

“A Prologue to a Farce or a Tragedy”? A Paradox, a Potential Clash: Digital Pirates, The Digital Millennium Copyright Act, The First Amendment & Fair Use*

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*. Letter from James Madison to W. T. Barry (Aug. 4, 1822), in 3 Letters and Other Writings of James Madison 276, 276 (New York, R. Worthington 1884).

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I. INTRODUCTION

Since the dawn of man, technology has been shaping the way people live.¹ It was technological developments in tools that allowed civilizations to evolve. Technology has influenced all aspects of human culture—from the

1. See Colin B. Picker, *A View From 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 151 (2001); see also Brian Paul Menard, *And the Shirt Off Your Back: Universal City Studios, DECSS, and the Digital Millennium Copyright Act*, 27 RUTGERS COMPUTER & TECH. L. J. 371, 373 (2001).

development of crude stone scraping and cutting tools used by early humans,² to the developments of farming technologies,³ to the printing press that spawned the expression of humanism during the Renaissance, to the creation of machines that drove the Industrial Revolution and changed the landscape of our planet. Indeed, technology has been a guiding force of our social structure, our belief system, and our laws.⁴ Today, technology's influence on our lives is obvious.⁵ Technology has shifted the focus of our economy from manufacturing to service and information.⁶ The rapid growth of the Internet is a catalyst to this change and has created a global marketplace.⁷

Instant access to virtually limitless raw information is at the heart of today's service economy. Economic value resides increasingly in the creation, distribution, interpretation and transformation of information. This information may take many forms, including text, sound, images, and video. Representation of information by ones and zeros, the binary language of the computer, permits the development of standardized formats for storage, distribution, manipulation, and display. This standardization lowers costs so that the ideal of universal access to information by all members of society is within reach, spawning the digitally-driven Information Age.⁸

These technological developments create the challenge of allowing access to information while providing an incentive to copyright owners by protecting their rights. In the past, technology was merely a means to an end, providing a more efficient way to produce a tangible commodity. Today, technology meshed with information is the end, it is the commodity that our world demands.

In this new paradigm, maintaining a balance in the law of copyright is essential to create economic growth while fostering positive social change.

2. See DANIEL R. GROSS, *DISCOVERING ANTHROPOLOGY* 169 (1992) (noting that anthropologists have discovered tools used by early humans that are about 2.6 million years old).

3. See *id.* at 310.

4. See Picker, *supra* note 1, at 151; see also CRAIG JOYCE ET AL., *COPYRIGHT LAW* 49 (5th ed. 2001).

5. See Anthony Townsend, *Technology in the Workplace: Employment and Employees in the Information Age*, 21 *JOURNAL OF LABOR RESEARCH* 377 (2000) (reporting that the technologically driven Information Age has shifted the geographic focus of our economy, forced a change in what America's major corporations produce, and has dramatically modified the role of the worker and the workplace).

6. See JOYCE ET AL., *supra* note 4, at 1.

7. See *id.* at 51-52.

8. W. Wayt King, Jr., *The Soul of the Virtual Machine: In Re Alappat*, 2 *J. INTELL. PROP. L.* 575, 575-76 (1995).

During the Industrial Revolution, when technological developments changed American society, Congress passed antitrust laws that made it illegal to create unfair competition.⁹ This ensured that America's metamorphosis from an agrarian society to a manufacturing society would be a positive change. In contrast, at the inception of the current Information Revolution, Congress passed two laws that strongly favor those who control information.¹⁰

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act¹¹ ("CTEA"), a law that extended the copyright term by twenty years.¹² This law applies retroactively; it extends the term of current and future copyrights.¹³ Although this is not the first time the term of copyright protection has been expanded and applied to existing copyrights,¹⁴ it is important to realize that a copyright's original term, fourteen years with a renewal term of fourteen years, has now been extended to the author's life plus seventy years.¹⁵ While a full study of the CTEA is not within the scope of this Comment, it is important to consider the flaws of this law and its effect on copyright law. This is especially true since commentators have "contended that an extension of an existing copyright term constitutes precisely one of those instances in which copyright law may unconstitutionally abridge speech."¹⁶ It is also important to review the arguments that were heard by the United States Supreme Court in *Eldred v. Ashcroft*.¹⁷

Eldred involved a challenge of the constitutionality of the CTEA by individuals and entities that rely on works that are in the public domain.¹⁸ The petitioners unsuccessfully argued that the CTEA violates both the Copyright Clause and the First Amendment.¹⁹ Specifically, they claimed that the "limited

9. See 15 U.S.C. § 1 (2000).

10. See 17 U.S.C. § 1201(2000); see also 17 U.S.C. §§ 302-304 (2000).

11. 17 U.S.C. §§ 101, 302-304 (2000).

12. *Eldred v. Ashcroft*, 123 S. Ct. 769, 774 (2003).

13. See *id.* at 775; see also Sue Ann Mota, *Eldred v. Reno—Is the Copyright Term Extension Act Constitutional?*, 12 ALB. L. J. SCI. & TECH. 167, 175 (2001).

14. See *Eldred*, 123 S. Ct. at 775. In 1831, Congress made the first alteration to the term of a copyright by increasing it to forty-two years. *Id.* Congress next extended the term to fifty-six years in 1909 and in 1976, they changed the method of computing the term by increasing it to the life of the author plus fifty years. *Id.*

15. *Id.*; Mota, *supra* note 13, at 170.

16. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 71 (2001) (referencing Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186-1204 (1970)).

17. See generally *Eldred*, 123 S. Ct. 769.

18. See *id.* at 775; see also *Eldred v. Ashcroft*, 255 F.3d 849, 850 (D.C. Cir. 2001), *aff'd*, 123 S. Ct. 769 (2003).

19. *Eldred*, 123 S. Ct. at 775.

Times” provision of the Copyright Clause does not allow Congress to extend the term of years like they did in passing the CTEA.²⁰ The First Amendment argument was based on the concept that the CTEA is a content neutral regulation of speech that fails the heightened constitutional scrutiny that such a law demands.²¹ Petitioners further argued that the CTEA violates the Copyright Clause because it fails to “promote the Progress of Science.”²² Another obvious, and “perhaps the most troubl[ing],”²³ flaw of the CTEA is that new authors do not benefit from its retroactive feature.²⁴ Instead, the CTEA’s primary beneficiaries are those who already held copyrights when the

20. *Id.* It is important to note that the petitioners did not contend that the Copyright Clause was offended by the CTEA’s twenty year addition to the copyright term. *See id.* In fact, they conceded that since the term the CTEA implemented—life of the author plus seventy years—was a limited time. *See id.* Instead, they only challenged Congress’s authority to apply the new term to existing copyrights. *Id.* They urged that “a time prescription, *once set*, becomes forever ‘fixed’ or ‘inalterable.’” *Id.* at 778 (emphasis added). Nevertheless, the Court disagreed and held that “[t]he word ‘limited’ . . . does not convey a meaning so constricted” and that there is a long history of Congress applying additional time to existing copyrights. *Id.* at 778; *see also supra* note 16 and accompanying text. Writing for the Court, Justice Ginsburg reasoned that the CTEA was a rational exercise of legislative authority that the Copyright Clause gives to Congress and that they acted in response to “demographic, economic, and technological changes.” *Id.* at 782. The Court went on to note that “we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.” *Id.* at 782-83. *But see id.* at 801 (Stevens, J., dissenting) (“It is emphatically the province and duty of the judicial department to say what the law is.”) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

21. *See id.* at 788. Again, the Court disagreed and held that it would be improper to impose strict scrutiny to the CTEA since the copyright system has built-in First Amendment protections. *Id.* at 788-89. The Court noted that the doctrine of fair use and only the expression of ideas are protected by the First Amendment. *Id.* 788-89. However, Justice Breyer notes:

This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation’s historical and cultural heritage and efforts to use that heritage, say, to educate our Nation’s children. 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. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.

Id. at 813 (Breyer, J., dissenting).

22. *Id.* at 784.

23. *See Mota, supra* note 13, at 175.

24. Netanel, *supra* note 16, at 70. *But see Eldred*, 123 S. Ct. at 775 (noting that the previous extensions of the copyright term have been applied to existing copyrights). *See generally supra* note 14 and accompanying text.

Act was created.²⁵ Thus, some copyright owners are receiving a benefit without creating a new work that could benefit all of society.²⁶ This would seem to contradict the goal stated in the Copyright Clause.²⁷ The beneficiary class of the CTEA “include[s] motion picture studios, record studios, and music publishers.”²⁸

In 1998, Congress passed another law that extended the scope of copyright protection and further tilted the balance of copyright in the favor of copyright owners. The Digital Millennium Copyright Act (“DMCA”),²⁹ the focus of this Comment, is a law that permits copyright owners to utilize technologies that create a shield that protects against any unauthorized use of their work.³⁰ This law upsets the balance of copyright law by providing copyright owners with a monopoly while preventing society from benefitting from fair use access.³¹ The great fear associated with the DMCA is that with the advent of digital technologies, especially the Internet, and with society’s growing reliance on them,³² copyright owners will only publish their works in a digital format where, because of the DMCA, there is no opportunity for fair use. This form of selective publishing will enable copyright owners to self-regulate or prevent access, thus legally violating both the Copyright Clause and the First Amendment. Therefore, the implications of the DMCA are far reaching,³³ this law, along with the CTEA, has made copyright law increasingly unjust,³⁴

25. Netanel, *supra* note 16, at 70.

26. See *Eldred*, 123 S. Ct. at 801 (Breyer, J., dissenting). Justice Breyer argues: The economic effect of this 20-year extension—the longest blanket extension since the Nation’s founding—is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of “Science”—by which word the Framers meant learning or knowledge.

Id. (citing E. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 125-126 (2002)).

27. See *supra* note 22 and accompanying text. Cf. *Eldred*, 123 S. Ct. at 785 (holding that it is in the discretion of Congress to determine the Copyright Clause’s objectives).

28. Netanel, *supra* note 16, at 70.

29. 17 U.S.C. § 1201 (2000).

30. Stephen M. Kramarsky, *Copyright Enforcement in the Internet Age: The Law and Technology of Digital Rights Management*, 11 DEPAUL-LCA J. ART & ENT. L. & POL’Y, 1, 42 (2001).

31. See *infra* notes 214-30 and accompanying text.

32. Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 439 (1997) (providing that “[t]he market for copyrighted works in digital form is already very substantial, and it will continue to grow.”) [hereinafter Samuelson, *WIPO*].

33. See *infra* Part V.

34. Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 821 (2001) (arguing that “in the face of unjust laws, individual citizens have no choice but to disobey and thereby

which may harness the full potential of this new Information Revolution by preventing the free flow of information.³⁵

Part II of this Comment will briefly examine the landscape of American copyright law. Part III will argue that the doctrine of Fair Use is an essential tool in ensuring that there is a balanced transition into the Information Age by providing access to information and by buttressing the copyright law with the guarantees of First Amendment expression. Part III provides examples of the importance of the fair use defense through case law. Part IV will review the developments in technology that may eliminate the fair use defense, the right to access, and the right to make use of works that have entered the public domain. Part V will examine the DMCA, specifically section 1201, its effect on fair use, and its potential effect on the development of America's Information Revolution. Part V will also examine cases that have interpreted the DMCA. Part VI will discuss proposals to save fair use which will ensure a balance in both copyright law and in the Information Revolution.

II. THE UNITED STATES LAW OF COPYRIGHT

A. *The Intent of the Copyright Clause*

"[T]he Framers intended copyright itself to be the engine of free expression."³⁶ Nearly all Framers of the Constitution believed that some form of copyright protection should be included in the federal sphere of government.³⁷ In fact, James Madison stated, "'The utility of this power will scarcely be questioned.'"³⁸ Article I Section 8 of the Constitution allows for the creation of the federal copyright protection that the Framers believed was so important.³⁹ The Copyright Clause provides that "The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁴⁰ The Supreme Court has held that while this clause grants Congress the power to make copyright laws, it limits congressional power to passing laws that serve the interests of the public and not merely the copyright owner.⁴¹

force society to enforce the law in a way that makes its injustice palpable.").

35. See *infra* Part V and Conclusion.

36. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

37. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01 (2002) [hereinafter NIMMER ON COPYRIGHT.].

38. *Id.* (quoting James Madison).

39. See U.S. CONST. art. I, § 8, cl. 8.

40. *Id.*

41. See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966).

Congress has since passed a federal copyright law that grants five basic exclusive rights to copyright owners over the protected work.⁴² These rights include: (1) the right to copy the protected work; (2) the right to make derivative works from the protected work; (3) the right to distribute copies of the protected work; (4) the right to perform the protected work; and (5) the right to publicly display the protected work.⁴³ This limited monopoly is given to the creators of original works under the theory that the public benefits from the work of inventors; it is essential to provide the benefits of the protection to promote new discoveries and creativity.⁴⁴

B. *Overview of the First Amendment's Limitations
to the Copyright Clause*

The protection of copyright law is not absolute. The copyright law restricts free speech in that it prevents others from using the author's expression of a work. Because of this restriction of speech, copyright protection must be limited.⁴⁵ The First Amendment guarantees freedom of expression and declares that ideas are freely alienable.⁴⁶ Therefore, a constitutional copyright law can protect only an author's expression of an idea, not the idea itself.⁴⁷ This distinction between ideas and expressions prevents the occurrence of a serious constitutional clash between the Copyright Clause and the First Amendment.⁴⁸ "It cannot be denied that the copyright laws do in some degree abridge freedom of speech, and if the First Amendment were literally construed, copyright would be unconstitutional."⁴⁹ Indeed, there are other laws that serve a vital role

42. 17 U.S.C. § 106 (2000).

43. *Id.*

44. See NIMMER ON COPYRIGHT, *supra* note 37, § 1.03[A].

45. See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J. L. & TECH, 41, 43 (2001).

46. See NIMMER ON COPYRIGHT, *supra* note 37, § 1.10[A] (noting the fact that the First Amendment trumps the Copyright Clause that appears in the central body of the constitution).

47. See *id.* § 1.10[B][2].

48. See *id.* Recognizing the problem presented by the copyright law's clash with the First Amendment Nimmer quotes Justice Cardozo: "The reconciliation of the irreconcilable, the merger of antitheses, the syntheses of opposites, these are the great problems of law." *Id.* § 1.10[A]. Nimmer states that the law often deals with these contradictions by ignoring the opposite's relationship, and by keeping the ideas separate in "logic-tight compartments." *Id.* Nimmer adds that this dichotomy is most evident in the law's attempt to protect all copyrighted works and to championing the values of the First Amendment while failing to realize that the law of copyright and the First Amendment may be contradictory. NIMMER ON COPYRIGHT, *supra* note 37, § 1.10[A].

49. *Id.*

in our society that also restrain speech and could be considered unconstitutional if the First Amendment was literally construed.⁵⁰

Here, the Copyright Clause's inconsistency with the First Amendment can be rationalized by the important social role that the copyright laws champion. The limited monopoly given to copyright owners serves the important purpose of providing authors with the incentive to create works from which society will benefit, while still allowing the work to be communicated freely.⁵¹ There are other limitations to the protection of copyright. While section 106 of the Federal Copyright Act of 1976 provides that any user of a copyrighted work who uses or authorizes the use trespasses into the exclusive domain of the protected work,⁵² section 107 provides that a use may not be a trespass into the exclusive domain of a copyrighted work if the use is considered to be a fair use.⁵³

III. THE DOCTRINE OF FAIR USE

"[T]he issue of fair use ... is the most troublesome in the whole law of copyright."⁵⁴ The concept of fair use has been explained as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."⁵⁵ The issue that vexes courts is what constitutes a reasonable, or fair use of a protected work. The four factor test provided in section 107 of the Copyright Act has codified the equitable considerations of the common law that help to focus a court's interpretation.⁵⁶

50. *Id.* (stating that the punishment of perjury, fraudulent statements, and antitrust laws are examples of laws that properly restrict speech). Nimmer also notes that the absolutist approach of considering any law involving speech to violate the First Amendment would yield an undesirable result. *Id.*

51. *See id.* at 37, § 1.10[B][1].

52. *See* 17 U.S.C. § 106 (2000).

53. *See* 17 U.S.C. § 107 (2000).

54. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (capturing the complexity of fair use analysis, Judge Learned Hand's statement is frequently quoted in fair use cases, and in other materials on copyright law).

55. *Rosemont Enters., Inc. v. Random House Inc.*, 366 F.2d 303, 306 (2d Cir. 1966) (quotation marks omitted).

56. *See generally* *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). In this opinion Justice Story introduced the doctrine of fair use to American law. *See id.*

A. *Factor One: The Purpose & Character of the Use*

1. The Profit/Nonprofit Distinction

The first factor that most courts consider is the purpose and character of the use.⁵⁷ In 17 U.S.C. § 107, Congress included that takings for comment or criticism should usually be considered a fair use.⁵⁸ However, the court must also determine if the use is commercial in nature, or for an educational or nonprofit reason.⁵⁹ "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."⁶⁰ This distinction is illustrated by *Princeton University Press v. Michigan Document Service Inc.*⁶¹

Princeton University Press held that a use that may ultimately have an educational purpose is still an unfair commercial use if the user is to gain a competitive edge or to make a profit.⁶² In this case, a copyright owner of college textbooks brought suit against a commercial print shop.⁶³ The print shop reproduced the copyrighted materials for professors who made coursepacks, which were sold to students as assigned class readings.⁶⁴ The Court of Appeals for the Sixth Circuit held that the reproduction of the copyrighted materials and the making of coursepacks was an unfair use.⁶⁵ "Like the students who purchased unauthorized coursepacks, the purchasers of *The Nation* did not put the contents of the magazine to commercial use—but that did not stop the Supreme Court from characterizing the defendant's use of the excerpts as 'a publication [that] was commercial as opposed to nonprofit.'"⁶⁶ Judge Rosen further explained the *Princeton University Press*

57. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (serving as a prototypical copyright case on literature and first publication, *Harper* involved the defendant publishing an article, which contained detailed excerpts, including verbatim quotes from President Ford's unpublished memoirs concerning his pardon of President Nixon).

58. 17 U.S.C. § 107.

59. See *id.*

60. *Harper*, 471 U.S. at 562; see also *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1386 (6th Cir. 1996).

61. 99 F.3d at 1385-87.

62. *Id.* at 1386.

63. *Id.* at 1383.

64. *Id.*

65. *Id.*

66. *Princeton Univ. Press*, 99 F.3d at 1386 (citing *Harper*, 471 U.S. at 562) (providing reasons for their decision that the use was not educational)(alterations in original).

holding while writing for the court in *Higgins v. Detroit Education Television Foundation*.⁶⁷ Judge Rosen stated:

Copying copyrighted materials was the express business of the *Princeton University Press* defendant. It was because the defendant was in the business of making copies of copyrighted material for profit that the court refused to find an educational purpose simply because the copies made were ultimately used by university students.⁶⁸

2. The Transformative Value of the Use

The first factor also considers the transformative value of the use.⁶⁹ Courts have held that copied works that merely supersede the original creation, but add nothing to transform the value of the original work, do not achieve the goal of fair use, which is to provide access to work so as to further science and to promote creativity.⁷⁰ To be considered transformative, a work must change the meaning of the protected work or add new value to it.⁷¹ *Campbell v. Acuff-Rose Music, Inc.*⁷² and *Suntrust Bank v. Houghton Mifflin Co.*⁷³ provide examples of a transformative use.

In the famous *Campbell* case, the Supreme Court found a transformative fair use in a parody.⁷⁴ In *Campbell*, the rap group 2 Live Crew, parodied Roy Orbison's classic song *Oh Pretty Woman*.⁷⁵ 2 Live Crew copied the opening

67. 4 F. Supp. 2d 701 (E.D. Mich. 1998) (involving the use of plaintiff's song by the defendant in the production of the defendant's film).

68. *Id.* at 705.

69. See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 78-79 (2d Cir. 1997) (noting Justice Souter's explanation of a transformative use). Serving as an example of a transformative analysis, *Ringgold* involved a defendant who used a poster of the plaintiff's "story quilt," a decorative piece of art as a prop for a sitcom set. See *id.* at 72. The poster depicting the plaintiff's work could be seen in certain segments of the program, but the defendant did not give credit to the plaintiff. *Id.* at 73. The Court held that because the defendant used the plaintiff's work for the same reason it was created, to be a decorative piece of art, the defendant merely superseded, the original since it added nothing to transform the original's value. See *id.* at 79.

70. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); see also *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) (involving the use of characters and plots from the television show *Seinfeld* in the defendant's quiz book). The Court held that the defendant's use contained no transformative value. See *Castle Rock Entm't, Inc.*, 150 F.3d at 142-43.

71. See *Ringgold*, 126 F.3d at 78-79.

72. 510 U.S. 569 (1994).

73. 268 F.3d 1257 (11th Cir. 2001).

74. *Campbell*, 510 U.S. at 594.

75. See *id.* at 571-72.

line of the original and used it as the first line of their song.⁷⁶ The rap group then moved to parody the original with their own brand of music and lyrics.⁷⁷ Finding a fair use, the Court stated that the use of the first line of the protected song was necessary in establishing the parody.⁷⁸ It allowed the listener to comprehend the intended humor by the rap group's reference to the original song.⁷⁹ The Court reasoned that the use was transformative because it changed the value and the meaning of the original by adding different music and new lyrics.⁸⁰ *Campbell* is an example of a traditional parody that takes a nearly de minimis amount of the original.⁸¹

However, the defendant's use in *Suntrust Bank* provides an example of a transformative use that takes a large portion of the original to achieve the using author's goal.⁸² There, the defendant published a book titled *The Wind Done Gone*, a fictional work based on the popular fictional novel *Gone With the Wind*.⁸³ The defendant argued that her novel served as commentary of *Gone With the Wind*'s depiction of slavery.⁸⁴ To achieve her artistic goal, the defendant appropriated *Gone With The Wind*.⁸⁵ The plaintiff claimed that *The Wind Done Gone* copied famous scenes, elements of the plot, the main characters, the characters' traits, and verbatim dialogue from *Gone With The Wind*.⁸⁶ The defendant contended that her work did not infringe upon the protected work because her book was a transformative use.⁸⁷ Addressing this factor the court held: "The fact that *TWDG* [*The Wind Done Gone*] was published for profit is the first factor weighing against a finding of fair use. However, *TWDG*'s for-profit status is strongly overshadowed and outweighed in view of its highly transformative use of *GWTW*'s [*Gone With The Wind*] copyrighted elements."⁸⁸

In holding that the defendant's use was a fair use, the court reached the proper conclusion. The defendant clearly gave new meaning to the original in her revisionist approach.⁸⁹ The defendant's book did not merely copy from the

76. *See id.* at 582.

77. *See id.*

78. *See id.* at 588-89.

79. *Campbell*, 510 U.S. at 588-89.

80. *See id.* at 583.

81. *See id.* at 582 (noting that only the first line of the original was copied).

82. *See generally* 268 F.3d 1257, 1239 (11th Cir. 2001).

83. *Id.*

84. *See id.*

85. *Id.*

86. *Id.*

87. *See Suntrust Bank*, 268 F.3d at 1259.

88. *Id.* at 1269.

89. *See id.* at 1270.

original, instead it transformed the original in a way that made it more historically accurate and a more truthful version of itself.⁹⁰ This is an example of a transformative use that does not merely point to the humor of a work of literature, it also points to the flaws of the society intended to view the protected work of art.⁹¹

B. *Factor Two: The Nature of the Protected Work*

Even if a defendant's purpose is held to be a non-transformative commercial use, this does not alone equate to an unfair use. The second factor of the fair use test studies the nature of the protected work.⁹² This factor questions whether the protected work is a creative work or a factual work.⁹³ The distinction between a creative work and a factual work is important due to the copyright law's treatment of facts and ideas as unprotected.⁹⁴ The law is slow to protect a fact or an idea alone because society, as a whole, may need full access to the information to advance as a people.⁹⁵ Instead, the law is only willing to protect the *expression* of a fact or the *expression* of an idea so that others may have access to the core concept for interpretation and further enlightenment.⁹⁶ To achieve this end, the scope of fair use is narrowed in situations where the original work is fictional or creative rather than a factual statement, such as a phone book, so as to promote creativity by protecting the expression of an idea while allowing the core idea to be shared and expanded.⁹⁷

C. *Factor Three: The Amount & Substantiality of the Use*

Factor three of the fair use analysis is a measure of the amount and the substantiality of the use.⁹⁸ This third factor is a sensitive scale, measuring the reasonableness of the taking.⁹⁹ "[T]he fact that a substantial portion of the

90. See *id.* at 1269-71.

91. See *id.* at 1271.

92. See 17 U.S.C. § 107 (2000).

93. See *Hustler Magazine, Inc. vs. Moral Majority, Inc.*, 606 F. Supp. 1526, 1536 (C.D. Cal. 1985).

94. See *Suntrust Bank*, 268 F.3d at 1271 (noting the "hierarchy of copyright protection"); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 at 563 (stating that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy").

95. See *Harper & Row, Publishers, Inc.*, 471 U.S. at 582-83 (Brennan, J., dissenting).

96. See *id.* at 558-59.

97. See *id.* at 563.

98. See 17 U.S.C. § 107 (2000).

99. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression."¹⁰⁰ In holding that the amount and substance of the used excerpts were an unfair use, the Supreme Court in *Harper & Row, Publishers, Inc., v. Nation Enterprises* found that "The *Nation* article is structured around the quoted excerpts which serve as its dramatic focal points," the most intriguing and the best portions of the manuscript were used; thus, "the heart" of the book was used, even though the exact quotes only made up thirteen percent of the defendant's article.¹⁰¹

However, there are instances where a complete copying can be a fair use.¹⁰² *Haberman v. Hustler Magazine, Inc.*, is a case that permitted a complete copying for the purpose of social commentary.¹⁰³ Although *Hustler* copied artistic photographs in full, the court held that this was not enough to be considered an unfair use.¹⁰⁴ The district court reasoned, "The works in question are graphic and unusual"; it was essential to copy them in order to criticize them or to comment on them.¹⁰⁵ The court, therefore, held that "a commentator may fairly reproduce as much of the original, copyrighted work as is necessary to his proper purpose."¹⁰⁶

In *Sony Corp. of America v. Universal City Studios*,¹⁰⁷ the plaintiffs claimed that the defendant's marketing of VCRs was an infringement on their copyrights.¹⁰⁸ The Supreme Court did not find this argument persuasive because of the potential non-infringing uses associated with VCRs.¹⁰⁹ This reasoning led the Court to hold that the marketing of VCRs was a fair use.¹¹⁰ The Court noted that two of the obvious non-infringing uses of the VCR were the copying of television shows by private owners of VCR's for the purpose

100. See *Harper & Row, Publishers, Inc.*, 471 U.S. at 565.

101. *Id.* at 548, 566.

102. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1272-73 (2001) (describing the Supreme Court's findings of fair use in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984), and the finding of fair use in *Haberman v. Hustler Magazine, Inc.* 626 F. Supp. 201 (D. Mass. 1986)).

103. See 626 F. Supp. 201, 212 (D. Mass. 1986).

104. *Id.*

105. *Id.*

106. *Id.*

107. 464 U.S. 417 (1984).

108. *Id.* at 420.

109. *Id.* at 442; see also *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 258, 270 (5th Cir. 1988) (holding that copies made during the process of reverse engineering was not copyright infringement). This case supports the *Sony* holding that if a use has valid purposes that do not infringe on a copyright they be considered a fair use. *Vault Corp.*, 847 F.2d at 267.

110. *Sony Corp. of Am.*, 464 U.S. at 454-55.

of “time shifting,”¹¹¹ or for the purpose of building a video library.¹¹² These, of course, are also complete takings.

D. Factor Four: The Use's Effect on the Original's Market

The fourth factor of the fair use inquiry has been deemed “undoubtedly the single most important element of fair use.”¹¹³ The Supreme Court has held that to negate fair use one need only to show that, if the challenged use “should become widespread, it would adversely affect the *potential* market for the copyrighted work.”¹¹⁴ “This inquiry must take account not only of harm to the original but also of harm to the *market* for derivative works.”¹¹⁵ These quotes clearly indicate that courts have focused on whether the use would impede sales of the protected work in deciding this element.¹¹⁶ Therefore, it is necessary for a copyright owner to offer evidence that the challenged work will replace or supplant the original or derivatives of the original.¹¹⁷

In *Suntrust Bank*, the court held that the copyright owner did not establish proof that the defendant's use infringed upon the market or potential market of the original or the original's protected derivatives.¹¹⁸ This led the court to decide this factor in the defendant's favor and contributed to the court's holding that the defendant's use was a fair use.¹¹⁹

111. *Id.* at 423 (meaning to record and to watch at a later time).

112. It is important to note that the challenged use was a VCR that by itself contained none of the plaintiffs' protected work. *See id.* at 420-423.

113. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566, 568-69 (1985) (analyzing this element the Supreme Court held the defendant's use was not fair because it “directly competed for a share of the market for pre-publication excerpts” and, therefore, infringed on the plaintiff's market since readers of the defendant's article would have no need to buy the plaintiff's book).

114. *Sony Corp. of Am.*, 464 U.S. at 451 (emphasis added).

115. *Harper & Row Publishers, Inc.*, 471 U.S. at 568 (emphasis added).

116. *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1275 (2001) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510, 569, 590 (1994)) (“[E]vidence of substantial harm to [a derivative market] would weigh against a finding of fair use.”) (alteration in original). *But cf. Campbell*, 510 U.S. at 584 (noting that in the most recent Supreme Court fair use decision, the court declined to give this factor more weight than the other factors).

117. *See Suntrust Bank*, 268 F.3d at 1275.

118. *See id.* at 1275-76 (noting that the use would have little or no appeal to the fans of the original, or to the fans of the original's derivatives).

119. *See id.*

E. *The Doctrine of Fair Use: Bridging The Gap Between the Copyright Clause & the First Amendment*

The doctrine of fair use is a limitation to the copyright law's protections that has the values of the First Amendment ingrained in it.¹²⁰ Fair use serves to reconcile the contradiction between the Copyright Clause and the First Amendment by permitting uses that serve as criticism, comment, parody, news reporting, and by other means that may further science and the useful arts.¹²¹

"The exceptions carved out [in §107] for these purposes are at the heart of fair use's protection of the First Amendment, as they allow later authors to use a previous author's copyright to introduce new ideas or concepts to the public."¹²² Fair use also provides a legal tool that allows the law of copyright to adapt to the application of new technologies.¹²³ It is important to understand this and to realize that the roots of our Constitution's Copyright Clause can be traced to the Statute of Anne that intended to promote the free exchange of ideas and to end the private censorship of ideas by giving authors the legal ownership of their works.¹²⁴ The Copyright Clause has a similar intent: to promote the arts and sciences while preventing private censorship.¹²⁵ Thus, for a copyright law to maintain the balance between the important interests of promoting science and the useful arts and providing access to the idea being expressed, it must be limited by the doctrine of fair use.¹²⁶ If the interests that fair use protects are ignored, the copyright law's carefully created balance will be upset only to violate the First Amendment.¹²⁷ Here, it is important to remember the role of Congress in creating copyright laws compared to the supremacy of the First Amendment:

A grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use, and an emerging constitutional limitation on copyright contained in the First Amendment. The scope and extent of fair use falls within the discretion of the Congress. The limitations of the First Amendment are imposed upon Congress itself. Fair use, when properly applied, is limited to copying by others that does not materially impair the marketability of the work that is copied. The First Amendment

120. *See id.* at 1264.

121. *Burk & Cohen, supra* note 45, at 43.

122. *Suntrust Bank*, 268 F.3d at 1274.

123. *See Burk & Cohen, supra* note 45, at 46; *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430-31 (1984).

124. *See Suntrust Bank*, 268 F.3d. at 1260.

125. *See id.* at 1263.

126. *See id.* at 1264.

127. *See id.* at 1264-65.

privilege, when appropriate, may be invoked, despite the fact that the marketability of the copied work is thereby impaired.¹²⁸

IV. TECHNOLOGIES THAT THREATEN FAIR USE

A. *Digital Pirates*

The Internet provides an economically efficient means for copyright owners to reach diverse markets and to utilize new distribution tactics.¹²⁹ However, when copyright owners use the Internet and digital technologies they also subject themselves to the risk of losing revenue from the work of modern day pirates.¹³⁰ Digital technologies allow for a pirate to make perfect copies of a protected work that can be duplicated and reduplicated without compromising the quality of the copies.¹³¹ Here, it is important to identify the problems associated with making copyrighted work available in digital forms and to distinguish the digital pirate from the private user. Pirates are highly skilled and extremely devoted to stealing copyrighted work:

“Digital files cannot be made uncopyable [sic], any more than water can be made not wet.” Although digital content can be scrambled, every known scrambling system has been hacked “[N]othing works against a dedicated and skilled hacker[,] [including] unlock codes, encryption, serial numbers, hardware devices, on-line verification[,] copy protection, file encryption and watermarking.” ... Almost any protection system will work against the average user, but *no* protection system will work against the power user, hacker, or professional pirate.¹³²

Of course, the loss of revenue caused by digital pirates threatens the copyright industry, which accounts for five percent of the United States gross domestic product and holds strong lobbying power.¹³³ In response to the risk of piracy and the need to capture markets by using the Internet, the copyright industry

128. NIMMER ON COPYRIGHT, *supra* note 37, at § 1.10.

129. See Jennifer Burke Sylva, *Digital Delivery and Distribution of Music and Other Media: Recent Trends in Copyright Law; Relevant Technologies; and Emerging Business Models*, 20 LOY. L.A. ENT. L. REV. 217, 218-19 (2000); see also Menard, *supra* note 1, at 372.

130. See Sylva, *supra* note 129, at 219.

131. See Menard, *supra* note 1, at 374.

132. Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L. J. 1575, 1636-37 (2002).

133. Menard, *supra* note 1, at 374; see also Burk & Cohen, *supra* note 45, at 49 (reporting that the industry spent nearly three years lobbying for the protection of anti-circumvention that the DMCA provided).

has pursued the development of technologies known as technological protection measures ("TPMs") that prevent any unauthorized access.¹³⁴

With the passage of the DMCA, the copyright industry was given the authorization to use TPMs and the support of the federal government, which will penalize anyone that attempts to circumvent TPMs.¹³⁵ This allows copyright owners to charge for access both during and after the term of copyright protection by using technology to create a pay-per-use world.¹³⁶ This gives the copyright owner an infinite term of protection, which is far more than what the Copyright Clause grants.¹³⁷

B. *Development of Technological Protective Measures*

The TPMs that have been developed to protect digital copyright material use encryption and digital watermarking¹³⁸ (or stegonography) to protect against unauthorized uses.¹³⁹ These technologies are based on mathematical processes that use numbers, symbols, or characters to encode the protected information in a seemingly illogical language.¹⁴⁰ By using these systems, the copyright industry believes they can eliminate the threat of most pirating.¹⁴¹ For example:

Using encryption technology, ... major companies believe they can ensure the secure transmission of digital movies and music over computers, high-definition televisions, TV set-top boxes, digital VCRs and digital-video disk

134. See also JOYCE ET AL., *supra* note 4, at 899.

135. See *infra* Part V.B. (discussing the DMCA).

136. See *infra* note 250 and accompanying text (discussing the DMCA's creation of a pay-per-use world).

137. See Burk & Cohen, *supra* note 45, at 48-49.

138. See David L. Clark, *Digital Millennium Copyright Act: Can It Take Down Internet Infringers?*, 6 COMPUTER L. REV. & TECH. J. 193, 200-201 (2002). Describing digital watermarks the author states:

One of the less expensive techniques is a digital watermark. The watermark signifies authenticity to compatible players, and cannot be removed from a digital recording without causing a dramatic deterioration in its quality. The watermark's disadvantage is that it does not limit access to the work but only provides a "trail" that can be traced to determine the distribution of unauthorized copies on the Internet. Other types of [TPM]s actually prevent copyright infringement from being physically possible. Some make an unauthorized use impossible. Others track and report uses: if an unauthorized use is detected, the system can disable the product altogether or charge for the use.

Id. at 201.

139. See JOYCE ET AL., *supra* note 4, at 899.

140. See Sabra Chartrand, *A New Encryption System Would Protect a Coveted Digital Data Stream—Music on the Web*, N.Y. TIMES, July 3, 2000, at C8.

141. See *id.*

players--or at least make it extremely difficult to copy without permission. It would allow digital devices to "talk" to each other and allow only a prescribed number of copies to be made. For example, if somebody downloaded a movie from the Internet onto a digital VCR, the transmitting device would tell the receiving device that the film could be viewed only once.

This process would be invisible to consumers, unless there was an attempt to make illegal copies.¹⁴²

Another TPM, called the public key, uses a mathematical formula called convolution product; it is claimed to be a faster and a more efficient form of encryption.¹⁴³ Proponents of the technology maintain that the public key can "encode every second of a data stream with a different encryption key."¹⁴⁴ This means that an average length song would be mixed into 180 distinct codes.¹⁴⁵ If pirates attempted to break this code, their attempts would be in vain; they would only be able to enjoy one second of the music.¹⁴⁶ "Data like songs could be encoded to play on only one specific music player or computer, after which that particular version of the code would be thrown away."¹⁴⁷ This TPM is thirty times smaller than other devices and can be used for any digital device that is connected to the Internet and can be personalized to the user.¹⁴⁸ Therefore, the information can only be downloaded by the specific user whose computer has the key that is customized to the user so "[h]e can't share it with his friends without authorization because it simply won't play on his friend's device."¹⁴⁹

These are not the only forms of encryption being used by copyright owners.¹⁵⁰ Many companies have developed their own brand of TPM to serve as solutions to the problem of digital piracy.¹⁵¹ In fact, before the DMCA became

142. Jon Bigness, *Taking Aim at Digital Piracy: Intel Leads Group Designing Standard*, CHI. TRIB., Feb. 20, 1998, at C1 (quoted in JOYCE ET AL., *supra* note 6, at 899 n.10).

143. Chartrand, *supra* note 140, at C8.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. See Chartrand, *supra* note 140, at C8.

149. *Id.* (quoting chief executive of the company that owns the patent of the TPM, Scott Crenshaw).

150. See *id.*

151. *Id.*

law,¹⁵² creators of TPMs were fighting to become the industry's standard TPM.¹⁵³

*C. Technological Protective Measures Upsetting the
Balance of the Copyright Clause*

If these technologies continue to be developed, TPMs will become more efficient and more difficult for the digital pirate and especially private copiers to crack. It seems that the copyright industry will free itself of the inefficiency of lost revenues caused by these pirates. Nevertheless, the benefit received by the copyright industry will be at the cost of society, who may have lost its right of fair use, access, and to make use of works that have entered the public domain. Therefore, society's half of the Copyright Clause's bargain was lost with the birth of the DMCA.

V. THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. Rationale for the DMCA

1. The White Paper

In 1993, the Clinton Administration established a working group to study the effect of digital technologies on intellectual property.¹⁵⁴ This was a response to the threat that digital pirates would make the Internet an unsafe and inefficient market, thus preventing copyright owners from releasing their work on it.¹⁵⁵ When reviewing the efficiency of digital piracy, the rapid growth of the Internet, and optimism that encompassed the Internet during the mid-1990s, the goal of making the Internet safe for copyright owners in order to promote its use seems valid.¹⁵⁶

Furthermore, during the 1980s, the uses of TPMs were failing in both the marketplace and in their ability to block unauthorized users.¹⁵⁷ Consumers rejected products that were protected by TPMs because they restricted common

152. See *infra* notes 242-244 and accompanying text (discussing how the DMCA prevents the market from demanding new TPMs).

153. See JOYCE ET AL., *supra* note 4, at 899.

154. See Gary W. Glisson, *A Practitioner's Defense of the White Paper*, 75 OR. L. REV. 277, 277-78 (1996) (noting that the working group began its study believing that digital technologies upset the traditional balance of copyright holders in the favor of non-copyright owners).

155. Samuelson & Scotchmer, *supra* note 132, at 1634.

156. See *supra* notes 123-127 and accompanying text.

157. See Samuelson & Scotchmer, *supra* note 132, at 1631.

product uses, such as making backup copies.¹⁵⁸ More importantly, copyright owners who chose to use TPMs were at a competitive disadvantage compared to those who did not use them.¹⁵⁹ Consumers simply chose not to purchase products that used TPMs.¹⁶⁰ The TPMs did not effectively block unauthorized uses because courts adopted the *Sony Corp. of America* non-infringing use standard when interpreting the products that enabled a user to circumvent TPMs.¹⁶¹

The working group's stated goal was to study the status of copyright law in relation to the Internet and to recommend changes that would help maintain the traditional balance of copyright.¹⁶² In September of 1995, the working group released its recommendations in the white paper, the working group's final report.¹⁶³ Prior to the white paper's release, the working group published the green paper, an early draft of the white paper, and also solicited public comment and heard testimony.¹⁶⁴ The working group "depict[ed] the changes to copyright law recommended in the white paper as minor clarifications and updates to existing law."¹⁶⁵ The white paper commented:

Throughout more than 200 years of history, with periodic amendment, United States law has provided the necessary copyright protection for the betterment of our society. The Copyright Act is fundamentally adequate and effective. In a few areas, however, it needs to be amended to take proper account of the current technology. The coat is getting a little tight. There is no need for a new one, but the old one needs a few alterations.¹⁶⁶

The white paper recommended specific alterations to update the copyright law.¹⁶⁷ When the white paper was written, the copyright law did not

158. *See id.*

159. *See id.*

160. *See id.*

161. *See, e.g.,* *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 257, 262, 270 (5th Cir. 1988) (holding that copies made while reverse engineering a product was not infringement).

162. *See* Glisson, *supra* note 154, at 278.

163. James V. Mahon, Note, *A Commentary on Proposals for Copyright Protection on the National Information Infrastructure*, 22 RUTGERS COMPUTER & TECH. L. J. 233, 234 (1996).

164. *Id.*

165. Pamela Samuelson, *The Copyright Grab*, 29 UWLA L. REV. 165, 167 (1998) (citing Bruce Lehman) [hereinafter Samuelson, *Grab*]; *see also* Info. Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure*, 2 (Sept. 1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii> (last visited Mar. 9, 2003) [hereinafter *White Paper*].

166. *See White Paper, supra* note 165, at 212 (citations omitted).

167. *See id.*

specifically address the distribution of electronic transmissions.¹⁶⁸ Thus, it endorsed amending the right to distribution to clarify that digital transmissions are within the exclusive distribution right of the copyright owner.¹⁶⁹ The working group believed that the technological aspects of electronic transmissions jeopardize the reproduction and distribution of a copy in digital format.¹⁷⁰ The white paper encouraged expanding the definition of “transmit” in section 101 that only included a performance or a display to incorporate the transmission of reproductions.¹⁷¹ The reason for this proposal was to respond to digital technologies’ ability to yield simultaneous fixation of a performance at the receiving end of a transmission.¹⁷² The white paper included an amendment clarifying that a digital transmission of a work into the United States violates the copyright owner’s exclusive importation rights.¹⁷³ The white paper also recommended the elimination of the first sale rule for digital transmissions.¹⁷⁴ Finally, the white paper recommended the creation of a new provision in the Copyright Act to aid copyright owners using TPMs by preventing the use of circumvention technologies.¹⁷⁵ Although the working group did not formulate its own provision concerning criminal offenses,¹⁷⁶ it passively endorsed legislation that intended to impose criminal liability for the copying or distribution of protected work that exceeds \$5,000.¹⁷⁷ The working group further rationalized the recommendations made in the white paper by stating that “when technology gets too far ahead of the law, and it becomes difficult and awkward to adapt the specific statutory provisions to comport with the law’s principles, it is time for reevaluation and change.”¹⁷⁸

Some commentators, however, criticized the recommendations made in the white paper as being too accommodating to the copyright industry.¹⁷⁹ These

168. *Id.* at 213.

169. *Id.*

170. *See id.*

171. *White Paper*, *supra* note 165, at 217.

172. *See id.* at 217-18.

173. *Id.* at 221.

174. *See id.* at 95.

175. *See id.* at 230-31.

176. *See infra* notes 206-10 and accompanying text (discussing how the DMCA went beyond the white paper’s recommendations).

177. *White Paper*, *supra* note 165, at 229.

178. *Id.* at 211.

179. *See* Samuelson, *Grab*, *supra* note 165, at 166 (proclaiming “ALERT[:] Stop the Clinton Copyright Grab! The Administration’s White Paper on Intellectual Property in the Digital Era Is a Wholesale Giveaway of the Public’s Rights”); *see also* Matt Jackson, *The Digital Millennium Copyright Act of 1998: A Proposed Amendment to Accommodate Free Speech*, 5 COMM. L. & POL’Y 61, 73 (2000) (stating that “[i]t was clear from the tone of the report that copyright owners had been very persuasive in articulating their view that strong

critics were quick to point out that the working group was led by Bruce Lehman, a former copyright industry lobbyist,¹⁸⁰ and that the alterations proposed are loaded with hidden benefits for copyright owners.¹⁸¹ They contended that the white paper is a “shockingly careless piece of work” that repeatedly misstates the current law concerning copyright.¹⁸² The critics further contended that the white paper’s evaluation of the law was consistently tilted in the favor of creating new laws and that it repeatedly misinterpreted the law in the favor of change.¹⁸³ These critics argued that the white paper’s actual agenda was to:

- (1) give copyright owners control over every use of copyrighted works in digital form by interpreting existing law as being violated whenever users make even temporary reproductions of works in the random access memories of their computers;
- (2) give copyright owners control over every transmission of works in digital form by amending the copyright statute so that digital transmissions will be regarded as distributions of copies to the public;
- (3) eliminate fair-use rights whenever a use might be licensed . . . ;
- (4) deprive the public of the ‘first sale’ rights it has long enjoyed in the print world . . . because the White Paper treats electronic forwarding as a violation of both the reproduction and distribution rights of copyright law;
- (5) attach copyright management information to digital copies of a work, ensuring that publishers can track every use made of digital copies and trace where each copy resides on the network and what is being done with it at any time;
- (6) protect every work technologically (by encryption, for example) and make illegal any attempt to circumvent that protection; [and]
- (7) force online service providers to become copyright police¹⁸⁴

2. WIPO Standards

Like the working group that the Clinton Administration established, the World Intellectual Property Organization (“WIPO”) attempted to address the

copyright enforcement measures were needed to ensure the success of the [National Information Infrastructure].”).

180. Samuelson, *Grab*, *supra* note 165, at 167; *see also* Teresa Riordan, *The Commissioner Quits, After Focusing Attention on Intellectual Property and Making Enemies*, NY TIMES, Oct. 26, 1998, at C2 (quoting Jamie Love, director of the Consumer Project on Technology, “whatever Hollywood or the biotechnology industry wanted, [Lehman] would do. His responsibility should have been to the public.”).

181. *See* Samuelson, *Grab*, *supra* note 165, at 167.

182. James Boyle, *Intellectual Property Policy Online: A Young Person’s Guide*, 10 HARV. J. L. & TECH. 47, 52 (1996).

183. *See id.*

184. Samuelson, *WIPO*, *supra* note 32, at 380-81.

dangers associated with publishing copyrighted materials in digital forms.¹⁸⁵ In 1996, WIPO passed two treaties to protect copyrighted information in digital forms.¹⁸⁶ The Performances and Phonograms Treaty created safeguards for releasing sound recordings in digital format.¹⁸⁷ The Copyright Treaty intended to buttress the Berne Convention Copyright Treaty and addressed protections for commerce on the Internet.¹⁸⁸ This Treaty included provisions for coverage of computer programs, robust public distribution rights, and extensive Internet communication rights.¹⁸⁹ On April 12, 1997, the United States signed both WIPO treaties.¹⁹⁰ In doing so, the United States was required by the treaties to:

provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.¹⁹¹

B. *The DMCA*

President Clinton signed the Digital Millennium Copyright Act in 1998¹⁹²

185. See, e.g., Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 J. ART & ENT. L. 397, 401 (1999).

186. *Id.* at 401-02.

187. *Id.* at 402.

188. *Id.* at 401.

189. See *id.* at 401-02.

190. World Intellectual Property Organization (WIPO) Copyright Treaty, Apr. 12, 1997, art. II, S. TREATY DOC. NO. 105-17, 36 I. L. M. 65 (1997), available at 1997 WL 447232.

191. Harry Mihet, Universal City Studios, Inc. V. Corley: *The Constitutional Underpinnings of Fair Use Remain an Open Question*, 2002 DUKE L. & TECH. REV. 3, 4 (quoting article II of WIPO Treaty of 1997, *supra* note 190).

192. *Clinton Statement on the Digital Millennium Copyright Act*, U.S. NEWswire Oct. 28, 1998, available at 1998 WL 13606936. After signing the DMCA President Clinton stated:

These treaties will become effective at a time when technological innovations present us with great opportunities for the global distribution of copyrighted works. These same technologies, however, make it possible to pirate copyrighted works on a global scale with a single keystroke. The WIPO treaties set clear and firm standards—obligating signatory countries to provide “adequate legal protection” and “effective legal remedies” against circumvention of certain technologies that copyright owners use to protect their works, and against violation of the integrity of copyright management information. This Act implements those standards, carefully balancing the interests of both copyright owners and users

Through enactment of the Digital Millennium Copyright Act, we have done our best to protect from digital piracy the copyright industries that comprise the leading export of the United States.

Id.

with the intent of updating the copyright law to be consistent with the developments of digital technologies and the Internet.¹⁹³ The DMCA also brought the United States in compliance with the 1996 WIPO treaties.¹⁹⁴ In drafting the DMCA, Congress created a drastic amendment to the Copyright Act of 1976.¹⁹⁵ Unlike traditional copyright laws, the DMCA does not address the act of infringement, but instead concentrates on the technologies that facilitate infringement.¹⁹⁶ "[I]ts goal is to 'make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius.'"¹⁹⁷

While the DMCA consists of five titles,¹⁹⁸ this discussion will focus on Title I that implements WIPO treaties.¹⁹⁹ This title also contains the most significant aspect of the DMCA:²⁰⁰ section 1201, which introduces anti-circumvention to the law of copyright and has obvious effects on the fair use doctrine.²⁰¹ This provision also highlights the tensions between copyright and technology.²⁰² Section 1201 states, "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."²⁰³ It also bans the creation, marketing, and trafficking of devices that are designed to crack encryption technologies and imposes civil and criminal penalties for violations of the section.²⁰⁴ In doing so, the DMCA illegitimizes the fair use defense and stifles researchers' ability to pursue the development of new technologies, thus directly hindering the progress of science.²⁰⁵

193. See Menard, *supra* note 1, at 377.

194. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 681 (2000) [hereinafter Nimmer, *A Riff*].

195. See *id.* at 674-75; see also Menard, *supra* note 1, at 377.

196. See Clark, *supra* note 138, at 202-03; see also *infra* notes 214-219 and accompanying text (discussing how the DMCA contradicts Sony).

197. Nimmer, *A Riff*, *supra* note 194, at 681.

198. See Jo Dale Carothers, Note, *Protection of Intellectual Property on the World Wide Web: Is the Digital Millennium Copyright Act Sufficient?*, 41 ARIZ. L. REV. 937, 944 (1999) (providing a brief explanation of the five titles).

199. *Id.* at 944-45.

200. See, e.g., Shandra J. Kotzun, *The Digital Millennium Copyright Act: Anticircumvention Ban Gives More Rights to Copyright Owners*, 3 TUL. J. TECH. & INTELL. PROP. 117, 120 (2001) (noting that § 1201 is "the heart" of the DMCA).

201. See Nimmer, *A Riff*, *supra* note 194, at 675; see also Menard, *supra* note 1, at 378 (noting that § 1201 (a)(1)(A) became law in October 2000 after being reviewed by the Library of Congress).

202. See Menard, *supra* note 1, at 378.

203. 17 U.S.C. § 1201(a)(1)(A) (2002).

204. See Nimmer, *A Riff*, *supra* note 194, at 684-85; see also JOYCE ET AL., *supra* note 4, at 901.

205. Cassandra Imfield, *Playing Fair with Fair Use? The Digital Millennium Copyright Act's Impact on Encryption Researchers and Academics*, 8 COMM. L. POL'Y 111, 125-26

C. *The Flaws of the DMCA*

1. The DMCA Goes Beyond the White Paper's Recommendations and the WIPO Requirements

a. The White Paper's Recommendations

The DMCA created protections for copyright owners that exceed the scope of the white paper's recommendations.²⁰⁶ The white paper proposed a prohibition on the importing, manufacturing, or distributing of devices or services that had the principal purpose of circumventing a TPM, but did not propose the creation of legislation that made the act of circumvention illegal.²⁰⁷ The effect of the white paper's approach would have protected copyright owners' section 106 of the Copyright Act rights from the perils of Internet piracy.²⁰⁸ However, the new causes of action created in section 1201 of the DMCA go far beyond the white paper approach by allowing copyright owners to prosecute those who attempt to circumvent their TPMs, even when their section 106 rights have not been violated.²⁰⁹

b. WIPO Requirements

Furthermore, section 1201 of the DMCA exceeds WIPO requirements. The WIPO treaties only require member countries to "provide adequate legal protection and effective legal remedies" to protect copyrighted works secured by TPMs against circumvention.²¹⁰ Compliance with the treaties could have been accomplished with the adoption of the less restrictive approach laid out in the white paper or by creating greater civil penalties for infringement.²¹¹ The WIPO treaties are devoid of language requiring member nations to implement the criminal penalties that section 1201 creates.²¹² More importantly, WIPO

(2003).

206. See Shahram A. Shayesteh, Comment, *High-Speed Chase on the Information Superhighway: The Evolution of Criminal Liability for Internet Piracy*, 33 LOY. L.A. L. REV. 183, 225 (1999).

207. See *id.* at 225-26.

208. *Id.* at 225.

209. *Id.* at 225-26 (noting that "[s]uch an added level of protection is wholly unnecessary and runs counter to the fundamental purposes of copyright law.").

210. See *supra* note 191 and accompanying text.

211. See *supra* notes 191, 206-09 and accompanying text.

212. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anticircumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 531-32 (1999).

does not require member nations to prosecute those who attempt to circumvent a TPM even when the copyright owner's rights have not been violated.²¹³

2. A "Back Door" Reversal of *Sony Corp. of America v. Universal City Studios, Inc.*?

In *Sony Corp. of America v. Universal City Studios, Inc.*,²¹⁴ the Supreme Court held that those who manufactured devices that had legitimate non-infringing uses could not be sued merely because their devices could also support infringing uses.²¹⁵ However, the copyright industry lobbied for Congress to pass a law that would prevent all acts of circumvention.²¹⁶ The copyright industry argued that the recognition of legitimate circumvention purposes would make it too laborious for them to litigate all the resulting cases of copyright infringement.²¹⁷ The copyright industry's concern may be valid, however, when one weighs it against the prospect of depriving society of circumvention tools that could provide robust fair use opportunities,²¹⁸ or the prospect of stifling technological development,²¹⁹ it seems that society's interest in permissible circumvention is greater. Furthermore, the risks of litigation and the responsibility of identifying whom to sue seem to be part of the costs associated with conducting business.

3. The Exemptions to Section 1201 of the DMCA Are Too Narrow to be Effective

The DMCA provides specific exemptions to the anti-circumvention rule with the intent of preserving the doctrine of fair use.²²⁰ These exemptions are designed to allow circumvention for legitimate encryption research, law enforcement activities, security testing, technologies that invade privacy rights, reverse engineering for the intent to enable the inter-operability of computer programs, and certain uses by libraries and educational institutions.²²¹ These

213. See *supra* note 191 and accompanying text.

214. 464 U.S. 417 (1984); see also discussion *supra* notes 107-112 and accompanying text.

215. See *Sony Corp. of Am.*, 446 U.S. at 442-56.

216. See Shayesteh, *supra* note 206, at 215.

217. *Id.*

218. See *infra* notes 220-28 and accompanying text for a discussion on how the exemptions of § 1201 do not provide a realistic opportunity for fair use.

219. See *infra* notes 233-46 and accompanying text for a discussion on how § 1201 stifles research.

220. See Shayesteh, *supra* note 206, at 211.

221. See Clark, *supra* note 138, at 204-05.

exceptions, however, are too limited to allow for any socially valuable access.²²² For example, the DMCA contains an exemption for the reverse engineering of TPMs, but the exemption has little practical value.²²³ The exemption fails to “allow reverse engineering for the production of non-infringing works that are not designed to be inter-operative.”²²⁴ More importantly, these exemptions are impractical because reverse engineering entails the use of circumvention technologies that the DMCA specifically bans.²²⁵ Furthermore, although the exemption does allow the development of technologies to circumvent TPMs for reverse engineering, the DMCA renders it useless because it specifically bans the distribution of circumvention technologies.²²⁶ Few people possess the requisite knowledge to create their own circumvention tools that would allow them to crack TPMs for reverse engineering or any other fair use access.²²⁷ In short, while the DMCA is purported to support the value of fair use and the necessity of access, none of the exemptions provide a practical means of achieving circumvention for fair use purposes.²²⁸

4. Congressional Criticism

The creation of the law that came to be the DMCA was criticized by Congressmen Scott Klug and Rick Boucher as failing to provide the proper balance of copyright law that the Constitution demands.²²⁹ The following is an excerpt of the criticism that illustrates some of the inherent flaws of the DMCA:

In its original version, H.R. 2281 contained a provision that would have made it unlawful to circumvent technological protection measures that effectively control access to a work, for any reason. In other words, the bill, if passed unchanged, would have given copyright owners the legislative muscle to “lock up” their works in perpetuity—unless each and every one of us separately negotiated for access. In short, this provision converted an

222. See Jason Sheets, *Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & Innovative Markets*, 23 HASTINGS COMM. & ENT. L. J. 1, 18-19 (2000).

223. *Id.*

224. *Id.* at 18.

225. *Id.*

226. *Id.*

227. Benton J. Gaffney, *Copyright Statutes that Regulate Technology: A Comparative Analysis of the Audio Home Recording Act and the Digital Millennium Copyright Act*, 75 WASH. L. REV. 611, 636 (2000).

228. See Sheets, *supra* note 222, at 18-19.

229. Nimmer, *A Riff*, *supra* note 194, at 720.

unobstructed marketplace that tolerates “free” access in some circumstances to a “pay-per-access” system, no exceptions permitted.

In our opinion, this not only stands copyright law on its head, it makes a mockery of our Constitution

The anti-circumvention language of H.R. 2281, even as amended, bootstraps the limited monopoly into a perpetual right. It also fundamentally alters the balance that has been carefully struck in 200 years of copyright case law, by making the private incentive of content owners the paramount consideration—at the expense of research, scholarship, education, literary or political commentary, indeed, the future viability of information in the public domain. In so doing, this legislation goes well beyond the rights contemplated for copyright owners in the Constitution.

The . . . amendment, representing a compromise between those on the content side and “fair use” proponents, simply delays this constitutional problem for a period of two years. Delegating authority to develop anti-circumvention regulations to the Secretary of Commerce was a means to eliminate the stalemate that existed, but it is not, by itself a comment on the need for limitations on this [sic] anti-circumvention rights

What we set out to do was to restore some balance in the discussion and to place private incentive in its proper context. We had proposed to do this by legislating an equivalent fair use defense for the new right to control access. For reasons not clear to us, and despite . . . WIPO Treaty language “recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information . . .”, our proposal was met with strenuous objection. It continued to be criticized even after it had been redrafted, and extensively tailored, in response to the myriad of piracy concerns that were raised.

In the end, this legislation purports to protect creators. It may well be that additional protections are necessary, though we think the 1976 Copyright Act is sufficiently flexible to deal with changing technology. Whatever protections Congress grants should not be wielded as a club to thwart consumer demand for innovative products, consumer demand for access to information, consumer demand for tools to exercise their lawful rights, and consumer expectations that the people and expertise will exist to service these products.²³⁰

5. The DMCA Frustrates the Justifications of the Copyright Clause & the Balance of the Copyright Clause with the First Amendment

The DMCA, and specifically section 1201, represents a severe deviation from the established notions and rationalizations for the privileges of copyright

230. *Id.* at 720-21 & n.255. (quoting the dissenting views of Congressmen Klug and Boucher). Both Klug and Boucher later retracted their statements and supported the law that became the DMCA. Nimmer, *A Riff*, *supra* note 194, at 723-24.

protection.²³¹ In fact, the DMCA frustrates both the justifications for the Copyright Clause and the balance between the Copyright Clause and the First Amendment.²³² The Copyright Clause justifies the granting of a *limited* monopoly to promote the progress of science and the useful arts.²³³ While the DMCA may provide additional incentives for authors who intend to post their work on the Internet or through other digital means, it contradicts the goal of promoting scientific discovery by preventing the research and publication of encryption technologies.²³⁴ “In chilling publication, the DMCA wreaks havoc in the marketplace of ideas, not only the right to speak, but the right to receive information—the right to learn.”²³⁵ In preventing circumvention, the DMCA restricts the valuable practice of reverse analysis that has long been recognized as legal²³⁶ and also promotes “follow-on innovation.”²³⁷ Moreover, these techniques may have little to do with copyright infringement.²³⁸ There are numerous practical uses of reverse analysis that have become casualties of the DMCA.²³⁹ Examples of these are: fixing flaws in computer programs, analyzing programs to learn how to improve them, and making a back up copy of a program.²⁴⁰ These practices also aid understanding the technology of a product to develop a more advanced competing product, and taking excerpts of a digital movie to criticize it or to make other fair uses of it.²⁴¹ Therefore, the DMCA provides ultimate protection for copyright owners at the expense of society’s access to and opportunities for making fair use of works.²⁴²

Furthermore, the DMCA’s grand protection of copyrighted work may hinder the development of TPMs and prevent related technological innovations.²⁴³ The DMCA does this by over-protecting copyright owners

231. See Burk & Cohen, *supra* note 45, at 51.

232. See *supra* Part II and notes 120-28 and accompanying text.

233. See U.S. CONST. art. I, § 8, cl. 8.

234. See generally Thomas Pack, *Legit Hack Creates Legal Controversy*, ECONTENT NEWS, Oct. 2001, available at <http://www.econtentmag.com/r8/2001/ecnes10b.html> (last visited Feb. 5, 2003) (reporting the legal developments regarding Professor Edward Felten of Princeton University who cracked encryption technologies and published his research).

235. See EFF Complaint, *Felten v. RIAA* at ¶ 68 (June 6, 2001), available at http://www.eff.org/IP/DMCA/Felten_v_RIAA/20010606_eff_felten_complaint.html (last visited Jan. 15, 2003) [hereinafter EFF Complaint].

236. See Samuelson & Scotchmer, *supra* note 132, at 1577. The authors contend that reverse engineering conveys knowledge and seldom has substantial negative effects on markets. *Id.* at 1650-51.

237. *Id.* at 1642.

238. *Id.*

239. See *id.* at 1642-43.

240. *Id.* at 1642-43.

241. Samuelson & Scotchmer, *supra* note 132, at 1642-43.

242. See Sheets, *supra* note 222, at 18.

243. Samuelson & Scotchmer, *supra* note 132, at 1641.

without encouraging them to research, develop, and implement exceptionally effective TPMs.²⁴⁴ Thus, the DMCA rules do not provide incentives to copyright owners for using better TPMs than the ones currently being used, which lessens the market for TPMs.²⁴⁵ The logical conclusion to this argument is that copyright owners would be most willing to invest in the development of more efficient TPMs if the DMCA did not prohibit all circumvention.²⁴⁶ The market for TPMs would also be better served by this approach:

The super-strong protection of the DMCA not only erodes incentives to use [TPMs], it also erects barriers to entering the market to supply them.

....The DMCA inhibits research and hence follow-on innovation in [TPMs] because it limits the ability of researchers to learn from their predecessors.²⁴⁷

The new protections the DMCA grants to copyright owners have also upset the balance of the Copyright Clause and the First Amendment's guaranties of access to ideas, use of ideas to build upon old works and to engage in a social dialogue, and its restriction against censorship.²⁴⁸ With the addition of the DMCA, copyright law is now allowing TPMs to protect the expression of an idea and shielding the idea from fair use access.²⁴⁹ Using the protections made available by the DMCA, a copyright owner can supersede the restraints of traditional copyright law by using TPMs to protect their work from all access in perpetuity, thus creating a pay-per-use world.²⁵⁰ Therefore, the DMCA permits a form of private censorship of speech²⁵¹ because the copyright owner has complete control over whom, if anyone, will be given access to the ideas expressed in their work.²⁵² "[T]his result—allowing every copyright owner to custom-design its own version of copyright law—[by deciding the term of protection and who will be given access] cannot conceivably been what Congress intended."²⁵³

244. *Id.*

245. *Id.* at 1639, 1646.

246. *Id.* at 1641 (remarking that the DMCA protects copyright owners by creating harsh penalties against infringement, not by encouraging the use of TPMs).

247. *Id.* at 1646.

248. See *supra* Part II and notes 120-28 and accompanying text.

249. See *supra* note 134 and accompanying text.

250. See Nimmer, *A Riff*, *supra* note 194, at 726; see also Burk & Cohen, *supra* note 45, at 50.

251. See *supra* notes 120-28 and accompanying text.

252. See Burk & Cohen, *supra* note 45, at 50.

253. *Id.* at 51.

6. The DMCA Does Not Stop Digital Pirates

The greatest flaw of the DMCA is that it obstructs legitimate access and fair use rights while failing to prevent the hard core digital pirate from accessing circumvention technologies.²⁵⁴ This is evident when evaluating the widespread pirating of satellite television.²⁵⁵ Although the DMCA has had limited success in stopping Americans who traffic circumvention technologies in the United States and in shutting down their websites,²⁵⁶ it has had relatively no effect on the practice of pirating satellite television.²⁵⁷ This is due to Canadian courts' interpretation of a "culture law" that made it illegal for its citizens to own an American satellite dish system.²⁵⁸ The law also resulted in the practice of Canadians giving phony American addresses to satellite providers to gain access to their service.²⁵⁹ Additionally, the law gave birth to a robust industry of pirating satellite signals.²⁶⁰ A judge recently held that Canadians could receive American satellite signals legally, and critics argue satellite piracy is not a crime because the American satellite businesses are not authorized to conduct business in Canada.²⁶¹

This odd holding has resulted in Americans having access to the tools to circumvent TPMs that protect copyrighted work released over satellite systems.²⁶² By conducting a basic America Online Internet search, one can easily find Canadian websites that are in the business of selling circumvention tools to Canadians and Americans.²⁶³ These sites also provide instructions on

254. See *supra* notes 129-37 and accompanying text discussing the stubborn will of digital pirates.

255. See Jay Lyman, *DirecTV Raids Satellite Pirates, Web Sites*, NEWSFACTOR NETWORK, June 28, 2001, available at <http://www.newsfactor.com/perl/story/11603.html> (last visited Jan. 15, 2003).

256. See *id.*

257. See *id.* (reporting that to prosecute these user pirates under the DMCA the copyright industry would have to "catch them red handed"); see also Robert Brehl, *DirecTV Blasts B.C. Judge*, TORONTO STAR BUSINESS REPORTER, Nov. 28, 1996, available at <http://www.canadians.freesevers.com/4.html> (last visited June 24, 2002) (quoting DirecTV's chief of security, Larry Rissler who stated that the Canadian "[piracy] is a direct assault at our core market, the United States.").

258. See *Gray/Black Legal Now in Canada? Judge Rules Watching U.S. Satellite-TV Signals Legal*, OTTAWA CITIZEN, May 25, 1997, available at <http://www.canadians.freesevers.com/3.html> (last visited Jan 15, 2003).

259. See Brehl, *supra* note 257.

260. See *id.*

261. See *id.*

262. See DSS Tester, at <http://www.dsstester.com/resources.asp> (last visited Jan. 15, 2003); see also DSS Underground, at <http://www.dssunderground.com/> (last visited Jan. 15, 2003).

263. See DSS Tester, *supra* note 262.

how to use the tools, tips on the best tools, chat rooms for discussing the various acts of piracy, and a colorful narrative history of satellite piracy.²⁶⁴ This problem illustrates both the stubbornness of the digital pirate and the inability of the DMCA to completely stop the theft of copyrighted material.

D. *The Cases Challenging the DMCA Have Failed*

In spite of the DMCA's flaws, the cases that have challenged its constitutionality have failed.²⁶⁵ While these cases illustrate some of the negative effects that the DMCA can have on research and publication, they did not reach the court with a full arsenal of ripe arguments to be asserted against the DMCA.²⁶⁶ Only one of these cases had its First Amendment argument analyzed by the court.²⁶⁷ Moreover, neither case was able to combine a First Amendment argument with a ripe and compelling fair use defense.²⁶⁸

1. *Felten v. RIAA*²⁶⁹

The dispute in *Felten v. RIAA*²⁷⁰ is illustrative of one of the ways the DMCA stifles scientific research.²⁷¹ In this case, the DMCA was challenged on the basis that it violates the First Amendment by restricting the scientific community from publishing its research.²⁷² On September 6, 2000, Secure Digital Music Initiative Foundation ("SDMI"),²⁷³ a developer of TPMs,²⁷⁴ published an online letter to the scientific community entitled, *An Open Letter to the Digital Community*.²⁷⁵ This letter was an invitation for researchers to "show off [their] skills, make some money, and help shape the future of the online digital music economy" by attacking TPMs that SDMI was developing

264. See, e.g., DSS Underground, *supra* note 262.

265. See *infra* notes 269-307 and accompanying text.

266. See *infra* notes 269-307 and accompanying text.

267. Universal City Studios, Inc. V. Corley, 273 F.3d 429, 445-58 (2d Cir. 2001).

268. See *infra* notes 269-307 and accompanying text.

269. EFF Complaint, *supra* note 235.

270. See *id.* RIAA "represents entities which manufacture and distribute sound recordings, including the five major labels and many of their subsidiary labels." *Id.* ¶ 13.

271. See *id.* ¶¶ 1-3.

272. See *id.* ¶¶ 67-69.

273. SDMI is a multi-industry business established to create TPMs for digital music. EFF Complaint, *supra* note 243, ¶ 14.

274. See *An Open Letter to the Digital Community*, available at http://www.sdmi.org/pr/OL_Sept_6_2000.htm. (last visited Jan. 15, 2003). This TPM was designed to protect digital music. *Id.*

275. *Id.*

and reporting the findings to SDMI.²⁷⁶ The letter went on to place a \$10,000 award for those who could crack the TPM if they assigned the intellectual property rights of their findings to SDMI.²⁷⁷ However, the letter stated that the winner did not have to claim the prize or assign the rights of their findings.²⁷⁸

In fact, the winners of the challenge, Professor Edward Felten, a computer science professor at Princeton, and his research team chose not to accept the prize money so that they could publish a paper describing their findings.²⁷⁹ Felten was then informed by the Recording Industry Association of America ("RIAA") that the TPM he and his team cracked was being used to protect copyrighted information, and that if Felten and his team published the paper they would be liable under the DMCA.²⁸⁰ Felten and his team decided to publish the paper arguing that they did not violate the DMCA,²⁸¹ that "the DMCA has chilled, and will continue to chill, the [p]laintiffs and others from engaging in activities protected by the First Amendment."²⁸² Felten and his team also contended that the DMCA violates the First Amendment:

By imposing civil and criminal liability for publishing speech (including computer code) about technologies of access and copy control measures and copyright management information systems, the challenged DMCA provisions impermissibly restrict freedom of speech and of the press, academic freedom and other rights secured by the First Amendment to the United States Constitution.²⁸³

Still, Felten's case was dismissed before the First Amendment claim was heard.²⁸⁴ Felten and his team decided not to appeal the case.²⁸⁵

276. *Id.*

277. *Id.*

278. See EFF Complaint, *supra* note 235, ¶ 32.

279. See *id.* ¶ 37.

280. *Id.* ¶ 43.

281. See *id.* ¶ 59.

282. *Id.* ¶ 67.

283. EFF Complaint, *supra* note 235, ¶ 69.

284. Declan McCullagh, *Copyright Law Foes Lose Big*, WIRED NEWS, Nov. 29, 2001, <http://www.wired.com/news/politics/0,1283,48726,00.html> (last visited Jan. 30, 2003) (noting that RIAA claimed that they never intended to sue Felten); see also Media Release, Electronic Frontier Found., Judge Denies Scientists' Free Speech Rights (Nov. 28, 2001), <http://www.eff.org/effector/HTML/effect14.37.html> (last visited Jan. 30, 2003).

285. See Media Release Electronic Frontier Found., Security Researchers Drop Scientific Censorship Case (Feb. 6, 2002), http://www.eff.org/IP/DMCA/Felten_v_RIAA/20020206_eff_felten_pr.html (last visited Jan. 30, 2003).

2. *Universal Studios, Inc. v. Corley*²⁸⁶

Like *Felten*, *Universal Studios, Inc. v. Corley*²⁸⁷ involved First Amendment challenges to the DMCA. Like *Felten*, these challenges failed; however, in *Corley* the Second Circuit held that the DMCA did not violate the First Amendment.²⁸⁸ In *Corley* the defendant published an article concerning a decryption program that could enable a user to circumvent the TPM protecting DVDs.²⁸⁹ The defendant's article contained a copy of DeCSS, the code for the decryption program.²⁹⁰ As a result of the publication of this code, the defendant was sued for violating the DMCA.²⁹¹ The district court granted the plaintiff an injunction that forbade the defendant from posting his article on the Internet or from using Internet linking to connect to websites that posted the article.²⁹² The Second Circuit held that the computer code was protected by the First Amendment.²⁹³ Nonetheless, the court refused to apply strict scrutiny when evaluating the constitutionality of the injunction.²⁹⁴ Instead, the court applied intermediate scrutiny reasoning that the restriction only touched upon the nonspeech aspects of the code.²⁹⁵ The court went on to hold that the injunction did not impede the defendant's First Amendment right because the restriction was content neutral.²⁹⁶ *Corley* affirmed the district court holding that there is not enough human interaction in computer code for it to be protected as pure speech, it is too functional.²⁹⁷ Humans do not have to follow an instruction or comprehend language for the code to accomplish its task; the

286. 273 F.3d 429 (2d Cir. 2001).

287. *Id.*; see also *United States v. Elcom*, 203 F. Supp.2d 1111, 1118-19, 1141-42 (N.D. Cal. 2002) (noting that the defendant was held to have violated the DMCA for writing a program to circumvent Adobe's e-book software).

288. *Corley*, 273 F.3d at 448-50.

289. See *id.* at 437-39 (noting that this program enabled users to play a DVD on an unauthorized player and make copies of DVDs).

290. See *id.* at 439.

291. *Id.* at 435-36.

292. *Universal Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294, 343-45 (S.D.N.Y. 2000); see also Tricia J. Sadd, Note, *Fair Use as a Defense Under the Digital Millennium Copyright Act's Anti-Circumvention Provisions*, 10 GEO. MASON L. REV. 321, 334 (2001) (noting the Court commented that "[t]he fact that Congress elected to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technological means of doing so is a matter for Congress, not the courts.").

293. See *Reimerdes*, 111 F.Supp.2d at 333.

294. See *id.* at 332-33.

295. See *id.* at 327-33.

296. See *id.* at 332. It is important to note that the Court used a stricter test to evaluate the linking issue. *Id.* at 341. The test considered if the link was posted with knowledge of providing decryption information. *Id.*

297. *Universal City Studios, Inc. v. Corley* 273 F.3d 429, 451 (2001).

computer instantly comprehends the language and does the work with the slightest human undertaking—"a single click of a mouse."²⁹⁸

The court also heard the defendant's claims that the DMCA is unconstitutional because it does not provide opportunities for fair use.²⁹⁹ The defendant claimed that section 1201 extends protection in perpetuity to copyright owners in spite of the Constitution specifically limiting Congress to granting the protection for a limited time.³⁰⁰ This claim was raised by an amicus brief, but only appeared in a footnote.³⁰¹ The court dismissed the claim and noted that it was not ripe for consideration.³⁰² Furthermore, the court refused to address the defendant's claim that the DMCA unconstitutionally eliminates fair use because the defendant did not raise the fair use defense.³⁰³

The courts that heard the *Corley* case have been criticized for missing an opportunity to correct some of the DMCA's flaws.³⁰⁴ They have also been criticized for misinterpreting the legislative history of the DMCA and for relying on the DMCA's statutory provisions addressing circumvention instead of the trafficking provision that were relevant to the case.³⁰⁵ Moreover, it has also been noted that the court ignored the DMCA's assurance that fair use would still exist in the digital millennium, and for not addressing the DMCA's effect on *Sony Corp. of America*.³⁰⁶ In spite of the court's blunders, it seems that as in *Felten*, the facts of *Corely* sealed its fate.³⁰⁷

VI. POTENTIAL SOLUTIONS TO THE DMCA DILEMMA

A. Copyright Law Must Permit Access

The lack of fair use access to copyrighted materials using TPMs can be analogized to the unauthorized fencing of public land; it hoards the benefits of a commodity in which all members of society have an interest.³⁰⁸ Although the DMCA does not intentionally kill the Doctrine of Fair Use, it makes the

298. *Id.*

299. *Id.* at 443.

300. *Id.* at 444-45.; *see also* U.S. CONST. art. I, § 8, cl. 8.

301. *Corley*, 273 F.3d at 444-45.

302. *Id.* at 445.

303. *See id.*

304. Sadd, *supra* note 292, at 334-35.

305. *Id.* at 334.

306. *Id.* at 334-35.

307. *See supra* note 302 and accompanying text (noting that the fair use issues were dismissed by the court for not being ripe).

308. Burk & Cohen, *supra* note 45, at 53-54.

doctrine inoperative since the use of TPMs prevent all legal access.³⁰⁹ However, for a copyright law to meet and achieve the balance of the Copyright Clause, it must allow society to access the work that it protects.³¹⁰ Therefore, the potential for TPMs to allow copyright owners to create their unique forms of copyright law and self regulation must be avoided.³¹¹ Although it should be mindful of the First Amendment, Congress should have a firm grasp of the regulation of copyright law.³¹²

B. *A Proposal: Congressional Regulation*

1. Technology Safeguarding Access

There are ways that Congress can regulate the use of TPMs under the DMCA while staying within the boundaries of the International Treaties that it was designed to comply with.³¹³ A rather inexpensive regulation of TPMs use is to require that the technology allow for a standard number of bits of a work to be available for free access.³¹⁴ This would ensure that society would have access to the ideas being expressed. Nonetheless, for this approach to work, further regulation would be required to ensure that copyright owners were using the proper TPMs that permit access.

2. The Trusted Third Party Observer

Another way that Congress can promote the use of TPMs while maintaining access values is to establish a trusted third party observer. Congress may be able to do this by delegating its power to regulate to a public organization, such as the Library of Congress.³¹⁵ Under this system the trusted third party would take requests for fair use access and would decide if the access should be permitted.³¹⁶ However, this approach forces the trusted third party to function as the Judiciary in that it is determining the value of the inquiring party's fair use. Consequently, the constitutionality of Congress's delegation might be challenged since it could be interpreted as delegating a

309. *See id.* at 54.

310. *See supra* Part II and notes 120-128 and accompanying text.

311. *See supra* note 136 and accompanying text.

312. *See supra* note 128 and accompanying text.

313. *See Burk & Cohen, supra* note 45, at 55.

314. *Id.*

315. *See Burk & Cohen, supra* note 45, at 66; *see also* Samuelson & Scotchmer, *supra* note 132, at 1636 n.296 (noting that 17 U.S.C. § 1201 (a)(1)(C) limits the Library of Congress's power to develop exceptions to the anticircumvention rule).

316. *See Burk & Cohen, supra* note 45, at 63.

power that is vested in a separate branch of government. Another use of the trusted third party would have it grant access to a potential fair user without identifying the party or judging the potential value of its use.³¹⁷ This would mirror the traditional or real world concept of fair use; it would also likely be rejected by the copyright industry because of the threat of piracy.³¹⁸ Perhaps the best use of a trusted third party would have it issue access, but keep a record of the user.³¹⁹ This would allow the copyright owner to obtain the identity of pirates.³²⁰ It has been suggested that the identity of the user should only be unveiled on a court order when the copyright owner can show the existence of piracy, so that Doctrine of Fair Use and privacy interests are promoted.³²¹

C. Other Suggestions

It seems that Congress would better serve the digital and the analog world if they forced the copyright industry to pursue self-help remedies.³²² If required to explore the digital world at its own risk, the copyright industry will be pressured to research and develop the strongest TPMs.³²³ Stronger TPMs will stop the common user from copying as well as make the act of circumvention too expensive for more skilled and daring pirates.³²⁴ The pirates who possess the ability to crack TPMs are most likely still pirating in spite of the DMCA.³²⁵ Further, the traditional section 106 rights provide an adequate system for copyright owners to bring litigation against accused infringers. This more natural approach would better serve society, and perhaps the copyright industry.³²⁶ Following the *Sony Corp. of America* holding one of the plaintiff's lawyers stated, "'Unless Congress acts to compensate copyright owners for the home taping of their intellectual property, the audiovisual marketplace will become a barren wasteland of programming that does not edify, nor inspire nor entertain.'"³²⁷ However, Congress did not act and the copyright industry is now thriving because of the VCR. This example indicates that the copyright

317. See *id.* at 64.

318. See *id.* at 64.

319. See *id.*

320. *Id.*

321. See Burk & Cohen, *supra* note 45, at 64.

322. See Samuelson & Scotchmor, *supra* note 132, at 1640.

323. See *id.* at 1641.

324. See *id.* at 1640.

325. See *supra* note 264 and accompanying text.

326. See *supra* note 242-46 and accompanying text.

327. Lunney, *supra* note 34, at 919 (quoting JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR 229 (1987)).

industry could thrive when it is forced to adapt. More importantly, this approach would maintain the balance and preserve the justifications for the Copyright Clause.

VII. CONCLUSION

Today, at the beginning of the Information Revolution, maintaining the intended balance of the Copyright Clause is essential so information is accessible to all elements of society and so the integrity of our Constitution is protected. The success of the Information Revolution depends on such a balance. Ironically, the same technologies that are fueling the Information Revolution are also providing ways for copyright owners to protect the value of their works from all uses, even fair use after the statutory term of protection expires.³²⁸ This suggests that copyright will be a pay-per-use world and that the Information Revolution will only breathe on one side of the digital divide and will only benefit the segment of society that can afford the access fee set by the copyright owner. However, the irony does not end with this restriction. These technologies are also protecting copyrighted information while preventing the study and potential development of other technologies, which may stifle the potential of the Information Revolution.³²⁹ These developments, set into motion by the drastic changes in the law of copyright instituted by the DMCA, seem to frustrate the very purpose of the Copyright Clause and suggest that the First Amendment limitations on copyright law have been ignored.³³⁰ The suggestions made in Part VI of this note may serve as a means of alleviating the contradictions in the law that the DMCA has created. However, it may be that the DMCA can only achieve the purposes of the Copyright Clause if it is amended.³³¹

Furthermore, it is important to recall that the DMCA was created in part to harmonize America's copyright law with the standards of the International

328. See Burk & Cohen, *supra* note 45, at 52.

329. See, e.g., Pack, *supra* note 234.

330. See *supra* notes 29-33 and accompanying text.

331. See Sheets, *supra* note 222, at 21-22.

The DMCA stifles innovation by creating an incentive to engage in the monopolistic practices of misuse. The DMCA creates an incentive to engage in copyright misuse regardless of whether the use of a technological protection system to prevent access to public domain material is considered a misuse. Prior to the DMCA, the availability of the copyright misuse defense and fair use defense provided the copyright owner reasons to avoid engaging in a misuse; protection by the copyright law was conditioned upon not engaging in misuses. The owner loses nothing by engaging in behavior that contravenes public policy.

Id.

Treaties.³³² No doubt, America's rationale for granting copyright protection is much different than other member nations. An obvious example of this is America's value of free speech, which is at the heart of our concept of government. For the past 227 years, America has reconciled the potential clash of the interests of the Copyright Clause with the interests of the First Amendment by promoting the Doctrine of Fair Use.³³³ Congress must ensure that this balance is once again achieved, even at the expense of breaching the standards of these International Treaties, so that our copyright law is in compliance with our Constitution.

Nonetheless, in spite of its glaring flaws, the DMCA seems to provide insight about our copyright law and about our society. The DMCA is a law that highlights Congress's willingness to give additional economic incentives to copyright owners at the expense of restricting access to information. This is also apparent when one evaluates the CTEA and the DMCA because both seem to indicate that our capitalistic values have trumped our ideals of individualism, as well as academic freedom and artistic liberty. These laws also bring to light the value of economic power and that the voice of lobbyists is greater than the voice of the people. One explanation for the passing of this unjust law "is a simple one: campaign contributions."³³⁴ However cynical, this notion may provide an explanation for a law that seems to contradict so much settled law. In fact, the flaws of the DMCA point to this. It was created under the pressure of lobbyists, and Congress gave the industry what they wanted, not what the white papers or WIPO treaties demanded.³³⁵ Perhaps the perils that have arisen with the passing of the CTEA and the DMCA have been best identified by James Madison, one of the fathers of the Copyright Clause, in a letter to W.T. Barry 190 years ago:

A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.³³⁶

At the beginning of an age that promises to revolutionize the diffusion of information, it is important that our lawmakers consider Madison's words as well as their role in our democratic system of government. It is equally

332. See *supra* note 193 and accompanying text.

333. See *supra* note 121 and accompanying text.

334. See Samuelson, *Grab*, *supra* note 165, at 166.

335. See *supra* notes 205-08 and accompanying text.

336. Letter from James Madison to W. T. Barry (Aug. 4, 1822), in 3 *Letters and Other Writings of James Madison* 276, 276 (New York, R. Worthington 1884).

important that they create exemptions to the DMCA that will ensure access to information, and the existence of the fair use defense. These staples of our copyright law will ensure that America does not evolve into a society where information is hoarded by the elite and a pay-per-use world keeps segments of our society in the darkness of ignorance.

