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UNFAIR USE: THE DIGITAL MILLENNIUM COPYRIGHT ACT
BY TYLER HILTON

I. INTRODUCTION

In the late 1990s, entertainment industry groups like the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA) faced a major threat to their business model: digital media. Although the ability to make copies of analog media, such as by dubbing a cassette tape or recording a television broadcast, had been around for many years, digital media offered the ability to make perfect copies. While the quality of analog copies declines with each generation, digital media allow for infinite copies with no reduction in quality. The advent of new ways to copy and use digital media, paired with the instant dispersion capabilities of the Internet, brought justified fears that piracy of copyrighted content would increase.

As part of its crusade to protect digital content, the entertainment industry resorted to Digital Rights Management (DRM), the term for a technological system that restricts access to digital media. For example, a digital sound file downloaded from Apple’s popular iTunes store has restrictions that prevent a consumer from playing it on an MP3 player produced by another manufacturer, and a DVD movie has digital protection that prevent users from copying the movie onto a computer’s hard drive. The entertainment industry sought, and obtained, legal protection against the circumvention
of DRM systems in the form of the Digital Millennium Copyright Act, or DMCA, which President Clinton signed into law in 1998. Section 1201 of the DMCA made it illegal to circumvent or distribute tools for the purpose of circumventing DRM systems.

While the goal of the DMCA was to stop piracy on the Internet and elsewhere, it has not proven effective in doing so. Section 1201 has introduced many unintended consequences that have injured legitimate consumers and competitors, who now find legally backed restrictions to otherwise lawful uses of digital content. Congressman Rick Boucher has introduced an amendment to the DMCA, called the Digital Media Consumers' Rights Act (DMCRA), that remedies many of the DMCA's unintended consequences. Congress should pass this amendment because the DMCA currently puts copyright legislation into the hands of copyright holders, criminalizes legitimate fair use of digital media by the public, and stifles market competition, all the while failing in its goal to prevent Internet piracy and protect creators of original works.

II. PLACING LEGISLATION IN THE HANDS OF COPYRIGHT HOLDERS

When Congress passed the DMCA, it effectively transferred many areas of copyright legislation into the hands of copyright holders. Though giving virtual lawmaking power to groups who are the primary beneficiaries of the rules they create is very dangerous, the DMCA does just that. In a sense, DRM systems are comparable to fences. While property owners may use fences to protect their property, it would be unwise to pass a law banning the crossing of fences, because sometimes there is a legitimate reason for doing so, such as to retrieve a piece of personal property. In addition, a law that prohibits the

crossing of fences is unnecessary to protect private property, because private property is already protected under trespassing and other laws. Similarly, DRM systems act as fences against efforts to gain access to copyrighted material. In many cases, the end result of actions to circumvent DRM systems falls under the doctrine of “fair use,” which allows exemptions to copyright law “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.” Fair use is an intentionally vague and evolving area of copyright law that leaves many questions up to the courts. When ruling on fair use issues, courts consider the purpose of the use of the work (such as whether it is commercial or noncommercial), the nature of the work, the amount of the work being used, and the effect of that use on the work’s market value. Many of these questions remain undecided, but Section 1201 prevents the courts from ruling on the issue at all by making the initial circumvention illegal. In other words, since the DMCA makes it illegal to cross the fence in the first place, it is impossible to determine the legality of the purpose behind the crossing.

Because the DMCA criminalizes the initial circumvention of DRM systems, the law gives copyright holders the chance to decide what constitutes fair use of their content, and copyright holders have routinely ruled in their own favor by restricting uses that would otherwise be legal. The opinion of copyright holders and the opinions of the courts, however, do not always coincide. For example, in the 1984 Supreme Court case Sony Corp. v. Universal City Studios, Inc., copyright holders fought to ban the newly invented VCR because

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of its capability to record copyrighted television broadcasts for later viewing. Nevertheless, the Court found these acts of “time-shifting” to be a fair use by consumers. More recently, the music industry initially argued in Metro-Goldwyn-Mayer Studios Inc. v. Grokster\textsuperscript{12} that copying a CD’s tracks onto a computer and then transferring those tracks to Apple’s iPod in MP3 format was “perfectly legal.”\textsuperscript{13} Later in a brief to the U.S. Copyright Office, industry groups contradicted themselves by proclaiming the action not to be a fair use.\textsuperscript{14} Despite copyright holders’ inconsistency and self-interest, Section 1201 allows them to set their own rules by writing DRM restrictions on whatever they do not deem to be a fair use of their content, and then have full legal backing against efforts to bypass those restrictions. Because there are no limits as to which types of DRM systems are permitted (only that the system “effectively controls access to a work”\textsuperscript{15}), copyright holders have the potential to effectively rewrite copyright law as it pertains to their content because the conditions they set are backed by the DMCA.

The DMCA gives copyright holders this power despite the fact that DRM systems can potentially harm consumers, as the recent Sony BMG Music Entertainment “rootkit” settlement demonstrates. In the case, consumers filed complaints against Sony BMG because of certain DRM software Sony BMG had implanted in its CDs.\textsuperscript{16} The complaints alleged that the software limited the number of copies of the CDs that could be made and also forced consumers to use Sony or Microsoft software to play the CDs on a personal computer.

\textsuperscript{12} 125 S. Ct. 2764 (2005).


\textsuperscript{16} In re Sony BMG CD Technologies Litigation, No. 05-CV-09575-NRB (S.D.N.Y. 2005).
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DRM software also prohibited users from transferring songs to Apple’s iPod portable music player. Each of these actions are considered fair uses. Even worse, however, were the risks that this software posed to consumers by the covert way in which it operated. Upon inserting the CD into the computer, an End User License Agreement confronted the user. The complaints alleged that this agreement did not disclose the limits placed on the audio files. The software then proceeded to install a “rootkit”, a software tool used to hide programs, inside the system. This rootkit was also capable of hiding other programs, meaning that it could also cloak viruses and other malicious software. Moreover, the rootkit essentially disabled security measures like firewalls and anti-spyware programs, exposing the computer to attack.

Thomas Hesse, president of Sony BMG’s Global Digital Business, gave one example of his industry’s attitude towards consumers when he said, “Most people, I think, don’t even know what a rootkit is, so why should they care about it?” It was impossible to uninstall the rootkit until Sony, in response to complaints, later created software for that purpose. Eventually, the case was settled and Sony BMG compensated consumers for the crippled CDs. The complaints against Sony BMG illustrate why it is unwise to allow companies to have legally backed free reign to impose DRM systems on consumers.

17 In re Sony BMG CD Technologies Litigation, No. 05-CV-09575-NRB (S.D.N.Y. 2005), at 5.
18 Id. at 6.
19 Id. at 7.
20 Id. at 7-8.
22 In re Sony BMG CD Technologies Litigation at 8, No. 05-CV-09575 (NRB) (S.D.N.Y. 2005).
III. Criminalization of Fair Use

Section 1201 of the DMCA also criminalizes legitimate fair use rights of consumers. Violators of Section 1201 can face up to $500,000 in fines and five years in prison for the first offense.24 The Sony case showed that despite the protests of copyright holders, noncommercial "time-shifting" of copyrighted television programs constitutes a fair use. There are other examples of efforts by copyright holders to restrict fair use rights. Today, the personal computer is probably the most frequently used tool for making digital copies. The Audio Home Recording Act (AHRA) of 1992 prohibits copyright holders from suing consumers who use digital audio recording devices to make digital copies for noncommercial use,25 in exchange for royalty payments on recording materials26 and the requirement that companies implement copying controls on recording devices.27 The personal computer is not considered to be a "digital audio recording device" and thus does not receive immunity under the act, but there are indications its use also falls under fair use. In RIAA v. Diamond Multimedia Systems, Inc.,28 the RIAA sued Diamond, an electronics company, in order to halt Diamond's production and sale of the Rio, one of the first of today's popular portable MP3 players. The RIAA alleged that the Rio was not subject to the AHRA and did not employ the copying controls.29 The court determined that while the Rio was not considered a "digital audio recording device" under the Act, the procedure of "space-shifting", in which an audio file is transferred from a CD to a computer as a very large audio file and then compressed into a much smaller MP3 file, was a "paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."30 In doing so, the

28 180 F.3d 1072 (9th Cir. 1999).
29 Id. at 1075.
30 Id. at 1079.
courts quoted a Senate report from the time of the AHRA showing that the purpose of the act was to “ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.” The DMCA currently restricts many of the rights Congress established in passing the AHRA. Consumers have more rights than copyright holders will concede them, and the DMCA unfairly criminalizes the exercise of those rights.

One finds examples of how copyright holders have criminalized fair use in the current market for music downloads. Today, every legal music download service in the United States offering a large amount of content from major record labels embeds DRM systems into their audio files. This prevents a file purchased at Apple’s iTunes store from being played on an MP3 player manufactured by any other company, and also prohibits a file purchased from Napster or the Walmart Music Store from playing on Apple’s iPod. Although it would seem that based on Diamond and the AHRA converting a legitimately purchased music file from one format to another would constitute a fair use, Section 1201 prohibits circumventing the DRM systems embedded in the files in order to transfer formats. This means that if a person who purchases their digital music collection from Apple ever wants to switch from the iPod to a different brand of MP3 player or vice versa, he or she has to repurchase their entire collection in order to avoid prosecution.

One sees another example of using Section 1201 to criminalize potential fair uses in 321 Studios v. Metro Goldwyn Mayer Studios, Inc. 321 Studios created the programs DVD X-COPY and DVD Copy Plus, both of which allow users to decrypt the Contents Scrambler System (CSS), a DRM system embedded in DVD movie releases to prevent copying of the content. Decrypting the CSS permitted users to create an archival backup copy of DVDs they had purchased. MGM sued 321 Studios, alleging that 321’s software violated the terms of Section 1201 due to its capability to circumvent the CSS system. The defendants argued that making an archival backup copy of a DVD

33 Id. at 1091.
is an expressly authorized fair use under copyright laws, and the court agreed. However, the court also stated that "... the downstream uses of the software by the customers of 321, whether legal or illegal, are not relevant to determining whether 321 itself is violating the statute." Thus, 321 Studios lost the case because their software "picked the lock" on the DRM to make that copying possible. In other words, because 321's software allowed consumers to cross a fence, the court could not consider consumers' reason for doing so when determining the software's legality. The court also argued that fair use rights are not limited under the DMCA because the act only prohibits the trafficking of circumvention devices, not the act of circumvention itself. This is largely irrelevant to consumers, however, since most consumers lack the technical knowledge required to circumvent DRM systems and must therefore rely on tools produced by others. Section 1201 can thus be used to criminalize the average consumer's fair use of copyrighted materials.

IV. LIMITING MARKET COMPETITION

Section 1201 also stifles legitimate competition in the marketplace. Because it is illegal to circumvent access controls on digital media, competitors are potentially prohibited from offering alternative digital media players that rely on circumvention to function. One example is RealNetworks' attempt to use its Harmony software to permit files purchased from its online store to play on Apple's iPod. Apple has threatened legal action under the DMCA against RealNetworks for these efforts. RealNetworks' stated in its Securities and Exchange Commission report: "Although we believe our Harmony technology is legal, there is no assurance that

34 Supra note 32, at 1097.
35 Id.
37 Matt Hines, 'Stunned' Apple Rails against Real's iPod
a court would agree with our position.\textsuperscript{38} Rather than improving on their products to compete in the market, the DMCA encourages companies to use legal threats to stifle their competition. These threats entail the potential for high litigation costs and severe penalties that discourage innovation on the part of other companies.

Another example of how the DMCA can stifle competition is the case of \textit{Lexmark v. Static Control Components}.\textsuperscript{39} Lexmark sold "prebate" printer cartridges protected by special software as part of an agreement in which the customer agreed to return used cartridges to Lexmark to be refilled. Static Control Components circumvented the software's authentication process in order to allow competitors to refill the cartridges, causing Lexmark to sue Static Control Components under Section 1201.\textsuperscript{40} Static Control Components won the case, but the legal battle forced the company to keep its product off the market for 19 months.\textsuperscript{41}

The real loser in these battles is the consumer, who loses the benefits of market competition when making choices to purchase copyrighted materials. These benefits include lower costs and newer ways to use digital content. While copyright laws like the DMCA should prevent piracy, they should not do so at the expense of legitimate market competition.

\textbf{V. Opposing Views}

Prevention of piracy is one of the main arguments copyright holders use in favor of Section 1201.\textsuperscript{42} Copyright holders fear that without legal backing, their DRM systems can serve no useful purpose.
purpose in stopping pirates. As Jack Valenti, head of the MPAA said about amending the DMCA, “It legalizes hacking. It allows you to make a copy or many copies. And the 1000th copy of a DVD . . . is as pure and pristine as the original. You strip away all the protective clothing of that DVD and leave it naked and alone.”

Yet, this “protective clothing” does not stop piracy.44 With copy protection schemes, the question is not if they will be broken, but when.45 Indeed, peer-to-peer file sharing networks still teem with copyrighted content. DRM systems originally protected much of this content, but computer users cracked these systems shortly after the content’s release. Additionally, because of the Internet, once one copy has been unlocked, infinite copies can be made and distributed globally. The circumvention of the DRM may have taken place in a country without DMCA-like laws, which when paired with the degree of anonymity the Internet offers makes prosecution of actual pirates under the DMCA extremely difficult. The Napster phenomenon, which initiated widespread file-sharing of music and other media through peer-to-peer networks on the Internet, occurred after Congress passed the DMCA. A&M Records sued Napster46 and won, but not because of the DMCA. In fact, Napster used a different section of the DMCA (not Section 1201), one that grants immunity to Internet service providers for copyright infringement by their clients under certain conditions,47 as a defense against allegations of contributory copyright infringement.48 That the DMCA

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gave Napster cover for enabling copyright infringement is highly ironic considering the DMCA's intended purpose to prevent piracy.

A second argument against amending Section 1201 is that Section 1201 protects artists who create original works. In this sense, Valenti called the DMCA "a viable and critical law that protects copyright holders from unauthorized abuse of their works in the digital arena." However, at least with music, many artists object to the record companies' use of DRM restrictions on their works, which often occurs against their will. In Canada, popular recording artists and groups such as Barenaked Ladies, Avril Lavinge, and Sum 41 have formed the Canadian Music Creators Coalition (CMCC), one of whose goals is to prevent Canada's government from passing legislation like the DMCA. In an open letter, the coalition expressed its alarm at record companies' usage of CMCC members' names to further the companies' own interests, and said this about technological restrictions on the coalition members' music:

Artists do not support using digital locks to increase the labels' control over the distribution, use and enjoyment of music or laws that prohibit circumvention of such technological measures. The government should not blindly implement decade-old treaties designed to give control to major labels and take choices away from artists and consumers. Laws should protect artists and consumers, not restrictive technologies. Consumers should be able


to transfer the music they buy to other formats under a right of fair use, without having to pay twice.\textsuperscript{51}

Often, it appears, the middlemen (the record companies in this case), not the producers or consumers, reap the most benefit from DRM restrictions because they can hold both sides hostage, especially when backed by legislation such as the DMCA. This hinders the distribution of artists’ material because content crippled by DRM systems is less attractive to consumers.

Although restrictive copyright laws like the DMCA may benefit creators of original works in the short term, the law’s overall effect is negative. Digital copyright restrictions have the potential to prevent works from ever reaching the public domain.\textsuperscript{52} Creative works are not born from nothing, but draw from the work of previous creators.\textsuperscript{53} A limited public domain ultimately limits the pool from which creators of works can draw and thus hinders their ability to build upon the works of others.

\textbf{VI. PROPOSED AMENDMENT TO SECTION 1201}

To address the DMCA’s problems, in 2005 Congressman Rick Boucher introduced the Digital Media Consumers’ Rights Act (DMCRA). The DMCRA, among other things, amends Section 1201 by adding the following: “[A]nd it is not a violation of this section to circumvent a technological measure in order to obtain access to the work for purposes of making noninfringing use of the work.”\textsuperscript{54} This amendment restores fair use rights to legitimate consumers and competitors while still allowing for penalties against those who


circumvent a technological measure in order to infringe a copyright. The amendment also includes other provisions favorable to the consumer, namely codifying the *Sony* Supreme Court decision that hardware or software products capable of noninfringing uses do not violate the copyright law, allowing exceptions to Section 1201 for purposes of scientific research, and requiring companies who sell copy-protected CDs to label those CDs as such. Putting the *Sony* decision into law would be particularly beneficial as it would allow companies to create products that circumvent DRM restrictions for legitimate consumers, who generally lack the technical knowledge to do so.

Supporters of the DMCRA include the American Association of Law Libraries, the American Library Association, the Association of American Universities, and various technology and consumer advocacy groups. These groups recognize the importance of granting digital media consumers the rights that have been guaranteed for many years by the fair use doctrine.

**VII. CONCLUSION**

The DMCRA restores to consumers the fair use rights that copyright law has granted them for many years. It is somewhat disheartening to purchase a legal copy of a work, only to find oneself unable to use it according to fair use rights, especially when so much unprotected content is readily available via the Internet and other sources. When consumers are able to use digital media according to

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57 H.R. 1201 at § 5(a).
58 H.R. 1201 at § 3.
59 Boucher, *supra* note 55.
fair use, they have an attractive alternative to illegal downloading and other infringing activities. This benefits both copyright holders, by encouraging consumers to purchase their content, and consumers, by permitting them to use their digital media with more freedom.

If Congress were to pass the DMCRA, companies would once again be allowed to observe and improve upon competitors’ products without the threat of legal action, in turn benefiting the marketplace through heightened innovation and competition. Indeed, such innovation and competition led to the VCR, the MP3 player, and many other digital technologies. Though copyright holders have often fought these new devices in the courts, these devices have proven to benefit both copyright holders and consumers by broadening the options for producing and consuming creative works. The filmmaking industry, for example, has benefited greatly from the sale and rental of videos, something it did not foresee at the advent of the VCR. The proper way copyright holders should cope with the capabilities of digital media is to find new business models which can capitalize on those capabilities, not hinder those capabilities through legislation.

The DMCRA would also take copyright legislation out of the hands of copyright holders and place it back in the courts and lawmaking bodies where it belongs. These measures would provide a better context for lawmakers to use as they draft new legislation to complement existing copyright laws in the digital age.

For these reasons, Congress should remedy the DMCA’s unintended consequences by passing the DMCRA. The DMCRA will enable fair use rights to continue to evolve and will create an opportunity to develop solutions that fairly manage the rights of all.