degree."\textsuperscript{87}

2. The Originality Requirement: Property Lines Are Not Conferred Around that Which Is Free for All

The "\textit{sine qua non} of copyright is originality."\textsuperscript{88} The constitutional call for "originality requires independent creation plus a modicum of creativity."\textsuperscript{89} This threshold requirement serves the public interest through a concerted refusal to

\textsuperscript{80} Cohen & Noll, supra note 50, at 459.
\textsuperscript{81} Fisher, supra note 23.
\textsuperscript{82} Cohen & Noll, supra note 50, at 459.
\textsuperscript{83} \textit{See generally} id. at 460-61.
\textsuperscript{84} \textit{See generally id.}
\textsuperscript{86} \textit{Id.} at 793, 801 (Stevens, J., dissenting).
\textsuperscript{87} \textit{Id.} at 801 (Breyer, J., dissenting).
\textsuperscript{89} \textit{Id.} at 346.
monopolize that to which the public already has unfettered access. Additionally, originality promotes the goal of providing economic incentives through exclusivity to authors who feel the "personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity... and a very modest grade of art has in it something irreducible, which is one man's alone." The requirement of originality balances both the creator's economic incentive as well as the ability of the public to have continued access to works, phrases, songs, and sayings that are commonplace and part of day-to-day life without fear of infringement.

3. Fair Use: The Public's Right to Encroach

Q. The protection of intellectual property is justified. But most of the copyright laws also allow fair use. If your system prevents users from making MP-3 files and copying them to their mobile device, doesn't your system undermine the fair use principle?

A. No, quite the contrary. In this age of digital media, fair use is being redefined by the courts and the legislatures.

The public domain serves as a well of inspiration for society to build on incrementally, whereas fair use enables free discourse and commentary to theoretically enable a fuller, richer society. However, with the Copyright Term Extension Act and the implied need for harmonization through the adoption of the Berne Convention, it is likely that fair use will be the main route for arguments showing incremental improvements from inspiration, as work in the public domain will remain inaccessible for the lifetime of the inspired artist.

The Copyright Act provides a safety net for the constitutional balancing act given the permission to "infringe" found in the fair use provision. Fair use is the "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent" when it arguably provides for a better society. Faced with an allegation of infringement, a person may assert fair use as a defense when the material was used "for purposes such as criticism, comment, news

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95. Id. at 549 (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).
reporting, teaching, scholarship, or research.\textsuperscript{96} The court will then consider four statutory factors to avoid "rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."\textsuperscript{97} The congressionally-stated factors for consideration of whether use is fair are:

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.\textsuperscript{98}

The application of the four factors is ad-hoc and, as such, the path to infringement is a trap for the unwary, lacking any bright-line path of assurance that fair use will be found by a court. The factors are "weighed together, in light of the purposes of copyright" law.\textsuperscript{99} However, as noted in the legislative history, no bright-line rule should be possible because the "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."\textsuperscript{100} This loose standard enables the court to apply the doctrine in light of emerging and changing technological backdrops.\textsuperscript{101}

The legislative history for the Copyright Act of 1976 states "the judicial doctrine of fair use, one of the most important and well established limitations on the exclusive right of copyright owners...[is] given express statutory recognition for the first time in section 107."\textsuperscript{102} The Congressional intent behind adoption of the language "fair use 'by reproduction in copies of phonorecords, or by any other means'" was stated to apply the doctrine to the emerging technology of "photocopying and taping as to older forms of use."\textsuperscript{103}

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"\textsuperscript{104} However, copyright does not accord the owner complete control over all possible uses of his or her work. Instead, the Act

\begin{itemize}
\item \textsuperscript{96} 17 U.S.C. § 107 (2000).
\item \textsuperscript{97} Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).
\item \textsuperscript{98} 17 U.S.C. § 107.
\item \textsuperscript{99} Campbell, 510 U.S. at 578.
\item \textsuperscript{101} Id.
\item \textsuperscript{102} Id. at 65, reprinted in 1976 U.S.C.C.A.N. at 5678.
\item \textsuperscript{103} Id. at 66, reprinted in 1976 U.S.C.C.A.N. at 5679.
\item \textsuperscript{104} Mazer v. Stein, 347 U.S. 201, 219 (1954).
\end{itemize}
grants the copyright holder "exclusive' rights to use and to authorize the use of his or her work in five qualified ways," subject to fair use and the public domain.\textsuperscript{105}

This is because the "monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."\textsuperscript{106} The incentive given to the author is intended to "induce release to the public of the products of his creative genius."\textsuperscript{107} The fair use doctrine strikes this delicate balance a majority of the time and indicates how jurisprudence can be developed proactively when grounded in principles, not technology.

I. Distribution and First Sale: Limiting the Copyright Owner's Boundary Line After Lawful Sale

"The power, in its terms, is confined to authors and inventors; and cannot be extended to the introducers of any new works or inventions."\textsuperscript{108} In regard to sound recordings, the power may be extended to the labels and distributors as introducers of new sound recording works.

The right of distribution is the third enumerated right of exclusivity granted to the copyright holder under Section 106.\textsuperscript{109} The right of distribution enables the introducer to determine "when, under what circumstances, and for what price" the work will be released to the public.\textsuperscript{110} This is the holder's "exclusive right publicly to sell, give away, rent or lend any material embodiment of his work."\textsuperscript{111}

As laws are expanding, they still must serve the constitutional goals of incentive and access. Traditional copyright jurisprudence has limited expansive rights through several doctrines.\textsuperscript{112} One of these is the "first sale doctrine," which extinguishes the copyright holder's right of distribution and passes title to the buyer upon lawful sale.\textsuperscript{113} The first sale doctrine serves to limit the distribution right once a lawful sale has occurred by enabling the new owner to treat the tangible object as their own property.\textsuperscript{114} The copyright owner's exclusive right of public distribution has no effect on anyone who owns "a particular copy or phonorecord lawfully made under this
The synergy between the first sale doctrine and the right of distribution rests on the principle that a "copyright owner is entitled to realize no more and no less than the full value of each...phonorecord upon its disposition."\(^{116}\)

The purpose of this doctrine is to limit the monopoly after the introducers have received their incentive by disfavoring restraints of trade and limitations on alienation of personal property.\(^{117}\) Once the copyright owner releases the work to public, the distribution right is no longer needed to protect the underlying copyright, as the holder exercised his or her right of first publication upon release.\(^{118}\)

The first sale doctrine enables a consumer to exercise property rights in the tangible item sold without restriction. In the face of the current trend to provide labels expansive piracy protection, consumers’ lawful property interests are being diminished. Sound recordings with copy protections provide a restraint on personal property by prohibiting the ability of the lawful owners of the tangible property to maximize the personal use of property.

Although the first sale doctrine only applies the copyright holder’s right of distribution, the ability of a consumer to copy should be considered to fall within the same policies underpinning the first sale doctrine.\(^{119}\) While, technically, the consumer would be infringing the copyright holder’s right of reproduction (not distribution) in the sound recordings, copying for personal use should be afforded protection under the first sale doctrine, as prohibiting restraint on the use of personal property. This activity should be given further immunity under the doctrine of fair use.

### J. How Copyright Law Serves These Goals: Who Is Fencing What and Why?

The following timeline indicates the expansive growth of rights and enforcement available to copyright holders:

<table>
<thead>
<tr>
<th>Year</th>
<th>Right</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976 Act</td>
<td>Sound recording rights treated separately from the musical right.(^{120})</td>
<td>Provides limitations to section 106 rights in reference to sound recordings.</td>
</tr>
</tbody>
</table>


\(^{117}\) Id. at 1388 n.7 (noting that the right of distribution also serves the right of reproduction by ensuring that the copyright owner can prohibit public distribution of the work through unauthorized reproduction or the release of wrongfully-obtained copies).

\(^{118}\) Id.

\(^{119}\) See id. at 1389.

<table>
<thead>
<tr>
<th>Year</th>
<th>Act</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>Computer Fraud and Abuse Act\textsuperscript{121}</td>
<td>Prohibits access to protected computers.</td>
</tr>
<tr>
<td>1992</td>
<td>Audio Home Recording Act\textsuperscript{122}</td>
<td>Legalized consumers' private, noncommercial copying.</td>
</tr>
<tr>
<td>1995</td>
<td>Digital performance right granted in sound recordings,\textsuperscript{123}</td>
<td>Granted performance rights regarding the sound recording.</td>
</tr>
<tr>
<td>1997</td>
<td>No Electronic Theft Act\textsuperscript{124}</td>
<td>Criminalized sound recording infringement.</td>
</tr>
<tr>
<td>1998</td>
<td>Digital Millennium Copyright Act\textsuperscript{125}</td>
<td>Prohibits circumvention and trafficking in anti-circumvention devices for digitally-protected works.</td>
</tr>
<tr>
<td>1998</td>
<td>Copyright Term Extension Act\textsuperscript{126}</td>
<td>Extended the duration of copyright holders for twenty additional years.</td>
</tr>
</tbody>
</table>

Under the Copyright Act of 1976 ("1976 Act"), exclusivity is the right to "reproduce," "prepare derivative works of," "distribute," "perform," and "display" copyrightable material\textsuperscript{127}. Relative to sound recordings, further expansion of rights is found in the Audio Home Recording Act ("AHRA"), which enables royalties to be paid\textsuperscript{128} and serial copy management of copyrightable material\textsuperscript{129}. Lastly, the Digital Millennium Copyright Act ("DMCA") gives copyright holders additional rights of exclusivity by prohibiting access to encrypted material\textsuperscript{130}. The term of copyright protection was also expanded to a single term consisting of life of the author plus seventy years after the death of the individual\textsuperscript{131}. Although hotly contested, the trend of the 1976 Act indicates longer monopoly periods and a larger bundle of sticks without requiring public access.

\textsuperscript{121} 18 U.S.C. § 1030 (2000).
\textsuperscript{123} 17 U.S.C. § 114 (2000).
\textsuperscript{130} 17 U.S.C. § 1201.
\textsuperscript{131} 17 U.S.C. § 302(a). Publication of a work under the 1909 Act allowed copyright protection for a maximum of fifty-six years from the date of publication.
Ultimately, the governmentally-granted monopoly is intended to be the means of serving the ends—the twin purpose of the Constitution. As copyright protections expand in light of emerging technologies, the benefits to society must remain the primary consideration.

III. BUT WHEN YOU TALK ABOUT DESTRUCTION, DON'T YOU KNOW THAT YOU CAN COUNT ME OUT?

"The ability of the owner of a [sound recording] to maintain the exclusive right to reproduce it for public distribution is the economic key to the sound recording industry." Congress has recognized the music industry’s legitimate concerns regarding piracy. Unauthorized copiers incur none of the upfront costs of taking a band to the market and, as such, can be made available to the public for the monopoly price. While a serious problem in regard to sound recordings, the line between pirates and purchasers must be a bright one. Public access and a consumer’s personal use of the record do not implicate the same fears as unauthorized distribution and reproduction.

However, the goals of copyright are not advanced when copyright holders are permitted to leverage their lawful copyright monopolies into control over which computer operating systems, browsers, media players, codecs or digital rights management systems must be used by those exercising licensed exclusive rights of reproduction or public performance or, worse, by those exercising rights that have never belonged to the copyright holder, such as the right to perform a work privately.

In the high seas pursuit of piracy over the Internet and abroad, the constitutional balance favoring access and incentives as well as the common law standards of consumer protection should not be diminished. Drafting and construing legislation in light of the constitutional purpose behind a governmental grant provides a framework with which to parse out pirates from consumers.

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132. See Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).
134. Id. (quoting Diamond, supra note 133, at 354-55).
135. Id. at 787 n.6.
A. The Rhetoric of "Piracy": We Have Heard the Cries Before
As the Salamander Eats Its Own Tail

Piracy is a sexy term that conjures up images of Johnny Depp and Orlando Bloom, but, aside from plundering seamen, piracy is the music industry's call to rally the troops. "According to PricewaterhouseCoopers LLP, CD shipments dropped almost 9 percent in 2002, while unit shipments of all music formats decreased 11 percent. 'A major cause of the decline in 2002 includes the ongoing problem of online and physical music piracy,' said Hilary Rosen, Chairman and CEO of the [Recording Industry Association of America ("RIAA")]". As we have seen piracy rise, we are responding aggressively online and have dramatically upped the activities of our Anti-Piracy Unit, increasing our seizures of counterfeit and pirate CDRs by 89.5 percent in 2002.

At the start of 2003, Soundscan reported a 10.7% drop in record sales, which was the sharpest drop in eleven years. In 2001, the RIAA announced a dip of 10.3% in the number of units shipped, estimating a 4.1% decrease in revenues from 14.3 billion dollars in 2000 to 13.7 billion in 2001. The year 2001 saw significant drops in other economies as well, possibly due in part to the events of September 11th. Eastman Kodak experienced a 4% decrease in revenues during 2001.

The PDA industry as a whole suffered a decline in 2001 to 2002. According to the RIAA's statistics, the music industry cut their inventory and artist investment by twenty-five percent and released 12,000 fewer new releases. Maybe this was a variable, along with the drudgery of music being released. Other variables that could affect a decrease include the economic doctrine of elasticity of goods. Since music is


138. Id.


not really a basic requirement for life, it could be considered elastic goods. Therefore, due to an almost seven percent increase of goods during the relative accounting period, the total revenue could be expected to fall with the decrease in quantity purchased.\footnote{144}

Compact discs continued to fall in 2001 after Napster was shut down.\footnote{145} Several of the biggest jumps in shipments occurred in 1994 and again in 1998, each time as a result of a drop in the average cost of a compact disc. Conversely, several of the biggest drops in shipments occurred in 1997 and again in 2001, both times when the average cost of a compact disc rose.\footnote{146}

Amazon's top downloads included bands such as The Strokes, Nick Cave, New Order, The Hives, Cherry Bikini, Alison Krauss, Yo La Tengo, Ministry, Cat Power, Tom Waits, Interpol, 50 Cent, and Dar Williams.\footnote{147} Gateway's top downloads included Owen, Bikeride, International Noise Conspiracy, and the Cinch.\footnote{148} Statistics regarding downloading do not indicate whether the consumer later purchased the item or downloaded it with permission. In the 2002 ad campaign launched against piracy on the Internet, glossy full paged ads included the likes of Britney Spears, Stevie Wonder, Eminem, Dixie Chicks, and Brian Wilson (not the pouty, messy likes of the Strokes).\footnote{149} Big Champagne indicates that top downloads include singles from major label releases like Norah Jones, J.Lo, Kid Rock, Dixie Chicks, and Avril Lavigne.\footnote{150}

In the case of diminishing consumer protection through prohibitions on lawful activities and decreasing the public domain, is rhetoric enough for Congress\footnote{151} to hang its hat on? In a metaphysical sense, this diminishing effect could be equally construed as piracy. Under the lens of rhetoric, major label contracts could also be

\footnote{145}{See W6 Daily, RIAA Claims Revisited, at http://w6daily.winn.com/000847.html (last visited Sept. 8, 2003).}
\footnote{146}{See id.}
\footnote{150}{See Big Champagne, Top Swaps, at http://www.bigchampagne.com/ (last visited Sept. 8, 2003).}
viewed as piracy. As one artist stated, "Piracy is the act of stealing an artist's work without any intention of paying for it." 152

B. Anti-Piracy Measures: Release the Mechanical Hounds

"The use of 'Cracking' programs to enable fair use should not be subject to criminal penalties. While 'Trading' (Stealing) or sale of physical reproductions of such works should clearly be illegal...." 153

In a nutshell, this discussion merely provides a quick, nickel tour of copy protection in order to frame the legal analysis, as neither specific technology legislation nor legislation focused on the constitutional purposes behind a government-granted monopoly will stand the test of time.

It indicates that an analyst for J.P. Morgan says that Arista Records, a subsidiary of BMG, "appeared to be moving to market with CD copy-protection technology. They expect volume shipments of protected CDs to ship commercially in the U.S. as early as in the May-June timeframe," using the SunnComm technology, which is a step beyond what we have previously seen in the marketplace. 154

Copy protection programs employ electronic means of preventing commercial CDs from being played on anything but a CD player, referred to as access controls. 155 The implication of this is the end user's inability to play the disc on a CD Rom drive, a DVD drive, and video game systems. 156 Unfortunately, the end user may not be able to play the CD on a regular CD player either. 157 A consumer who circumvents

152. See Courtney Love, Courtney Love Does the Math, June 14, 2002, at http://archive.salon.com/tech/feature/2000/06/14/love/print.html (last visited Sept. 8, 2003). The author acknowledges that the quote is from Courtney Love. What more should be said?


155. See id.


157. Id. See Fat Chuck's, Music-Corrupt CDs, at http://www.fatchucks.com/23.cd.html (last visited Sept. 10, 2003) (naming copy-protected CDs that are not playable. Interesting enough is the fact that a majority of the bands fall into the dance or techno genre of music. Please excuse my unhip reference to techno.).
the protection to play the CD on their home platform could be in violation of the
DMCA. 158

Copy-protected CDs potentially prohibit fair use of the merchandise purchased
by distorting the sound when the CD is played on an incompatible player. 159
Copy-protected CDs can prohibit making a secondary copy of the same quality as well as
contain access controls prohibiting playing the CD on a PC platform. 160 A consumer
who circumvents the copy protection to make a personal backup copy could be in
violation of the DMCA. 161 As John Gale noted,

I am not arguing that music should be free, that there shouldn't be
copyrights or anything of the like. I am arguing that the rights of the
purchaser are being removed by my government! If I chose not to buy
records from some draconian and bullying entertainment conglomerate, a
small company could grow and fill the niche of leaving me with the rights
due a legitimate customer. However, this is no longer possible since I am
subject to the DMCA... 162

A consumer's ability to engage in non-infringing, personal use of their records
exercises the consumer's property interest. Non-infringing purposes include the
ability to make back up copies, copies for the car in order to prevent the original from
degradning or being stolen, or setting home movies to music. Vinyl records have a
fuller sound and richer texture, but the medium sadly degrades through use. 163 The
ability to run the turntable through the hard drive and burn a copy of the record

159. The author acknowledges that, currently, home electronics used to play CDs include a
DVD/CD player. As I write, my CD Rom is spinning the latest Andy Dick CD and my son is tucked
in every night to Smash Mouth or Offspring CDs played from his computer CD Rom drive. Alas, a
pirate I am not.
160. See Marx, supra note 156.
162. See John C. Gale, Comment to Librarian of Congress, Dec. 18, 2002, at
consumer protection concerns see Ethan Hartman, Comment to Librarian of Congress, at
http://www.copyright.gov/1201/2003/comments/044.pdf (last visited Sept. 8, 2003); Christopher
Longmire, Comment to Librarian of Congress, Nov. 20, 2003 at
http://www.copyright.gov/1201/2003/comments/042.pdf (last visited Sept. 8, 2003); James
McNamee, Comment to Librarian of Congress, at
http://www.copyright.gov/1201/2003/comments/048.pdf (last visited Sept. 8, 2003); Jonathan Potter,
Comments of Digital Media Association, Dec. 18, 2002, at
Sudderth, Comment to Librarian of Congress, at
163. See Howstuffworks.com, Is the Sound on Vinyl Records Better Than on CDs or DVDs?,
preserves the original record while providing a copy that sounds as full as the record.\textsuperscript{164} Personal property interests in the tangible chattel are frustrated by the DMCA.\textsuperscript{165} There is an inherent tension brewing between the proponents of copy protection and proponents of the industry who are moving towards the personal computer as the digital hub or entertainment box.

C. Is Piracy Leading to the Destruction of Consumer Rights?

Piracy seems to loosely drape practices of copying content from one source to another, including in this realm a consumer's lawful activities. Per the RIAA's statistics, aggressive enforcement is on the incline, even if sales are allegedly decreasing.\textsuperscript{166} Specifically, 2,677 sight seizures were conducted in 2002, which was 129\% more than the number performed in 2001.\textsuperscript{167} In 2002, the RIAA also performed 350 searches under warrant or per consent, an increase of 96.6\% from the year prior.\textsuperscript{168} This is a marked increase from mid-1998's fifty-five search warranted and 528 sight seizures.\textsuperscript{169} These statistics indicate a need for Congress to clearly articulate to the consuming public the presence and scope of fair use due to increasingly aggressive enforcement actions.

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest. . . . The sole interest of the US and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors.\textsuperscript{170}

The ability of the industries to cry "piracy" has led to the enactment of various statutory schemes that potentially affect the ways consumers may now enjoy their purchases.\textsuperscript{171}

\textsuperscript{164} To rebuke the nay-sayers regarding the high sound quality of vinyl as opposed to CDs, see \textit{id}.  
\textsuperscript{165} 17 U.S.C. § 1201.  
\textsuperscript{167} \textit{See} id.  
\textsuperscript{168} \textit{Id}.  
\textsuperscript{170} Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431-32 (1984) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (internal quotations omitted)).  
\textsuperscript{171} \textit{See} United States v. Elcom, Ltd., 203 F. Supp. 2d 1111, 1129 (N.D. Cal. 2002) ("Congress recognized that a primary threat to electronic commerce and to the rights of copyright holders was the plague of digital piracy.").
Piracy of music is a worldwide problem due to the ease of downloading and burning on the Internet. This raises the additional question of whether United States based companies, operating under a utilitarian copyright regime, should be afforded the opportunity to prosecute foreigners who operate under a much different philosophical regime, such as communitarianism. According to communitarian philosophies, creative acts are only one part of the continuum and, as a result, no one person should be attributed as the "author."

Without an eye toward cultural or legal copyright, piracy may be more inclined to occur in these countries. The international implications of copyright harmonization are difficult and outside the scope of this discussion. However, the ability of pirates to operate in a jurisdiction adhering to communitarian beliefs should not affect the lawful consumer's ability to exercise personal property interests in the purchased sound recording.

IV. IS THE INSTITUTION ASKING FOR A CONTRIBUTION OR SHOULD YOU FREE YOUR MIND INSTEAD?

There is an inherent conflict between the music industry's war cry to prohibit piracy and the ever-increasing technologies that enable end users to easily manipulate their data and files. As courts struggle to strike a balance between the purpose of the constitutional grant of exclusivity, the public's right of access, and the need to provide an incentive to create, the music industry has a real interest at stake and so does the public.

A. Sound Recordings Under Copyright Law

Under the 1976 Act, a copyright in a sound recording protects the particular series of "fixed" sounds and includes the right to reproduce and to prepare derivative works as well as the rights of distribution and performance by means of digital audio transmission. As such, copyright protection will extend to two separate elements in a sound recording: (1) the contribution of the author whose performance is captured and (2) the contribution of the person or persons responsible for capturing and processing the sounds to make the final recording.

The Senate bill adding the sound recording, ("SR") rights expressly excluded the right of performance, whereas the House bill required the Register of Copyrights to submit a report to Congress on January 3, 1978 with recommendations as to whether

174. See Library of Congress, Copyright Registration for Sound Recordings, available at http://www.copyright.gov/circs/circ56.html#what (last visited Apr. 16, 2003). Sound recording is not the same as a phonorecord. A phonorecord is the physical object in which the work is fixed. Id.
copyright protection for sound recordings should be expanded to include performing rights. In 1995, sound recording rights were amended to include a right of digital public performance for the owners of the SR right.

Under Section 114, statutory protection for a sound recording extends to the particular sounds of which the recording consists. Imitation alone of a recorded performance would not constitute a copyright infringement, as infringement of the sound recording right would occur whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced. The Agee court stated that the purpose behind this passage was to prevent the widespread effects of piracy. The Section 114 right to prepare derivative works is limited to the situation "in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."

Fair Use principles are inherently expressed in the amendments through the provisions that allow sound recording use in educational television and radio programs distributed through public broadcasting entities. This enables the use of such materials without authorization from the owner of the SR copyright as long as copies of the program are not distributed commercially from the public broadcasting entity to the general public.

B. The Lay of the Land: Laws Surrounding Sound Recordings and Musical Performances

In the light of further piracy fears, Congress has responded with a set of tools to protect the industry's investments in up-and-coming artists. The rights granted by the Copyright Act of 1976 protect the substance of a phonorecord. Sound recordings have an enumerated statutory scope, including the right of digital public performance under section 106(6). In DMCA cases, courts have responded to defendants' arguments that they have a right to copy the original work in the original format, responding that "We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by

181. Id.
182. Id.
184. Id.
the optimum method or in the identical format of the original. ¹⁸⁶ However, as stated above, consumers have a personal property interest in the tangible good embodying the expression under the first sale doctrine. ¹⁸⁷ Further, as stated below, the AHRA created a consumer right to digital copies. ¹⁸⁸

This table briefly summarizes the discussion to follow and shows the inherent conflict that consumers face, namely, that copyright laws have conferred analog and digital fair use rights, but the ability to exercise those rights may be limited by the now-known or later-developed technology. The DMCA potentially prohibits the exercise of these rights through anti-circumvention technologies, making the consumer’s exercise of lawful rights illegal. ¹⁸⁹ It is impossible to exercise fair use rights when the expression is under circumvention’s lock and key.

<table>
<thead>
<tr>
<th>Law</th>
<th>Technology Covered</th>
<th>Prohibits</th>
<th>Civil or Criminal Enforcement</th>
<th>Fair Use Built In</th>
<th>Purpose Served</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copyright Act of 1976 (1976 Act)</td>
<td>Protected expression: Digital and analog content.</td>
<td>Unauthorized duplication.</td>
<td>Civil or Criminal</td>
<td>Fair use provision found in the statute.</td>
<td>Utilitarian: Economic incentive to create/distribute balanced against public domain and access.</td>
</tr>
<tr>
<td>Audio Home Recording Act (AHRA)</td>
<td>Digital audio recording devices that do not have substantial non-infringing purposes.</td>
<td>Selling such a device without royalty payments to the recording industry.</td>
<td>Civil</td>
<td>Consumers have a right to copy for private, non-commercial use; establishes a right to a digital fair use.</td>
<td>Utilitarian: Economic incentive to create/ distribute balanced against consumers’ interest in purchased tangible property.</td>
</tr>
<tr>
<td>No Electronic Theft Act (NET)</td>
<td>Protected Expression: Digital or analog content</td>
<td>Criminalizes copyright infringement.</td>
<td>Criminal</td>
<td>Mere reproduction is not sufficient for prosecution; damage threshold requires financial harm prior to prosecution.</td>
<td>Utilitarian: Economic incentive to create/ distribute.</td>
</tr>
</tbody>
</table>

¹⁸⁶ Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001); see also United States v. Elcom, 203 F.Supp.2d 1111, 1130 (N.D. Cal. 2002).


C. Civil and Criminal Copyright Infringement Under the 1976 Act

Subject to statutory defenses, civil liability for copyright infringement is present when someone has copied the work and misappropriated the protected expression.\textsuperscript{190} Criminal liability for copyright infringement requires the additional showing that the infringement was willful and was done for purposes of "commercial advantage or private financial gain" or that the infringer reproduced or distributed more than one copyrighted work during a 180 day period with a value exceeding $1,000.\textsuperscript{191} After establishing that a valid copyright was infringed, the defendant must have acted "willfully."\textsuperscript{192} Willful infringement means that the person had specific intent to violate copyright laws.\textsuperscript{193} In some circuits, willfulness is present with the intent to copy, not to infringe.\textsuperscript{194} The defendant does not need to actually make or intend to make a profit in order to be prosecuted; the infringer must have merely committed the

\textsuperscript{190} 17 U.S.C. § 501(a)-(b) (2000).
\textsuperscript{191} 17 U.S.C. § 506(a) (2003).
\textsuperscript{192} Id.
\textsuperscript{194} United States v. Backer, 134 F.2d 533, 535 (2d Cir. 1943) (holding that the defendant was guilty of infringement even though he did not intend to cause trouble).
acts with the hope or expectation of reaping some financial gain. Fair use is a statutory defense.

D. The Audio Home Recording Act

The Audio Home Recording Act was passed in 1992. The AHRA is a testament to the balance struck between the music industry and the hardware manufacturers for the music industry in response to industry fears over digital audio technology ("DAT"). DATs were introduced to enable audio capture in a digital format. The AHRA covers devices that are likely to have substantial infringing uses. The statute indicates that a consumer has a right to copy for private, non-commercial use; textually, this is a right and not a cause of action that a consumer could pursue. The AHRA’s main purpose is the “facilitation of personal use” by ensuring “the right of consumers to make analog or digital audio recordings of copyrighted music.” The AHRA expands monopoly protections granted in section 106 by congressional reinforcement of exclusivity through legally safeguarding the technological measures defending these rights. The AHRA does not run afoul of fair use by enabling the consumer to make lawful first generation copies. The Act is also not applicable to most digital music

195. A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001) (“[T]he definition of a financially motivated transaction for the purposes of criminal copyright actions includes trading infringing copies of a work for other items. . .”).


A digital audio recording device is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use. . . .

Id. Computers with CD burning capability would not be covered within the scope of the definition, unless the burner component and the software running the program were included in the definition section.

200. 17. U.S.C. § 1008 (2000). “No action may be brought under this title alleging infringement of copyright based on the...noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.” Id.

201. Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) (citing S. REP. No. 102-294, at 86 (1992)).


203. Vesper, supra note 153.
software and hardware since these platforms are not solely used for copying music as required under the statutory definition of digital audio recording devices. 204

E. The No Electronic Theft Act

Passed by Congress in 1997, the No Electronic Theft Act ("NET") criminalized sound recording infringement, digital or analog, regardless of whether or not commercial gain or profit occurred. 205 The Act amended a variety of existing sections of Chapter 17 and Chapter 18, criminalizing infringement to enable the Department of Justice to prosecute individuals involved in large-scale, illegal reproduction. 206 The NET penalizes willful infringement for commercial advantage or private gain or for distributing one or more copies with a retail value of $1,000 during a 180 day period. 207

Fair use policies are built into the statute by the fact that mere reproduction is not enough to establish the required mens rea of "willfulness." 208 Further, small-scale, non-commercial copying is exempt from criminal prosecution by the required minimum damage threshold. 209

F. The Computer Fraud and Abuse Act

For twelve years prior to the introduction of the DMCA, mere access and circumvention of computers, not content, was prohibited under the Computer Fraud and Abuse Act of 1986 ("CFAA"). 210 This Act leaves the enforcement of circumvention primarily up to the Department of Justice. 211 The damage threshold is high and civil actions require a showing of $5,000 of damage from the unauthorized access. 212 The CFAA looks to three types of criminal activity: Trespass or unauthorized entry by users into an online system; users exceeding authorized access; and users exchanging information on how to gain unauthorized access to computers. 213 Violations of an Online Service Provider's Terms and Conditions have

205. U.S. Dept. of Justice, NET Summary, supra note 124.
208. See U.S. Dept. of Justice, NET Summary, supra note 124.
209. Id.
211. Id.
been considered unauthorized access.\textsuperscript{214} Under the CFAA, a fraudulent trespass is an unauthorized entry with intent to defraud that results in 1) furthering the fraud and 2) receiving something of value in the process of trespassing.\textsuperscript{215} As such, the act of hacking into a music database was already prohibited under the CFAA.\textsuperscript{216} Felony charges are available when acts were committed for commercial advantage or financial gain.\textsuperscript{217}

Civil, private enforcement under the CFAA is available to someone who suffers any damage or loss against the person who violates the Act.\textsuperscript{218} However, mere “loss” alone may be insufficient grounds for bringing a civil claim under the CFAA.\textsuperscript{219} For a system that is breached, a plaintiff must show “damage” under the Act, which includes loss of a minimum dollar amount, impairment of medical care, physical injury, or threat to public health or safety.\textsuperscript{220}

Balanced against the public interest, finally the interests of a copyright holder are struck by requiring a specific mental state in accessing the protected computer and some resulting harm. The public’s copyright interest in fair use and a public domain are not diminished by the implementation of the statute.

\textbf{G. The Digital Millennium Copyright Act}

In 1998, the Digital Millennium Copyright Act was passed by Congress and created a new right of non-access, covering other technologies not included in the AHRA.\textsuperscript{221} The DMCA goes further than providing a safe harbor for OSP’s and creating web casting licenses; it prohibits the manufacture and distribution of devices designed with the sole purpose of circumventing technological protections of the copyrightable material.\textsuperscript{222} Specifically, the DMCA prohibits “access” by creating a cause of action for circumvention\textsuperscript{223} of technological measures\textsuperscript{224} regardless of

\begin{itemize}
  \item \textsuperscript{214} Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444, 450 (E.D. Va. 1998).
  \item \textsuperscript{215} 18 U.S.C. § 1030(a)(4) (2000).
  \item \textsuperscript{216} See 18 U.S.C. § 1030.
  \item \textsuperscript{217} 18 U.S.C. § 1030(c)(B)(i) (2000).
  \item \textsuperscript{218} 18 U.S.C. § 1030(c) (2000).
  \item \textsuperscript{220} Thurmond, 171 F. Supp. 2d at 676-77.
  \item \textsuperscript{221} See 17 U.S.C. § 1201 (2000).
  \item \textsuperscript{222} 17 U.S.C. § 1201(2)(A) (2000).
  \item Circumvent a technological measure means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.
\end{itemize}

\textit{Id.}
whether access leads to infringement. The DMCA textually parses out provisions regarding access to a copyrightable work and measures that impose limitations on the use of the work.

Under section 1201(a), "no person shall circumvent a technological measure that controls access to a work protected under this title." The RIAA defines access as referring to that system or platform on which a compact disc can be played. According to the RIAA "it wouldn't be a violation of 1201(a) for an individual to circumvent copy controls as long as in doing so he or she did not circumvent access controls." The access control that has been applied to date prevents a compact disc that is playable in a normal home audio player from being played on a personal computer. . .there is the large class of the evolving technologies here that could be considered access controls in that they permit access on some devices and not other devices.

The Elcom court established that Sections 1201(a)(1) and (2) of the DMCA, as relating to access controls, "banned both the act of circumventing access control restrictions as well as trafficking in and marketing of devices. . ." Section 1201(b) "addresses a different circumvention, specifically, circumventing a technological measure that imposes limitations on the use of a copyrighted work. . ." This section prohibits the trafficking of technologies that are primarily designed for circumvention, have limited commercial significance aside from circumvention, or are marketed by a person who knows the technology is designed to circumvent. Section 1201(b)'s anti-trafficking provision only extends "to devices that circumvent copy control measures. The decision not to prohibit the conduct of circumventing

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224. 17 U.S.C. § 1201(a)(3)(B) (2000) ("Technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or process or treatment, with the authority of the copyright owner, to gain access to the work." This would include passwords.).
229. Copyright Office Hearing, supra note 154.
230. Id.
copy controls was, made in part, because it would penalize some noninfringing conduct such as fair use.  

This section is a “blanket ban” covering all circumvention tools regardless of their technological abilities to enable the user to also engage in non-infringing uses. This blanket ban was viewed by the court as the “sacrifice Congress was willing to make in order to protect against unlawful piracy.” The Elcom court construed this to mean that, under Section 1201(b), circumvention is not unlawful, but trafficking the device is, which is the balance that Congress struck to preserve fair use.

The logic is strained for two reasons. First, Section 1201(a) makes “access” circumvention unlawful, eliminating fair use. Second, Section 1201(b) prohibits “use” trafficking so consumers will have no access to anti-circumvention technologies in order to enable fair use.

Per the RIAA, Section 1201’s purpose is to encourage the use of copy protection and access controls. In opposing the inclusion of the proposed class of red book copy protected CDs as exempted, the RIAA stated that “Protected CDs are primarily designed to inhibit copying, not access [even though]. . . some copy-protected CDs might, as a technical matter, employ both access and copy-control measures. . . .” As such, circumvention of copy protection may violate both 1201(a) if access is required to get the disc to play on a PC platform, and section 1201(b) if circumvention is at issue to make a lawful back up copy.

H. High Fidelity: Where Is Consumer Fair Use in the DMCA?

Section 1201(c)(1):

simply clarifies that the DMCA targets the circumvention of digital walls guarding copyrighted material. . . but does not concern itself with the use of those materials after circumvention has occurred. Subsection 1201(c)(1) ensures 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.

235. Id. at 1123.
236. Id. at 1124-25 (citing S. REP. NO. 105-190, at 8 (1998)).
237. Id. at 1125.
240. See Copyright Office Hearing, supra note 154.
241. Id. at 118.
Textually, the DMCA provides that "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."244 Plainly stated in the text, congressional intent is that "Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products."245

Section 1201(a)(1)(B) exempts the application of circumventing access controls to "users of copyrighted work...if such persons are...adversely affected by virtue of such prohibition in their ability to make non-infringing uses of that particular class of works," as determined every three years by the Librarian of Congress.246 The result is reliance on the Library of Congress's three-year rulemaking process to provide exemptions for those adversely affected instead of employing the fair use analysis under the statute.247

Indeed, the Library of Congress is required to promulgate rules exempting individuals who would otherwise be adversely affected in their ability to make non-infringing uses.248 Current exceptions include a provision for nonprofit libraries, archives and educational institutions,249 law enforcement,250 reverse engineering,251


The legislative history of the enacted bill makes quite clear that Congress intended to adopt a "balanced" approach to accommodating both piracy and fair use concerns. It sought to achieve this goal principally through the use of what it called a "fail-safe" provision in the statute, authorizing the Librarian of Congress to exempt certain users from the anti-circumvention provision when it becomes evident that in practice, the statute is adversely affecting certain kinds of fair use.

Id.


This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a state. For purposes of this subsection, the term "information security" means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

Id.

encryption research,\textsuperscript{252} protection of minors on the Internet,\textsuperscript{253} cookies and technologies that contain the capability of collecting or disseminating personally identifying information,\textsuperscript{254} and security testing under the enumerated statutory conditions.\textsuperscript{255}

The Elcom court stated that "If this is an evil in the law, the remedy is for Congress. . . ."\textsuperscript{256} The same deference found in Elcom was also encouraged in an exemption hearing: "The office had it exactly right in rulemaking three years ago when you decided. . . .[to] proceed with particular caution when Congress has already made in the statute specific judgments about the scope of an exemption."\textsuperscript{257}

In Corley, the court stated that "fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original."\textsuperscript{258} The RIAA seems to agree that "there's no assurance under. . . Section 1201 that. . . user[s] of copyrighted works, ought to have access to works in the most convenient means."\textsuperscript{259}

The Corley court enumerated several examples, such as making a video in a movie theatre of a movie, and stated that an art student has no "constitutional claim to fair use of a painting by photographing it in a museum."\textsuperscript{260} These situations are distinguishable from the consumer who lawfully owns a chattel and is allowed to make full use of the property. The rightful property interest in the goods is frustrated if access is denied, as is the case when a consumer cannot play the disc in the player. To be consistent, the same level of protection should be afforded to the tangible property as is given to the underlying intangible property.

The reverse engineering exceptions provide that a person may develop a circumvention device and make it available to others "solely for the purpose of enabling interoperability\textsuperscript{261} of an independently created computer program with other programs. . . to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section."\textsuperscript{262} The exception did not apply to microchips developed to circumvent the original manufacturer's authentication

\begin{thebibliography}{99}
\bibitem{252} 17 U.S.C. § 1201(g) (2000).
\bibitem{256} United States v. Elcom Ltd., 203 F. Supp. 2d at 1111, 1132 (N.D. Cal. 2002).
\bibitem{257} See Copyright Office Hearing, supra note 154, at 122. Copy-protected CDs will be heard again in May's round of hearings so stay tuned.
\bibitem{258} Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001).
\bibitem{259} Copyright Office Hearing, supra note 154, at 118-19.
\bibitem{260} Universal City Studios, Inc., 273 F.3d at 459.
\end{thebibliography}
sequence.\textsuperscript{263} The \textit{Lexmark} court did not find that the microchips were independently created programs since the chips only contained circumvention code and a copy of the original manufacturer's operating code.\textsuperscript{264}

Notably, "interoperable" is defined as "the ability for one system to communicate or work with another."\textsuperscript{265} The definition of a computer system is the "CPU, memory and related electronics..., all the peripheral devices connected to it and its operating system."\textsuperscript{266} It has yet to be seen whether a consumer could argue interoperability regarding the conversion of a musical CD track to MP3 format through a ripper that would enable playing tracks from the consumer's hard drive or creating a compilation.

In traditional copyright cases involving the reverse engineering of computer software, courts have determined that reverse engineering in order to access uncopyrightable ideas, facts, or other materials locked up within a copyrightable work constitutes fair use.\textsuperscript{267} Other courts have expanded that idea and enabled protected reverse engineering under fair use for access to the unprotected ideas as well as copyrightable material.\textsuperscript{268} These rulings serve the utilitarian purposes behind a government-granted monopoly by enabling expression to remain in the public domain and should act as a limit to the DMCA.\textsuperscript{269}

Furthermore, the first sale doctrine should limit the DMCA\textsuperscript{270} and enable a consumer to use the tangible property purchased in a non-infringing manner, as it is the consumer's property once a lawful transaction is complete. Indeed, "once a published copy is sold, the copyright owner has no right to restrict the further sale or transfer of that copy."\textsuperscript{271}

It is an oxymoron to say that one has a right to fair use of material that is in reality unobtainable. Enabling the DMCA to remove the potential for fair use could, by analogy to \textit{Elcom}'s First Amendment concerns, "turn centuries of our law and

\textsuperscript{264} Id.
\textsuperscript{266} Id. at 74.
\textsuperscript{267} See Sony Computer Entm't, Inc. v. Connectix Corp., 203 F. 3d 596, 599 (9th Cir. 2000) (holding that it is lawful to reverse engineer a video game system as an intermediate step to creating a computer program that would allow games designed for the system to run on a PC).
\textsuperscript{268} Bateman v. Mnemonics Inc., 79 F.3d 1532, 1539-40 n.18 (11th Cir. 1996).
\textsuperscript{270} Id.
legal tradition on its head, eviscerating the carefully crafted balance” found in the constitutional grant of exclusivity.

Although referencing the Copyright Term Extension Act, the following quote is just as applicable to the DMCA:

This statute will cause serious expression-related harm. It will likely restrict traditional dissemination. ... It will likely inhibit new forms of dissemination through the use of new technology. ... It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright related way in which the statute will benefit the public.273

The DMCA does not protect the act of circumvention as fair use, thereby enlarging the scope of a copyright owner’s monopoly to include the circumvention technology.274 It is difficult to construe how the provisions support the constitutional purpose of a limited monopoly for the benefit of the public.275 It is more difficult to understand the need to prohibit limitations on the fair use defense when access is already entirely denied through the inability of the “average consumer” to circumvent use restrictions.276 These implications of the DMCA are not congruent with the purposes behind a governmental grant.277 The ability of copyright holders to effectively control the use of a sound recording after a lawful sale runs afoul of the first sale doctrine. Moreover, the copyright holders’ right to restrict use outweighs the benefit to society by abrogating fair use to those lacking education regarding circumvention for use. Would the founding fathers be comfortable saying that fair use is for some and not for others?

V. YOU SAY YOU HAVE A REAL SOLUTION—WE’D ALL LOVE TO SEE THE PLAN

For small-scale, noncommercial or independent creations, the potential to litigate fair use or obtain free license can be extremely costly, thus serving as a chilling effect on the creation and distribution of creative works to the public. What solutions exist to enable the promotion of independent small-scale productions without fear of

272. Id. at 1128.
274. See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001).
275. See Elcom, 203 F.Supp.2d at 1132 (applying First Amendment review, the Elcom court did not find the above arguments persuasive).
expensive litigation? Do the proposed solutions serve the real purposes of the Constitution: To create a benefit to society through access to copyrightable works and incentives to create?

This table touches on major legislative attempts to further address access and economics.278

<table>
<thead>
<tr>
<th>Bill/Year</th>
<th>Aim of the Bill</th>
<th>History</th>
<th>Purpose Served</th>
</tr>
</thead>
<tbody>
<tr>
<td>Balance Act—2002. Introduced by Lofgren, 107th Congress, HR 5522.</td>
<td>Include digital transmission in fair use. The first sale owner is given the right to perform or display in preferred embodiment so long as private; prohibits shrink wrap agreements from enabling consumers to contractually abrogate fair use rights; and no DMCA prosecution for circumventing technologies on lawfully-obtained materials if the copyright holder failed to give information.</td>
<td>11/12/2002: Referred to the Subcommittee on Courts, the Internet, and Intellectual Property.</td>
<td>Utilitarian: Economic incentive to distribute balanced against public interest to access materials.</td>
</tr>
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A. P2P Prevention

In 2002, the “P2P Piracy Prevention Bill” would have granted copyright owners a license to hack and circumvent ways that would otherwise be a liability under the CFAA. This proposed legislation looked to control piracy and downloads through a variety of methods. Under the P2P bill, music industry software that enabled redirection away from file download sites, spoofing, and the potential release of viruses and denial of service attacks would have been curbed. The bill limited the engagement of such tactics by requiring no economic loss, except up to fifty dollars for file swappers, and notification to the Department of Justice one week prior. This proposal heavily favored the incentive side of the quid pro quo under a utilitarian approach.

B. The Balance Act

The “Balance Act” looked to establish digital consumer rights, extending the rights consumers enjoyed in analog to digital mediums by enabling copies for personal use and avoidance of limitations imposed in shrink-wrap license clauses. Introduced in October 2002, the Digital Choice and Freedom Act of 2002 looked to expand the rights of consumers. The bill was intended to give the first sale owner the rights to “perform or display works in the preferred digital media device, provided such display is not public,” as well as resale the digital product. Secondly, the bill sought to prohibit shrink-wrap agreements and other “non-negotiable license terms” that prohibit a consumer from contractually waiving rights to fair use. Lastly, the consumer would be free from prosecution under the DMCA for circumventing technologies on lawfully-obtained works if necessary to make non-infringing uses


281. Id.


284. Id.

285. Id.
when the copyright owner failed to make the public aware of means to perform non-infringing uses.\textsuperscript{286}

Additionally, the proposal granted permission for circumvention technologies when it was necessary for non-infringing uses, was created for such uses, and the copyright owner failed to provide the means necessary for non-infringing uses.\textsuperscript{287}

The bill was referred to the Committee on the Judiciary in 2002.\textsuperscript{288} This bill serves the public access interests of the constitutional quid pro quo under a utilitarian model by enabling consumers to use the sound recording while maintaining access to lawfully purchased sound recordings. The economic incentive to continue marketing goods that a consumer will purchase and use is also served.

C. The Digital Media Consumers' Rights Act

In January 2003, the Digital Media Consumers' Rights Act of 2003 was introduced.\textsuperscript{289} Included are provisions that would have required CDs with copy protection to be labelled as such.\textsuperscript{290} Sales of mislabeled, copy-protected CDs would be considered an unfair act under the Federal Trade Commission's Consumer Protection Statutes.\textsuperscript{291} Section 5 presents fair use amendments, which include eliminating DMCA violations for circumventing technology measures resulting in non-infringing uses as well as the manufacture and distribution of circumvention technologies that enable non-infringing uses.\textsuperscript{292} Unlike the Digital Choice and Freedom Act, this bill proposed a clear exemption for non-infringing uses without the

\begin{itemize}
\item \textsuperscript{286} Digital Choice and Freedom Act, H.R. 5522, 107th Cong. § 2 (2002).
\item \textsuperscript{287} Id.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} Digital Media Consumers' Rights Act, H.R. 107, 108th Cong. (2003).
\item \textsuperscript{290} Id.
\item \textsuperscript{291} Id. The Digital Media Consumers' Rights Act details:
\begin{itemize}
\item[A] prerecorded digital music disc product shall be considered mislabeled if it 1) bears any logo or marking, which, in accordance with common practice, identifies it as an audio compact disc; 2) fails to bear a label on the package in which it is sold at retail in words that are prominent and plainly legible on the front of the package that- A) it is not an audio disc; B) it might not play properly in all devices capable of playing audio compact discs; and C) it might not be recordable on a personal computer or other device capable of recording content from an audio compact disc; or 3) fails to provide the following information on the packaging which it sold at retail in words that are prominent and plainly legible- A) any minimum recommended software requirements for playback or recordability on a personal computer; B) any restrictions on the number of times song files may be downloaded to the hard drive a personal computer; and C) the applicable return policy for consumers who find that the prerecorded digital music disc product does not play properly in a device capable of playing an audio compact disc.
\item \textsuperscript{292} Id. (noticing no definition for non-infringing uses).
\end{itemize}
\end{itemize}
need for the copyright holder to have failed to take action.\textsuperscript{293} This bill was referred to the Committee on the Judiciary.\textsuperscript{294} The proposal serves the public access interests in the constitutional grant by enabling consumers to exercise their property interests as well as to create technologies that serve non-infringing purposes.

\section*{D. Security Standards}

The Security Systems Standards and Certification Act would have required copy protection technologies to be built into all forms of technology.\textsuperscript{295} In 2002, the bill was reintroduced as the Consumer Broadband \& Digital Television Act of 2002 ("CBDTPA"), with Senator Hollings stating that consumers' interests were being affected due to the lack of access to high quality digital content.\textsuperscript{296} The bill was intended to give the marketplace a "nudge" due to its perceived failure to "secure a safe haven for copyrighted digital products."\textsuperscript{297} As a result of this failure, the bill proposed giving the private sector one year to reach an agreement, high noon style.\textsuperscript{298} If an agreement was not reached, the government would step in; if consensus was reached, the government would enforce the agreed upon standards.\textsuperscript{299} The CBDTA would have criminalized removal of security technologies regardless of whether the removal is for non-infringing purposes and would have required all digital devices to conform to federal security standards.\textsuperscript{300} This bill does not serve a quid pro quo interest, as forced government standards can reduce both access and incentive.\textsuperscript{301} Criminalizing removal of security technologies further diminishes the public's access to non-infringing uses.\textsuperscript{302}

In light of the above "solutions," Congress should remain mindful of the constitutional purpose behind the monopoly grant when approaching copyright legislation. Two questions are relevant, namely: 1) Is legislation needed and, if so, what are the consequences to avoid? and 2) Is there a way to use existing laws, which prevent discriminatory treatment by creating unique laws for old problems?

\begin{itemize}
\item \textsuperscript{293} Id.
\item \textsuperscript{294} Digital Media Consumers' Rights Act, H.R. 107, 108th Cong. (2003).
\item \textsuperscript{297} Id.
\item \textsuperscript{298} Id.
\item \textsuperscript{299} Id.
\item \textsuperscript{300} Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. § 2 (2001).
\item \textsuperscript{301} See generally Press Release, supra note 296.
\item \textsuperscript{302} See discussion infra Part IV.C.
\end{itemize}
With regard to sound recording legislation, the concrete problem is unlawful duplication and distribution. The Digital Millennium Copyright Act provides a private action for infringement, creating digital and Internet aimed laws, as infringement is not a unique digital or Internet problem. Further, true injury-producing piracy is actionable under existing laws both civilly and criminally. Laws that target particular types of technology addressing generic problems, such as the DMCA, sweep too broadly and disrupt the balance established by the Constitution.

E. Market Solutions

Where Congress fears to tread, the market rushes in. As alliances form, the potential to reconstruct the music industry is yet again on the horizon. As iTunes, a potential “killer app,” indicates, if sales remain strong, consumers like their music. The Internet presents entirely new distribution models for labels and artists to employ. However, artists and labels may find solace in licensing specific parts of the copyright bundle to enable consumers to maintain their level of enjoyment in the digital frontier. Change is inevitable, but not always for the worst.

F. Strategic Alliances

Potentially, the Hollings “nudge” worked, as the market place responded and formed coalitions to combat this legislation. In January 2003, the Alliance for Digital Progress (“ADP”) formed to combat governmental solutions to legislation requiring anti-piracy measures, with members including the likes of Apple, Cisco, Dell, Hewlett-Packard, Intel, and Microsoft. The following quote is an excerpt from their mission statement: “ADP believes that the best ways to meet consumer expectations and fight piracy include market-driven efforts to educate consumers, create digital distribution strategies, develop innovative technology, and enforce

304. Id.
305. Id.
307. See discussion infra Part III.C.
308. See discussion infra Part V.D.
existing laws. ADP strongly opposes efforts to make the government design and mandate copy-protection technologies.”

ADP has five initiatives to drive its plan for private sector innovation and consumer engagement, including consumer education on obeying copyright laws, enforcing existing laws against violators instead of attempting to be proactive, and leaving the tech industry with the “freedom to innovate.” Digital Consumer is a member of the ADP coalition and advocates six principles of fair use. Instead of focusing on the importance of a supple public domain, the Bill of Right’s principles look to assure that consumers have consistent access to lawful uses in digital format that were previously present in analog format, such as the right to time-shift, space-shift, backup copies, and translate the content to comparable formats.

In January 2003, another coalition formed between the RIAA, Business Software Alliance (“BSA”), and Computer Systems Policy Project (“CSPP”). BSA members in this camp include Apple, Cisco, Hewlett-Packard, Intel, and Microsoft. CSPP members include Dell, Hewlett-Packard, and Intel. These entities agreed on seven principles to govern lobbying efforts, including strong provisions that government mandates regarding technologies are not practical.

314. Id.
318. BSA, CSPP & RIAA Agreement, supra note 315.
presents a marked shift in the music industry’s approach to the situation from prior bills advocating for imposition of technological measures.319

Regarding the agreed upon principles in the alliance, CSPP stated: “how companies satisfy consumer expectations is a business decision that should be driven by the dynamics of the marketplace, and should not be legislated or regulated.”320 Assenting to the need for labeling products in order to inform a consumer of the playability of the CD, the coalition stated that legislation should not be used to limit the availability of technology that may impair playability.321 Lastly, the principles state that the role of the government is not to mandate technological protection measures.322 Instead, “the role of the government, if needed at all, should be limited to enforcing compliance with voluntarily developed functional specifications reflecting a consensus among affected interests.”323 Alliances could serve to further stimulate incentives to create technologies that enable a sound recording right. However, the jury is still out on the ability of the market to maintain consumer rights and form market-based solutions compatible with the constitutional purposes.

1. Artist Freedom

The availability of distribution on the Internet also poses a market-based solution. Independent artists may not need the major label infrastructure to reach their fan base as much as in the past. The music group Simply Red has independently released its latest album, hoping to target direct sales to consumers.324 The availability of copy protection software and anti-piracy technologies is not ubiquitous, as a small run of 5,000 records through a local press would not require implementation of anti-circumvention technology. Independent labels may release, download, or access their market directly with new trade channels presented by way of the Internet.

Ultimately, successful employment of a new distribution model could serve the twin purposes of the constitutional grant by enabling public access to the work.325 Incentives to create effective distribution technologies and further lines of distribution would also be served if a new model were viable.

319. See Declan McCullagh, Anti-Copy Bill Hits D.C., at http://www.wired.com/news/politics/0,1283,51245-2,00.html (last visited Sept. 9, 2003) (stating that, in March 2002, the RIAA was supportive of Senator Hollings’ bill that would require copy protection).

320. BSA, CSPP & RIAA Agreement, supra note 315.

321. Id.

322. Id.

323. Id.


325. Or at least enabling public access to the work of those who are connected to the Internet.
2. The Pay-Per-Download Model

In April 2003, Mac's iTunes launched a successful campaign of rip and burn for ninety-nine cents a song without requiring a subscription fee by employing a pay-per-download model. iTunes enables consumers to browse a 200,000 back and current catalogue title inventory, listen to a thirty second preview, burn a song onto an unlimited number of CDs for personal use, listen to songs on an unlimited number of iPods, play songs on up to three Macs, and use the songs in other Mac applications. The downloaded files can be played or burned to an iPod, but they cannot be played on a PC or with any music player other than iTunes, although the files can be converted to PC-compatible MP3 files. As a result, incentives to create are not diminished and the public has conditioned access to the downloaded work.

3. Licensing Options

The market has also supported the rise of the Creative Commons, a coalition of educators formed to create a fuller public domain by releasing works without copyright protection and the use of licensing. Licensing music may prove to be a lucrative market solution for downloading; however, there is fear that consumers could end up with less rights. There is potential for a market force that uses licenses in a consumer-friendly manner, as licensing, like anything else, is not inherently evil.

Indeed, licensing has proven to be a strong tool of social engineering in the software arena so perhaps sound recording copyright licenses could follow suit. Music licensing could be used as a tool of distribution from the labels and as a tool of dissemination for authors. Furthermore, music distribution could follow the shrink-wrap model of licensing that grants the consumer the ability to exercise non-infringing uses of the disc.

Although all groups may not look at end user licenses favorably, typically, the issue is with unconscionable terms and conditions, such as choice of venue

329. See Creative Commons, About Us, at http://creativecommons.org/leam/aboutus/ (last visited Sept. 9, 2003).
330. See generally Creative Commons, Licenses Explained, at http://creativecommons.org/leam/licenses/ (last visited Sept. 12, 2003).
provisions.\textsuperscript{332} The market could be very responsive to a consumer friendly, accessible end-user license agreement that prohibits infringement while maintaining a consumer's right to exercise non-infringing uses of the work. In light of the RIAA's ever-growing "Evil Empire" persona, advocating such a license would indicate that pirates are the true targets, not the consumers.

Licensing as a tool of dissemination for authors would enable the artist to dictate interests that are more akin to the author's purpose for releasing the work. Creative Commons provides eleven types of model licenses, enabling an author to carve out some of the copyright bundle.\textsuperscript{333} The GNU software license has been modified as on Open Source Music License for open music distribution.\textsuperscript{334} The Electronic Frontier Foundation has an open audio license that "allows artists to grant the public permission to copy, distribute, adapt, and publicly perform their works royalty free as long as credit is given to the creator as the Original Author."\textsuperscript{335} That is proof that licenses can be as benevolent as the drafter chooses.

Incentives to create would not be diminished under licensing models, as the author is able to disseminate the works subject to the limitations that he or she chooses. Public access and benefit could result from an end-user license agreement that is consumer-friendly. However, access could instead be further diminished through the licensor's ability to set oppressive terms that are at odds with the constitutional purposes.\textsuperscript{336}

The founding fathers were familiar with the conflict between the private sector's need to monopolize and the government's necessary involvement when they struck the balance between the two in the Copyright Clause.\textsuperscript{337} The purpose of the grant is to stimulate further creation of "useful Arts."\textsuperscript{338} At the end of the day, the basic question that should be asked is: Does it?

\textbf{VI. DON'T YOU KNOW IT'S GONNA BE ALRIGHT?}

As my friend is so fond of saying in response to some intra-band quibble over outlets or amps, "Hey, we ain't curing cancer here, its only rock and roll." So too is my message to the music industry. Courts and Congress should tip the balance in

\begin{itemize}
\item \textsuperscript{332} Id.
\item \textsuperscript{333} See Creative Commons, Licenses Explained, at http://creativecommons.org/learn/licenses/ (last visited Sept. 9, 2003).
\item \textsuperscript{334} See Root # Records, Licenses, The Open Source Music License (OSML), at http://www.rootrecords.org/osml.html (last visited Sept. 9, 2003).
\item \textsuperscript{335} See Electronic Frontier Foundation, EFF Open Audio License: Version 1.0.1, Apr. 21, 2001, at http://www.eff.org/IP/Open_licenses/eff_oal.html (last visited Sept. 9, 2003).
\item \textsuperscript{336} U.S. CONST. art. I, § 8, cl. 8.
\item \textsuperscript{337} Id.
\item \textsuperscript{338} See generally THE FEDERALIST NO. 43 (James Madison), available at http://lcweb2.loc.gov/cgi-bin/query (last visited Sept. 12, 2003).
\end{itemize}
favor of promoting the constitutional goals of copyright protection in order to provide an incentive to create and enable public access and fair use so long as reasonable economic incentive exists for industries to continue expending money to bring us the latest Tom Waits album.\textsuperscript{339} The symbiotic relationship between the artist and the label demands protection of legitimate economic interests reflected in each album and single released. However, a balance must be struck in harmony with the founding fathers' realization that society benefits from the free flow of information. The politics of rhetoric are not a solid basis on which to formulate public policy and create expansive rights protecting distribution.

The ability of the government to legislate specific to technology is strained; instead the government should provide safeguards for its citizens in light of how the market chooses to move forward. Reactive legislation such as the DMCA\textsuperscript{340} runs afoul of the established, proactive jurisprudence. Legislation should focus on the broad strokes and leave the minutiae to flow with the times, as the doctrine of fair use has done by establishing a rich common law tradition.

Music is the soundtrack to each individual's life, a uniquely personal experience. Access stimulates further expression regardless of whether the creation is a small-scale independent artist such as John Doe or well-known artist like Bob Dylan. The market is not likely to obsess over the constitutionality of anti-piracy measures. Hence, copyright regulation must balance the need to maintain economic incentives to create while preserving access and consumer rights. Further, legislation created based on policies and not specific technology will serve the utilitarian purpose behind the monopoly grant by not chilling the market with overburdensome regulation while preserving public interests in use of and access to protected material.

In creating sound legislation it seems that asking "why" goes further than asking "what." At the end of the day, "I know it's only rock 'n roll but I like it."\textsuperscript{341}

\textsuperscript{339} The author admits to living in a fantasyland, as Epitaph is Tom Wait's label and has not aggressively pursued piracy. Instead, the anti-piracy movement is likely to need incentive to bring me the latest Kelly Clarkson's Greatest Hits album.


\textsuperscript{341} \textsc{Rolling Stones}, \textit{It's Only Rock 'N Roll (But I Like It), on It's Only Rock 'N Roll} (Virgin Records 1974).