Digital Rights and Wrongs

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I. INTRODUCTION

The Digital Millennium Copyright Act (DMCA), enacted in 1998, made the circumvention of copy protection systems illegal: “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” The DMCA created the anti-circumvention provisions in Section 1201 of U.S. Code Title 17. This statute was created with two primary goals in mind: (1) to accelerate the adoption of digital media and digital distribution networks by the United States copyright industry and (2) to help the U.S. copyright industry fight digital piracy.

Today, digital formats dominate large segments of the copyright industry, in particular, film and music. Since the introduction of the DMCA, DVDs and online streaming videos have replaced analog formats such as VHS tapes; CDs and direct-download MP3s have replaced audio cassette tapes. The U.S. copyright industry has embraced digital media and digital networks, fulfilling the first goal for which U.S. Code Title 17 Section 1201 was created.  

During the same period, Section 1201 has proven useless in the fight against digital piracy. Worse yet, the copyright industry uses Section 1201 to stifle consumers’ fair use of the digital formats and...
distribution networks Section 1201 was created to promote, even though the statute expressly states that it has no impact on fair use.3

Having already achieved one of its two goals, and being fundamentally unable to achieve the other, U.S. Code Title 17, Section 1201 should be repealed. Repealing Section 1201 will not prevent the U.S. copyright industry from prosecuting pirates; rather, it will restore the balance that the creators of the DMCA intended between exclusive rights and fair use rights.

II. BACKGROUND

A. EXCLUSIVE RIGHTS

The U.S. Constitution states that Congress has the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."4 Section 106 of U.S. copyright law explicitly defines this "exclusive Right" by granting the copyright owner "exclusive rights to do and to authorize," among other things, the reproduction, distribution, and display or performance of the copyrighted work.5

Copyright owners exercise their exclusive rights to reproduce and distribute their works through contracts with agents such as publishers, recording studios, and websites. Copyright notices remind consumers what they can and cannot legally do with content owned by others. Whenever consumers open a package containing copyrighted material, or click "I Agree" to access content such as software, they agree not to violate the rights of copyright owners.6

4 U.S. CONST. art. I, § 8, cl. 8.
6 See ProCD, Inc. v. Zeidenberg, 86 F.3d 1449, 1449 (7th Cir. 1996).
B. Fair Use

Although U.S. Code Title 17 Section 106 grants copyright owners certain exclusive rights, the fair use doctrine, embodied in U.S. Code Title 17 Section 107, allows for a few notable exceptions. As defined in Black's Law Dictionary, fair use is

[a] reasonable and limited use of a copyrighted work without the author's permission. Fair use is a defense to an infringement claim, depending on the following statutory factors: (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.7

Two court cases, *Universal v. Sony* and *RIAA v. Diamond Multimedia*, defined two types of copying that fall under the terms of fair use. In *Universal v. Sony*, the practice of recording over-the-air television broadcasts for later viewing, also known as "time-shifting," was determined to be a fair use.8 Similarly, in *RIAA v. Diamond Multimedia*, the practice of converting digital audio from one format to another more portable format, or "space-shifting," was likewise deemed to be within the scope of fair use.9

The advent of time-shifting and space-shifting significantly changed the copyright industry. With the assurance that time-shifting did not constitute infringement, a new medium—home video—was born. Home video led to new product categories for electron-

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9 Recording Indus. Ass'n of America v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999).
ics makers, new revenue models for motion picture companies, and new opportunities for consumers to more easily obtain and enjoy more content. Likewise, the assurance that space-shifting was not infringement created a variety of new media known collectively as portable media. Portable media players such as the Apple iPod simply would not exist if time-shifting and space-shifting were not fair use practices.

C. Piracy and DRM

Piracy is "the unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law." Content distributors have long tried to deter piracy through written notices. The "FBI Warnings," familiar to home video viewers since the advent of the VHS tape, warn consumers of the severe criminal penalties potentially associated with copyright infringement. Whereas it may be difficult to prevent piracy of conventional analog media such as books or audiotapes, digital rights management (DRM) technologies can be used by content owners and distributors to control and limit how consumers access digital content.

When DRM is used, technical restrictions, which make some infringing actions impossible to perform, supplement or even replace written notices. As defined in the law, "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." Circumventing DRM, therefore, implies gaining access to copyrighted material without authority from its owner.

D. The DMCA

In 1996, the World Intellectual Property Organization (WIPO, a branch of the United Nations) drafted the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty

10 BLACK'S LAW DICTIONARY 1186 (8th ed. 2004).
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(WCT). These treaties assert that circumventing DRM should be illegal.12 Nations who adopt the treaties are obligated to incorporate the terms of both treaties into their own copyright laws, providing uniform protection for digital content throughout much of the world. In 1998, the U.S. Congress passed the Digital Millennium Copyright Act (DMCA), also known as the WIPO Copyright and Performances and Phonograms Treaties Implementation Act, which took effect in the year 2000. The DMCA implements the WIPO treaties in the United States, banning both the circumvention of technological copy protection measures and the manufacture of or traffic in tools that enable circumvention.13

III. ACCELERATING THE ADOPTION OF DIGITAL MEDIA AND DIGITAL NETWORKS

U.S. Code Title 17 Section 1201 was created to accelerate the adoption of digital media and digital networks by the U.S. copyright industry. In 1991, the High Performance Computing and Communication Act (HPCA) created a new duty for the President: to foster the growth of the computer network now known as the Internet.14 “In February 1993, President Clinton formed the Information Infrastructure Task Force (IITF) to articulate and implement the Administration’s vision for the National Information Infrastructure (NII).”15 The taskforce concluded that content—such as literature, audio, and video works—would be the key to promoting the development of a strong national information infrastructure.16

16 See id. at 8.
At that time, copyright owners, like the major film studios, were reluctant to adopt digital formats, due to the threat of piracy. Unless DRM is used, digital systems allow perfect copies to be produced quickly, easily, and inexpensively. Hence, the IITF report recommended the use of technological copy protection measures in order to persuade publishers, record companies, motion picture studios, television networks, and software companies to join the information superhighway. The IITF’s recommendations influenced the creation of the WPPT and the WCT, which directly resulted in the DMCA. In effect, every one of these laws had, at its inception, the motivation to promote digital formats and digital networks.

The abundance of digital content now available via the Internet and on formats such as DVD was made possible by the foresight of the IITF. In persuading content owners to adopt digital formats and networks, U.S. Code Title 17 Section 1201 has already achieved the first goal for which it was created. As for its other goal, however, Section 1201 has proven altogether ineffective.

IV. FIGHTING DIGITAL PIRACY—THE PROSECUTION PARADOX

Section 1201 was created with the intent to help fight digital piracy. Ironically, the publishers, record companies, film studios, television networks, and software companies who demanded the creation of Section 1201, benefit very little from it when prosecuting the vast majority of digital piracy cases. Thousands of copyright infringement lawsuits are brought against suspected illegal file sharers every year, but none of these suits cite Section 1201 as their basis. In 2003, the copyright industry initiated an ongoing series of

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18 "NII Report, supra note 14, at 177.

lawsuits against suspected digital pirates. The industry utilizes services offered by SafeNet, Inc. to obtain evidence of piracy in the form of computer screenshots and IP addresses. This evidence is used to identify network users, the files they share, and the network locations of their computers.\(^20\) Industry representatives file lawsuits against suspected file sharers for violating U.S. Code Title 17 Section 106, which bans unauthorized distribution of copyrighted works, not Section 1201, which bans unauthorized circumvention of DRM.\(^21\) Clearly, the copyright industry does not need Section 1201 in order to prosecute illegal file sharers.

V. STIFLING FAIR USE

If Section 1201 of the Copyright Code is \textit{not} used in connection with illegal file sharing lawsuits, then how \textit{is} it used? While not directly used to sue pirates, Section 1201 is often used to prevent the distribution of products and services which circumvent DRM systems. The results of these cases do not bode well for the future of time-shifting and space-shifting.

In 2005, a small company called Load ‘n Go Video began to offer commercial services whereby they copied video from legally-obtained DVDs onto the newly released Apple iPod, one of the first mass-market portable media players capable of video playback. For each video loaded onto a customer’s iPod, Load ‘n Go made certain the customer already owned a copy of the video on DVD. In spite of these precautions, the Motion Picture Association of America (MPAA) quickly noticed Load ‘n Go’s operation and filed a lawsuit in the Federal Court. Rather than face the legal onslaught, Load ‘n Go closed their doors as part of a private settlement. Judging by the company’s thriving business, Load ‘n Go offered an innovative service—something consumers clearly valued.\(^22\) The company’s de-


\(^21\) Kravets \textit{supra} note 20.

\(^22\) Interview with Vijay Raghavan, Co-founder of Load N’ Go, http://www.publicknowledge.org/node/1816.
mise is a case of the kind of abuse Section 1201 enables the copyright industry to perpetrate. Section 1201 was created to fight piracy—not to stifle fair use. But this type of abuse of the DMCA will likely continue unless the copyright industry’s aggression is checked.

An ongoing case, *Universal v. RealNetworks*, could bring this problem clearly into focus. While Load 'n Go opted to fold rather than fight, RealNetworks has instead chosen to challenge Hollywood’s implicit assertion that preventing fair use copying is an unavoidable casualty in the fight against digital piracy.

As a licensed member of the DVD Copy Control Association (DVD CCA), RealNetworks, Inc. (unlike Load 'n Go) is contractually allowed to use secret DVD decryption keys owned by the DVD CCA. This is because all DVD players must utilize secret keys to “unlock” the DRM system inherent in the DVD standard, and RealNetworks produces DVD playback software. In 2008, RealNetworks announced a new product called RealDVD23 that allows users to copy DVD content onto personal computers. RealDVD makes copies using the DVD decryption keys RealNetworks licenses from the DVD CCA. Seeking to preemptively appease Hollywood, RealNetworks created a new DRM scheme, different from the DVD CCA secret keys, which is added to files created by the RealDVD software. This DRM scheme effectively limits the copying of DVD video content to a limited number of authorized devices. In spite of this precaution, the DVD CCA filed suit against RealNetworks and was granted a temporary restraining order against RealNetworks prohibiting the distribution of RealDVD software. The DVD CCA's complaint, filed September 30, 2008, claims that RealDVD violates Section 1201.24

This case raises important questions about the viability of space-shifting when videos contain DRM. If RealDVD and products like it are kept off the market, the film industry only stands to alienate itself from its customers. Preventing the distribution of products like RealDVD undermines fair use in a way that is plainly inconsistent with the standards established in *Sony v. Universal* and *RIAA v. Diamond Multimedia*. Furthermore, Section 1201(c) guarantees “[n]othing in

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23 RealDVD is a trademark of RealNetworks, Inc.

24 Complaint, *supra* note 17, at 10.
this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use."25 Could there be a stronger mandate to stop using Section 1201 to thwart the creation of products that enable fair use copying?

VI. CONCLUSION

U.S. Code Title 17 Section 1201 has already fulfilled the first purpose for which it was created, namely, to accelerate the U.S. copyright industry’s adoption of digital formats and digital networks. The United States now enjoys a vibrant national information infrastructure, just as the creators of the DMCA intended. On the other hand, Section 1201 has irredeemably failed in its second purpose. The statute serves no useful purpose in the U.S. copyright industry’s fight against digital piracy. Rather than fighting piracy, the U.S. copyright industry actually uses Section 1201 to stifle fair use.

Convincing the U.S. copyright industry to adopt new digital formats was analogous to teaching a child to ride his bicycle. At first, a hand steadying the bicycle helps the child succeed, but as the child learns to ride, the hand that once helped him only slows him down. Similarly, Congress enacted the DMCA to help the U.S. copyright industry succeed in adopting digital formats and digital networks. Now that copyrighted content is widely available online and in digital formats, fair use must not be overshadowed by copyright owners’ exclusive rights. The U.S. copyright industry’s long-term viability depends upon innovations like the videocassette recorder and the portable media player. In addition to defining new fair use paradigms, these inventions led to new product categories and new business models that benefit consumers while enriching copyright owners. So long as the copyright industry insists on using Section 1201 to prevent the creation and distribution of products and services that enable fair use, they will fail to realize the full benefits afforded by digital technologies.

Having already achieved one of its two goals, and being fundamentally unable to achieve the other, U.S. Code Title 17, Section

1201 should be repealed. Because Section 1201 is not currently used to prosecute illegal file sharers, nor is it necessary to effectively do so, repealing the statute will have little effect on the U.S. copyright industry’s ability to prosecute digital pirates. Ultimately, repealing Section 1201 will restore the balance between exclusive rights and fair use rights that the creators of the DMCA intended.