

# WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?

Julie E. Cohen

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In October 1998, the U.S. Congress enacted and President Clinton signed into law the Digital Millennium Copyright Act (“DMCA”).<sup>1</sup> Among other things, the DMCA is intended to implement the WIPO Copyright Treaty’s requirement that member nations provide effective legal remedies against circumvention of technological protection for copyrighted works in cases where such circumvention would interfere with a right of the copyright owner.<sup>2</sup> The DMCA is the culmination of a two year battle over how to implement that provision. As they had done during the Treaty negotiations, the copyright industries sought broad protection against all acts of circumvention and all technologies that could be used to accomplish the circumvention. They argued that these things were necessary in order for the protection to be “effective,” as the Treaty requires.<sup>3</sup> Academic, library and consumer groups, on the other hand, argued that a ban on technology would stifle innovation, and that a ban on circumvention would be unjustified in cases where the desired use of the copyrighted work would not violate any right of the owner under existing copyright law.<sup>4</sup> In particular, they argued that a comprehensive ban on circumvention would negate the fair use doctrine, which allows re-use of copyrighted expression in a

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<sup>1</sup>Digital Millennium Copyright Act, Pub. L. 105–304, 112 Stat. 2860 (1998).

<sup>2</sup>WIPO Copyright Treaty, Art. 11:

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

<sup>3</sup>See WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecommunications Trade & Consumer Protection of the House Comm. on Commerce, 105th Cong. (1998) (statement of Robert W. Holleyman, II, President, the Business Software Alliance); Copyright Legislation: Hearings on H.R. 2281 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1997) (statements of Robert W. Holleyman, II, President, the Business Software Alliance; Allee Willis, on behalf of Broadcast Music, Inc.; Tom Ryan, CEO, SciTech Software, Inc., on behalf of Software Publishers’ Association; Gail Markels, General Counsel and Senior Vice President, Interactive Digital Software Association; and Allen R. Adler, Vice President for Legal and Governmental Affairs, Association of American Publishers); National Information Infrastructure: Hearing on S. 1284 Before the Senate Comm. on the Judiciary, 104th Cong. (1996) (testimony of Kenneth R. Kay, Executive Director, Creative Incentive Coalition); Copyright Protection on the Internet: Hearings on H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. (1996) (statements of Barbara A. Munder, Senior Vice President, the McGraw-Hill Companies Inc.; Frances W. Preston, President and CEO, Broadcast Music, Inc.; Jack Valenti, Chairman and CEO, Motion Picture Association of America; and the Association of American Publishers).

<sup>4</sup>See Digital Future Coalition, *Collected Papers and Press Releases*, <http://www.dfc.org/>.

variety of circumstances.<sup>5</sup>

Ultimately, Congress did not give either group what it wanted. Instead, it attempted to strike a compromise between the two positions. This article discusses the terms of that compromise and assesses its implications for the future of the fair use doctrine as applied to digital works. The author concludes that, as a practical matter, the DMCA will transform the fair use doctrine from a flexible common law “safe harbour” to a civil law system of narrow, specific exceptions to copyright. The DMCA also will narrow the fair use doctrine, both because it reverses the traditional presumption of fairness that attaches to non-commercial uses, and because it bans the technologies that are likely to be necessary to make fair use of technologically-protected works. Finally the DMCA does not address the fact that the prevailing legal climate supports eroding the traditional boundaries of fair use wherever new technologies allow licencing markets to form. Neither Congress nor the courts, however, appear willing to eliminate fair use entirely. In addition, U.S. copyright law has constitutional underpinnings that may, and should, be invoked to prevent the doctrine from being narrowed too far.

### **The Digital Millennium Copyright Act**

As the copyright industries had requested, the DMCA includes both technology- and conduct-related prohibitions. Both prohibitions, however, are subject to limitations and exceptions intended to safeguard the public interest in innovation and access to creative products. The DMCA thus represents a congressional determination that the more comprehensive prohibitions sought by the copyright industries would not promote the public interest.

The DMCA prohibits the manufacture, sale, or importation of technologies that can be used to circumvent technological protection for copyrighted works, popularly known as “rights management systems” or “rights management technologies”.<sup>6</sup> A technology will fall within the prohibition if it is marketed knowingly for use in circumvention.<sup>7</sup> In the absence of such knowledge, a technology may still fall within the prohibition, but only if it either is “primarily designed or produced for the purpose of circumvent[on]” or has “only limited commercially significant purpose other than to circumvent” rights management technologies.<sup>8</sup> This means, for example, that the DMCA cannot be interpreted to prohibit the development and use of software decompilers or decryption tools, as critics of the legislation previously had feared.

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<sup>5</sup>See 17 U.S.C. § 107.

<sup>6</sup>DMCA, Title I, s.3, at § 1201 (a) (2), (b) (1). Technologies protected under the DMCA include those that “require[] the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work,” and those that “prevent[], restrict[], or otherwise limit[] the exercise of a right of a copyright owner under [Title 17 of the U.S. Code].” *ibid.*, at § 1201 (a) (3) (B), (b) (2) (B).

<sup>7</sup>*ibid.*, at § 1201 (a) (2), (b) (1).

<sup>8</sup>*ibid.*, at § 1201 (a) (2), (b) (1).

The DMCA also prohibits the act of circumvention of a rights management system that controls access to a copyrighted work.<sup>9</sup> However, this prohibition is subject to a two-year moratorium.<sup>10</sup> In the interim, the DMCA directs the Librarian of Congress, in consultation with the Register of Copyrights, to assess the impact of the circumvention ban on traditional fair use practices.<sup>11</sup> If they deem it necessary, they are authorised to issue rules excepting certain users of certain categories of works from the ban on circumvention.<sup>12</sup> The Librarian and the Register are to reassess the effect on fair use, and declare new exceptions as needed, every three years thereafter.<sup>13</sup> Such exceptions, however, do not afford a defence to the prohibition on technologies described above.<sup>14</sup>

In addition to providing for possible future fair use exemptions, the DMCA sets forth three specific technology-related exceptions to the ban on circumvention. First, it is not a violation of the DMCA to circumvent rights management technologies for purposes of encryption research, as long as the encrypted copy of the copyrighted work was lawfully obtained and certain other conditions are met.<sup>15</sup> Secondly, one may circumvent rights management technologies in the course of reverse engineering lawfully acquired computer software “for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs”.<sup>16</sup> Thirdly, one may circumvent rights management technologies for

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<sup>9</sup>*ibid.*, at 1201 (a) (1) (A).

<sup>10</sup>*ibid.*, at § 1201 (a) (1) (A).

<sup>11</sup>*ibid.*, at § 1201 (a) (1) (C). The Librarian is directed to consider the following factors: “(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works, and (v) such other factors as the Librarian considers appropriate.” *ibid.*, at § 1201 (a) (1) (C).

<sup>12</sup>*ibid.*, at § 1201 (a) (1) (B), (D).

<sup>13</sup>*ibid.*, at 1201 (a) (1) (C)–(D).

<sup>14</sup>*ibid.*, at § 1201 (a) (1) (E).

<sup>15</sup>*ibid.*, at § 1201 (g) (2). Circumvention of a lawfully obtained copy for purposes of encryption research is lawful if, the circumvention is “necessary” to conduct the research; the use of the work does not constitute copyright infringement or a violation of other law; and “the person made a good faith effort to obtain authorization before the circumvention.” *ibid.*, at 1201 (g) (2).

<sup>16</sup>*ibid.*, at § 1201 (f) (1). This exception applies only to the extent that the elements necessary for interoperability “have not previously been readily available to the person engaging in the circumvention”, and only to the extent that the use of the software does not constitute infringement. *ibid.*, at § 1201 (f) (1). Notwithstanding the ban on circumvention technologies, the DMCA expressly authorises the development of circumvention technologies that are to be used for the sole purpose of permissible reverse engineering. *ibid.*, at § 1201 (f) (2), encryption research, *ibid.*, at § 1201 (g) (4), on security testing, *ibid.* at § 1201 (j) (4).

purposes of computer security testing authorised by the owner of the computer system or network.<sup>17</sup>

The circumvention ban also does not apply to a nonprofit library, archive, or educational institution that “gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work”, so long as the copy to which access is gained is used for no other purpose.<sup>18</sup> In addition, the DMCA sharply limits the liability of these institutions. A non-profit library, archive, or educational institution that violates the ban, but proves that it did not know its acts were unlawful, is entitled to request that the court remit any award of damages.<sup>19</sup> The DMCA’s provisions authorising criminal penalties in cases of wilful violation for purposes of commercial gain do not apply to these institutions at all.<sup>20</sup>

A final exception to the ban on circumvention concerns the collection and processing of personal data. If a rights management system collects personally identifying information about an individuals’ online activities “without providing conspicuous notice of such collection or dissemination...and without providing [individuals] with the capability to prevent or restrict such collection or dissemination”, then it is not unlawful to tamper with or circumvent the system for the sole purpose of protecting the information.<sup>21</sup> This exception renders the DMCA one of the few areas of U.S. law that even begins to meet the standards for data protection set forth in the European Directive on the Processing of Personal Data.<sup>22</sup> The DMCA says nothing, however, about personal identifying information collected in the course of a transaction with the copyright owner.

### **Effect of the DMCA on the Fair Use Doctrine**

The effect of the DMCA on the fair use doctrine is difficult to determine, because there is no precedent in U.S. copyright law for the oversight process that the DMCA establishes. Given both the nature of the authority vested in the Librarian of Congress and the prevailing climate of opinion about the purpose of the fair use doctrine, however, it is likely that the scope for privileged uses will narrow.

As an initial matter, it is worth noting that the oversight procedure may violate the constitutionally mandated separation of powers. Under the U.S. Constitution, legislative branch actions must satisfy the requirements of bicameralism (consideration by both Houses of Congress) and presentment

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<sup>17</sup>*ibid.*, at § 1201 (j).

<sup>18</sup>*ibid.*, at § 1201 (d) (1).

<sup>19</sup>*ibid.*, at 1203 (c) (5) (B).

<sup>20</sup>*ibid.*, at 1204 (b).

<sup>21</sup>*ibid.*, at § 1201 (I).

<sup>22</sup>See Directive 95/46 of the European Parliament and of the Council of October 24, 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Art. 25.

(submission to the President for signature or veto).<sup>23</sup> Congress may delegate specific grants of rulemaking authority, but only to agencies of the executive branch, consistent with that branch's constitutional authority to enforce the laws.<sup>24</sup> In particular, Congress may not vest rulemaking or enforcement authority in an official if it has the power to direct or control that official's actions or remove him or her from office.<sup>25</sup> Although the Librarian of Congress is appointed by the President, the Library of Congress and the Copyright Office are part of the legislative branch, subject to the supervision of Congress.<sup>26</sup> When President Clinton signed the Bill into law, he issued a statement that the Copyright Office is, "for constitutional purposes", part of the executive branch, and that therefore he would not interpret the bill as authorising Congress to exert direct control over the DMCA's oversight process.<sup>27</sup> The President cannot relocate the Copyright Office (and, implicitly, the Library of Congress) within the executive branch simply by issuing a statement, however. If the oversight procedure violates separation of powers, it is likely that the circumvention ban also will fall since the oversight provision does not appear to be severable.

If the oversight procedure survives judicial review, the history of U.S. copyright law suggests that its operation will be shaped largely by special-interest lobbying. For most of the last century, that lobbying has been done almost exclusively by the copyright industries, and the resulting copyright legislation reflected this imbalance.<sup>28</sup> During the process that led to the DMCA, however, a remarkable coalition of educational, consumer, and scientific groups came together to lobby for the public interest.<sup>29</sup> This development came as a surprise to the copyright industries, which seemed to have expected that they would win broad anti-circumvention provisions without much public comment. The result was a somewhat more balanced statute, with provisions designed to safeguard the public interest in access to copyrighted works. It is unclear, though, whether the Digital Future Coalition will continue to exist in its current form. The DMCA addresses some of the other issues, unrelated to fair use, that motivated certain members of the coalition.<sup>30</sup> If these groups take a less active role, the coalition will have fewer

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<sup>23</sup>See U.S. Const. Art. I, §§ 1, 7, cl. 2, 3; *INS v. Chadha* 462 U.S. 919 (1983).

<sup>24</sup>See U.S. Const. Art. II, §§ 2, 3.

<sup>25</sup>See *Bowsher v. Synar*, 478 U.S. 714, 725–732 (1986).

<sup>26</sup>See 2 U.S.C. § 131 (establishing Library of Congress in legislative branch); 17 U.S.C. § 701 (establishing Copyright Office as part of Library of Congress).

<sup>27</sup>The White House, Office of the Press Secretary, *Statement by the President* (October 28, 1998), <http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi//oma.eop.gov.us/1998/10/29/16.text>. 1.

<sup>28</sup>See Jessica Litman, "Revising Copyright Law for the Information Age" (1996) 75 Or. L. Rev. 19; Jessica Litman, "The Exclusive Right to Read" (1994) 13 Cardozo Arts & Ent. L.J. 29; Jessica Litman, "Copyright Legislation and Technological Change", (1989) 68 Or. L. Rev. 275.

<sup>29</sup>See Digital Future Coalition, *Collected Papers and Press Releases*, n. 4 above.

<sup>30</sup>On-line service providers were concerned that they not be held strictly liable for acts of infringement by their subscribers. In fact, the DMCA does not impose infringement liability on service providers, but instead

resources. It remains to be seen whether it will be able to generate the same level of public awareness of and interest in the oversight process, and whether the oversight process will be responsive to a broad range of constituents and concerns.

Assuming that the oversight process is constitutional and is implemented in a fair and balanced manner, what kind of fair use exemptions will it produce? For both procedural and substantive reasons, the exemptions, if any, that emerge from the process are likely to be both narrower than and different from the “rules” of fair use that have previously been developed by the courts.

The U.S. fair use doctrine is firmly rooted in the Anglo-American common law tradition of case-by-case adjudication. The fair use provision of the Copyright Act does not provide a definitive list of uses that are fair. Instead, it requires an open-ended, fundamentally equitable balancing inquiry that assesses the challenged use relative to several factors, the most important of which are the purpose and character of the use and its effect on the actual or potential market for the work.<sup>31</sup>

The DMCA’s oversight process represents a significant departure from this tradition. Rather than giving the Librarian of Congress broad authority to affirm common law style fair use principles, it authorises the Librarian to identify and exempt specific categories of users of specific categories of works on a finding of need. In many ways, this is a European solution to the problem of identifying fair uses. It replaces the old open-ended balancing inquiry familiar in common law systems with a series of particular, discrete exceptions along the civil law model. The effect of the reverse engineering exemption is similar. U.S. case law applying the fair use doctrine to reverse engineering considers interoperability

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establishes a “safe harbour” procedure under which copyright owners may bring acts of alleged infringement to the service provider’s notice and request assistance in removing the offending materials. Service providers that follow the procedure are exempted from infringement liability. DMCA, Title II, On-Line Copyright Infringement Liability Limitation. The consumer electronics industry feared an outright ban on multi-purpose technologies that might, but need not, be used to circumvent rights management systems. The limits on the scope of the technology ban, see text accompanying nn. 6–8 above, largely alleviate this concern. See generally Digital Future Coalition, *Collection Papers and Press Releases* n. 4 above.

<sup>31</sup>See 17 U.S.C § 107:

“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

justifications, but focuses more broadly on the need for access to uncopyrightable functional principles embodied in computer software.<sup>32</sup> The DMCA's reverse engineering exemption more closely resembles the European Directive on the Legal Protection of Computer Programs, which allows reverse engineering only for interoperability purposes.<sup>33</sup>

There is no reason in principle why a European-style procedure for determining exemptions might not work well to preserve traditional fair use concerns. As a practical matter, however, the DMCA's approach to fair use is likely to narrow its scope. First, the oversight procedure reverses the presumption of fair use that traditionally has attached to non-commercial uses.<sup>34</sup> Under the DMCA, the burden is on those who would convince the Librarian of Congress that a use is fair. Secondly, the technologies necessary to effectuate fair uses are likely to be unavailable, given that enablement of fair use is unlikely to be deemed a sufficiently "commercially significant purpose, other than to circumvent."

Finally and most importantly, the oversight process does not address the views about copyright and the role of fair use that led to the development of rights management systems in the first place. There is a school of thought within U.S. copyright law that sees fair use primarily as a means of correcting for market failure.<sup>35</sup> Under this view, the fair use doctrine will excuse payment when a use is socially valuable and the cost of transacting for it is prohibitively high, as has historically been the case for many educational, scholarly, and critical uses. It follows that when transactions costs drop, as they do in the digital environment, the justification for fair use disappears. If fair use has no role beyond correcting for market failure, it is hard to see why even educational users should not pay once technology makes available the means for them to do so cheaply. Once an inexpensive licensing mechanism exists, allowing use without payment threatens the "actual or potential market" for the work. The "three-step test" for exceptions to copyright set forth in the Berne Convention and the GATT/TRIPs Agreement supports similar reasoning, since it focuses on uses "which do not conflict with a normal exploitation of the work".<sup>36</sup>

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<sup>32</sup>See *Sega Enters., Ltd v. Accolade, Inc.* 977 F.2d 1510 (9th Cir. 1992).

<sup>33</sup>See Council Directive of May 14, 1991 on the Legal Protection of Computer Programs, 91/250, Art. 6; Pamela Samuelson, "Comparing U.S. and E.C. Copyright Protection for Computer Programs: Are They More Different than They Seem?" (1994) 13 J.L. & Com. 279.

<sup>34</sup>See *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

<sup>35</sup>See e.g., Tom W. Bell "Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine," (1998) 76 N.C.L. Rev. 557; Paul Goldstein, *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox* (1994), pp. 170, 224; Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors" (1982) 82 Colum. L. Rev. 1600; Robert P. Merges, "The End of Friction?: Property Rights and Contract in the "Newtonian" World of On-Line Commerce" (1997) 12 Berkeley Tech. L.J. 115.

<sup>36</sup>See GATT/TRIPs Art. 13; Berne Conv. Art. 9 (2). In this regard, it is interesting to note that under the Berne Convention, the "normal exploitation" proviso applies only to exceptions to the reproduction right. The Convention authorises many other types of exceptions that are not subject to the proviso. See Berne Conv. Arts 10, 10 bis, 11 bis, 13. Under the GATT/TRIPs, in contrast, the proviso's scope is extended to all exceptions that a

Many commentators who adopt the “market failure” view of fair use argue, as well, that even if fair use has some role beyond correcting for market failure, copyright merely establishes a set of default rules, which may be varied by contract.<sup>37</sup> In theory, then, even if consumers have some fair use rights that survive in a digital licensing environment, they can agree to sign away these rights. Rights management systems do not bargain, however. Instead, they operate by requiring the user to accede to the usage restrictions before being granted access to the work. In theory, such “shrinkwrap” or “clickwrap” restrictions could enable publishers of copyrighted work simply to opt out of the copyright system en masse.<sup>38</sup> If this occurs, then the courts, and possibly Congress, will need to consider whether copyright policy permits this result.

## A Constitutional Basis for Fair Use

The DMCA suggests that Congress did not believe that the fair use doctrine should disappear entirely. Even those courts that have adopted a “market failure” theory of fair use to resolve particular cases have stopped short of suggesting that the doctrine has no other purpose.<sup>39</sup> Thus far, however, neither Congress nor the courts have articulated a compelling alternative vision of the fair use doctrine’s role within the fabric of copyright law. Such a vision must begin with the relationship between fair use and creative progress.

As a matter of policy, the fair use doctrine and related limits on the scope of copyright protection play a valuable role in promoting the progress of knowledge and the creative arts. There is no particular reason to think that giving copyright owners greater control over all possible uses of their works would result in more or better progress. Creative potential does not necessarily correlate with the ability to pay market value for use, and in any case, copyright owners may perceive some potentially valuable uses—for example, creative parodies or scholarly criticism or competing software products created through reverse engineering—as detrimental to their interests.<sup>40</sup> In contrast, society as a whole may

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Member State might authorise.

<sup>37</sup>See Bell, n. 34 above; Merges, n. 34 above; Robert P. Merges, “Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations” (1996) 84 Cal. L. Rev. 1293; Maureen A. O’Rourke, “Copyright Preemption After the ProCD Case: A Market-Based Approach” (1997) 12 Berkeley Tech. L.J. 53.

<sup>38</sup>Many courts in the United States have held that “shrinkwrap” licence terms not disclosed to the purchaser beforehand are not enforceable and do not become part of the contract. See Mark A. Lemley, “Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing” (1999) 87 Cal. L. Rev. (collecting cases). Under proposed Article 2B of the Uniform Commercial Code, however, this would change for some types of works. Shrinkwrap terms would become part of the contract as long as the user has the opportunity to review them, and is required to manifest assent, before first use of the product. U.C.C. Art. 2B: Licenses, § 2B-208 (Proposed Draft November 1998).

<sup>39</sup>See *Princeton Univ. Press, Inc. v. Michigan Document Serv., Inc.* 99 F.3d 1381 (6th Cir. 1996) (*en banc*); *American GeoPhysical Union v. Texaco, Inc.* 60 F.3d 913 (2d Cir. 1994).

<sup>40</sup>See Julie E. Cohen, “Lochner in Cyberspace: The New Economic Orthodoxy of ‘Rights Management’” (1998) 97 Mich. L. Rev. 301, 335–344.

place a higher value on these works and the shared benefits they produce.<sup>41</sup> The fair use doctrine is not costless, of course. At the margin, it is conceivable that the possibility of unauthorised uses may deter some potential authors. More important, to the extent that copyright owners charge higher prices to offset the perceived risks flowing from fair use, the doctrine may be viewed as distributing the “costs” of uncompensated uses among paying consumers. Society may decide, however, that the result—in terms of the gains to both creative progress and the quality of public discourse—is worth the price.<sup>42</sup> If society values these limits on copyright protection, moreover, it would be entirely logical to forbid or limit the ability to contract around them—particularly where the terms are non-negotiated and bind large numbers of consumers.

Ultimately, however, limits on proprietary rights in copyrighted works and other informational works stem from the U.S. Constitution, which authorises Congress to grant exclusive rights only to “Authors”, and only for limited times, in order to promote “Progress”.<sup>43</sup> The Supreme Court has held that the prohibition on copyright protection for facts and ideas is constitutionally required, both because facts and ideas do not demonstrate the required originality of expression and because leaving facts and ideas in the public domain, where they may serve as building blocks for future authors, promotes creative progress.<sup>44</sup> Other constitutional limits on the scope of copyright protection are imposed by the First Amendment to the Constitution, which prohibits the government from making laws that abridge the freedom of speech.<sup>45</sup> In particular, the Supreme Court has indicated that the fair use doctrine and the prohibition on copyright protection for facts and ideas are necessary adjuncts of a statute that creates proprietary rights in expression.<sup>46</sup> It follows that the law should not lightly allow copyright owners to opt out of the copyright framework of limited entitlements and into more robust entitlements of their own design.<sup>47</sup>

The DMCA suggests that Congress already has realised that limits on the scope of copyright are both good policy and constitutionally mandated. Indeed, the DMCA contains a provision specifying that the rights it grants shall not “diminish any rights of free speech or the press for activities using

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<sup>41</sup>See *ibid.*, at 382–390.

<sup>42</sup>See *ibid.*, at 382–398.

<sup>43</sup>U.S. Const. Art. I., § 8, cl. 8.

<sup>44</sup>*Feist Publications, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 349–350 (1991); see also *Baker v. Selden* 101 U.S. 99, 103–104 (1879) (holding methods of operation protectable, if at all, only under the patent system, and indicating that the intellectual property clause of the Constitution informs this result); *The Trade-Mark Cases* 100 U.S. 82, 93–94 (1879) (holding that the intellectual property clause does not authorise grant of exclusive rights in trademarks).

<sup>45</sup>U.S. Const. amend. 1.

<sup>46</sup>*Harper & Row, Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 555–560 (1985).

<sup>47</sup>See Julie E. Cohen, “Copyright and the Jurisprudence of Self-Help” (1998) 13 *Berkeley Tech. L.J.* 1089, 1128–37.

consumer electronics, telecommunications, or computing products”.<sup>48</sup> Congress has been reluctant, however, to address the potential conflict between copyright and contract.<sup>49</sup> The U.S. legal system ascribes enormous importance to “freedom of contract”; as a result, proposals to limit the scope of contract are controversial and tend to be perceived as politically unwise. Until this conflict is resolved, the fair use doctrine exists only in principle.

It is likely that U.S. courts will set some limits on rights management practices that threaten fundamental copyright policy. Within the U.S. legal system, the courts traditionally have been the guardians of both fair use and First Amendment principles. A court might invoke these principles to support a limited constitutionally-mandated exception to the DMCA’s circumvention ban, and to the technology ban as well. This would, in effect, give users of digital works both the right and the wherewithal to tamper with rights management systems in certain circumstances.<sup>50</sup> The better solution, however, would be limits on the sorts of technological protection that may be used by copyright owners, and limits on the contents of permissible standard-form contract restrictions. For that, legislation is required.

## Conclusion

In the DMCA, Congress attempted to send a message that it values the fair use doctrine and believes that the doctrine has an important role to play within the fabric of copyright law, even in the digital realm. Yet without more, the oversight process designed by Congress is unlikely to do an effective job of preserving traditional fair use concerns. Preserving fair use in the digital context requires, first, a reconceptualisation of the doctrine’s purposes and a renewed appreciation of its constitutional roots. More concretely, it requires access to the technologies necessary to effectuate fair use and limits on mass-market contracting practices designed to vitiate legislatively determined limits on the scope of copyright protection. At least in the first instance, these tasks are likely to fall to the courts.

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<sup>48</sup>DMCA, Title 1, s.3, at § 1201 (c) (4).

<sup>49</sup>Statutory language proposed by the Digital Future Coalition would have pre-empted non-negotiated, mass-market licence terms inconsistent with copyright. See Digital Era Copyright Enhancement Act, H.R. 3048, 105th Cong. (1997); Digital Copyright Clarification and Technology Education Act of 1997, s.1146, 105th Cong. (1997); Digital Future Coalition, *Collected Papers and Press Releases*, n. 4 above.

<sup>50</sup>See Cohen, note 46 above, at 1137–1142. As described above, the DMCA specifies that an exception established by the Librarian of Congress may not be used as a defence in an action to enforce any other provision of the DMCA. DMCA, Title I s.3, at § 1201 (a) (1) (E). However, limits on the technology ban may be necessary to effectuate limits on the circumvention ban. Self-evidently, even if users of copyrighted works are permitted to circumvent rights management systems, they cannot exercise the right without the necessary technological tools. See Cohen, note 46 above, at 1140–1142; Julie E. Cohen, “A Right to Read Anonymously: A Closer Look at ‘Copyright Management’ in Cyberspace” (1996) 28 Conn. L. Rev. 981, 1029–1030.

## **Appendix: Digital Millennium Copyright Act, Title 1**

### TITLE 1—WIPO TREATIES IMPLEMENTATION

#### **Sec. 103. COPYRIGHT PROTECTION SYSTEMS AND COPYRIGHT MANAGEMENT INFORMATION**

(a) IN GENERAL—Title 17, United States Code, is amended by adding at the end the following new chapter:

#### **CHAPTER 12—COPYRIGHT PROTECTION AND MANAGEMENT SYSTEMS**

Sec.

1201. Circumvention of copyright protection systems.

1202. Integrity of copyright management information.

1203. Civil remedies.

1204. Criminal offenses and penalties.

1205. Savings clause.

#### **Sec. 1201. Circumvention of copyright protection systems**

(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL MEASURES—

(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Commissions and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding on the record for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—

(i) the availability for use of copyrighted works;

(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

(v) such other factors as the Librarian considers appropriate.

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of work for the ensuing 3-year period.

(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title;  
or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection—

(A) 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; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) ADDITIONAL VIOLATIONS—

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection—

(A) to “circumvent protection afforded by a technological measure” means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure “effectively protects a right of a copyright owner under this title” if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

(c) OTHER RIGHTS, ETC., NOT AFFECTED—

(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a) (2) or (b) (1).

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

(d) EXEMPTION FOR NONPROFIT LIBRARIES, ARCHIVES, AND EDUCATIONAL INSTITUTIONS—

(1) A nonprofit library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under this title shall not be in violation of subsection (a) (1) (A). A copy of a work to which access has been gained under this paragraph—

(A) may not be retained longer than necessary to make such good faith determination; and

(B) may not be used for any other purpose.

(2) The exemption made available under paragraph (1) shall only apply with respect to a work when an identical copy of that work is not reasonably available in another form.

(3) A nonprofit library, archives, or educational institution that willfully for the purpose of commercial advantage or financial gain violates paragraph (1)

(A) shall, for the first offense, be subject to the civil remedies under section 1203; and

(B) shall, for repeated or subsequent offenses, in addition to the civil remedies under section 1203, forfeit the exemption provided under paragraph (1).

(4) This subsection may not be used as a defense to a claim under subsection (a) (2) or (b), nor may this subsection permit a nonprofit library, archives, or educational institution to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, component, or part thereof, which circumvents a technological measure.

(5) In order for a library or archives to qualify for the exemption under this subsection, the collections of that library, or archives shall be—

(A) open to the public; or

(B) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.

(e) **LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT**

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

(f) **REVERSE ENGINEERING**—

(1) Notwithstanding the provisions of subsection (a) (1) (A), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.

(2) Notwithstanding the provisions of subsections (a) (2) (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.

(3) The information acquired through the acts permitted under paragraph (1), and the means permitted under paragraph (2), may be made available to others if the person referred to in paragraph (1) or (2), as the case may be, provides such information or means solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section.

(4) For purposes of this subsection, the term “interoperability” means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged.

(g) ENCRYPTION RESEARCH—

(1) DEFINITIONS—For purposes of this subsection—

(A) the term “encryption research” means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption or to assist in the development of encryption products; and

(B) the term “encryption technology” means the scrambling and descrambling of information using mathematical formulas or algorithms.

(2) PERMISSIBLE ACTS OF ENCRYPTION RESEARCH—Notwithstanding the provisions of subsection (a) (1) (A), it is not a violation of that subsection for a person to circumvent a technological measure as applied to a copy, phonorecord, performance, or display of a published work in the course of an act of good faith encrypted research if—

(A) the person lawfully obtained the encrypted copy, phonorecord, performance, or display of the published work;

(B) such act is necessary to conduct such encryption research;

(C) the person made a good faith effort to obtain authorization before the circumvention; and

(D) such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

(3) FACTORS IN DETERMINING EXEMPTION—In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include—

(A) whether the information derived from the encryption research was disseminated, and if so, whether it was disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology, versus whether it was disseminated in a manner that facilitates infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security;

(B) whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology; and

(C) whether the person provides the copyright owner of the work to which the technological measure is applied with notice of the findings and documentation of the research, and the time when such notice is provided.

(4) USE OF TECHNOLOGICAL MEANS FOR RESEARCH

ACTIVITIES—Notwithstanding the provisions of subsection (a) (2), it is not a violation of that subsection for a person to—

(A) develop and employ technological means to circumvent a technological measure for the sole purpose of that person performing the acts of good faith encryption research described in paragraph (2); and

(B) provide the technological means to another person with whom he or she is working collaboratively for the purpose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).

(5) **REPORT TO CONGRESS**—Not later than 1 year after the date of the enactment of this chapter, the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly report to the Congress on the effect this subsection has had on—

- (A) encryption research and the development of encryption technology;
- (B) the adequacy and effectiveness of technological measures designed to protect copyrighted works; and
- (C) protection of copyright owners against the unauthorized access to their encrypted copyright works.

The report shall include legislative recommendations, if any.

(h) **EXCEPTIONS REGARDING MINORS**—In applying subsection (a) to a component or part, the court may consider the necessity for its intended and actual incorporation in a technology, product, service, or device, which—

- (1) does not itself violate the provisions of this title; and
- (2) has the sole purpose to prevent the access of minors to material on the Internet.

(i) **PROTECTION OF PERSONALLY IDENTIFYING INFORMATION**—

(1) **CIRCUMVENTION PERMITTED**—Notwithstanding the provisions of subsection (a) (1) (A), it is not a violation of that subsection for a person to circumvent a technological measure that effectively controls access to a work protected under this title, if—

- (A) the technological measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person who seeks to gain access to the work protected;
- (B) in the normal course of its operation, the technological measure, or the work it protects, collects or disseminates personally identifying information about the person who seeks to gain access to the work protected, without providing conspicuous notice of such collection or dissemination to such person, and without providing such person with the capability to prevent or restrict such collection or dissemination;
- (C) the act of circumvention has the sole effect of identifying and disabling the capability described in subparagraph (A), and has no other effect on the ability of any person to gain access to any work; and
- (D) the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information about a natural person who seeks to gain access to the work protected, and is not in violation of any other law.

(2) **INAPPLICABILITY TO CERTAIN TECHNOLOGICAL MEASURES**—This subsection does not apply to a technological measure, or a work it protects, that does not collect or disseminate personally identifying information and that is disclosed to a user as not having or using such capability.

(j) **SECURITY TESTING**—

(1) **DEFINITION**—For purposes of this subsection, the term “security testing” means

accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer, computer system, or computer network.

(2) PERMISSIBLE ACTS OF SECURITY TESTING—Notwithstanding the provisions of subsection (a) (1) (A) it is not a violation of that subsection for a person to engage in an act of security testing, if such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

(3) FACTORS IN DETERMINING EXEMPTION—In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include

- (A) whether the information derived from the security testing was used solely to promote the security of the owner or operator of such computer, computer system or computer network, or shared directly with the developer of such computer, computer system, or computer network; and
- (B) whether the information derived from the security testing was used or maintained in a manner that does not facilitate infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security.

(4) USE OF TECHNOLOGICAL MEANS FOR SECURITY TESTING—Notwithstanding the provisions of subsection (a) (2), it is not a violation of that subsection for a person to develop, produce, distribute or employ technological means for the sole purpose of performing the acts of security testing described in subsection (2), provided such technological means does not otherwise violate section (a) (2).

(k) CERTAIN ANALOG DEVICES AND CERTAIN TECHNOLOGICAL MEASURES—

(1) CERTAIN ANALOG DEVICES—

(A) Effective 18 months after the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise, traffic in any—

- (i) VHS format analog video cassette recorder unless such recorder conforms to the automatic gain control copy control technology;
- (ii) 8mm format analog video cassette camcorder unless such camcorder conforms to the automatic gain control technology;
- (iii) Beta format analog video cassette recorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 1,000 Beta format analog video cassette recorders sold in the United States in any one calendar year after the date of the enactment of this chapter;
- (iv) 8mm format analog video cassette recorder that is not an analog video cassette camcorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 20,000 such recorders sold in the United States in any one calendar year after the date of the enactment of this chapter; or
- (v) analog video cassette recorder that records using an NTSC format video input and that is not otherwise covered under clauses (i) through (iv), unless

such device conforms to the automatic gain control copy control technology.

(B) Effective on the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in—

(i) any VHS format analog video cassette recorder or any 8mm format analog video cassette recorder if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the automatic gain control copy control technology no longer conforms to such technology; or

(ii) any VHS format analog video cassette recorder, or any 8mm format analog video cassette recorder that is not an 8mm analog video cassette camcorder, if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the four-line colorstripe copy control technology no longer conforms to such technology.

Manufacturers that have not previously manufactured or sold a VHS format analog video cassette recorder, or an 8mm format analog recorder, shall be required to conform to the four-line colorstripe copy control technology in the initial model of any such recorder manufactured after the date of the enactment of this chapter, and thereafter to continue conforming to the four-line colorstripe copy control technology. For purposes of this subparagraph, an analog video cassette recorder “conforms to” the four-line colorstripe copy control technology if it records a signal that, when played back by the playback function of that recorder in the normal viewing mode, exhibits, on a reference display device, a display containing distracting visible lines through portions of the viewable picture.

(2) CERTAIN ENCODING RESTRICTIONS—No person shall apply the automatic gain control copy control technology or colorstripe copy control technology to prevent or limit consumer copying except such copying—

(A) of a single transmission, or specified group of transmissions, of live events or of audiovisual works for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions;

(B) from a copy of a transmission of a live event or an audiovisual work if such transmission is provided by a channel or service where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service;

(C) from a physical medium containing one or more prerecorded audiovisual works; or

(D) from a copy of a transmission described in subparagraph (A) or from a copy made from a physical medium described in subparagraph (C).

In the event that a transmission meets both the conditions set forth in subparagraph (A) and those set forth in subparagraph (B), the transmission shall be treated as a transmission described in subparagraph (A).

(3) INAPPLICABILITY—This subsection shall not—

(A) require any analog video cassette camcorder to conform to the automatic gain control copy control technology with respect to any video signal received through a camera lens;

(B) apply to the manufacture, importation, offer for sale, provision of, or other trafficking in, any professional analog video cassette recorder; or

(C) apply to the offer for sale or provision of, or other trafficking in, any previously owned analog video cassette recorder, if such recorder was legally manufactured and sold when new and not subsequently modified in violation of paragraph (1) (B).

(4) DEFINITIONS—For purposes of this subsection:

(A) an “analog video cassette recorder” means a device that records, or a device that includes a function that records, electromagnetic tape in an analog format the electronic impulses produced by the video and audio portions of a television program, motion picture, or other form of audiovisual work.

(B) An “analog video cassette camcorder” means an analog video cassette recorder that contains a recording function that operates through a camera lens and through a video input that may be connected with a television or other video playback device.

(C) An analog video cassette recorder “conforms” to the automatic gain control copy control technology if it—

(i) detects one or more of the elements of such technology and does not record the motion picture or transmission protected by such technology; or

(ii) records a signal that, when played back, exhibits a meaningfully distorted or degraded display.

(D) The term “professional analog video cassette recorder” means an analog video cassette recorder that is designed, manufactured, marketed, and intended for use by a person who regularly employs such a device for a lawful business or industrial use, including making, performing, displaying, distributing, or transmitting copies of motion pictures on a commercial scale.

(E) The terms “VHS format”, “8mm format”, “Beta format”, “automatic gain control copy control technology”, “colorstripe copy control technology”, “four-line version of the colorstripe copy control technology”, and “NTSC” have the meanings that are commonly understood in the consumer electronics and motion picture industries as of the date of the enactment of this chapter.

(5) VIOLATIONS—Any violation of paragraph (1) of this subsection shall be treated as a violation of subsection (b) (1) of this section. Any violation of paragraph (2) of this subsection shall be deemed an “act of circumvention” for the purposes of section 1203 (c) (3) (A) of this chapter.

## **Sec. 1202. Integrity of copyright management information**

(a) FALSE COPYRIGHT MANAGEMENT INFORMATION—No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement—

(1) provide copyright management information that is false, or

(2) distribute or import for distribution copyright management information that is false.

REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION—No person shall, without the authority of the copyright owner or the law—

- (1) intentionally remove or alter any copyright management information,
- (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or
- (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

(c) **DEFINITION**—As used in this section, the term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of a work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.
- (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

(d) **LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT**

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

(e) **LIMITATIONS ON LIABILITY**—

(1) ANALOG TRANSMISSIONS—In the case of an analog transmission, a person who is making transmissions in its capacity as a broadcast station, or as a cable system, or someone who provides programming to such station or system, shall not be liable for a violation of subsection (b) if—

(A) avoiding the activity that constitutes such violation is not technically feasible or would create an undue financial hardship on such person; and

(B) such person did not intend, by engaging in such activity, to induce, enable, facilitate, or conceal infringement of a right under this title.

(2) DIGITAL TRANSMISSIONS—

(A) If a digital transmission standard for the placement of copyright management information for a category of works is set in a voluntary, consensus standard-setting process involving a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to the particular copyright management information addressed by such standard if—

(i) the placement of such information by someone other than such person is not in accordance with such standard; and

(ii) the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title.

(B) Until a digital transmission standard has been set pursuant to subparagraph (A) with respect to the placement of copyright management information for a category or works, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to such copyright management information, if the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title, and if—

(i) the transmission of such information by such person would result in a perceptible visual or aural degradation of the digital signal; or

(ii) the transmission of such information by such person would conflict with—

(I) an applicable government regulation relating to transmission of information in a digital signal;

(II) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted by a voluntary consensus standards body prior to the effective date of this chapter; or

(III) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted in a voluntary, consensus standards-setting process open to participation by a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems.

(3) DEFINITIONS—As used in this subsection—

(A) the term “broadcast station” has the meaning given that term in section 3 of the

Communications Act of 1934 (47 U.S.C. 153); and  
(B) the term “cable system” has the meaning given that term in section 602 of the Communications Act of 1934 (47 U.S.C. 522).

### **Sec. 1203. Civil remedies**

(a) **CIVIL ACTIONS**—Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

(b) **POWERS OF THE COURT**—In an action brought under subsection (a), the court—

- (1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;
- (2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;
- (3) may award damages under subsection (c);
- (4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;
- (5) in its discretion may award reasonable attorney’s fees to the prevailing party; and
- (6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

(c) **AWARD OF DAMAGES**—

(1) **IN GENERAL**—Except as otherwise provided in this title, a person committing a violation of section 1201 or 1202 is liable for either—

- (A) the actual damages and any additional profits of the violator, as provided in paragraph (2), or
- (B) statutory damages, as provided in paragraph (3).

(2) **ACTUAL DAMAGES**—The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

(3) **STATUTORY DAMAGES**—

- (A) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1201 in the sum of not less than \$200 or more than \$2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.
- (B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than

\$2,500 or more than \$25,000.

(4) REPEATED VIOLATIONS—In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 within 3 years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

(5) INNOCENT VIOLATIONS

(A) IN GENERAL—The court in its discretion may reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

(B) NONPROFIT LIBRARY, ARCHIVES, OR EDUCATIONAL INSTITUTIONS—In the case of a nonprofit library, archives, or educational institution, the court shall remit damages in any case in which the library, archives, or educational institution sustains the burden of proving, and the court finds, that the library, archives, or educational institution was not aware and had no reason to believe that its acts constituted a violation.

#### **Sec. 1204. Criminal offenses and penalties**

(a) IN GENERAL—Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain—

(1) shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and

(2) shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

(b) LIMITATION FOR NONPROFIT LIBRARY, ARCHIVES, OR EDUCATIONAL INSTITUTION—Subsection (a) shall not apply to a nonprofit library, archives, or educational institution.

(c) STATUTE OF LIMITATIONS—No criminal proceeding shall be brought under this section unless such proceeding is commenced within 5 years after the cause of action arose.

#### **Sec. 1205. Savings clause**

Nothing in this chapter abrogates, diminishes, or weakens the provisions of, nor provides any defense or element of mitigation in a criminal prosecution or civil action under, any Federal or State law that prevents the violation of the privacy of an individual in connection with the individual's use of the Internet.

### **SEC. 104 EVALUATION OF IMPACT OF COPYRIGHT LAW AND AMENDMENTS ON**

## **ELECTRONIC COMMERCE AND TECHNOLOGICAL DEVELOPMENT.**

(a) **EVALUATION BY THE REGISTER OF COPYRIGHTS AND THE ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION**—The Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly evaluate—

(1) the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code; and

(2) the relationship between existing and emergent technology and the operation of sections 109 and 117 of title 17, United States Code.

(b) **REPORT TO CONGRESS**—The Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall, not later than 24 months after the date of the enactment of this Act, submit to the Congress a joint report on the evaluation conducted under subsection (a), including any legislative recommendations the Register and the Assistant Secretary may have.