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Andrew Johnson

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*Andrew Johnson**

I. INTRODUCTION

Spurred by the advancement of new technologies, copyright law had well-intentioned beginnings. Its sole purpose was to protect an author's interest in his work by preventing unauthorized multiplication. A minority of large industry players, however, was still able to exploit writers and advance their own interests. It has also been argued that the current copyright law regarding digital media similarly protects the interests of record companies and large media corporations at the expense of the end users' rights. The competing interests of users, who want inexpensive and easily accessible media, and those of the rights owners, who want protection against the unauthorized distribution and duplication of their works, make it difficult to achieve perfect equilibrium. In many regards, the courts have ruled in favor of rights owners, who have presented arguably conflicting or biased data to support their claims of financial loss caused by piracy.

This comment will detail the history and purpose of copyright law generally. Beginning with origins of copyright law and its development in early America, this paper will examine the central provisions of the Copyright Act of 1976, and the Digital Millennium Copyright Act (DMCA). Further, it will explore how interpretation of those laws—along with technological developments and hard-line lobbying—has led to the current condition of copyright law in the United States. Specifically, the comment will focus on the development of peer-to-peer file sharing, its shift in structure, and the difficulties of enforcing copyrights that result from the more recent file-sharing systems. It will examine the current approaches and possible alternatives of enforcing piracy law and analyze the weaknesses of specific provisions of the DMCA as applied to developing technology.

I hope to offer insight into the consumers' psychology regarding piracy and the effect, if any, of the current enforcement mechanisms on the consumers' attitudes. This comment will also examine what rights consumers have when purchasing media and how the DMCA affects those rights. The comment will also address arguments of opponents of the DMCA regarding its limit on fair use through Digital Rights Management Technology and the stifling effect this has on creativity. Finally, I will offer possible alternatives to the current copyright regime.

* Andrew Johnson is a J.D. Candidate at Southern Methodist University Dedman School of Law, Class of 2013.

II. HISTORY OF COPYRIGHT LAW

A. British Ancestry

“A copyright is a property right in an original work of authorship that is fixed in tangible form.”¹ The concept of owning an interest in an artistic or literary work sprung from the political and cultural turmoil of the English Reformation.² The political purpose of controlling dissemination of information, rather than protecting an author’s right to his work, ultimately led to the development of copyright as it is known today.³

During the 16th century, King Henry VIII attempted to censor any writing that might cause harm to his reign following his break with Rome.⁴ To limit what literature was printed, the Crown conferred printers’ licenses upon publishers—giving them the exclusive right to publish only certain works, authorized by the king, for a set term.⁵ This right extended to printing certain classes of books and sometimes gave the sole right to print a single work.⁶ The first recorded English copyright had a seven-year duration and was given to John Palsgrave in 1530 for his treatise on the study of French.⁷

Religious conflict continued to alter the landscape of this newly developing area of British law. Notably, King Henry’s daughter, Queen Mary I, attempted to undo her father’s break from Rome and return England to the Roman Catholic faith.⁸ Borrowing her father’s tactics of controlling dissemination of literature with which she disagreed, she created the Stationer’s Company in 1557 in order to suppress Protestant literature.⁹ The Crown mandated that all printers and publishers join the Stationer’s Company as a way of supervising, censoring, and licensing all books to be printed.¹⁰

In return for submitting to royal control, members were given extreme latitude in their shrewd business dealings to acquire great profits.¹¹ They were essentially given a monopoly of all English printing—sanctioned by

1. ABA SECTION OF INTELLECTUAL PROPERTY LAW, WHAT IS A COPYRIGHT? 5 (2011).
2. *Id.*
3. See BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 50 (1967).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 4 (3d ed. 1999).
10. BUGBEE, *supra* note 3, at 50.
11. *Id.* at 51-52.

statute.¹² In 1662, the Parliament passed the Licensing Act, which essentially prohibited building or operating a printing press and printing books without the approval of the Stationer's Company.¹³ Moreover, any printing press that received such approval eventually became the company's property under the Act.¹⁴ The statute assumed a common law ownership of a book where authors were presumably given literary ownership over their works along with printers and publishers, which was understood to be perpetual.¹⁵ These exclusive rights of individual publishers within the Stationer's Company to publish particular works came to be known as "Stationer's Copyright."¹⁶ The company internally monitored the copyrights of each member by requiring all books purchased from the authors or members of the Stationer's Company to be logged in the company's register.¹⁷

Authors, on the other hand, were not recognized as truly holding a "Stationer's Copyright" in their books and played little to no role in this process since they were not members of the Stationer's Company.¹⁸ Publishers widely exploited authors' rights to their works. An author seeking publication did not have exclusive control over multiplications of copies, but only held a single copying privilege.¹⁹ Because of unequal bargaining positions with the Stationer's Company, authors were forced to sell this interest in order to have their works printed and published.²⁰ Upon acquiring the right, a publisher could freely make unlimited copies—thus gaining a proprietary interest in the text, while the author essentially relinquished control of his work.²¹ Traditional copyright, unlike the modern concept, protected the rights of book manufactures and sellers, not the authors.²²

The Long Parliament's passage of the Licensing Order of 1643 reinvigorated the Stationer's Company's monopoly on the book trade. It extended the throne's policy that required all books to be entered into the register and

12. *Id.* at 50.

13. Brandon Grzandziel, Comment, *A New Argument for Fair Use Under the Digital Millennium Copyright Act*, 16 U. MIAMI BUS. L. REV. 171, 175 (2008).

14. *Id.*

15. BUGBEE, *supra* note 3, at 51.

16. Grzandziel, *supra* note 13, at 175.

17. FRANK H. FOSTER & ROBERT L. SHOOK, PATENTS, COPYRIGHTS, & TRADEMARKS 14 (1989).

18. L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USER'S RIGHTS 22 (1992).

19. BUGBEE, *supra* note 3, at 51.

20. *Id.*

21. *Id.*

22. PATTERSON & LINDBERG, *supra* note 18, at 22.

outlawed the importation of their copies.²³ This caused disappointment and aggravation among the public. In 1644, John Milton published his argument/speech, *Areopagitica*, to protest such policies.²⁴ Acting in direct conflict with the statute of 1643, Milton printed his unlicensed pamphlet without registering it with the Stationer's Company.²⁵ He sought to expose the law for what it was—a tool for the government's control of ideas—and argued that necessary protections from illegal and libelous works could be secured by less restrictive means.²⁶

A shift in power began when Parliament chose not to renew the Licensing Act after it expired in 1695.²⁷ The sudden end of the Stationer's Company's monopoly threw the book trade into disorder as they lost the law's protection for their private copyrights.²⁸ When the booksellers' attempt to reinstate the former law failed, they sought protections for the authors who would ultimately assign them the right to print the work.²⁹ The lobbying succeeded when the Parliament, under Queen Anne, passed the Statute of Anne of 1710.³⁰

The Statute of Anne was the first statute to recognize an author's right to his work, ultimately signifying the first step toward the modern idea of copyright law.³¹ The purpose of the Act can be summed up by its title: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."³² Not only did the act reward authors for their work, unlike former law, but also it created the public domain for literature.³³ The statute limited copyrights to a specific term of years and allowed free access to previously protected works.³⁴ Former monopolists, however, continued to benefit from the new legislation. The statute grandfathered existing Stationer's Copyrights

23. BUGBEE, *supra* note 3, at 52.

24. Sid Parkinson, *Milton's Aeropagitica*, THE ST. LAWRENCE INSTITUTE FOR THE ADVANCEMENT OF LEARNING, <http://www.stlawrenceinstitute.org/vol14mit.html> (last visited Sept. 1, 2012).

25. *Id.*

26. *Id.*

27. Grzandziel, *supra* note 13, at 176.

28. *Id.*

29. PATTERSON & LINDBERG, *supra* note 18, at 27.

30. *Id.*

31. *Id.*

32. *Id.* at 27-28.

33. LEAFFER, *supra* note 9, at 5.

34. Adrian Johns, *Copyright Series Part 9—The Statute of Anne, A New Hope (1710–1740)*, SUSTAINABLE DIVERSITY, July 8, 2011, <http://www.sustainablediversity.com/?p=74> (last visited Sept. 1, 2012).

for twenty-one years.³⁵ Its provision making copyright assignable to others allowed booksellers to exploit authors.³⁶ In order to make profit, authors had to assign their copyright to booksellers in order to get their works published.³⁷ Although remnants of the old regime lingered, copyright—once conceived as a publisher's right—became known as an author's right.³⁸

B. Copyright in Early America

Early colonial America—rooted in agriculture and without a formed identity—had little concern for copyright protection.³⁹ Yet this concern would move to the forefront as America continued down the path of political independence, while also attempting to break free from the literary tradition of Europe.⁴⁰ In the process, many authors became frustrated with the lack of protection for their works and the lack of appreciation given to them by their fellow countrymen.⁴¹ The Continental Congress had no authority under the Articles of Confederation to issue copyrights and, prior to 1783, only two states had passed acts dealing with private copyrights in America.⁴²

In the 1780s, a few American writers commenced a copyright movement—seeking both to protect their works and to forge America's distinctive literary identity.⁴³ As a result of their petitions, the Continental Congress formed a committee “to consider the most proper means of cherishing genius and useful arts throughout the United States by securing to the authors or publishers of new books their property in such works.”⁴⁴ The Continental Congress passed a resolution that encouraged states to enact copyright statutes that protected authors for a minimum of fourteen years.⁴⁵ Within three years, every state except Delaware had some form of copyright law in place.⁴⁶

35. PATTERSON & LINDBERG, *supra* note 18, at 30.

36. *Id.* at 28.

37. *Id.*

38. *Id.* at 31.

39. See Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPY. SOC'Y. 675, 686 (2002), available at <http://law.scu.edu/faculty/File/ochoa-tyler-anti-monopoly.pdf>.

40. BUGBEE, *supra* note 3, at 104.

41. *Id.*

42. See Ochoa & Rose, *supra* note 39, at 686-87; BUGBEE, *supra* note 50, at 65-67; See 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 16, 17 (1994).

43. FOSTER & SHOOK, *supra* note 17, at 106.

44. Ochoa & Rose, *supra* note 39, at 686 (citing NATIONAL ARCHIVES, PAPERS OF THE CONTINENTAL CONGRESS, No. 36, II, folios 113-114).

45. Ochoa & Rose, *supra* note 39, at 687.

46. *Id.*

The concept of protecting a right to one's work embedded itself in American thinking and became a great concern for early writers and educators.⁴⁷ Fundamental disagreements over the purpose of government and property rights caused the political mood to grow tense.⁴⁸ Wealthy figures—to whom many ordinary citizens owed debts—threatened to control state legislatures, and thus challenged “John Locke’s concepts of property as the reward of industry and the security of that property as the chief end of government”⁴⁹ Many sought to safeguard property rights, which ultimately included protection of intellectual property.

The issue of copyright protection came to a head at the Constitutional Convention in 1787.⁵⁰ Both Charles Pickney, who served in the South Carolina Legislature, and James Madison of Virginia submitted proposals to give Congress the power to grant copyrights.⁵¹ Madison saw the copyright clause as not only a form of protection for authors, but also as a safeguard against monopolies, which stifled creativity and allowed for the “sacrifices of the many to the few.”⁵² The final proposed intellectual property clause was approved unanimously without debate.⁵³ It gave Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries.”⁵⁴ Unlike other clauses that “denominate a sphere of authority and leave the details to Congress, the Copyright Clause includes specific parameters for the content of copyright law.”⁵⁵ This reveals the Framers’ intent to constrain Congress from permanently extending copyright protection.⁵⁶

47. FOSTER & SHOOK, *supra* note 17, at 128.

48. *See id.*

49. *See id.* at 129.

50. *See id.*

51. Ochoa & Rose, *supra* note 39, at 688; *See also* FOSTER & SHOOK, *supra* note 17, at 128-29.

52. Ochoa & Rose, *supra* note 39, at 692 (citing Letter from Madison to Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON 21 (Princeton 1958)).

53. FOSTER & SHOOK, *supra* note 17, at 129.

54. U.S. CONST. art. I, § 8, cl. 8.

55. Grzandziel, *supra* note 13, at 177 (citing Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, in 5 Occasional Papers in Intellectual Property 8 (Benjamin N. Cardozo School of Law, Yeshiva University, 1999)).

56. *See id.*

The first copyright law enacted by Congress was the Copyright Act of 1790.⁵⁷ It gave protection to the author of maps, charts, and books for a fourteen-year term, with a fourteen-year renewal period.⁵⁸ The statute tracked much of the language of its English predecessor—the Statute of Anne—including protection for previously published works.⁵⁹

Before being published, an author was required to deposit his book with the U.S. Secretary of State six months prior to publication and run an advertisement of the facts of publication during the first two months after publication.⁶⁰ Once a copyright was established, an infringing publisher who issued a pirated copy would have to forfeit all copies and pay a fine of fifty cents for every sheet found, divided between the author and the government.⁶¹ This Act, however, did not offer copyright protection for foreigners.⁶² American printers and publishers pirated and reprinted foreign books without restraint.⁶³ The common view was that literary piracy of foreign works benefited the country—it allowed American publishers to meet the high demand for imported books at a considerably lower price than had there been copyright protection to prohibit the practice.⁶⁴

The Act underwent a handful of substantial revisions, the first of which took place in 1831. Largely recognized as the result of the lobbying efforts of Noah Webster—a prolific writer and lexicographer—the Copyright Act of 1831 consisted of several additions to the original statute.⁶⁵ One of the most significant changes, to Noah Webster's benefit, was the extension of the duration of a copyright.⁶⁶ The original term was extended from fourteen to twenty-eight years plus the possible renewal of fourteen years.⁶⁷ Other change included the ability of a widow or children of a deceased author to

57. Copyright Extension, *The Copyright Clause of the United States Constitution and Its Historical Background*, available at <http://www.copyrightextension.com/page00.html> (last visited Feb. 4, 2012).

58. Copyright Act of 1790, 1 Stat. 124 (1790), § 1, available at <http://www.copyright.gov/history/1790act.pdf>

59. Ochoa & Rose, *supra* note 39, at 695.

60. FOSTER & SHOOK, *supra* note 17, at 128.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. The Copyright Act of 1831, 4 Stat. 436, Primary Sources on Copyright (1450-1900), L. Bently & M. Kretschmer eds., http://copy.law.cam.ac.uk/cam/tools/request/showRecord.php?id=record_us_1831.

66. First General Revision of U.S. Copyright Law, Enacted by the Twenty-first Congress on February 3, 1831, http://www.ellenwhite.info/copyright_law_us_1831.htm (last visited Feb. 4, 2012).

67. *Id.*

obtain such a copyright renewal.⁶⁸ The new law also broadened protection by prohibiting reprinting a portion of a book without permission, not merely the entire book.⁶⁹ At the same time, it also expanded the permitted use of copyrighted material by making a concession for derivative works, which were not addressed under the first Act.⁷⁰ Derivative works were permitted, but only if they involved a variation of the original design.⁷¹

The second major change to the law occurred with the enactment of Copyright Act of 1870. This Act centralized the administration of copyright by placing the U.S. Copyright Office under the Library of Congress.⁷² Incorporating earlier changes from 1865, the Act extended to performance rights, photography, and sculptures.⁷³ Thus, two copies of every book, map, engraving, photograph, musical composition, periodical, and other material submitted for copyright were brought to the Library of Congress, leading to an overflow and expansion of the Library.⁷⁴ In 1891, amendments to the law gave foreign authors copyright protection of their works.⁷⁵ The Act was applied to foreigners “when [his native country] permit[ted] to citizens of the United States of America the benefit of copyright on substantially the same basis as [to] its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, . . .”⁷⁶ The copyright of foreign books written in English, however, was conditioned upon being printed in America or from American-made printing plates.⁷⁷

The last major revision of the Copyright Act of 1790 occurred over a century later with the Copyright Act of 1909, which lasted unchanged for nearly another century.⁷⁸ The 1909 Act expanded the list of protected works,

68. *Id.*

69. *Id.*

70. *Id.*

71. First General Revision of U.S. Copyright Law, *supra* note 66.

72. Second General Revision of U.S. Copyright Law — Enacted by the Forty-first Congress on July 8, 1870, http://www.ellenwhite.info/copyright_law_us_1870.htm (last visited Feb. 4, 2012).

73. *Id.*

74. *Id.*

75. The International Copyright Act — Amendments to the 1870 Copyright Act Enacted by the Fifty-first Congress on March 3, 1891, http://www.ellenwhite.info/copyright_law_us_1891.htm (last visited Feb. 6, 2012).

76. *Id.*

77. Legal Protection of Digital Information, Chapter 1: An Overview of Copyright, <http://digital-law-online.info/lpdi1.0/treatise4.html> (last visited Feb. 6, 2012).

78. *Id.*

yet again, even including a catchall clause for “all the works” of an author.⁷⁹ It also extended the duration of a copyright to an initial period of twenty-eight years and a one-time renewal period of twenty-eight years.⁸⁰ Further, a copyright ran from the first publication with proper notice, instead of date of registration and deposit, and was revoked if material was published without notice.⁸¹

Not wanting to dispense with the current formalities of depositing books to the Library of Congress, giving notice, and the longer period of two twenty-eight-year terms, the United States refused to join the Berne Convention.⁸² Formally known as the International Convention for the Protection of Literary and Artistic Works, the Convention is an international copyright agreement adopted by an international conference in 1886.⁸³ It was the first, and has remained the principal international copyright convention for 100 years.⁸⁴ It provided its numerous signatories—known as the Berne Copyright Union—“with automatic protection for works first published in other countries of the Berne union and for unpublished works whose authors are citizens of or residents in such other countries.”⁸⁵ Under the agreement, copyright protection lasted for the lifetime of the author and only fifty years after his or her death.⁸⁶ Unlike the American system—where noncompliance with the formalities resulted in the work going into the public domain—copyright protection under the Berne Convention was granted automatically without the need to comply with formalities.⁸⁷

America entered the sphere of international copyright in 1954 under the Universal Copyright Convention (U.C.C.).⁸⁸ Similar to the Berne Convention, this provided non-discriminatory protection to all nationals of all member nations for works published within their borders.⁸⁹ These published works were required to bear a prescribed notice, but unlike the Berne Convention, nations could require their own formalities for their own citizens or

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. BRITANNICA ACADEMIC EDITION, *Berne Convention*, <http://www.britannica.com/EBchecked/topic/62482/Berne-Convention> (last visited Feb. 6, 2012).

84. LEAFFER, *supra* note 9, at 8.

85. Britannica Academic Edition, *supra* note 83.

86. Berne Convention for the Protection of Literary and Artistic Works, art. 7, § 1 (1971), available at <http://www.law.cornell.edu/treaties/berne/7.html>.

87. LEAFFER, *supra* note 6, at 8.

88. *Id.* at 9.

89. *Id.*

for works first published within their borders.⁹⁰ The United States, thus, could maintain its fixed term provision and the requirement of deposit to the Library of Congress.⁹¹ These formalities, however, would not last long.

C. The Copyright Act of 1976

With the introduction of new technology and various types of works, simply amending the Copyright Act of 1909 to keep pace proved unworkable.⁹² In fact, phonorecords remained unprotected by copyright law until 1972.⁹³ Radio broadcasts were also excluded from copyright law—most likely because their transcripts were still sheltered under existing law.⁹⁴ The invention of television, copying machines, and later, computers challenged the existing regime.⁹⁵ The Copyright Act of 1976 was a reaction to the communications revolution and is viewed by most as an entirely new body of copyright law as opposed to a revision of the existing law.⁹⁶

The new Act made many significant changes yet helped in clarifying more muddled areas of the law. It restructured which subject matter would receive protection. All included subject matter was reduced to eight broad categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.⁹⁷ It also preempted common law application to copyright, thus dispensing with the dual system of federal protection for published works and state common law protection for unpublished works.⁹⁸ This expanded the protection from published works to original works that are “fixed in tangible medium of expression.”⁹⁹ It also replaced the two, twenty-eight-year terms with a single term of the author’s life plus fifty years, which was increased to seventy years in 1998.¹⁰⁰ The Act, however, preserved some of the existing formalities. Published works still re-

90. *Id.*

91. *See id.*

92. *See* L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USER’S RIGHTS* 90-91 (1992).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*; FRANK H. FOSTER & ROBERT L. SHOOK, *PATENTS, COPYRIGHTS, & TRADEMARKS* 16 (2d ed. 1993).

97. *See* 17 U.S.C.A. § 102(a) (West 2011).

98. *See id.* § 301.

99. *See id.*

100. *See id.* § 302(a).

quired notice, and one's failure to affix notice of copyright could lead to its forfeiture.¹⁰¹

Section 1 of the original Act granted five exclusive rights to copyright holders: 1) the right to *reproduce* (copy) the work into copies and phonorecords; 2) the right to create *derivative works* of the original work; 3) the right to *distribute* copies and phonorecords of the work to the public by sale, lease, or rental; 4) the right to *perform* the work publicly; and 5) the right to *display* the work publicly.¹⁰² Section 106 was later added, which granted works of visual art separate and exclusive rights.¹⁰³ Congress added a sixth exclusive right to "perform[] . . . a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, . . ."¹⁰⁴ These are still subject to the limitations of the remaining sections of chapter one.¹⁰⁵

One of the most significant changes, and the largest exception to the rights of a copyright holder, was the statute's codification of the doctrine of fair use.¹⁰⁶ In general, under fair use, copyrighted material could be used in a manner that would otherwise violate copyright if for some socially beneficial purpose.¹⁰⁷ This doctrine was certainly not a novel idea and has been traced back to early 19th century common law tradition.¹⁰⁸ The Copyright Act of 1976 set forth the criteria for determining what constitutes fair use.¹⁰⁹ Four factors are considered when invoking this privilege: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount or substantiality of the portion of the original work used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹¹⁰

101. *See id.* §§ 401(a), 405.

102. LEAFFER, *supra* note 6, at 10.

103. *See id.* § 106.

104. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995) (amending, *inter alia*, §114 and §115, title 17, *United States Code*).

105. *See* 17 U.S.C. § 106.

106. *See id.* § 107.

107. *Id.*

108. Kevin Smith, *How Fair Use was Born*, COPYRIGHT ISSUES AND LEGISLATION, FAIR USE, May 21, 2009, <http://blogs.library.duke.edu/scholcomm/2009/05/21/how-fair-use-was-born/>.

109. *See* 17 U.S.C. § 107.

110. *Id.*

III. CURRENT STATE OF COPYRIGHT IN AMERICA

A. Copyright in the Digital Age

The advent and vast expansion of the Internet drew many users to an electronic playground, which, because of the lack of initial regulation, was likened to the “Wild West.”¹¹¹ Initially, the vast number of those who flocked to the Internet sought information without publishing content of their own.¹¹² Naturally, demand fell on media content, which became readily accessible with the implementation of file-share systems. The introduction of broadband Internet access further increased the ease and speed with which files could be located and transferred.¹¹³ As a result, legislators proposed the Digital Millennium Copyright Act (DMCA) to inject some form of regulation. The Senate report on the DMCA’s initial bill states:

“Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet . . . without reasonable assurance that they will be protected against massive piracy. [The DMCA] provides this protection and creates the legal platform for launching the global digital online marketplace for copyrighted works.”¹¹⁴

A lobbying battle ensued on the brink of the DMCA’s enactment. Copyright owners sought to expand traditional copyright protection in light of new digital challenges, and many threatened to withhold participating in the market unless Congress yielded to their demands.¹¹⁵ They sought to make unlawful both an individual’s circumvention of digital protection on their devices and media and the production and sale of tools used for circumvention.¹¹⁶ Opponents argued that the prohibition on circumvention would essentially lay waste the well-established doctrine of fair use that “allowed for an opportunity to engage in independent criticism, scholarship and teaching.”¹¹⁷ The

111. See Jonathan J. Rusch, *Cyberspace & the “Devil’s Hatband,”* 24 SEATTLE U. L. REV. 577 (2000).

112. David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1697 (2005).

113. See *id.*

114. Peter Moore, *Steal This Disk: Copy Protection, Consumers’ Rights, and the Digital Millennium Copyright Act*, 97 N.W. U. L. REV. 1437, 1439 (2003) (citing S. Rep. No. 105-190, at 8 (1998)).

115. Diane M. Barker, *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L.J. 47, 48 (2005).

116. Arnold P. Lutzker & Susan J. Lutzker, *Altering the Contours of Copyright-the DMCA and the Unanswered Questions of Paramount Pictures Corp. v. 321 Studios*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 561, 565 (2005).

117. *Id.*

legislation, they argued, would essentially protect the interest of copyright holders at the expense of the dissemination of knowledge.¹¹⁸ More moved by the magnitude of the threat of digital copyright infringement, Congress ultimately sided with the proponents.

President Bill Clinton signed the DMCA into law in 1998.¹¹⁹ It was the first significant change to copyright law since the Copyright Act of 1976.¹²⁰ In fact, it has been hailed by many as the “most sweeping revision[] ever to the Copyright Act of 1976.”¹²¹ According to the Senate reports, the Act essentially was promulgated for two purposes: (1) to offer legal protection to copyright owners to prevent their material from being freely shared across the Internet, and (2) to affirm the ratification of the World Intellectual Property Organization (WIPO) treaties.¹²² WIPO is a specialized agency within the United Nations that was established in 1967.¹²³ It has nearly 200 member countries and twenty-four treaties.¹²⁴ Its central goal is to promote worldwide protection of intellectual property by administering its treaties and ensuring cooperation among its member states.¹²⁵ The adoption of the DMCA allowed the United States to implement WIPO’s “Copyright Treaty” and the “Performances and Phonograms Treaty.”¹²⁶

The DMCA’s direct protective measures can be boiled down to three primary prohibitions, all of which are found in section 1201.¹²⁷ Section 1201(a)(1) prohibits the circumvention of a technologically protected measure (TPM), which “effectively controls access to a [copyrighted] work.”¹²⁸ This includes descrambling, decrypting, or bypassing a technological measure, without the copyright owner’s authority.¹²⁹ Section 1201(a)(2) prohibits

118. Thomas A. Mitchell, *Copyright, Congress, and Constitutionality: How the Digital Millennium Copyright Act Goes Too Far*, 79 NOTRE DAME L. REV. 2115, 2127 (2004).

119. Barker, *supra* note 115, at 49.

120. Grzandziel, *supra* note 13, at 200.

121. Moore, *supra* note 114, at 1437 (citing Davide Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 674 (2000)).

122. Justin D. Fitzdam, *Private Enforcement of the Digital Millennium Copyright Act: Effective Without Government Intervention*, 90 CORNELL L. REV. 1085, 1089 (2005).

123. Centre for Innovation Law and Public Policy, *Digital Copyright Reform in Canada*, <http://www.innovationlaw.org/archives/projects/dcr/reform/wipo.htm> (last visited Feb. 8, 2012).

124. *Id.*

125. *Id.*

126. Mitchell, *supra* note 118, at 2127.

127. Lutzker, *supra* note 116, at 565-66.

128. 17 U.S.C. § 1201(a)(1)(A) (1998).

129. *Id.* § 1201(a)(3)(A).

the manufacturing and trafficking of devices that are used to circumvent TPM in order to obtain unauthorized access to protected works.¹³⁰ Section 1201(b) prohibits manufacturing, trafficking, or providing technology that bypasses TPMs, which protect a copyright holder's statutory rights.¹³¹

These anti-circumvention provisions are the backbone of the DMCA, legally reinforcing the barricades that copyright owners began erecting on their digital works. These obstacles, which come in the form of digital encryption, serial numbers, or key files, are known as digital rights management (DRM).¹³² DRM serves the legitimate purpose of protecting media files, with the underlying goal of maximizing copyright holders' profits.¹³³ It developed as a result of traditional copyright's inability to prevent the distribution of its copyrighted material online.¹³⁴ Recording companies and artists did not want to stand by idly while they were losing money from the illegal downloading and sharing of their music.¹³⁵ The Institute for Policy Innovation estimates that online music piracy causes \$12.5 billion in economic losses each year.¹³⁶

Consumers, on the other hand, argue that DRM's effect on fair use is a more legitimate concern than the profits of these already-wealthy figures.¹³⁷ As a concession to opponents of the DMCA, Congress wrote in a handful of qualifications to soften the blow to the doctrine of fair use.¹³⁸ Thus, the law now exempts those who make non-infringing use of copyrighted works, which fall into one of the classes identified by the Librarian of Congress.¹³⁹ It also allows the Librarian of Congress to take into account the potentially negative impact this prohibition on circumvention has on non-infringing uses, such as education and research, for determining the scope of what constitutes non-infringing use.¹⁴⁰ In addition, the Act exempts from liability, any circumvention done for the purpose of law enforcement and intelligence ac-

130. *Id.* § 1201(a)(2).

131. *Id.* § 1201(b).

132. Julia Layton, *How Digital Rights Management Works*, HOW STUFF WORKS, <http://computer.howstuffworks.com/drm1.htm>.

133. *Id.*

134. *See id.*

135. *See* RIAA Frequently Asked Questions, <http://www.riaa.com/faq.php> (last visited Sept. 10, 2012).

136. *Id.*

137. *See* Layton, *supra* note 132.

138. *See* 17 U.S.C. § 1201.

139. *Id.* § 1201(a)(1)(B).

140. *Id.* § 1201(a)(1)(C).

tivities, encryption research, limited educational purposes, and reverse engineering.¹⁴¹

The DMCA also addresses an internet service provider's role in the on-line file-sharing battle. Because of the impracticability of an internet service provider (ISP) monitoring every detail of its customers' activity, legislators notched out a safe harbor provision to prevent a service provider's liability for the copyright infringement of its customers.¹⁴² An ISP, which essentially provides online services or network access,¹⁴³ can limit its liability for three forms of communication: 1) transitory communications, 2) outside material temporarily stored on the ISP's system, and 3) material stored on the system by one of the ISP's users.¹⁴⁴ In order to take advantage of the safe harbor, the service provider must satisfy three conditions.¹⁴⁵ First, it can have no actual or constructive knowledge of the infringing activity and must act expeditiously to remove or disable access to the material upon becoming aware of the infringing activity.¹⁴⁶ Second, the service provider cannot receive any financial benefit directly attributable to the infringing activity.¹⁴⁷ Finally, the service provider must promptly remove or disable access to the offending material once they receive notice of copyright infringement.¹⁴⁸

B. Enforcing the Law of the "Wild West"

To strengthen their effectiveness in copyright prevention and enforcement, the music industry took concerted action under the Recording Industry Association of America (RIAA) —a trade organization "that supports and promotes the creative and financial vitality of the major music companies."¹⁴⁹ The RIAA was formed in 1952 primarily to develop a uniform standard for recording vinyl records, and currently participates in the collective rights management of sound recording.¹⁵⁰ The association is also behind the certification of Gold and Platinum albums and singles in the United States.¹⁵¹ Its members consist of the most influential players in the recording industry.¹⁵²

141. *Id.* § 1201(d)-(g).

142. *Id.* § 512.

143. *Id.* § 512(k)(B).

144. *Id.* § 512(a)(b)(c).

145. *Id.* § 512(c)(1)(A)(i)-(iii).

146. *Id.* § 512(c)(1)(C).

147. *Id.* § 512(c)(1)(B).

148. *Id.*

149. RIAA About Us, <http://www.riaa.com/aboutus.php> (last visited Sept. 10, 2012).

150. *Id.*

151. *Id.*

152. *Id.*

RIAA members create, manufacture, and distribute 85% of the total music recorded and produced in the United States.¹⁵³ Today, the RIAA is known for its aggressive litigation-driven methods of enforcing its copyrights.¹⁵⁴

At the outset, the RIAA attempted to prevent unauthorized copying and distribution by going after the distributors of technology that allows circumvention.¹⁵⁵ This type of enforcement gained the title of “gatekeeper litigation.”¹⁵⁶ For the music industry, this was the most logical step to enforce its rights and was thought to be the most efficient solution.¹⁵⁷ The owners of copyrights on television programs unsuccessfully took this approach when bringing a copyright infringement suit against the manufacturers of videotape recorders.¹⁵⁸ In the eye of the public, however, this was more palatable than directly suing end-users.¹⁵⁹

The infamous case against Napster in 2000 illustrated the strategy of the copyright holders at that time.¹⁶⁰ This was partly a result of the notable file sharing software’s structure. Commonly referred to as a peer-to-peer system, Napster did not operate as such.¹⁶¹ Using a semi-centralized server, the central server essentially acted as a broker to bring together two users—one seeking to download a file and one possessing the desired file.¹⁶² Within a matter of minutes, a user could connect to the server and gain access to the content list, search for the desired music file, and then connect directly to a host computer containing that file to download it to his computer.¹⁶³ By February 2001, Napster averaged an astonishing 1.57 million simultaneous users each day.¹⁶⁴ The centrality of its server made Napster an easy entity to enjoin.

153. *Id.*

154. *RIAA Methods Under Scrutiny*, WIRED, Aug. 15, 2003, <http://www.wired.com/entertainment/music/news/2003/08/60042>.

155. Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 583 (2009).

156. Opderbeck, *supra* note 112, at 1699.

157. Bridy, *supra* note 155.

158. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

159. *Id.*

160. *See A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

161. Fitzdam, *supra* note 122, at 1088.

162. Opderbeck, *supra* note 112, at 1697.

163. *See Sandvine Inc., Peer-to-Peer File Sharing: The Impact of File Sharing on Service Provider Networks, An Industry White Paper*, 3-4, <http://downloads.lightreading.com/wplib/sandvine/P2P.pdf>.

164. *Id.* (citing *Report: Napster Loses that Sharing Feeling*, CNN, June 28, 2001, 10:40 AM, <http://archives.cnn.com/2001/TECH/internet/06/28/napster.usage/>).

Peaking at fifty-eight million users, the company achieved great success before a Federal District Court in San Francisco ordered an injunction against the company's operation in 2001—essentially shutting it down.¹⁶⁵ The court found that the plaintiffs presented a *prima facie* case for copyright infringement and that the users' activity did not amount to fair use.¹⁶⁶ Following the reasoning of a similar case, the court recognized the need for balance between "a copyright holder's legitimate demand for effective . . . protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce."¹⁶⁷ Reasoning that such technology has legitimate, non-infringing uses, the court enjoined Napster only from facilitating infringement, but not from distributing peer-to-peer software or operating peer-to-peer networks.¹⁶⁸

The RIAA held Napster's downfall as a major victory. It assumed that this file sharing would not be possible without these Napster-like centralized servers.¹⁶⁹ The high demand for digital content ultimately led to decentralization of the old regime.¹⁷⁰ Users began to flock to true peer-to-peer systems, which—without a central server to process the search requests—resulted in an Internet traffic jam.¹⁷¹ Instead, individual computers connected to a network and acted as "supernodes"—with focal points shifting as users signed on and offline.¹⁷² This architecture of consumers acting as hubs for distribution became more prevalent as connection speeds began to increase.¹⁷³

This led to the next major battle in the file sharing war—*Grokster*.¹⁷⁴ The plaintiffs—consisting of songwriters, music publishers, and motion picture studios—sued Grokster for copyright infringement for its distribution of peer-to-peer file-sharing computer networking software.¹⁷⁵ They brought the same arguments as the plaintiffs in *Napster*.¹⁷⁶ Unlike *Napster*, however, the

165. Nancy Chandross, *Napster Shuts Down*, ABCNEWS.COM, July 27, 2001, <http://abcnews.go.com/Technology/story?id=119627&page=1#.TzHo45jG1yE>.

166. *Napster, Inc.*, 239 F.3d at 1004; Bridy, *supra* note 155, at 584.

167. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

168. *Napster*, 239 F.3d at 1021-22.

169. Fitzdam, *supra* note 122, at 1098.

170. See John Borland, *Democracy's Traffic Jams*, CNET NEWS (Oct. 26, 2000), <http://news.cnet.com/2009-1023-247379.html>.

171. *Id.*

172. Opderbeck, *supra* note 112, at 1698.

173. See Borland, *supra* note 170.

174. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

175. *Id.* at 1158.

176. *Id.*

Ninth Circuit affirmed the district court's summary judgment order for the defendants on the contributory negligence and vicarious liability claims.¹⁷⁷ It held that Grokster ultimately neither had (1) the knowledge of its users' copyright infringement, which was required for contributory infringement, nor (2) the right or ability to supervise the direct copyright infringers who used their software, which was necessary for vicarious liability.¹⁷⁸ Because the company operated on a more "pure" peer-to-peer format, the court found that Grokster did not provide the "site and facilities" for infringement like Napster's central server.¹⁷⁹

This case seemed to shelter pure peer-to-peer systems from secondary liability for its users' copyright infringement.¹⁸⁰ The district court even noted that it was "not blind to the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares."¹⁸¹ The Ninth Circuit recognized that the "courts [are] ill-suited to fix the flow of internet innovation," and thus "it is prudent for [them] to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude."¹⁸²

When gatekeeper litigation proved to be ineffective, the RIAA developed a new strategy aimed at individual end-users.¹⁸³ The flood of RIAA lawsuits, with middle class Americans named as defendants, took hundreds of routine file sharers by surprise.¹⁸⁴ By throwing off the gloves, the RIAA hoped to bring awareness to the issue of piracy and educate others about the dangers of illegal file sharing, with the hope of recovering a portion of the lost profits in the process.¹⁸⁵ Ordinary computers became subject to serious risk of liability, with fines of up to \$150,000 per violation.¹⁸⁶ And most users were sharing 1,000 songs or more on file-swapping networks.¹⁸⁷ For a brief period, the RIAA was able to use the provisions of the DMCA to subpoena

177. *Id.* at 1167.

178. *Id.* at 1163-64.

179. *Id.* at 1163.

180. Fitzdam, *supra* note 122, at 1101.

181. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003).

182. *Grokster*, 380 F.3d at 1167.

183. See John Borland, *RIAA sues 261 file swappers*, CNET NEWS, Sept. 8, 2003 10:57 AM, http://news.cnet.com/2100-1023_3-5072564.html.

184. *Id.*

185. *RIAA Continues College Deterrence Campaign Into 2008*, <http://www.riaa.com/newsitem.php?id=36720A8F-FF55-2886-C2A2-EAB629C662BD>.

186. Borland, *supra* note 183.

187. *Id.*

the internet service providers to determine the identity of the users.¹⁸⁸ As a result, many people simply took it on the chin and agreed to settle for far less than initial claimed damages.¹⁸⁹ Still, users paid anywhere from \$3,000 to \$17,000.¹⁹⁰ This also resulted in absurd situations. For example, suits were filed against a twelve-year-old girl, an elderly woman who rarely used her computer, and a homeless man.¹⁹¹

In 2003, the D.C. Circuit's ruling in a suit against Verizon changed the nature of the fight.¹⁹² It held that the subpoena provisions "only [applied] to an [internet service provider] engaged in storing on its servers material that is infringing or the subject of infringing activity."¹⁹³ Section 512(h) "does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others."¹⁹⁴ The RIAA could no longer serve "form" subpoenas on internet service providers.¹⁹⁵ Instead, it was forced to seek identities by filing "John Doe" civil suits against unknown defendants, based on their IP addresses.¹⁹⁶ From there, it used discovery and rules of procedure, working under court supervision, to learn the names of the infringers.¹⁹⁷

In hindsight, this approach was clearly unsuccessful on multiple levels. End-user suits fulfilled their purpose of scaring *some*, but, in the end, had little effect on the attitude or actions of the file-sharing community.¹⁹⁸ In 2003, a study by the Pew Internet and American Life Project found that sixty-seven percent of Americans downloading music said they did not care whether the music was copyrighted.¹⁹⁹ From a purely financial perspective,

188. *Defending the Constitutional Rights of Internet Users and ISPs*, SUBPOENA DEFENSE ALLIANCE, <http://www.subpoenadefense.org/> (last visited Feb. 10, 2012).

189. Borland, *supra* note 183.

190. *Id.*

191. *The 14 Most Ridiculous Lawsuits Filed by the RIAA and the MPAA*, BRAINZ, <http://brainz.org/14-most-ridiculous-lawsuits-filed-riaa-and-mpaa/> (last visited Feb. 8, 2012).

192. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

193. *Id.* at 1233.

194. *Id.* at 1237.

195. Opderbeck, *supra* note 112, at 1704-05.

196. *Id.*

197. *Id.*

198. *See generally* Bridy, *supra* note 155, at 601-610 (discussing the ineffectiveness of the industry to reshape file sharing norms through educational programs that have been both punitive and propagandistic in character).

199. Amanda Lenhart & Mary Madden, *Music Downloading, File-sharing and Copyright*, PEW INTERNET (Jul 31, 2003), <http://pewinternet.org/Reports/2003/Music-Downloading-Filesharing-and-Copyright/Data-Memo.aspx>

the cost far exceeded the worth. In the three-year period from 2006 to 2008, the RIAA spent \$64 million on the lawsuit campaign to only recover \$1.4 million.²⁰⁰

In the end, technology—pushed by consumer demand—would continue to outpace the law, making individual end-users even more difficult to trace. Torrent downloading, which came on the scene in 2001, is currently the biggest threat to the RIAA.²⁰¹ The American copyright system has sprung a leak, and each time new law or judicial action patches it up, another leak forms.

IV. ANALYSIS

A. Why the DMCA must be changed

Since its introduction, the DMCA has had vehement opposition. The most prevalent argument raised against the new law is that it nearly destroys a purchaser's right to fair use. As mentioned, fair use is a well-established component of American copyright law—"the principle that the public is entitled, without having to ask permission, to use copyrighted works in ways that do not unduly interfere with the copyright owner's market for a work."²⁰²

While this is a legitimate interest—which must be balanced against copyright owners' interest in protecting their work from exploitation—the law seems to more heavily favor copyright protection, with little concession to proponents of fair use. The existence of the DMCA is likely the result of the influence of money and power. The RIAA, consisting of the most influential artists and media conglomerates in America, has a nearly limitless source of wealth to mobilize lobbyists to fight for its interests. It also has the ability to throw its weight toward certain political figures and their causes in return for getting its own back scratched.

So why do consumers care so much about fair use? Because it allows them the freedom to use legitimately purchased media without restriction. DRM and other anti-circumvention devices limit the use of digital music and eBooks to a single device. Moreover, it prevents the backup and storage of such files, which can easily be lost, deleted, or become corrupted. The fair use exception written in to the DMCA is more of a gesture to appease fair use proponents than an actual protection. It allows true fair use for a limited pool of individuals. Writing in a case where RealNetworks, Inc. was sued for

200. See Mike Masnick, *RIAA Spent \$17.6 Million In Lawsuits. . . To Get \$391,000 In Settlements?*, TECHDIRT, July 14, 2010 9:44 AM, <http://www.techdirt.com/articles/20100713/17400810200.shtml>.

201. See generally Ernesto, *RIAA Wants to Shutter Torrent Sites, and More*, TORRENT FREAK, Nov. 16, 2011, <http://torrentfreak.com/riaa-wants-to-shutter-torrent-sites-and-more-111116/> (discussing RIAA's support for SOPA, which would shut down a large number of torrent domains without due process).

202. *Unintended Consequences: Twelve Years Under the DMCA*, ELECTRONIC FRONTIER FOUNDATION, Mar. 3, 2010, <https://www.eff.org/wp/unintended-consequences-under-dmca>.

manufacturing CD ripping software, Judge Patel recognizes the catch-22 nature of the issue. He acknowledges that “. . . while it may well be fair use for an individual consumer to store a backup copy of a personally-owned DVD on that individual’s computer, a federal law has nonetheless made it illegal to manufacture or traffic in a device or tool that permits a consumer to make such copies.”²⁰³ Thus, a person theoretically has the right to circumvent digital blocks for non-infringing use, yet must do so without the help of devices designed for that purpose. The average American certainly does not have the requisite technical knowledge to do so. A theoretical right is no right at all.

Opponents also claim that the DMCA stifles free expression. The most prominent case, and the first prosecution under the DMCA, was against a Russian citizen and employee of a Moscow-based corporation, ElcomSoft.²⁰⁴ Dmitry Sklyarov was a programmer who had developed a software package that decrypts electronic books. He was arrested in Las Vegas in 2001 and was charged with trafficking and offering to the public a software program that could circumvent technological protections on copyrighted material under section 1201(b)(1)(A) of the DMCA.²⁰⁵ The Electronic Frontier Foundation argues that his program promotes the full expression of free exercise and fair use rights. Specifically, it allows the ability 1) to read eBooks on a computer other than the one purchased for; 2) to read eBooks on an operating system other than Macintosh or Windows; 3) to make a backup copy of an eBook 4) to access the eBook on a new computer when the old one becomes obsolete; 5) to print out an eBook; or 6) to loan or sell an eBook to a friend.²⁰⁶ More strictly, it prohibits the non-infringing uses of copying passages for educational use or using text-to-speech for the visually impaired.²⁰⁷

With such imbalance between fair use and copyright protection, the general public—unable to engage in fair use without aid from third-party technologies—simply cannot exercise that privilege. One is forced to either break the law and face potential criminal charges, or forego the circumvention and sacrifice whatever activity it would have promoted. This will ultimately chill the legitimate activities of professors, journalists, publishers, scientists, students, programmers, and general members of the public.

Additionally, it has been argued that the DMCA impedes competition.²⁰⁸ Several companies now realize how useful the DMCA can be in preventing

203. *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 942 (N.D. Cal. 2009) (citing *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1125 (N.D. Cal. 2002)).

204. Moore, *supra* note 114, at 1455.

205. *US v. ElcomSoft Sklyarov*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.org/cases/us-v-elcomsoft-sklyarov> (last visited Feb. 10, 2012).

206. Moore, *supra* note 114, at 1456.

207. *Id.*

208. *See Unintended Consequences*, *supra* note 201.

other companies from entering a specific market. Competing companies are now forced to “tread softly” for fear of being sued for a misstep. For example, in April 2005, a Massachusetts programmer named Dave Coffin discovered that camera-maker Nikon was encrypting certain portions of uncompressed “raw” photos produced by its professional-grade digital cameras.²⁰⁹ This proprietary encryption prevented the files’ compatibility with third-party software, forcing developers of Photoshop and other similar image software to obtain licenses from Nikon.²¹⁰ To put it simply, Nikon was obtaining market leverage in the image editing software market through encrypting its own files. Thomas Knoll, the creator of Photoshop, expressed concerns of Nikon’s competitors in his refusal to fully support the decrypted files for fear of violating the broad circumvention provisions of the DMCA.²¹¹

Inserted comma.

Lexmark, one of the largest laser printer makers in the United States, made similar use of the DMCA to advance its market interests.²¹² With the intent to eliminate the secondary market in refilled laser toner cartridges, Lexmark took an approach similar to Nikon.²¹³ By adding authentication routines between its printers and cartridges, Lexmark squeezed out aftermarket vendors and forced consumers to buy from them.²¹⁴ When Static Control Components (SCC) reverse-engineered these measures to enable refilled cartridges to work in Lexmark printers and sold them for profit, Lexmark brought suit and obtained an injunction.²¹⁵ They complained that the “Smartek” chips contained “unauthorized, identical copies of Lexmark’s copyrighted Toner Loading Programs.”²¹⁶ In the end, SCC succeeded in overturning the injunction on appeal, but it took nineteen months of costly litigation during which time its product was withheld from the market.²¹⁷ While SCC came out victorious, Lexmark was able to sufficiently frustrate a large portion of the company’s time and finances, and send a chilling message to similarly postured competitors. The DMCA was originally intended

209. Declan McCullagh, *Nikon’s Photo Encryption Reported Broken*, CNET NEWS, Apr. 21, 2005, 10:55 AM, http://news.cnet.com/Nikons-photo-encryption-reported-broken/2100-1030_3-5679848.html.

210. *See id.*

211. *Id.*

212. *See Unintended Consequences*, *supra* note 201.

213. Declan McCullagh, *Lexmark Invokes DMCA In Toner Suit*, CNET NEWS, Jan. 8, 2003 7:28 PM, <http://news.cnet.com/2100-1023-979791.html>.

214. *Id.*

215. *Id.*

216. *Id.*; *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).

217. *See Unintended Consequences*, *supra* note 2011.

as a shield to protect copyright holders and prevent piracy, yet companies have harnessed it as a sword to keep competitors a safe distance from the market.

Inserted (West 2008)_

Considered reversing to Thus, Plaintiffs. . .

.The DMCA has had other consequences not intended by Congress. It has threatened to displace state and federal computer intrusion laws. Specifically, the DMCA could jeopardize the Computer Fraud and Abuse Act (CFAA), the Wiretap Act, the Electronic Communications Privacy Act (ECPA), and a range of state computer intrusion statutes.²¹⁸ Generally, these statutes contain provisions that a plaintiff must prove that the intrusion caused some harm. For instance, under the Computer Fraud and Abuse Act, a plaintiff must show that the alleged violation “caused . . . loss to [one] or more persons during any 1-year period . . . aggregating at least \$5,000 in value.”²¹⁹ The CFAA defines the term “loss” to mean “any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.”²²⁰ The DMCA, on the other hand, contains no financial damage requirement. It gives the court the authority to “grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation.”²²¹ It also provides for the recovery of anywhere from \$200 to \$2,500 for each act of circumvention of a device, product, or component, “as the court considers just.”²²² Plaintiffs, thus, used the DMCA as a route around the actual damage threshold of some of the other computer intrusion statutes.²²³ This will likely continue until more precedent is laid to reign in such misuse of the DMCA.

218. *Id.*

219. 18 U.S.C.A. § 1030(c)(4)(A)(i)(I) (West 2008).

220. *Id.* § 1030(e)(11).

221. 17 U.S.C.A. § 1203(b)(1).

222. *Id.* .§ 1203(c)(3)(A).

223. *See Pearl Investments, LLC v. Standard I/O, Inc.*, 257 F. Supp. 2d 326 (D. Me. 2003) (rejecting the company’s electronic trespass and CFAA claims for gaining unauthorized access to an automated stock-trading computer system’s virtual private network due to lack of evidence of any actual damage done, yet upholding the DMCA circumvention claim for the same); *See also Ticketmaster L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096, 1113 (C.D. Cal. 2007) (“ . . . because [Ticketmaster] has not quantified its harm as required by the statute or even attempted to show what portion of the harm is attributable to [RMG], the Court cannot find that [Ticketmaster] has affirmatively shown that its harm caused by [RMG] exceeds the \$ 5,000 minimum. Thus, the CFAA claim does not provide a basis for a preliminary injunction.”).

Recent developments, however, have limited the DMCA's reach and given hope to opponents of the controversial act.²²⁴ The Federal and Fifth Circuits have made rulings essentially requiring a plaintiff in a DMCA suit to prove copyright infringement.²²⁵ In *Storage Tech*, a Fifth Circuit case, the plaintiff sold data storage software and provided maintenance repair services to large enterprise clients.²²⁶ Its competitor, Custom Hardware, provided similar repair services. StorageTek, however, password-protected its software solely to prevent independent service providers such as Custom Hardware from using maintenance software included in its hardware systems.²²⁷ It sued Custom Hardware under the DMCA, arguing that it had circumvented those passwords with the intention to force its customers to obtain repair services from them.²²⁸

After reversing the district court's grant of a preliminary injunction against Custom Hardware more than a year after it was granted, the Federal Circuit wrote that "[t]o the extent that [Custom Hardware's] activities do not constitute copyright infringement or facilitate copyright infringement, StorageTek is foreclosed from maintaining an action under the DMCA."²²⁹ In other words, a plaintiff must prove that a circumvention of technological measure either "infringes or facilitates infringing a right protected by Copyright Act."²³⁰ Many DMCA opponents viewed this as a victory, hoping that other courts would follow this lead.

The Fifth Circuit took a similar step in *MGE v. GE* to limit the reach of the DMCA.²³¹ MGE produced uninterruptible power supply machines, many of which required the use of certain programs during servicing.²³² MGE developed and copyrighted these software programs, which required an external hardware security key known as a "dongle."²³³ Years after MGE introduced these security programs, hackers discovered how to crack them,

224. Tim Armstrong, *Is the DMCA Still Controversial?* INFORMATION, LAW, AND THE LAW OF INFORMATION, Aug. 20, 2010, <http://blogs.law.harvard.edu/info-law/2010/08/20/is-the-dmca-still-controversial/>.

225. *See id.*

226. *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005).

227. *Id.*

228. *Unintended Consequences*, *supra* note 201.

229. *Storage Tech. Corp.*, 421 F.3d at 1318.

230. *Id.* (citing *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004)).

231. *MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc.*, 622 F.3d 361 (5th Cir. 2010).

232. *Id.* at 364.

233. *Id.*

disclosing their findings on the Internet.²³⁴ When a hacker overcame the security key, he could use the software without any restriction.²³⁵ When the employees of GE/PMI, a machine-serving company, obtained a copy of MGE's software, MGE sued for copyright infringement, misappropriation of trade secrets, unfair competition, conversion, and DMCA violations.²³⁶

Tailoring the issue, the court asked whether GE/PMI's representatives circumvented a technological measure, not whether they used circumvented technology to access MGE's software.²³⁷ The court narrowly applied § 1201(a)(1), the DMCA's anti-circumvention provision, reasoning that because the provision "is targeted at circumvention, it does not apply to the use of copyrighted works *after* the technological measure has been circumvented."²³⁸ Such a broad "construction would extend the DMCA beyond its intended purposes" to regulate conduct that is already addressed by existing copyright law.²³⁹

Additionally, the Librarian of Congress has been adding new exceptions to the DMCA under its ability to exempt classes of materials from the anti-circumvention provision as long as it is used for a non-infringing purpose.²⁴⁰ The DMCA mandates that every three years the U.S. Copyright Office review requests for specific classes of work to be exempted, and then recommends that the Library of Congress adopt certain exemptions.²⁴¹ Most notably, the Library of Congress has ruled that consumers who "jailbreak" their iPhone or circumvent digital protections to install unapproved applications for non-infringing uses will be exempt from prosecution under the anti-circumvention provision.²⁴² The Library of Congress reasoned that such modifications that are "purely for the purpose of . . . interoperability are fair uses."²⁴³ Furthermore, in 2010, the Library created an exception allowing the circumvention of movies on DVD's that were protected by the Content Scrambling System when done to incorporate portions of the film into a new

234. *Id.*

235. *Id.*

236. MGE UPS Sys. Inc., 622 F.3d at 364.

237. *Id.* at 366.

238. *Id.*

239. *Id.*

240. 17 U.S.C. § 1201(a)(1)(C).

241. *Id.*

242. Mike Masnick, *Surprising New DMCA Exceptions: Jailbreaking Smartphones, Noncommercial Videos Somewhat Allowed*, TECHDIRT, July 26, 2010, 1:08 PM, <http://www.techdirt.com/articles/20100726/09564610361.shtml>.

243. *Id.*

work for comment or criticism.²⁴⁴ It also permitted such circumvention “where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances: (i) Educational uses by college and university professors and by college and university film and media studies students; (ii) Documentary filmmaking; (iii) Noncommercial videos.”²⁴⁵

These cases demonstrate how judges—who are beginning to see the impracticability of the DMCA and the potential for abuse—are making judgments that consider the balance of all interests, not just copyrights holders. While those who feel the DMCA is harmful to free speech, fair use, and the rights of consumers, can celebrate progress in the right direction, their opponents have not relented.

B. New Developments

Advocates of strong copyright protection, such as the Motion Picture Association of American (MPAA) and the RIAA, have also recently backed new legislation that would bring combating Internet piracy to a new level. The Stop Online Privacy Act (SOPA) and Protect IP Act (PIPA) were introduced into Congress with the intention of strengthening the protection against copyright infringement and intellectual property theft. Opponents argue that it would stifle expression and censor Internet content. Essentially, the PIPA would force the U.S. internet providers to block access to websites deemed as enablers of copyright infringement and allow corporations and the government to sue search engines, blog sites, directories, or any site in general to remove the black listed sites.²⁴⁶ SOPA is broader than the PIPA, allowing the U.S. attorney general to block domain name services and de-list websites from search engines.²⁴⁷ This would ultimately push a workable solution to the copyright problem in the opposite direction.

C. Possible Solutions

Copyright has taken a drastic turn from its original purpose of encouraging the dissemination of literature toward fostering private gain. It has become primarily a mechanism to protect the interests of authors and creators when it should be reformed to serve the original purpose of maintaining and replenishing a rich cultural public domain and encouraging new forms of

244. Nate Anderson, *Library of Congress Asks: How Should We Let You Break DRM?*, <http://arstechnica.com/tech-policy/news/2011/10/library-of-congress-asks-how-should-we-let-you-break-drm.ars> (last visited Mar. 6, 2012).

245. *Id.*

246. See Trevor Timm, *How PIPA and SOPA Violate White House Principles Supporting Free Speech and Innovation*, ELECTRONIC FRONTIER FOUNDATION, Jan. 16, 2012, <https://www EFF.org/deeplinks/2012/01/how-pipa-and-sopa-violate-white-house-principles-supporting-free-speech>.

247. *Id.*

expression. One commonly advanced change attempts to revive copyright's original purpose in America by reverting to the British system of archiving all copyrights in a central database. By then requiring each work to be marked to express the intentions of the author, others would be on notice of what constitutes infringement.

Furthermore, shortening copyright duration would aid in expanding the public domain. Under the current copyright law, a copyright lasts for the life span of a creator plus an additional seventy years²⁴⁸ Opponents have argued that the law overreaches, stifling innovation. This essentially gives an author a monopoly over his or her work and prevents others from building on that expression to create new works. Some have suggested reducing the term to the lifespan of the author plus fifty years, or even as low as twenty-five years. More aggressive proponents of change suggest getting back to the original fourteen-year term, with an optional renewal term of fourteen years, which would give an author a period of protection, yet allow the work to more readily become public domain.²⁴⁹

Another approach relies on the market to correct any imbalances. It is most useful in regard to copyright protection of digital music files. This would help reduce Internet piracy, stimulate copyright holders' economic gain, and meet the needs of consumers. The explosion in popularity of Napster revealed two types of consumers: (1) those who wanted interoperable digital music, and (2) those who merely wanted free music.²⁵⁰ The market approach allows content providers to use infringement data to reveal consumer demand. Companies can use this information to fulfill the demand.

Apple's development of iTunes is a prime example of this theory in action. Apple introduced iTunes to fulfill the high consumer demand for digital content.²⁵¹ The company filled the vacuum left by the demise of Napster with an innovative, yet legitimate business model. It provided albums and individual songs at relatively inexpensive prices.²⁵² Moreover, it did so in an intuitive fashion—offering hardware that integrated with the web-based system. Allowing the market to work out the kinks in the system would incentivize acquiring copyrighted material legitimately. Moreover, competition would drive down the cost to consumers, thus making the legitimate purchase of digital music more appealing.

248. *How Long Does Copyright Protection Last?*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-duration.html> (last visited Sept. 15, 2012).

249. See Mike Masnick, *How Much We're Missing From The Public Domain*, TECHDIRT, Sept. 15, 2010, 11:15 AM, <http://www.techdirt.com/articles/20100912/22283310972.shtml>.

250. See Natalie Klym, *Digital Music Distribution*, MIT COMMUNICATIONS FUTURES PROGRAM (Dec. 2005), <http://cfp.mit.edu/docs/digital-music-dec2005.pdf>.

251. *Id.*

252. *Id.*

A more extreme proposal of copyright reform calls for the total elimination of copyright. The leading proponent, Raymond Ku, suggests that copyright can be safely discarded entirely.²⁵³ He views copyright law not as protecting an author's natural right in his work, but as representing "a bargain between the public and the author in which the public grants the author certain exclusive rights in exchange for access to her creation."²⁵⁴ As such, he contends that the current copyright law has become so tainted that it should simply be eliminated all together. He questions the two interests currently served by copyright: creation and public dissemination.²⁵⁵ Because consumers build and fund the distribution channels for digital content themselves, copyright is no longer needed to encourage distribution.²⁵⁶ Ku argues that copyright has allowed large record labels to exert excessive influence over what music gets heard, leading to the homogenization of music, which is contrary to the original purpose of promoting creativity.²⁵⁷ Eliminating copyright would promote creativity by encouraging the use of others' works to produce new works.

New technologies and business models continue to emerge that attempt to balance the competing interests of consumer demand and copyright protection. One specific model, Spotify, has been surprisingly successful in striking such a balance. The platform is a DRM-based music streaming service.²⁵⁸ Non-subscribing users can listen to an unlimited amount of streamed music, with occasional visual and audio advertisements.²⁵⁹ By offering applications for desktop *and* mobile devices, the problem of interoperability that plagues other DRM protected music is no longer an issue. The service is funded by individuals who pay for a monthly subscription, advertisements, and partner retailers' music purchases.²⁶⁰ Because users do not possess digital copies of the music, but stream it anytime there is Internet connectivity, the music cannot be shared. A user essentially has access to more music than would be possible if storing the actual files on a standard mobile device. The downfall, however, is that the music is accessible only where there is an Internet connection. Also, because the platform is limited to streaming music, a user cannot use portions of the files for educational purposes. In this case,

253. Opderbeck, *supra* note 112, at 1745.

254. Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 277 (2002).

255. *Id.* at 263.

256. *Id.*

257. Opderbeck, *supra* note 112, at 1745.

258. See A Critical Look at Spotify, STEALING SHARE, <http://www.stealingshare.com/pages/A%20Critical%20Look%20at%20Spotify.htm> (last visited Sept. 15, 2012).

259. *Id.*

260. *Id.*

one would be pushed toward purchasing DRM-free music from systems such as iTunes.

D. Conclusion

It is undisputed that copyright law has veered from its original purpose of encouraging creativity and promoting education. The current law incorrectly views copyright as a property-like interest, thus serving the interests of copyright holders at the expense of the public. The DMCA has granted the music industry too much power to protect its financial stakes, which has led to Internet censorship and has chilled musical creativity. The influx of infringement and circumvention claims demonstrate how the law has become a tool used to force out competition and increase profits. If copyright is going to maintain its original purpose, lawmakers must look beyond copyright holders and their lobbying efforts to the interest of the public.

