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**THE COPYRIGHT & DIGITAL MISMANAGEMENT CHASM:
FAIR USE IMPLICATIONS OF DIGITAL RIGHTS
MANAGEMENT TECHNOLOGIES UPON THE
DIGITAL VERSATILE DISK MEDIUM**

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“Technological progress is like an axe in the hands of a pathological criminal.” – *Albert Einstein*.¹

I. INTRODUCTION

A new border fence has been erected, albeit almost unnoticed to the casual observer. Yet this fence, unlike the hotly debated concrete and wire fence at the southern border currently before Congress, is a unique creature indeed. This fence contains encryption methods and technologies to facilitate its ubiquitous dissemination. This new fence has its agents, too. However, unlike those that patrol the desert, these agents are in the form of Digital Video Disc (“DVD”) optical disc manufacturers, DVD players, encryption licensing associations, and backers in the entertainment industry.

While consumers of audiovisual and audio works fixed in Video Home System (“VHS”), DVD, and Compact Disc (“CD”) formats have become accustomed to certain privileges regarding uses of their purchased content, such niceties may soon be a thing of the past. To illustrate, an individual who owns DVDs may want to transfer the content to a portable digital player for an upcoming trip in order to avoid traveling with bulky discs and risking damage to them. However, certain technologies within the DVD prevent such a transfer.² Likewise, if an individual wanted to “rip” DVD content to a portable player, in order to preserve a back-up copy in the event the DVD becomes corrupt, access will be blocked. The only option will be to buy a new DVD.³ Similarly, if a movie critic wished to take excerpts from various DVDs to present a point of view, she too, would be prevented from doing so.⁴ These “privileges” fall under a legal doctrine called Fair Use and the Technologies, while the mechanisms that prevent such freedoms fall under the rubric of Digital Rights Management (“DRM”).

This article suggests that the fair use rights of commentators, critics, and the everyday consumer are slowly being eroded by a two-pronged threat posed by technological and legal measures, namely

¹ Brainy Quote, http://www.brainyquote.com/quotes/authors/a/albert_einstein.html (last visited Oct. 1, 2006).

² Center for Democracy and Technology, *Evaluating DRM: Building a Marketplace for the Convergent World 4* (2006), <http://www.cdt.org/headlines/931> (follow “Evaluating DRM Paper” hyperlink).

³ *Id.* at 5.

⁴ *Id.*

DRM systems and the Digital Millennium Copyright Act (“DMCA”), respectively.

In furtherance of the instant proposition, this article will elucidate how actions that were within the ambit of time-honored fair usage rights are now under attack. Such traditional freedoms have included: creating commentary and parody, time-shifting, having unfettered access to and copying of ideas, facts, and public domain materials, and copying for personal use. This article proposes that such restraint upon DVD content usage frustrates a basic tenet of fair usage: balancing the protections and incentives provided by copyright’s constitutional push to reward authors, while simultaneously safeguarding First Amendment free speech rights as delineated by the Fair Use Doctrine and the Idea/Expression Dichotomy.

A. *The Controversy*

Public interest groups, associations, scholars, and critics, exercising their rights relating to accessing and copying DVD content blocked by DRM, all voiced fair use concerns to the United States Copyright Office (“Copyright Office”) in its triennial review.⁵ For instance, to comment on or criticize the content of a DVD is well within the Fair Use Doctrine; however, the use of DRM systems with DVDs prevents commentators from critiquing ancillary portions of DVDs by preventing clips from being excised for criticism.⁶ Similarly, newsworthy material is also within the bounds of fair use; however, even with “thin copyright”⁷ public domain works, once DRM is put into place upon a DVD, such access is denied and this is backed by the DMCA.⁸

⁵ United States Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works (2006), <http://www.copyright.gov/1201>.

⁶ *Id.* at 12; *see also* David H. Holtzman, *The DVD War Against Consumers*, BUSINESS WEEK ONLINE, May 30, 2006, http://www.businessweek.com/technology/content/may2006/tc20060526_680075.htm.

⁷ United States Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 10 (2003), <http://copyright.gov/fedreg/2003/68fr2011.html>. “Thin copyright” refers to works where the copyrightable expression is limited in relation to the amount of subject material which is not in the particular work. *Id.*

⁸ *Id.*

Although the DMCA only protects copyrighted works,⁹ DRM technology is not sophisticated enough to distinguish protected expression from underlying quotes, theories, facts, ideas, and *de minimis* takings, which are free to sample. Before giving a full exposition as to why such elements contained in works of authorship are free for the taking while others require a more nuanced analysis, which will be addressed in Part III.A *infra*, it is crucial to comprehend the themes underlying the controversy.

While the Copyright Office's triennial review commented upon the DMCA's inapplicability to public domain works, this is of no consequence to the non-sophisticated DVD user. In other words, while the technologically-savvy may be able to circumvent a particular DRM technology, those without such a background are unable to access that to which they have every right.

To date, it is not clear that one may create tools to access DRM, even if the work is in the public domain and one is simply exercising her fair use rights.¹⁰ Another annoyance consumers of legally purchased DVDs endure is the blocking methods that prevent skipping advertisements at the beginning of movies.¹¹ While the Copyright Office technically found such blocking is not anti-access, but rather a User Operation Prohibition ("UOP"), it declined to adopt an exemption and found such impediment to be of little concern.¹² Interestingly, while UOP blocking received a comprehensive discussion in the 2003 triennial report, the latest triennial review released by the Copyright Office on November 27, 2006, relegates UOP blocking to a footnote citing the 2003 report.¹³ Although the Copyright Office does not see UOP blocking as anti-access, there are several commentators that do, suggesting that the definition of "access" is partially open to interpretation.

What in times past used to be an absolute right to access such building blocks and "engine[s] of free expression"¹⁴ is now shrouded

⁹ 17 U.S.C. § 1201(a)(1)(A) (2006) "No person shall circumvent . . . to a work protected under this title." (emphasis added).

¹⁰ Pamela Samuelson, Towards More Sensible Anti-Circumvention Regulations 4, <http://www.ischool.berkeley.edu/~pam/papers/fincrypt2.pdf> (last visited May 1, 2007).

¹¹ Marybeth Peters, *Recommendation of the Register of Copyrights in RM 2005-11, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* 21, Nov. 17, 2006, http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

¹² *Id.*

¹³ *Id.*

¹⁴ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985);

in a legal and technological morass in order to accommodate a concentrated, but powerful class. To suggest that one may copy, in order to appease those who argue for the undeniable right to ideas and facts, while concurrently denying access via encryption, is analogous to suggesting that one may speak in public to exercise her free speech rights, while at the same time denying the speaker an audience.

It is worth noting at the outset that the piracy of digital content on DVDs merits focused attention, using tailored means to combat the piracy via technological tools and legal methods. Assuming the end sought is the protection of expression through copyright laws in the United States and elsewhere in the world, the means employed are too broadly sweeping to accomplish this end.

To combat piracy of digital content utilizing DRM, at this stage of its development, is inappropriate because it is overly broad and its scope too restrictive on end-users. Not only does the technology block items which should be free for the taking (such as underlying commentary, facts, ideas, and quotes), but the legal force behind it, the DMCA, is just as far-reaching, if not more, in its breadth of coverage than its technological counterpart, DRM.

B. Why the Digital Rights Management Push

In order to gain a better understanding of why DRM protection of DVDs is on the rise, it is important to view the issue from the perspective of the distributor. Piracy of copyrighted movies and other information stored on DVDs is a serious issue and a growing epidemic.¹⁵ The escalation can be largely attributed to the digitalization of media content, Internet access, and devices to play and copy such content. The focus herein is limited to DVDs, DVD players, and the Internet. To illustrate, International Data Corporation (“IDC”), a subsidiary of the International Data Group, a global provider of market intelligence for the information technology¹⁶ and

See also Eddan Katz, Yale ISP, “Regulating Search?” Symposium, Dec. 3, 2005, <http://www.library.yale.edu/~license/ListArchives/0511/msg00087.html>. For an interesting read, this article discusses regulating searches on search engines with a legal-policy oriented approach.

¹⁵ See generally Candace S. Friel, *The High Cost of Global Intellectual Property Theft: An Analysis of Current Trends, the TRIPS Agreement, and Future Approaches to Combat the Problem*, 7 WAKE FOREST INTELL. PROP. L.J. 209 (2007).

¹⁶ Interoperability Clearinghouse (ICH), <http://www.ichnet.org/glossary.htm> (last visited Feb. 15, 2007); The Science Coalition, <http://www.sciencecoalition.org> (last visited Feb. 15, 2007). Information technology is essentially an integrated,

telecommunications industry, projects that by 2007 the information equivalent of the Library of Congress will be accessed and downloaded more than 64,000 times per day.¹⁷ Just as staggering are some of the projected losses estimated by the Motion Picture Association of America, which represents giants such as 20th Century Fox, Warner Brothers Entertainment, Universal Studios, Sony Pictures, and Buena Vista Pictures.¹⁸ In 2005, over \$18.2 billion was lost to various forms of piracy worldwide, with \$6.1 billion in losses attributable to studios represented by the Motion Picture Association of America.¹⁹ In that same year, approximately eighty-one million DVDs were seized by enforcement agencies globally; in addition, there was a 113% increase in confiscated DVD burners from the previous year.²⁰

Also noteworthy is the global profile of the typical pirate: a young male between the ages of sixteen and twenty-four, predominantly domiciled in an urban environment.²¹ Additional studies have shown that in the United States alone, over 44% of losses are attributable to piracy by college students.²² Further, as a result of the lower costs associated with hard goods, optical disc piracy, which includes not only piracy of DVDs but also of Laser Discs and Video Compact Discs, is very much on the rise.²³

The phenomenon most responsible for the escalation in piracy seems to be the wider availability of the Internet, which makes downloading and streaming media possible on a much larger scale than in years past.²⁴ The World Intellectual Property Organization (“WIPO”) estimates that over 600,000 copies of movies are

functional system with the goal of creating a framework, which manipulates, transmits, and utilizes business data in meaningful ways. *Id.*

¹⁷ Colin C. Haley, *Traffic Jam Could Lift Telecom*, ISP-PLANET, Mar. 3, 2003, http://www.isp-planet.com/research/2003/idc_traffic_030303.html.

¹⁸ Motion Picture Association of America, <http://www.mpa.org/AboutUs/Members.asp> (last visited Feb. 18, 2007). The aforementioned companies, among others, have members on the MPAA’s board of directors.

¹⁹ Motion Picture Association of America, 2005 U.S. Piracy Fact Sheet, <http://www.mpa.org/USPiracyFactSheet.pdf> (last visited Feb. 18, 2007).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ World Intellectual Property Organization Frequently Asked Questions: Counterfeiting and Piracy, Which Products Are Typically Affected?, <http://www.wipo.int/enforcement/en/faq/counterfeiting/faq03.html> (last visited Feb. 21, 2007).

²⁴ *Id.*

downloaded illegally every day.²⁵ The Business Software Alliance suggests the escalation in piracy is due not only to the increased availability of the Internet, but also to the simplicity of making copies, which even a non-technically oriented user can accomplish.²⁶

A simple scenario of one person buying a legally authorized copy of a DVD, downloading it onto his or her computer, and permitting others to download, vastly diminishes prospective sales. Thus, it is easy to see why DVD movie distributors, among others in the supply chain, have gone beyond raising an eyebrow to taking affirmative action to stop piracy through legal, technological, and lobbying methods.

C. Plotting a Course Through the Morass

Part II of this article provides a foundation by defining DRM technologies and how they interrelate with DVDs. Part III then addresses the DMCA and how courts have grappled with the tension between right of access via fair use under the Copyright Act, and the author's right to protect his or her expression. Likewise, this part will present this author's suggestions, in conjunction with other commentators' thoughts, on how precedent should guide the courts in navigating the murky waters left in the wake of the DRM/DVD merger. Finally, Part IV concludes with recommendations for various options that may be available to ensure a more balanced approach by courts, which will maintain the inherent spirit of copyright law, both as it was first envisioned and as it has evolved in the face of emerging new technologies.

II. DRM/DVD 101: WHAT DRM IS AND HOW IT RELATES TO DVDS

DRM may best be described as an umbrella of technologies and solutions that allows digital media content providers to manage or restrict (depending on one's viewpoint) not only who uses the provider's products, but also when and how many times access will be permitted.²⁷ Further, DRM's implementation is varied, as it can

²⁵ *Id.*

²⁶ Business Software Alliance (BSA): Anti-Piracy Information, Internet Piracy, <http://www.bsa.org/usa/antipiracy/Internet-Piracy.cfm> (last visited Feb. 21, 2007). Estimates show that over 100 million Americans have Internet access. *Id.* Further, what used to be an involved process of understanding source code and object code has been relegated to the simple click of the mouse button. *Id.*

²⁷ United States Public Policy Committee of the Association for Computing

encompass encryption of both methods and tools, digital broadcast flags²⁸ transmitted via video signal, and cross-licensing agreements between digital content providers and manufacturers of hardware devices such as DVD players.²⁹ DRM technology is a relative newcomer to the digital media market. This is due in large part to the explosion of the Internet, and the latest media devices which allow the expeditious and effortless transfer of digital content across the web, as well as from disc to disc in DVD and CD formats.³⁰ As initially envisioned, the DVD was a win-win product for consumers, distributors, and manufacturers alike. Hitting the market in 1996,³¹ DVDs provide seven times the storage capacity of CDs and are capable of displaying movies, outtakes, director's notes, and various factual underpinnings related to the digital content.³² Unfortunately, at least from the distribution and manufacturing side of the aisle, once such content is put into digital form, it becomes very easy for consumers to make unlicensed copies to share with others.

A. *Early and Current DRMs*

In order to deter piracy of digital content, Content Scramble System ("CSS"), an encryption form of DRM protection, was put into

Machinery, *USACM Policy Recommendations on Digital Rights Management* (Feb. 2006), <http://www.acm.org/usacm/PDF/DRM.pdf>.

²⁸ Mark Hackman, *New DRM Scheme Could Make Current DVD Players Obsolete*, Jan. 5, 2005, EXTREMETECH, <http://www.extremetech.com/article/0,1558,1748511,00.asp>. This article explores the DVD encryption method Video Content Protection Scheme, which evaluates Broadcast Flags working in concert with DVD players and optical discs to deny users the ability to copy digital television, thereby making current players obsolete.

²⁹ See generally Center for Democracy and Technology, *Evaluating DRM: Building A Market Place for the Convergent World*, Sept. 2006, <http://www.cdt.org/copyright/20060907drm.pdf>.

³⁰ See generally *id.*; Electronic Frontier Foundation, Sony BMG Litigation Info, <http://www.eff.org/IP/DRM/Sony-BMG/#docs> (last visited Feb. 21, 2007) (On December 28, 2005, Sony-BMG, First 4 Internet, and SunnComm International entered into a settlement agreement in a class action in the U.S. District Court for the Southern District of New York [In re Sony BMG CD Technologies Litigation No 1:05-cv-09575 (NRB)] Sony had distributed CDs with flawed DRM, which restricted music transfer by way of XCP and Media Max, which when installed, precipitated security vulnerabilities to viruses and made the systems unstable).

³¹ TIMOTHY B. LEE, CIRCUMVENTING COMPETITION: THE PERVERSE CONSEQUENCES OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, CATO INST. POL'Y ANALYSIS 7 (2006), <http://www.cato.org/pubs/pas/pa564.pdf>.

³² WGPU Public Media, http://www.wgcu.org/hdtv_glossaryofterms.html#D (last visited Feb. 15, 2007).

place. A CSS blocks would-be pirates by allowing only CSS-enabled DVD players to play the DVDs.³³ The DVD Copy Control Association is the group responsible for the licensing of this dual-pronged system, by which manufacturers of DVD players and those who produce the discs purchase licensing agreements from each other.³⁴ Essentially, the Copy Control Association licenses the DRM scheme (CSS encryption) to DVD manufacturers. With discs so encrypted, DVD device manufacturers come to the DVD Copy Control Association to enter into licensing agreements (providing the decryption tools) so as to allow those CSS-enabled discs to play on their respective DVD players.³⁵

One particular aspect of storing content on DVDs is the capability of manufacturers to “region code,” which is another form of digital rights management. Region coding allows the manufacturer to restrict a particular DVD, sold in a particular region, to be played only on DVD players from that region.³⁶ As with any cat and mouse game, soon enough there were DVD players being manufactured with the capacity to play DVDs from any region. To combat this progression, a new form of region coding dubbed Regional Coding Enhancement, an upgraded DRM scheme, has developed to stop DVDs manufactured in the United States, its territories, and Canada from playing on region-free DVD players.³⁷ As with CSS and region coding, such restricted usage has sparked debate about consumer rights, as well as many of

³³ Technicolor Encyclopedia, [http://www.technicolor.com/Cultures/En-US/Support/Encyclopedia/C/CSS+\(Content+Scramble+System\).htm](http://www.technicolor.com/Cultures/En-US/Support/Encyclopedia/C/CSS+(Content+Scramble+System).htm) (last visited Feb. 15, 2007). This method scrambles the data on the master disc so that only CSS-enabled DVD players can decrypt the code. *Id.*

³⁴ DVD Copy Control Association, Frequently Asked Questions, <http://www.dvdcca.org/faq.html> (last visited Feb. 15, 2007); *see also*, <http://www.dvdcca.org/css/> (last visited Feb. 15, 2007). The Copyright Control Association is a not-for-profit association which has various pricing schemes for the licensing of CSS, depending on where in the chain a particular product and/or service falls. *Id.*

³⁵ *See generally* <http://www.dvddemystified.com/dvdfaq.html#6.1> (last visited Feb. 15, 2007). No single entity claims sole ownership of “DVD,” rather the specification (a term of art in patent law) was developed by JVC, Mitsubishi, Pioneer, Time Warner, Philips, Hitachi, Toshiba, Thomson, Matsushita, and Sony. *Id.*

³⁶ DVD Talk, Regional Coding Enhancement, <http://www.dvdtalk.com/rce.html> (last visited Feb. 15, 2007).

³⁷ *Id.* (explaining that the world has been divided into 8 regions with the United States, its territories, and Canada comprising Region 1; Regional Coding Enhancement is currently being implemented onto DVDs by Warner Brothers and Columbia Pictures).

the legal underpinnings which give supplemental support to these DRM schemes.³⁸

The DVD Copy Control Association suggests, at least implicitly, that region coding benefits consumers.³⁹ Due to the fact that movies are released in theatres at different times around the world, if region coding were not available, movie makers would hesitate to release a DVD format until all the theatre releases worldwide had opened.⁴⁰ In other words, if a particular movie is slated for theatre release in December in the United States, with region coding it can be made available on DVD a few months later in the United States, even though that same film will not be released in theatre version in Australia until the following summer.⁴¹ Thus, region coding allows consumers to get the DVD soon after release at theatres in their country.⁴² Of course, if region coding were not in place, people in other countries could purchase DVDs before the theatre release, and thus negatively impact box office sales.

At the time of CSS's release in 1996, it was designed as a relatively weak DRM encryption scheme (using a forty-bit key), in large part due to U.S. export policies on the exportation of encrypted products.⁴³ It has been suggested that the weakness of CSS's algorithm led to its being broken by a sixteen-year-old Norwegian (otherwise known as "DVD Jon"),⁴⁴ along with two other individuals. These three individuals collaborated to create DeCSS, which decrypts CSS and allows for the playback of encrypted DVDs.⁴⁵

B. *DRM Into the Future*

Just as the DVD was a significant advancement over CD capacity, so too the next generation of DVD optical disc, the Blu-ray

³⁸ Legal ramifications such as the legal doctrine of Fair Use and the Copyright Clause are discussed in Part III, *infra*.

³⁹ DVD Copy Control Association, FAQ, *supra* note 34.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ The Openlaw DVD/DeCSS Forum Section 1.1.3, <http://cyber.law.harvard.edu/openlaw/DVD/dvd-discuss-faq.html#ss1.1.3> (last visited May 1, 2007).

⁴⁴ Faultine, *US Inspired Copyright Laws Set to Sweep the Globe – For Fun and Profit*, Jan. 6, 2004, http://www.theregister.co.uk/2004/01/06/us_inspired_copyright_laws_set.

⁴⁵ The Openlaw DVD/DeCSS Forum Section 1.1.1, <http://cyber.law.harvard.edu/openlaw/DVD/dvd-discuss-faq.html#ss1.1.1> (last visited May 1, 2007).

Disc and its rival counterpart High Definition DVD (“HD-DVD”),⁴⁶ exemplify another leap in digital capacity well-suited to deliver high definition video content.⁴⁷ Although both standardizations incorporate advanced DRM schemes, Blu-ray’s is stricter by way of its utilization of a unique encryption form known as Blu-ray Disc+, which is being implemented into this next generation of DVDs.

Blu-ray⁴⁸ DVD discs integrate the latest protective mechanisms via DRM. Essentially, the DRM scheme is three-tiered. One level comprises digital watermarking, another Blu-ray Disc+, and a third is comprised of an Advanced Access Content System (“AACS”).⁴⁹ What is unique about this DRM scheme is its ability to avoid the problems CSS encountered.

In essence, Blu-ray Disc+ is a dynamic system which can continuously update its algorithms when a user is connected to the Internet. If a code related to a particular disc player is compromised, that player can be denied, via signal, to play any Blu-ray Discs.⁵⁰ Both HD-DVD and Blu-ray utilize the DRM scheme AACS; however, in order to get Fox Studios to sign on with the Blu-ray format, Fox required the even stricter layer of content protection via Blu-ray Disc+.⁵¹ According to Mark Knox, a representative of HD-DVD, Fox Studios did not like the idea of consumers being able to watch movies where they pleased.⁵² In other words, some would advocate that HD-DVD is more consumer friendly by allowing for more interoperability, whereas the Blu-ray format allows for no transferability of content whatsoever.

⁴⁶ The Digital Rights Management Dictionary, http://www.info-mech.com/drm_dictionary.html#hddvd (last visited May 1, 2007). Like the Blu-ray DVD proposal, HD-DVD format utilizes the AACS encryption scheme, and is backed by Microsoft.

⁴⁷ Blu-ray disc format was introduced in February 2002 as an example of what the future holds. Some of the supporting companies and members of the Blu-ray Disc Association include: Sony, Philips, Pioneer, Sun, Hitachi, Walt Disney, and Lionsgate. <http://www.blu-raydisc.com>.

⁴⁸ The “Blu-ray” name refers to the blue-violet laser used to read/write. The name was also purposely misspelled for instant trademark recognition. Blu-ray Disc Association, http://www.blu-ray.com/faq/#bluray_name (last visited May 1, 2007).

⁴⁹ Home Theater Blog, Jul. 19, 2006, http://www.hometheaterblog.com/home-theater/2006/07/disney_fox_divx.html. See also <http://www.aacsla.com/press> (last visited May 1, 2007).

⁵⁰ Home Theater Blog, *supra* note 49.

⁵¹ Aaron Dobbins, *HD DVD: Blu-ray Has Problems*, BETANEWS, Jan. 7, 2006, http://www.betanews.com/article/HD_DVD_Bluray_Has_Problems/1136673259.

⁵² *Id.*

The Blu-ray Disc Association has over 140 members including Sony, Walt Disney Pictures, 20th Century Fox, Dell, Hitachi, Panasonic, and Apple.⁵³ If one contemplates the vast list of backers for this latest development in DVD technology, it is easy to see the implications of such a far-reaching DRM platform, especially if it were to become the industry standard. Backed by the DMCA, digital rights management technologies seem to be in conflict with many of the basic tenets which underlie Congress' constitutional powers over intellectual property.

III. CASE LAW AND STATUTORY ANALYSIS OF FAIR USE AND DVD IMPLICATIONS

What exactly is "fair use" anyway? In large part it depends on whom you ask and where you look for authority. In certain sections of the entertainment industry there are those who believe fair use should not apply to DVDs at all.⁵⁴ Fortunately, for consumers of digital media fixed in DVDs, the inquiry does not end there. The Fair Use Doctrine has existed in various forms throughout common law history and is codified in Title 17 U.S.C. § 107, commonly known as the Copyright Act of 1976.⁵⁵

Fair use is essentially an exception to the exclusive rights that copyright law affords to the author of works fixed in a tangible medium, or her employer in the case of a work for hire.⁵⁶ The doctrine lays out four non-exclusive factors, which carry varying degrees of weight depending on what is at issue.⁵⁷ In addition, § 107 provides a

⁵³ Mark Hachman, *Update: Blu-Ray DRM Plans Released*, August 2005, EXTREMETECH, <http://www.extremetech.com/article2/0,1697,1845993,00.asp>.

⁵⁴ Pamela Samuelson, *Towards More Sensible Anti-Circumvention Regulations*, <http://www.ischool.berkeley.edu/~pam/papers/fincrypt2.pdf> (last visited May 1, 2007).

⁵⁵ *Princeton Univ. Press v. Mich. Document Serv., Inc.*, 99 F.3d 1381 (6th Cir. 1996).

⁵⁶ 17 U.S.C. §107 (2006) ("Notwithstanding the provisions of sections 106 and 106A the fair use of a copyrighted work...is not an infringement of copyright.") *See also* 17 U.S.C. §106 (2006) (listing those enumerated exclusive rights as the right to reproduce, to prepare derivative works, to publicly distribute, to publicly display, to publicly perform and in the case of sound recordings, to publicly perform by means of digital audio transmission).

⁵⁷ 17 U.S.C. §107 (2006) ("(i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work"). *See also*

non-exhaustive list of acts that may be deemed a fair use in light of those four factors. To illustrate, such acts may include: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research.

An examination of the House Report for codification of the Fair Use Doctrine in the 1976 Copyright Act specifically recognized that the doctrine should not be frozen in time, “especially in a period of rapid technological change,” thus emphasizing its expansive reach.⁵⁸ Perhaps now it becomes slightly clearer how DRM can negatively impact the Fair Use Doctrine’s worth with respect to DVDs. By essentially locking up copyrighted works in DVDs behind the cloak of encryption, an individual seeking to exercise his or her rights as defined in the doctrine under § 107 of the Copyright Act is blocked from doing so.

As will become more evident, while the crux of the tension between the public’s fair usage rights pertaining to accessing DVD content blocked by DRMs is rooted in complexities of the DMCA, a proper starting point nonetheless must spring from foundational decisions that will aid in framing the issues and provide contextual support.

A. Essentials in Fair Use and Access to Building Blocks Fixed Onto DVDs

“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.”⁵⁹ It is this clause of the U.S. Constitution which broadly empowers Congress to grant or deny copyrights and patents. As Professor Melville Nimmer stated in his treatise, “[t]he primary purpose of copyright is not to reward the author, but is rather to secure the general benefits derived by the public from the labors of authors.”⁶⁰ From the first Copyright Act of 1790 to the present day, this was the common theme to copyright.⁶¹ This theme now appears to be in jeopardy by the threat of digital piracy, DRM, and its DMCA countermeasures.

Harper & Row Publishers Inc. v. Nation Enters., 471 U.S. 539 (1985) (suggesting the fourth factor to be the most important one).

⁵⁸ H.R. REP. NO. 94-1476, at 65-66 (1976).

⁵⁹ U.S. CONST. art. I, § 8, cl. 8.

⁶⁰ N.Y. Times Co. Inc. v. Tasini, 533 U.S. 483, 519 (2001).

⁶¹ Eldred v. Ashcroft, 537 U.S. 186, 227-28 (2003) (Stevens, J., dissenting).

If, as this author suggests and will expound upon in Part III.C *infra*, DMCA infringement cases must take into account fair use at least on a case-by-case basis, then it shall follow that a proper examination requires, at a bare minimum, a succinct examination of seminal decisions respecting access to ideas, facts, theories, and those specific exemptions under § 107.⁶²

1. Non-Copyrightable Elements

Copyright protects expression, yet this protection has its limits.⁶³ *Feist Publications, Inc.*, held that although a work as a whole may be protected by copyright, such protection does not extend to underlying elements that do not originate with the author.⁶⁴ As emphasized by one commentator in 1990: “[N]o matter how much original authorship the work displays, the facts and ideas it exposes are *free for the taking . . .*” (*emphasis added*).⁶⁵ Although the demarcation between an idea and its expression has always been difficult to draw, as Judge Learned Hand stated in *Nichols v. Universal Pictures*, “that is no excuse for not drawing it.”⁶⁶ This illustrates that the concept of distinguishing between the two has played a vital role in balancing the *quid pro quo* of copyright.

From *Baker v. Selden*'s seminal decision in 1879, refusing to extend copyright to blank forms,⁶⁷ to codification of that principle in 1976 in Title 17 U.S.C. § 102(b), that “in no case does copyright protection extend . . . to any idea/principle regardless of the form in which it is embodied,” the underlying theme has been unwavering. This bedrock principle should play a central role in analysis respecting access to underlying factual theories buried in a DVD's outtakes. Because the DMCA only protects copyrighted works, should not a proper starting point be whether the material extracted from the DVD had a right to copy protection in the first place? This author would suggest such a route; if the material is not subject to copyright, the

⁶² 17 U.S.C. §107 (2006). Such examples include, but are not limited to, criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research.

⁶³ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

⁶⁴ *Id.*

⁶⁵ *Id.* at 349 (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990)).

⁶⁶ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

⁶⁷ *Baker v. Selden*, 101 U.S. 99, 107 (1879).

DMCA should give way to the underlying non-copyrightable elements.

2. Parodies

Parody of a copyrighted work has not only been long regarded as falling within the ambit of the Fair Use Doctrine, but also as an important aspect of social commentary. Thus, if a film critic wishes to excise portions of a DVD to parody the work, it would appear his ability to do so would be frustrated by DRM countermeasures as well as the threat of civil and criminal liability under the DMCA. As stated by Justice Kennedy, “[t]he parody must target the original, and not just its general style . . .”⁶⁸ Further, in *Dr. Seuss Enterprises v. Penguin Books*, the Ninth Circuit Court of Appeals opined that parody is “a form of social and literary criticism, having a socially significant value as free speech under the First Amendment.”⁶⁹ This author posits that in making such sweeping legislation as the DMCA, and further permitting elements which should be free for the taking to hide behind the cloak of copyright, is to lose sight of the underlying purposes of copyright.

As stated earlier, application of the four factors of fair use is very fact specific; however, in the context of parodies, a few generalizations can be made. For instance, in *Campbell v. Acuff-Rose Music*,⁷⁰ the Supreme Court shed light on two of the § 107 factors of particular relevance to parodies. Since a parody by nature draws upon the original, yet adds to it in order to poke fun at the work, it is these additions that, although unnecessary for a finding of fair use, are highly regarded as underlying the purpose of the Fair Use Doctrine, especially as it pertains to the first factor of § 107, the purpose and character of the use.⁷¹

Additions to the original work in the context of commentary or criticism are said to be transformative.⁷² These transformations, in a constitutional sense, promote the progress of science.⁷³ Likewise, the fourth factor, relating to market harm, in most cases is not invoked in

⁶⁸ *Dr. Seuss Enters., L.P. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 597 (1994) (Kennedy, J., concurring)).

⁶⁹ *Id.*

⁷⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁷¹ *Id.* at 578.

⁷² *Id.* at 579.

⁷³ *Id.*

parodies against one who utilized the copyrighted work, primarily because the kind of economic harm caused by a parody is not the type of harm the statute recognizes.⁷⁴ Rather, the economic harm must stem from the alleged infringing work replacing demand for the original in the market; however, any reduction in demand caused by the negative impact of the parody is not cognizable.⁷⁵

3. Time and Space Shifting

The ability to record a television show for later viewing and to fast-forward through commercials in VCR tapes and DVDs, otherwise known as “time-shifting,” is something that consumers have become accustomed to due in large part to the decision in *Sony Corp. v. Universal City Studios*.⁷⁶ There, the Supreme Court held such acts to fall within fair use.⁷⁷ However, various DRM initiatives built into DVDs as well as digital signals, or broadcast flags, will block the ability not only to fast forward through commercials, but also will not allow a recorder to save television shows for later viewing.⁷⁸

Currently, under the Copyright Office’s triennial review (a review to uphold Congress’ commitment to fair use),⁷⁹ the Office has placed the onus on users of digital works to show a substantial harm for an exception to be carved out of the DMCA. However, of particular interest is what appears to be a shift in which party has the burden. As stated by the Court in *Sony*, the copyright holder bears the burden of bringing forth evidence of harm “before he may condemn a private act of time-shifting as a violation of federal law.”⁸⁰ In analyzing the four fair use factors, time-shifting was found to be a noncommercial and nonprofit activity with no demonstrable effect upon the copyright holder’s market.⁸¹ The testimony of one individual in *Sony*, Fred Rogers from *Mr. Rogers’ Neighborhood*, best sums up

⁷⁴ *Id.* at 590.

⁷⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

⁷⁶ *Sony Corp. v. Universal Studios*, 464 U.S. 417 (1984).

⁷⁷ *Id.* at 423.

⁷⁸ Electronic Frontier Foundation, Digital Video Restrictions, <http://www.eff.org/IP/digitalvideo> (last visited May 1, 2007).

⁷⁹ Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works (2006), *available at* http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

⁸⁰ *Sony Corp.*, 464 U.S. at 454.

⁸¹ *Id.* at 449.

what then, and probably today, would be the consumer consensus on time-shifting:

Very frankly, I am opposed to people being programmed by others. My whole approach in broadcasting has always been 'You are an important person just the way you are. You can make healthy decisions.' Maybe I'm going on too long, but I just feel that anything that allows a person to be more active in the control of his or her life, in a healthy way, is important.⁸²

Similar to time-shifting is "space shifting," which is a method of transferring digital media files already stored on one's computer hard drive to a portable device, in other words, to shift its location.⁸³ *Recording Industry Association of America v. Diamond Multimedia Systems* found such shifting of digital audio files (e.g., music) to be a fair use.⁸⁴ There are several advantages of space shifting, such as avoiding the hassle of carrying bulky discs while traveling, reducing the chance of theft (it is easier to conceal one small portable player than many DVDs), or making a backup copy in the event the original disc becomes corrupt.

In support of the notion that personal transferring of audio content should also apply to audiovisual works fixed onto DVDs, consider that in *A & M Records v. Napster* (the music file-sharing case), the court refused to apply time and space shifting fair use methods, primarily because the music was being distributed to the general public.⁸⁵ Conversely, *A & M Records* specifically noted that in both *Sony*⁸⁶ and *Recording Industry Association of America*, the shifting was limited to the original owner.⁸⁷ As mentioned earlier, DRM platforms will prevent this transferability; thus, following the rationale of *Sony*, *A & M Records*, and *Recording Industry Association of America*, consumers of legally purchased DVDs should be able to shift the audiovisual content from optical discs to a portable player for personal, not public, use.

⁸² *Sony Corp. v. Universal Studios*, 464 U.S. 417, 445 n.27 (1984).

⁸³ *Recording Indus. Ass'n of Am. v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072, 1072 (9th Cir. 1999).

⁸⁴ *Id.* at 1079.

⁸⁵ *A & M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1019 (9th Cir. 2001).

⁸⁶ *Sony Corp.*, 464 U.S. at 417.

⁸⁷ *A & M Records, Inc.*, 239 F.3d at 1019.

Having explored a contextual snapshot of fair use, access to facts and ideas, and the origins of the Copyright Act, this article will now ascertain the interrelation of the DMCA and the near consumption of consumers' fair use rights of DVD content by DRMs.

B. The DMCA's Statutory Effect upon DVD Fair Use Analysis

The enactment of the Digital Millennium Copyright Act in 1998 made matters even more convoluted in terms of fair use access to copyrighted works which were hiding in plain sight behind DRM encryption schemes.⁸⁸ While it has been suggested that the DMCA was enacted to provide an incentive for authors to digitalize their works for placement on the Internet⁸⁹ by providing a legal mechanism for targeting pirates, arguably the Act has exceeded its constitutional scope.⁹⁰

The DMCA's origin in large part can be traced to two sources, one being a 1995 White Paper, *Intellectual Property and the National Information Infrastructure*, which was an extensive study on the state of intellectual property rights (patent, copyright, and trademark) in the new global, Internet-connected world.⁹¹ The other prod leading to the DMCA was pressure on the United States from the 1996 enactment of the WIPO⁹² Treaty, which imposed on all signatories a duty to enact adequate legal measures and effective remedies to combat digital piracy.⁹³

⁸⁸ 17 U.S.C. § 1201 (2006) (Circumvention of Copyright Protection Systems).

⁸⁹ Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Chair, White Paper, *Intellectual Property and the National Information Infrastructure, The Report of the Working Group on Intellectual Property Rights* (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/execsum.html>.

⁹⁰ Samuelson, *supra* note 54, at 2.

⁹¹ Lehman, *supra* note 89.

⁹² World Intellectual Property Organization, <http://www.wipo.int> (last visited May 1, 2007). The WIPO is a division of the United Nations and was established in 1967. WIPO currently has 183 member states. WIPO seeks to provide a globally balanced intellectual property system; one of its goals is promotion of the economic development of intellectual property while concurrently protecting the public interest. *Id.*

⁹³ *Unintended Consequences: Seven Years Under The DMCA*, ELECTRONIC FRONTIER FOUNDATION, Apr. 2006, http://www.eff.org/IP/DMCA/?f=unintended_consequences.html#Section4; see also World Intellectual Property Organization Treaty, art. 11, Apr. 12, 1997, S. TREATY DOC. NO. 105-17 (1997).

1. Anti-Access and Anti-Copy Measures

Two particular sections of the DMCA are highly germane to DVD-DRM fair use analysis, namely § 1201(a)(1)(A) and § 1201(b). Section 1201(a)(1)(A) makes it a crime, punishable by both fines and/or imprisonment, to circumvent anti-access measures.⁹⁴ Section 1201(b) makes it illegal to traffic, make, or offer any tool which has a primary purpose of circumventing *either* anti-access or anti-copying technology (emphasis added). Thus, while one may circumvent anti-copying technology to make a copy, one may not circumvent⁹⁵ anti-access technology. Moreover, in neither case may one make or sell tools allowing the utilization of articles protected by anti-access or anti-copying technology.

It has been suggested that Congress' intent in making it lawful to circumvent anti-copying technology in order to make a copy but not to gain access, was to preserve the Fair Use Doctrine.⁹⁶ Further, such allowance was intended to strike a balance between the competing interests of lawful access and the strong opposition to deny such access by those desiring legal tools to strengthen encryption methods.⁹⁷ However, to allow one to make a copy of a DVD, but not be able to watch it since circumventing anti-access measures is illegal, is pointless. Rather than striking a balance, it appears a heavy thumb was placed on one side of the scale.

2. A Legislative Perspective

The legislative history of the DMCA devotes a substantial portion to concerns over fair use implications. Of particular interest are the Committee on the Judiciary's comments in House Report 2281.⁹⁸ Therein, the Committee continuously emphasized the necessity of balancing the competing interests of authors of

⁹⁴ 17 U.S.C. § 1204(a)(1)(2) (2006). The Copyright Act provides for fines of up to \$500,000 and/or up to five years imprisonment for first offense and for subsequent offenses up to \$1 million and/or ten years imprisonment. *Id.*

⁹⁵ 17 U.S.C. § 1201(a)(2)(A) (2006) ("To circumvent a technological measure means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner").

⁹⁶ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000).

⁹⁷ *Id.* at 322.

⁹⁸ H.R. REP. NO. 105-551(II), at 1 (1998).

copyrighted works against the interests of the public wishing to exercise fair use rights.⁹⁹

Fearful of creating a “pay-per-use” society, the Committee on Commerce claimed in its report that H.R. 2281 “fully respects and extends into the digital environment the bedrock principle of ‘balance’ in American intellectual property law for the benefit of both copyright owners and users.”¹⁰⁰ Yet, immediately following such statements of concern, the Committee seemed to brush this aside, at least implicitly, and affirmed the United States’ commitment to abiding by the WIPO Treaties. Thus, one inference that can be drawn from the legislative history behind the DMCA is that while trying to provide “adequate protection and effective remedies” under WIPO, the DMCA swallowed up that “bedrock” of American copyright law. Furthermore, the capability of DRM technologies on DVDs exemplifies this quandary.

While the DMCA, operating upon a DRM/DVD platform, may have certainly narrowed (or eliminated) fair use, it would be without merit to suggest that the House Committee on Commerce, which was assigned the task of amending Title 17 of the U.S. Code, was not cognizant of the immense magnitude of its amendment modifications.¹⁰¹ The Committee saw H.R. 2281 as something greater than just a bill about intellectual property; rather, the Committee recognized that H.R. 2281 would have substantial effects on how electronic commerce was recognized generally.¹⁰² The Report repeatedly cited to a Department of Commerce Report, *The Emerging Digital Economy*, which contained staggering estimates of electronic economic activity that were no doubt an impetus to the adoption of the bill.¹⁰³

The Emerging Digital Economy estimated that over 7.4 million Americans were employed in the information technology sector at the end of 1997.¹⁰⁴ It is estimated that there was approximately \$500 billion in online economic activity in 2002, and that in 1998 approximately 8.2% of the gross domestic product stemmed from information technology.¹⁰⁵ These numbers may aid in illuminating

⁹⁹ *Id.* at 25.

¹⁰⁰ *Id.* at 26.

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 22.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

some of the theory behind enactment of the DMCA.¹⁰⁶ Yet, as alluded to earlier, perhaps the real impact of this data was to mask some of the underlying tribulations that stemmed from the erosion of fair use.

Due to the global nature of the DMCA with respect to WIPO commitment, it is necessary to consider a recent decision by a French Court of Appeals in Paris. An individual who owned a DVD, but who was unable to watch DVDs and wanted to copy the DVD onto VHS, brought suit against the makers of the DVD who had installed copy protection mechanisms on the DVD.¹⁰⁷ The French Appeals Court held that DVD content providers must remove copy protection mechanisms from all movies because the mechanisms violate the fair usage rights of consumers.¹⁰⁸ While many heralded the decision as a great advance for the public interest, the celebration was short-lived. France's highest court, Cour de cassation, felt otherwise and found in favor of the DVD content providers in order to come more in compliance with WIPO commitments.¹⁰⁹

Unfortunately, as international treaties and organizations lobby to provide global protection and remedies for infringement of copyrighted works, the decision by the French court may have a ripple effect resulting in a further bolstering of U.S. restrictive enforcement policies in relation to fair use rights pertaining to DVDs. It is from this point that this article will now address case law decisions in the United States in order to better grasp the contours of the legal landscape.

C. The DMCA's Case Law Effect upon DVD Fair Use Analysis

If a film review critic wishes to compile excerpts from various documentaries in a series of DVDs in order to make a point to the public about misleading arguments, and yet a DRM blocks him from

¹⁰⁶ *Id.*

¹⁰⁷ Andrew Orłowski, *French Court Bans DVD DRM, Keep It In the Family*, THE REGISTER, Apr. 26, 2005, http://www.theregister.co.uk/2005/04/26/french_drm_non; see also Eric Bangeman, *French Court Rules Against Copy-Protected DVDs*, ARS TECHNICA, Apr. 25, 2005, <http://arstechnica.com/news.ars/post/20050425-4846.html>.

¹⁰⁸ Orłowski, *supra* note 107; see also Bangeman *supra* note 107.

¹⁰⁹ PC PRO, *French Court Rules Against Fair Use for DVD Copies*, Mar. 3, 2006, <http://www.pcpro.co.uk/news/84406/french-court-rules-against-fair-use-for-dvd-copies.html>; see also Gabriele Parussini, *France's Highest Court Boosts Copyright Protection on Film DVDs*, BLOOMBERG.COM, Mar. 1, 2006, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8Dz7xQuZ_14.

making a single disc compilation, such use is admittedly within the purview of fair use. Thus it is not difficult to envision how the Fair Use Doctrine, and through it the public's right of access, is frustrated by DRMs. This was the conclusion of the district court in *Universal City Studios, Inc. v. Reimerdes*.¹¹⁰ However, the court, while sympathetic to the apparent erosion of fair use, interpreted the DMCA with an eye toward the legislative history of the Act. As the court saw it, Congress was well aware of fair use at the time of enactment of the DMCA and held, in essence, that it was not for the court to disturb the findings of Congress.¹¹¹

According to *Reimerdes*, if Congress wanted fair use to apply to the DMCA, Congress would have so stated. *Reimerdes* involved an infringement action brought against website owners who were posting DeCSS on their websites, as well as links to other sites posting similar decryption data.¹¹² The motion picture studios sought an injunction under the DMCA as such postings would allow consumers to decrypt the DVD-DRM scheme.¹¹³ Interestingly, *Reimerdes* seems to draw a distinction between being sued for copyright infringement and being sued under the DMCA;¹¹⁴ yet, the proper analysis cannot be so neatly divided.

1. Where to Draw the Line

To bolster the position that the demarcation between the DMCA and supplemental portions of the Copyright Act is not so bright, one need only consider the comments of the Copyright Office in its triennial review respecting the proposed class of public domain works. In rejecting arguments for another DMCA exemption, the Copyright Office sets forth that no such exception is necessary, as the DMCA is not applicable to works which are in the public domain.¹¹⁵ Hence, the tie-in between the DMCA and copyright law seems not as

¹¹⁰ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322-324 (S.D.N.Y. 2000).

¹¹¹ *Id.*

¹¹² *Id.* at 303.

¹¹³ *Id.*; see also *In re Implementation of Section 304 of Telecommunications Act of 1996*, 15 F.C.C.R. 18199, 18203-05 (F.C.C. Sept. 18, 2000).

¹¹⁴ *Reimerdes*, 111 F. Supp. 2d at 294.

¹¹⁵ United States Copyright Office, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works 13 (2006), available at http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

attenuated as the *Reimerdes* court might suggest. By stating that the DMCA is inapplicable if a work is not copyrightable, the Copyright Office appears to suggest a relationship, which one would normally assume, between various subsections within the same statute.

Comparing various sections of the Copyright Act seems to further draw a more narrow view of the DMCA than *Reimerdes* puts forth. The Copyright Act itself, and more specifically § 1201(c)(4), states “nothing in this section shall diminish or enlarge any rights of free speech . . . for activities using computing products.” Likewise, the parallel section of the DMCA, read in light of § 102(b) states that “in no case does copyright protection extend . . . to any idea, concept, or principle . . . regardless of the form in which it is embodied” (*emphasis added*).¹¹⁶ Based on this comparison, it is difficult to reach the same conclusion as *Reimerdes*.

While the DMCA adds some real teeth to DRM technologies, it is important to note that for the copyright owner to have the legal backing of the Act, her other anti-access control measure must be effective.¹¹⁷ Thus, if a DRM encryption scheme blocks one route of access but freely allows another, the DMCA cannot be enforced by the copyright holder.¹¹⁸ As the Ninth Circuit stated in *Lexmark International*: “[A]s one would not say that a lock on the back door of a house ‘controls access’ to a house whose front door does not contain a lock . . . it does not make sense to say that this provision of the DMCA applies to otherwise-readily-accessible copyrighted works.”¹¹⁹

Lexmark International involved a printer manufacturer that brought a copyright infringement and DMCA action against a vendor whose computer chip mirrored their own, and which allowed a third party’s toner cartridges to be operable in Lexmark’s printers.¹²⁰ Although *Lexmark International*’s emphasis is on matters tangential to DVD fair use implications, the opinion nonetheless provides helpful guidance, with respect to modern fair use interpretation, and therefore may provide guideposts of suggestion.

Lexmark International provides an excellent review of the first factor of § 107 of the Copyright Act, namely the purpose and character of the use, including whether the use is of a commercial or not-for-

¹¹⁶ 17 U.S.C. §§ 1201(c)(4); 102(b) (2006).

¹¹⁷ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).

¹¹⁸ *Id.* at 547.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 529.

profit nature.¹²¹ The Court of Appeals in *Lexmark International*, citing *Harper & Row Publishers*, stated that the question is not whether commercial gain is realized, but rather, whether “the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹²²

Taking factor one for comparison, it would be a difficult task indeed for a copyright holder to suggest a cognizable loss of profit against a parodist who samples the holder’s DVD for behind-the-scenes commentary and criticizes the work. Certainly, such transformative use is favored under fair use, both statutorily and through years of case law. Likewise, the fourth, and arguably most important factor, respecting the effect upon the potential market for the value of the copyrighted work, seems also to weigh heavily in favor of the parodist desiring to sample various DVDs to make a compilation of commentaries.

Perhaps Nimmer best framed the issue as “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for” the original.¹²³ Again, assuming the DMCA is overbroad, a copyright holder would have a difficult time convincing a court that a movie critic merely sampling behind-the-scenes footage for commentary or criticism would have any *cognizable* impact upon sales. However, due to the fact that the DMCA created a new cause of action¹²⁴ against an encryption infringer, which is separate from the issue of copyright infringement, such penalties might dissuade individuals from exercising their fair use rights out of fear of a DMCA suit.

These new causes of action were without question in the minds of commentators at the time leading up to enactment of the DMCA. This new zone of rights to bolster copyright law, termed “paracopyright,” was discussed by sixty-two professors of copyright law in a letter to Congress in September 1997. The letter expressed concern over these new supplemental copyright enforcement mechanisms.¹²⁵ Nonetheless, the Committee on Commerce felt compelled to tackle this new digital threat to copyright. Emphasizing

¹²¹ *Id.* at 544.

¹²² *Id.* (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

¹²³ NIMMER ON COPYRIGHT § 13.05[A][4] (2007).

¹²⁴ *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1192 (Fed. Cir. 2004).

¹²⁵ H.R. REP. NO. 105-551, pt. 2, at 24 (1998).

the dangers facilitated by the ease of making near-perfect copies and mass distribution thereof in comparison to the earlier analog model, the Committee stated “[a]s technology advances, so must our laws.”¹²⁶

2. Stymieing Fair Use

If indeed the DMCA has hindered the Fair Use Doctrine in the DVD medium, the implications are not patently obvious. In the Copyright Registrar’s triennial recommendation memorandum to the Librarian of Congress,¹²⁷ it is suggested that to invoke the four factors of § 107, proper analysis requires a case-by-case determination.¹²⁸ While this is true, as the four factors are non-exclusive and receive varying degrees of weight depending on the facts before the court, one might argue that since the DMCA creates this new cause of action, fewer fair use cases are litigated. Thus, with fewer cases making it to court (assuming settlement and/or parties not wishing to exercise fair use rights), a body of law is left undeveloped in the face of these new emerging technologies. This situation is exacerbated by the unique case-by-case analysis the Fair Use Doctrine demands for its proper implementation.

Of particular relevance to this article is the rejection in the Copyright Office’s triennial review of the proposed class relating to “ancillary audiovisual works distributed on DVDs encrypted by CSS.”¹²⁹ While the Registrar states that such matters (e.g., outtakes, interviews with actors and directors, and similar features) would fall within the fair use purview, the class is dismissed with the principal rejection based upon two premises.¹³⁰ The first premise is the

¹²⁶ *Id.* at 25.

¹²⁷ Under 17 U.S.C. §§ 1201(a)(1)(C)-(D) (2006), the Librarian of Congress is empowered to create exemptions to DMCA § 1201 for a three-year period.

¹²⁸ United States Copyright Office, Recommendation of the Register of Copyrights in RM 2002-4, Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works 29 (2006), available at http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

¹²⁹ United States Copyright Office, Recommendation of the Register of Copyrights in RM 2002-4, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 116 (2003), available at <http://www.copyright.gov/1201/2003/index.html>. Interestingly, this particular class was not addressed in the Nov. 27, 2006 triennial review; thus, one may surmise that the positions underlying the 2003 review on this point have not faltered. *Id.*

¹³⁰ *Id.*

capability of users to circumvent copy control methods to record the analog output of DVD players; the second is the capacity to take a digital camcorder and place it in front of a television to record while a DVD is playing.¹³¹

This author suggests that both of these alternative fair use methods are without substance. As for the analog output option suggested, there are already DRM schemes in the works to plug the “analog hole.”¹³² Both the Blu-ray disc and HD-DVD format, discussed previously as the next generation of DVDs to set the new standard, are said to cripple the analog capabilities.¹³³ As for taking a camcorder and placing it in front of a television screen, at first glance it seems a bit absurd that one must go to such lengths to exercise fair use rights. Moreover, even if one were to go through the trouble of obtaining a camcorder, this avenue will also soon be plugged. If the next generation of DVDs (Blu-ray and/or HD-DVD) becomes the standard, the technology will prevent those camcorder recordings from playing on Blu-ray players, according to Andrew Setos, President of Engineering for the Fox Entertainment Group.¹³⁴

The rivalry between the Blu-ray format and HD-DVD is similar to the old fight between the VHS and Betamax formats. As both of these rival standardizations for DVDs have strong supporters, one might suggest that consumer rights respecting access, use, and transferability of purchased DVD content might be no more than an afterthought, thus maintaining a “copyright-centric” position.¹³⁵ Moreover, legislation has previously been introduced in Congress, namely the Digital Transition Content Security Act of 2005, which would wipe out the capacity to record digital works via the analog output option on DVD players.¹³⁶

As for the alternative to making direct digital-digital copies for ancillary commentary via placing a digital recorder in front of a

¹³¹ *Id.*

¹³² Eric Bangeman, “Analog Hole” Legislation Introduced, ARS TECHNICA, Dec. 18, 2005, <http://arstechnica.com/news.ars/post/20051218-5797.html%20discussing>.

¹³³ David Katzmaier, *Blu-ray and HD-DVD: Crippled HD Analog Output Option*, ALPHA THE CNET BLOG, Jan. 20, 2006, http://reviews.cnet.com/4531-10921_7-6423704.html.

¹³⁴ Mark Hachman, *Update: Blu-Ray DRM Plans Released*, Aug. 2005, EXTREMETECH, <http://www.extremetech.com/article2/0,1697,1846092,00.asp>.

¹³⁵ Samuelson, *supra* note 54. This article discusses the idea of “copyright-centricity” in greater detail.

¹³⁶ Digital Transition Content Security Act of 2005, H.R. 4569, 109th Cong. (2005).

television, having to resort to such less than optimal means is not required. The triennial review cites to *Universal City Studios v. Corley* for support of the notion that placing a camcorder in front of a television is sufficient.¹³⁷ However, the later case of *Eldred v. Ashcroft*, with its discussion of fair use that was lacking in *Corley*, might not have relegated fair use to camcorder taping only.¹³⁸ Since *Eldred* was decided in January 2003, and the triennial report was released in October of 2003, one might infer that the fair use the Supreme Court read as being mandated by the Constitution in *Eldred*, prevents such a narrow reading of fair use as the Second Circuit suggested in *Corley*. Furthermore, it suggests that the Second Circuit erred in not applying *Eldred*.

Circumventing an anti-access DRM measure is not copyright infringement.¹³⁹ Rather, such unauthorized access to an anti-circumvention technology is a new cause of action upon which a copyright holder may enforce his copyright.¹⁴⁰ According to *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, this distinction is critical to a proper DMCA fair use analysis.¹⁴¹ The copyright holder in *Chamberlain Group* argued that creation of the DMCA effectively reshaped the legal landscape so that any and all uses of copyrighted works protected by anti-access measures without the copyright holder's permission became a violation of the DMCA.¹⁴² The *Chamberlain Group* court pointed out, however, that such broad coverage would be a violation of both antitrust laws and the doctrine of copyright misuse.¹⁴³

While *Chamberlain Group* involved a DMCA patent action on a garage door opener allegedly infringed by a universal remote control, the court's analysis of fair use and technologies is directly relevant to DVD/DRM fair use analysis. For example, while *Reimerdes* seemed to draw a distinct line between copyright and the DMCA, *Chamberlain Group* is more applicable to fair use concerns in

¹³⁷ *Universal City Studios, Inc., v. Corley*, 273 F.3d 429 (2d Cir. 2001).

¹³⁸ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹³⁹ *Id.*

¹⁴⁰ *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1192 (Fed. Cir. 2004).

¹⁴¹ *Id.*

¹⁴² *Id.* at 1193.

¹⁴³ *Id.* at 1194. See also *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1090 (9th Cir. 2005) (citing *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 792 (5th Cir. 1999) (discussing copyright misuse as an affirmative defense that "forbids the use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which is contrary to public policy to grant"))).

the DVD/DRM medium. Instead of reading the DMCA and other sections of the Copyright Act independently, *Chamberlain Group* provides an excellent marriage of the various statutory sections. The *Chamberlain Group* court suggested that any interpretation of § 1201(a) must be read in conjunction with § 1201(c)(1), which addresses fair use.¹⁴⁴ *Chamberlain Group* thereby rejects the copyright holder's assertion that fair use is inapplicable in a proper DMCA analysis.

Consider the application of the *Chamberlain Group* analysis to DMCA causes of action against a WebBlog movie critic who wishes to sample DVD outtakes from various movies. *Chamberlain Group* analysis should control because DVD outtakes are not available in VHS format (an alternative the triennial review suggested),¹⁴⁵ and § 1201 should be interpreted in light of the fair use exemption to the § 106 exclusive rights. Otherwise, fair use will no longer exist under the DMCA in the context of DRM/DVD platforms. In support thereof, the *Chamberlain Group* court quoted Justice Souter's dissent in *Reno v. American-Arab Anti-Discrimination Committee*: “[n]o canon of statutory construction familiar to me specifically addresses the situation in which two simultaneously enacted provisions of the same statute flatly contradict each other.”¹⁴⁶ Applying this reasoning, it is difficult to see how commentators or critics desiring to breach anti-access DRM measures to sample DVD outtakes would be liable under the DMCA.

In contrast to the Court of Appeals for the Federal Circuit's approach in *Chamberlain Group*, an earlier decision by the Second Circuit in *Universal City Studios, Inc. v. Corley*, declined to read fair use into DMCA infringement analysis; rather, *Corley* interpreted the DMCA as targeting “the circumvention of digital walls guarding copyrighted material . . . but . . . not concern[ing] itself with the use of those materials after circumvention has occurred.”¹⁴⁷ *Corley* involved a DMCA action brought by motion picture studios to enjoin the defendant from posting DeCSS, a decryption algorithm allowing users

¹⁴⁴ *Chamberlain Group*, 381 F.3d at 1200.

¹⁴⁵ Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 13, Oct. 31, 2003, <http://copyright.gov/fedreg/2003/68fr2011.html>.

¹⁴⁶ *Id.* (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 509 (1999) (Souter, J., dissenting)).

¹⁴⁷ *Universal City Studios, Inc., v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001).

who downloaded it to play a DVD encrypted with Content Scramble System, on his website.¹⁴⁸

Unlike *Chamberlain Group*, *Corley* relies on the legislative history of the DMCA by placing emphasis on the “fail-safe” triennial review by the Librarian of Congress as recommended by the Registrar of the Copyright Office.¹⁴⁹ In essence, the *Corley* court rejected the defendant’s argument for a fair use defense, concluding that Congress is in the best position to decide how to best effectuate fair use. Additionally, by mandating a triennial review, Congress already provided for the protection of the Fair Use Doctrine. When the defendant in *Corley* asserted the affirmative defense of fair use as an alternative to no liability, the court used the example of a child desiring to sample portions of a DVD for a school project.¹⁵⁰ *Corley* suggests that fair use does not mandate the optimum method of exercising rights under the doctrine; instead, other means, such as using a camcorder to tape a DVD playing on a television, would satisfy fair use.¹⁵¹

The key to understanding *Corley* is its place in time. The Second Circuit decided the case in 2001, at which time *Eldred v. Ashcroft*¹⁵² (holding that fair use is constitutionally required) had yet to come before the Supreme Court. *Corley* cited several Supreme Court decisions¹⁵³ which made isolated comments respecting the connection between the Fair Use Doctrine and the Constitution. However, these cases offered no clear guidance. As such, *Corley* dismissed the defendant’s arguments.¹⁵⁴ Using the Court’s reasoning in *Eldred*, *Corley* would likely have come out the same, as the primary issue was not related to sampling DVDs per se. If, however, the issue before the court had been DVD commentary sampling, using the *Eldred* Court’s reasoning, it is possible *Corley* would have swayed in favor of DVD digital-to-digital sampling. This assertion is based on the fact that much of *Corley*’s analysis is framed around the absence of

¹⁴⁸ *Id.* at 435-437.

¹⁴⁹ *Id.* at 443, n.13.

¹⁵⁰ *Id.* at 459.

¹⁵¹ *Id.*

¹⁵² *Eldred*, 537 U.S. at 186.

¹⁵³ *Universal City Studios, Inc., v. Corley*, 273 F.3d 429, 458 (2d Cir. 2001) (citing *Stewart v. Abend*, 495 U.S. 207 (1990) (“fair use permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster”)); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁵⁴ *Corley*, 273 F.3d at 459.

a controlling decision mandating that fair use be read into the Constitution.

In recognition of decisions post-*Corley*, such as *Chamberlain Group*, as well as this author's agreement that proper statutory interpretation of § 1201 (DMCA) be read in light of § 107 (fair use) and § 106 (copyright's exclusive rights), the direction of this article will now shift to expounding upon the notion that free speech, as guaranteed by the First Amendment, and Fair Use are inextricably intertwined. In making any judgments respecting DRM's negative effects upon DVDs, in light of the DMCA, the factors elaborated below should be given due consideration.

3. A First Amendment Perspective

In 2003, the Supreme Court in *Eldred v. Ashcroft* made it clear that fair use is to be read into the Constitution.¹⁵⁵ *Eldred* concerned a challenge to a twenty year extension to existing and future copyright terms. While the Court upheld the term extension, the Court's First Amendment/Fair Use Doctrine discussion is highly relevant to issues surrounding DVDs, fair use, and the DMCA.

Where Congress has not altered the traditional contours of copyright protection, First Amendment heightened scrutiny is unnecessary.¹⁵⁶ The Supreme Court premised this upon copyright law's two built-in First Amendment safeguards. The first safeguard draws a distinction between copyrightable expression and the underlying ideas and facts via the Idea/Expression Dichotomy. The second safeguard, under the Fair Use Doctrine, allows access to the copyrighted expression itself in certain circumstances for commentary, criticism, and the like.¹⁵⁷

In light of DRM's capability to block a DVD owner from excising outtakes or expression snippets for commentary while having the legal backing of the DMCA to enforce the technology measures, it is difficult to suggest that the traditional contours of copyright have not changed dramatically. This author suggests that the landscape has indeed changed. While the legislative history leading up to the DMCA, as discussed in Part III.B *supra*, provides some rationale for the shift, the DMCA should be examined under heightened scrutiny for proper First Amendment analysis, irrespective of that rationale.

¹⁵⁵ *Eldred v. Ashcroft*, 537 U.S. 219 (2003).

¹⁵⁶ *Id.* at 221.

¹⁵⁷ *Id.* at 219.

While the Supreme Court rejected the imposition of heightened scrutiny in *Eldred*, it premised this upon the adoption of the Copyright Clause and First Amendment in close proximity, in addition to the aforementioned built-in safeguards.¹⁵⁸ The Court emphasized that the framers of the Constitution must have viewed “copyright’s limited monopolies compatible with free speech principles.”¹⁵⁹ This author suggests that the key to the Framers’ intent was the limited nature of the monopoly; however, DRM effectively creates a perpetual monopoly, one that appears contrary to copyright’s purpose of promoting the sciences for limited times.

Protecting free speech is a central tenet of the First Amendment. It bears repeating that *Eldred* further emphasized that any impediments to free speech are addressed by those built-in safeguards¹⁶⁰ in the Copyright Clause and not by heightened scrutiny. However, with DRM and the DMCA blocking such protections to gain access to DVD content altogether, heightened scrutiny should apply. If a film commentator cannot excise portions of various DVDs to make a point to viewers on her WebBlog, or a movie critic cannot remove what he deems inaccurate in a DVD for criticism, or a news reporter cannot take small portions of DVDs in a certain genre to illustrate a point, how can it be said that there has not been prior restraint and a chilling of free speech rights?

If a controversial documentary were to be released in DVD format exclusively, having DRM control measures, it could be suggested that this is a form of government control of information by way of DMCA backing. In the words of the Supreme Court in *Bartnicki v. Vopper*,¹⁶¹ such “prior restraints on speech bear a heavy presumption against . . . constitutionality.”¹⁶² The rationale of Congress’ term extension was one point the Supreme Court in *Eldred* kept referring to with respect to the built-in safeguards. However, as explained above, with such protections being non-existent in a DVD format, where a law is generally applicable without regard to content, it may still be subject to heightened review under the First Amendment. As was stated in *Turner Broadcasting System, Inc. v. F.C.C.*,¹⁶³ “[w]here a law is subjected to a colorable First Amendment

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 221.

¹⁶¹ *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

¹⁶² *Id.* at 555 (Rehnquist, J., dissenting) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam)).

¹⁶³ *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994).

challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force.”¹⁶⁴

Some may argue that free speech is not impinged by the DMCA providing legal teeth to DRMs locking up DVD content because critics can still quote from such movies and post commentary. However, as the clichéd phrase goes, a picture is worth a thousand words. For a speaker to get her point across in a digital environment, a more meaningful message and a more even playing field can be created when the audience is able to visualize what the speaker is criticizing.

Whether the Court will see the DMCA’s effect upon DVD fair use access as an impediment to the exercise of free speech, from the perspective outlined above, remains to be seen. While the above statutory and case law analysis provides a legislative and judicial perspective, this article will now examine comments by those in the industry for comparison. The DRM/DVD controversy has a vast array of opponents and supporters too numerous to give full exposition herein, but a flavor of what is out there can be illuminating.

D. Comments and Perspectives by Industry Stakeholders

The Electronic Frontier Foundation (“EFF”),¹⁶⁵ a not-for-profit organization that seeks to inform and defend consumer rights in the digital world, presents the interesting position that DRM and the DMCA stifle innovation in new technologies due in large part to the nonexistence of fair use.¹⁶⁶ To illustrate, the EFF cites to the *Sony* time-shifting decision and suggests that if fair use had not been found, many of the technologies that surrounded and developed work from the VCR would not have been created.¹⁶⁷ Thus, on a broader scale the EFF suggests that where fair use is found, companies will develop products and services to aid consumers in getting the most out of those

¹⁶⁴ *Id.* at 641 (citing *Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring)).

¹⁶⁵ See Electronic Frontier Foundation Home Page, <http://www.eff.org> (last visited May 1, 2007).

¹⁶⁶ Fred von Lohmann, *Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension between Them*, ELECTRONIC FRONTIER FOUNDATION 1, Apr. 16, 2002, http://www.eff.org/IP/DRM/cfp_fair_use_and_drm.pdf.

¹⁶⁷ *Id.* at 3-4.

copyrighted works. Illustrative of this proposition are such products as the audio cassette deck, the photocopier, and the CD-RW drive.¹⁶⁸

The United States Association for Computational Mechanics (“USACM”) likewise has some interesting thoughts on DRM and technology, which are directly on point with DVD works.¹⁶⁹ The USACM views the marketplace, rather than the courthouse or Congress, as the proper venue to determine whether DRM will thrive or die.¹⁷⁰ The USACM suggests that competition among various DRM schemes is essential, and that there should be no standardization, which in turn will foster innovation.¹⁷¹ Consumer protection is paramount and thus any DRM scheme should not alter those rights consumers already have.¹⁷² Finally, the USACM suggests that DRM should be limited in scope to target only piracy-related activities of copyrighted works and to give consumers full disclosure of the restrictions that are embedded in the products they buy.¹⁷³

From the other side of the aisle, DRM is viewed as something that can benefit the consumer. For instance, a spokesperson of the Motion Picture Association of America stated:

Content owners use DRMs because it provides casual, honest users with guidelines for using and consuming content based on the usage rights that were acquired. Without the use of DRMs, honest consumers would have no guidelines and might eventually come to totally disregard copyright and therefore become a pirate, resulting in great harm to content creators.¹⁷⁴

Suffice it to say, not all parties see DRM through such rosy glasses. For instance, in June 2006, supporters frustrated with DRM called upon the Recording Industry Association of America to voice their concerns in the Defective By Design Anti-Digital Rights Campaign.¹⁷⁵

¹⁶⁸ *Id.* at 5.

¹⁶⁹ See USACM Home Page, <http://www.usacm.org> (last visited May 1, 2007).

¹⁷⁰ U.S. Public Policy Committee of the Association for Computing Machinery, USACM Policy Brief, USACM Policy Recommendations on Digital Rights Management (2006), <http://www.acm.org/usacm/Issues/DRM.htm>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Ken Fisher, *MPAA: DRM “helps honest users,”* ARS TECHNICA, Feb. 10, 2006, <http://www.arstechnica.com/news.ars/post/20060210-6153.html>.

¹⁷⁵ Anti-DRM Campaign Targets the RIAA, DRM NEWS, June 22, 2006, <http://www.drmblog.org/index.php?/archives/422-Anti-DRM-campaign-targets-the->

As was discussed earlier respecting Blu-ray, HD-DVD, and their advanced DRM schemes, it is noteworthy to mention what Bill Gates, Chairman of Microsoft, had to say about the effects upon consumers of the Blu-ray format. Gates was quoted in an interview stating that Blu-ray's copyright protection is "anti-consumer," and that "[t]he inconvenience is that the [movie] studios got too much protection at the expense of consumers . . ." ¹⁷⁶ Conversely, Maureen Weber, general manager of optical storage at Hewlett-Packard, touted the advantages and her company's endorsement of the Blu-ray standard, in large part due to the "capacity advantage (over HD-DVD) as well as the interactive features being built into the specification." ¹⁷⁷

In addition to the two aforementioned DVD DRM standardizations going head-to-head, there are also a myriad of other DRM platforms relating to computer-based schemes, most of which are incompatible with one another. Thus, buying digital media from one online service will not work with another service provider's devices. To illustrate the morass of DRM varieties, consider the following: Sony uses OpenMG; RealNetworks uses Helix; Microsoft uses Windows DRM; and Apple uses FairPlay. ¹⁷⁸ According to Peter Lee, an executive at Disney, "if consumers even know there's a DRM, what it is, and how it works, we've already failed." ¹⁷⁹

As with all things, time will tell which format, and hence which DRM scheme, the market brings forth. However, one thing that can be assured is that the debate over DRM schemes, content owners, and consumer rights will continue. Irrespective, it is this author's view that as technology manipulates the balance between authors and the public, it is the duty of the Supreme Court and Congress to maintain the inherent stability that the copyright laws were intended to facilitate. Consider the comment of the Supreme Court in *Twentieth Century Music Corp. v. Aiken*, which nicely captures the essence of this balance, stating "[t]he immediate effect of our copyright law is to

RIAA.html.

¹⁷⁶ Nate Mook, *Gates: Blu-Ray DRM is "Anti-Consumer,"* BETANEWS, Oct. 17, 2005, http://www.betanews.com/article/Gates_Bluray_DRM_is_AntiConsumer/1129572265.

¹⁷⁷ Richard Shim, *HP Strikes Blu Note for DVDs, Talks of Fat Storage*, Nov. 16, 2004, http://news.com.com/2102-1041_3-5455018.html?tag=st.util.print. HP is actually endorsing both HD-DVD and Blu-ray to give consumers the best of both formats. See Hewlett Packard News Release, *HP to Support HD-DVD High Definition DVD Format and Join HD-DVD Promotions Group*, Dec. 16, 2005, <http://www.hp.com/hpinfo/newsroom/press/2005/051216a.html>.

¹⁷⁸ *Science Fiction?*, THE ECONOMIST, Sept. 3, 2005, at 59-62.

¹⁷⁹ *Id.*

secure a fair return for an ‘author’s’ creative labor but the ultimate aim is . . . to stimulate artistic creativity for the general public good . . . [but] *when technological change has rendered its literal terms ambiguous*, the Copyright Act must be construed in light of this basic purpose” (emphasis added).¹⁸⁰

IV. CONCLUSION

If Congress and the Supreme Court were to take a more balanced or holistic approach to copyright instead of what appears to be, according to University of California at Berkeley Professor Pamela Samuelson,¹⁸¹ one that favors the entertainment industry without equally factoring in broader implications, then perhaps companies would be inspired to devise technologies and services that would allow for fair use access while protecting authors from unlimited copying. For instance, the Copyright Office seemed open to the idea of permitting the forwarding on of digital content provided the original file could be automatically destroyed.¹⁸²

Under what is termed the “first sale” doctrine, the Copyright Office declined to extend the doctrine to digital media since current computer technology is not able to recognize that if one user sells his copy to another, the original should be deleted.¹⁸³ However, if technology companies were put on notice that such functions (a forward and delete function) were legal, these companies could invest in developing such software, which in turn would allow consumers to regain the rights to which they have become accustomed.

As suggested above by the Center for Democracy and Technology and by comments of industry spokespeople, consumer awareness, or lack thereof, relating to DRM restrictions upon content usage should be brought to the forefront. In 2003, Representative Rick Boucher introduced the Digital Media Consumers’ Rights Act, which would prohibit the advertising of CDs unless the package wrap gives full disclosure relating to DRM restrictions.¹⁸⁴ Likewise,

¹⁸⁰ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁸¹ Pamela Samuelson, *Towards More Sensible Anti-Circumvention Regulations*, <http://www.ischool.berkeley.edu/~pam/papers.html> (last visited May 1, 2007).

¹⁸² United States Copyright Office, *A Report of the Register of Copyrights Pursuant to §140 of the Digital Millennium Copyright Act* 136 (2001) <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

¹⁸³ *Id.* at 150.

¹⁸⁴ Declan McCullagh & Milana Homsy, *Leave DRM Alone: A Survey of*

proposed legislation from Senator Sam Brownback, called the Consumers, Schools, and Libraries Digital Rights Management Awareness Act, is similarly situated to monitor DRM schemes through government regulation banning media products that do not comply with consumer friendly mandates.¹⁸⁵ While these bills do not address all of the issues this author presents, they certainly do take a step in the right direction. Moreover, as emphasized earlier, with powerful groups lobbying to maintain the *status quo* of a digital media environment favoring content providers, one cannot expect giant leaps forward. Perhaps, like evolution, more bills will pass and the courts will give wider interpretation thereafter, and thus provide a more balanced approach to fair use.

The tensions between protecting an author's exclusive rights in the digital age on the one hand, and the right of the public to fully utilize and build upon prior works on the other, is one of the most challenging balancing acts in copyright law today. By examining the DMCA, its legislative history, case law, and commentary from industry players, this article hopefully illuminated the contours of how the Fair Use Doctrine has changed in the face of new DRM technologies while simultaneously suggesting alternative interpretations, which would provide for a more balanced approach.

Legislative Proposals Relating to Digital Rights Management Technology and Their Problems, 2005 MICH. ST. L. REV. 1, 4.

¹⁸⁵ *Id.* at 3; see also Brian Fitzgerald, *Digital Rights Management (DRM) Australian Anti-Circumvention Law Sony PS2 Mod Chip Case*, QUT Law School, http://iacits2005.iitm.ernet.in/presentations/DRM_DrBrianFitzgerald.pdf (analyzing the *Kabushiki Kaisha Sony Computer Entm't v. Stevens* case in Australia where the court held that reproducing a copy in RAM does not infringe copyright, and thereby playing a game is not an infringement either) (last visited May 1, 2007).