The Digital Millennium Copyright Act and the First Amendment:
Section 1201's Disruptive Effects on the Fair Use Doctrine

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Legal Background

The Digital Age provides numerous emergent and quickly evolving concerns for the scope of copyright law. [1] The institution of law is commonly not structurally equipped to deal with the continuous concerns that society creates through both rapid generation of digital format options and consumers' utilization of proprietary content that is digital. The shift from analog to digital works by copyright owners represents a critical site of intervention for the amendment of copyright law. The Digital Millennium Copyright Act (DMCA) is a substantive amendment to the Copyright Act of 1976.[2] Within the DMCA, Section 1201's anti-circumvention provision plays the most significant role in Digital Rights Management (DRM) ubiquity within digital proprietary content.

I. The Creation of the DMCA

The DMCA was passed into American Federal law in 1998. The DMCA was unanimously supported in the United States Senate, and acted to extend copyright law in order for copyright law to have increased relevancy within the Digital Age.[3,4] The specific manner that the DMCA allowed for increased relevancy within the Digital Age was tied to the development and expansion of the Internet in the United States. As financial investment from private industry was necessary for the expansion and development of the Internet, there needed to be potential for profit from the Internet. Thus, there was an ultimate interest in the Internet containing content that consumers would want to spend money on. If proprietary content owners were to be interested in disseminating their content online, instead of through analog channels of dissemination, then the economic benefit from their work would need to be maintained through

[1] Goodwin, Tom. "The Three Ages of Digital." TechCrunch. June 23, 2016. Accessed October 18, 2018. https://techcrunch.com/2016/06/23/the-three-ages-of-digital/.
[2] Digital Millennium Copyright Act, 105 P.L. 304, 112 Stat. 2860, 1998 Enacted H.R. 2281, 105 Enacted H.R. 2281 (October 28, 1998).
[3] Alfred, Randy. "Oct. 28, 1998: President Signs New Copyright Law." Wired. June 04, 2017. Accessed October 21, 2018. https://www.wired.com/2008/10/oct-28-1998-president-signs-new-copyright-law-2/.
[4] Seltzer, Wendy, Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment (March 1, 2010). Harvard Journal of Law & Technology, Vol. 24, p. 171, 2010; Berkman Center Research Publication No. 2010-3.

protective changes in the Copyright Act of 1976.[5] The effective copyright protection of newly developed media has been a site of contention within copyright law since the invention of commercial broadcasting in the 1920s.[6] In the decade before the DMCA it had been contested in the case *Sony Corp. of America v. Universal City Studios, Inc*. In this Supreme Court case, also known as the Betamax case, Universal Studios sued Sony over the development of the Betamax video recorder as Universal Studios argued that it could be used for Copyright infringement. Ultimately, the Supreme Court ruled in favor of Sony as the majority opinion found that the Betamax had substantial use-value for purposes of fair use.[7] Before the DMCA, *Sony* served as a significant legal precedent for court rulings in which the risk of significant copyright infringement was weighed against the opportunity for the fair use of proprietary content. Following the DMCA, the relevance of *Sony* to copyright law has been superseded by the DMCA anti-circumvention provision.[8] Previous to the DMCA the Copyright Act contained no provisions describing the impermissibility of the circumvention of copy-protection in digital materials.[9]

II. Digital Rights Management

Towards the previously mentioned increased relevancy, Section 1201 acts as one important facet of the regulatory teeth of the DMCA. This section exhibits regulatory action via its delineation of the anti-circumvention provisions named discretely as, "two distinct prohibitions: "a ban on 'acts' of circumvention, and a ban on the 'distribution of tools and technologies' used for circumvention…A violation of any of the 'act' or 'tools' prohibitions is

[5] Litman, Jessica. "Copyright Lawyers Set Out to Colonize Cyberspace." *Digital Copyright*. United States of America: Maize Books, an Imprint of Michigan Publishing, 2017. 90.
[6] Litman, Jessica. 96.
[7] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574, 1984 U.S. LEXIS 19, 52 U.S.L.W. 4090, 220 U.S.P.Q. (BNA) 665, 224 U.S.P.Q. (BNA) 736, 55 Rad. Reg. 2d (P & F) 156 (Supreme Court of the United States January 17, 1984, Decided). https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3RVB-1PR0-003B-S014-00000-00&context=1516831.
[8] Samuelson, Pamela, The Generativity of Sony V. Universal: The Intellectual Legacy of Justice Stevens. Fordham Law Review, Vol. 74, p. 1831, 2006; UC Berkeley Public Law Research Paper No. 925127. https://ssrn.com/abstract=925127
[9] Litman, Jessica. "The Bargaining Table." 144.

subject to significant civil and, in some circumstances, criminal penalties. "[10,11] These anti-circumvention provisions were originally intended to prevent piracy and illegal large-scale distribution that can be achieved through disabling the piracy-deterring protections contained in copyrighted works.[5]

The protections contained in copyrighted works can be implemented in numerous ways but the implementation of the protections is known as Digital Rights Management. DRM constitutes technological means for physical control by copyright owners over the use of their copyrighted works. Especially in cases where the DRM takes the form of code, it allows for physical control of the work for an unrestricted time frame after the date of purchase.[12] Despite the most current copyright term being delineated as, "a term consisting of the life of the author and 70 years after the author's death," DRM permits copyright holders to have more post-purchase control over the usage of their work than at any time in the history of copyright law.[13,14] With the proliferation of DRM in digital media, the DMCA creates a scenario in which entities have only the ability to interact with digital media in the manner that is permitted by the DRM. The anti-circumvention provisions contained in Section 1201 disallow the circumvention of DRM even in cases where the ensuing utilization of the work would be protected by fair use. DRM is empowered by the DMCAs anti-circumvention provision to potentially preclude the possibility of the fair use of a work.

III. Fair Use

The doctrine of fair use is outlined in Section 107 of the Copyright Act. In 1976, Section 107 was codified by Congress. The change was introduced to both account for technological

[10] "17 U.S. Code § 1201 - Circumvention of Copyright Protection Systems." LII / Legal Information Institute. Accessed October 20, 2018. https://www.law.cornell.edu/uscode/text/17/1201.
[11] "Unintended Consequences: Sixteen Years under the DMCA." Electronic Frontier Foundation. September 2014. Accessed October 13, 2018. https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf.
[12] Doctorow, Cory. "What Happens with Digital Rights Management in the Real World?" The Guardian. February 05, 2014. Accessed October 21, 2018. https://www.theguardian.com/technology/blog/2014/feb/05/digital-rights-management.
[13] § 302. Duration of copyright: Works created on or after January 1, 1978, 17 USCS § 302 (Current through PL 115-396, approved 12/21/18, with a gap of PL 115-334). https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTK1-NRF4-43HP-00000-00&context=1516831.
[14] Andrea M. Matwyshyn, Technoconsen(t)sus, 85 Wash. U. L. Rev. 529 (2007).

innovations that had occurred since the Copyright Act of 1909, and to align the United States' copyright policies with international copyright standards set by the Universal Copyright Convention (UCC) [15,16]. Previous to the adoption of Section 107, fair use had been enforced through common law practices as the permissibility of fair use is aligned with copyright law's central purpose of promoting creativity and ingenuity or the "Progress of Science and Useful Arts."[17,18]

Section 107 states, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[19,20] In addition to these purposes named in Section 107, if an entity wants to utilize copyrighted material they are compelled to determine if their usage constitutes fair use with a consideration of the four fair use factors. These factors are as follows: "the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect of the use on the potential market.[12]" The courts are required by Section 107 to consider legal challenges to the right to fair use with a "case-by-case analysis" with consideration of the four factors.[21] Importantly, this means that there is no bright-line rule for what constitutes fair use. Each time copyright is challenged with a fair use claim it must be adjudicated in a case-by-case manner. Despite the fact

[15] Office, U.S. Copyright. "Chapter 11: Subject Matter and Scope of Copyright." Copyright. Accessed October 15, 2018. https://www.copyright.gov/title17/92chap1.html.
[16] Dubin, Joseph S. "E Universal Copyright Convention." *California Law Review* 42, no. 1 (March 1954).
[17] Ku, Raymond Shih Ray, Jiayang Sun, and Yiying Fan. "Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty " Accessed October 12, 2018. http://vanderbiltlawreview.org/articles/2009/11/Ku-et-al.-Does-Copyright-Law-Promote-Creativity-62-Vand.-L.-Rev.-1669-2009.pdf.
[18] U.S. CONST. art. I, § 8.
[19] § 107. Limitations on exclusive rights: Fair use, 17 USCS § 107 (Current through PL 115-281, approved 12/1/18). https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GM91-NRF4-431H-00000-00&context=1516831.
[20] Hudson, David L., Jr. "Copyright & the First Amendment." Newseum Institute. August 05, 2004. Accessed October 12, 2018. http://www.newseuminstitute.org/2004/08/05/copyright-the-first-amendment/.
[21] The Authors Guild, Betty Miles, Jim Bouton, Joseph Goulden, individually and on behalf of all others similarly situated, Plaintiff-Appellants, Herbert Mitgang, Daniel Hoffman, individually and on behalf of all others similarly situated, Paul Dickson, The McGraw-Hill Companies, Inc., Pearson Education, Inc., Simon & Schuster, Inc., Association of American Publishers, Inc., Canadian Standard Association, John Wiley & Sons, Inc., individually and on behalf of all others similarly situated, Plaintiffs, v. Google, Inc., Defendant-Appellee., 804 F.3d 202, 2015 U.S. App. Lexis 17988, Copy. L. Rep. (CCH) P30,832, Copy. L. Rep. (CCH) P30,832, 43 Media L. Rep. 2981, 116 U.S.P.Q.2D (BNA) 1423 (United States Court of Appeals for the Second Circuit October 16, 2015, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H5B-G231-F04K-J02C-00000-00&context=1516831.

that there is no bright-light rule for what fair use is, fair use is often cited as a protection against the infringement on First Amendment freedoms by copyright law.[22,23]

This citation was seen in the Supreme Court case *Eldred v. Ashcroft*. This case challenged the constitutionality of the 1998 Sony Bono Copyright Term Extension Act (CTEA). The CTEA extended the term of copyright by 20 years and applied to both newly and previously published works.[24] The lead petitioner, Eric Eldred, is an online publisher who relied on the public domain for his publications. The CTEA applied to works that had been previously published. Thus, works that were set to enter the public domain (to be subsequently published by Eldred and/or other petitioners) in 1998 were unexpectedly delayed by 20 years. In *Eldred,* it was asserted by the lead petitioner (Eldred) and the other petitioners that the CTEA presents a, "content neutral regulation of speech." [25,26] If the CTEA represented a content neutral regulation of speech then it could potentially violate freedoms of speech guaranteed under the First Amendment. The majority opinion rejected the First Amendment challenge to the CTEA.

In her majority opinion Justice Ginsburg disagreed with the First Amendment challenge as "copyright law contains built-in First Amendment accommodations" which she later names as the "idea/expression dichotomy" and "fair use" both of these constituting "traditional First Amendment safeguards."[27] She additionally referenced the decision made in the Court of Appeals to reject the First Amendment challenges to the CTEA as, "there are no First Amendment rights to use the copyrighted works of others...copyright does not impermissibly restrict free speech, for it grants the author an exclusive right only to the specific form of expression; it does not shield any idea or fact contained in the copyrighted work, and it allows

[22] Lockridge, Lee Ann W., The Myth of Copyright's Fair Use Doctrine as a Protector of Free Speech (November 2007). Santa Clara Computer and High Technology Law Journal, Vol. 24, p. 31, 2007.
[23] *See* Eldred v. Ashcroft, 537 U.S. 186, 215 (2003); Harper & Row v. Nation Enters,, 471 U.S. 539, 560 (1985); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577 (1977).
[24] [Sonny Bono Copyright Term Extension Act; Fairness in Musical Licensing Act of 1998], 105 P.L. 298, 112 Stat. 2827, 1998 Enacted S. 505, 105 Enacted S. 505 (October 27, 1998). https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:3X51-XR60-0019-T2R3-00000-00&context=1516831.
[25] Eric Eldred, et al., Petitioners v. John D. Ashcroft, Attorney General, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683, 2003 U.S. Lexis 751, 71 U.S.L.W. 4052, Copy. L. Rep. (CCH) P28,537, 2003 Cal. Daily Op. Service 426, 2003 Daily Journal DAR 512, 65 U.S.P.Q.2D (BNA) 1225, 16 Fla. L. Weekly Fed. S 44 (Supreme Court of the United States January 15, 2003, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47P7-BT40-004B-Y018-00000-00&context=1516831.
[26] Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983), https://scholarship.law.wm.edu/wmlr/vol25/iss2/2
[27] Eldred v. Ashcroft, 537 U.S. 186 (2003).

for fair use even of the expression itself."[28,29,30] What Justice Ginsburg highlighted in the *Eldred* decision, is her legal opinion that inherent to the Copyright Clause itself is the protection of First Amendment interests.

Within the DMCA, fair use is explicitly referenced as in 17 USCS § 1201(c)(1) it states: "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."[31] This statement was directly challenged in the appellate court case *Universal Studios v. Corley*. In this case eight movie studios sued Eric Corley to prevent the dissemination of the computer program DeCSS which was capable of decrypting the Content Scramble System present in DVDs. The case represented the first case to challenge the constitutionality of the DMCA. Before the plaintiffs ultimately won the case in appellate court the court ordered a temporary injunction against the dissemination of DeCSS. To counter the potential for a possible permanent injunction the appellant (Corley) claimed that the injunction against his decryption computer program violated his rights under fair use. The court ruled against Corley's claim affirming a permanent injunction against the dissemination of DeCSS.

There has been a successful defense of the right to fair use under the tenure of the current Copyright Act. *Authors Guild v. Google Inc*. represents a legal interpretation adjudicated in favor of the right to fair use in the Digital Age. In *Authors Guild v. Google Inc.*, the Author's Guild sued Google for copyright infringement while Google maintained that their Google Book Search database constituted fair use. [32] The Google Book Search database was an enormous project where over 12 million books were scanned by major research libraries and subsequently

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[28] "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." § 102 [Revised -- 1947 & Oct. 19, 1976], 17 U.S.C.S. 102 (Current through PL 115-281, approved 12/1/18). https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:472S-7NF0-006F-13W5-00000-00&context=1516831.

[29] Eric Eldred, et al., Appellants v. Janet Reno, in her official capacity as Attorney General, Appellee, 239 F.3d 372, 345 U.S. App. D.C. 89, 2001 U.S. App. Lexis 2335, Copy. L. Rep. (CCH) P28,219, 57 U.S.P.Q.2D (BNA) 1842 (United States Court of Appeals for the District of Columbia Circuit February 16, 2001, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CJ-5BY0-0038-X2SH-00000-00&context=1516831.

[30] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[31] § 1201. Circumvention of copyright protection systems, 17 USCS § 1201 (Current through PL 115-281, approved 12/1/18). https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTV1-NRF4-40C2-00000-00&context=1516831.

[32] Mullin, Joe. "Appeals Court Rules That Google Book Scanning Is Fair Use." Ars Technica. October 16, 2015. Accessed March 17, 2019. https://arstechnica.com/tech-policy/2015/10/appeals-court-rules-that-google-book-scanning-is-fair-use/.

transformed into an "electronic database of books…available for online searching."[33] Ultimately, the case was dismissed in the Second Circuit Court and was declined for review by the Supreme Court–affirming Google's fair use argument. Although this is not a case that brings questions concerning DRM to the fore—as the construction of the Google Book Search database involved the scanning of physical copies of books—it does provide a useful example of how questions concerning fair use are addressed under the tenure of the DMCA. Complicating the precedent set in *Corley*, in the appeals proceedings for *Authors Guild v. Google* Judge Pierre Leval stated that, "Copying the entirety of a work is sometimes necessary to make a fair use of the work." [34] Here, Leval makes it clear that there is a distinction between the act of copying and the determination of fair use. Copying, even the entirety of the form of expression, is not inherently protected or not protected under fair use but importantly the action of copying must be determined to fall (or not fall) under fair use after the action has occurred. The key distinction in this ruling was that the United States Second Circuit found that Google's creation of a "full-text searchable database is quintessentially transformative use" and thus protected under fair use.[34] In *Authors Guild v. Google Inc.,* the database was not created through the circumvention of DRM so the database does not engender questions concerning the anti-circumvention provision. If the database had been created through the circumvention of DRM it is unknown whether the ruling would have been in favor of Google. The case certainly has broader implications for works that contain DRM as if the act of copying (through the circumvention of DRM) is maintained to be illegal this delimits the potential for a transformative use of digital media.

IV. The First Amendment

The First Amendment states, "Congress shall make no law…abridging the freedom of speech, or of the press."[35] When the First Amendment was ratified in 1791, there was no conception of speech expressed in a digital format. The technology of the printing press and its

[33] Authors Guild v. Google, Inc., 282 F.R.D. 384, 2012 U.S. Dist. LEXIS 76080, 82 Fed. R. Serv. 3d (Callaghan) 712, Copy. L. Rep. (CCH) P30,265, 102 U.S.P.Q.2D (BNA) 1916, 2012 WL 1951790 (United States District Court for the Southern District of New YorkMay 31, 2012,
Filed). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55SM-8D41-F04F-03GD-00000-00&context=1516831.
[34] Authors Guild v. Google, Inc., 804 F.3d 202, 219, 2015 U.S. App.
[35] U.S. CONST. amend. I

enabling of more widespread distribution of print media provided a technological context for the First Amendment i.e., "the freedom of…the press" and additionally, provided unique legal challenges for the First Amendment, within the genre of print media. Following from this, technological innovation throughout United States history has continued to generate novel First Amendment issues. Presently, digital media has raised unique questions for the relationship of the First Amendment to copyright law.[36]

Within First Amendment law, a foundational case affirming the broad scope of First Amendment protections for speech and for the press, was *New York Times Co. v. United States*. In *New York Times Co. v. United States*, President Richard Nixon attempted to prevent the publication of the Pentagon Papers by the New York Times as the documents constituted classified information. The Supreme Court ruled in favor of the New York Times. In this case, the ruling for the supremacy of the freedom of the press even, significantly, against a challenge by President Nixon established a precedent of superiority for the freedom of speech. Further affirming the significance and superiority of the First Amendment to any legal questions regarding restrictions on speech Justice Black, in his concurring opinion, wrote, "The Framers of the First Amendment…sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged."[37] For Justice Black, freedom of speech—over the power of the Executive Branch of United States government—is essential to a functional and safely operating society.

V. Code as Protected Speech

Within copyright law, the First Amendment is uniquely tied to legal questions concerning the place of code as speech. Beyond issues concerning fair use, the appellate opinion for *Corley* additionally worked through questions concerning the scope of First Amendment protections in computer code. In this case, majority opinion rejected the First Amendment challenge to the constitutionality of the Digital Millennium Copyright Act (DMCA). The ruling, was not a ruling

[36] Goodwin, Tom. "The Three Ages of Digital." TechCrunch. June 23, 2016. Accessed October 18, 2018. https://techcrunch.com/2016/06/23/the-three-ages-of-digital/.
[37] New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822, 1971 U.S. LEXIS 100, 1 Media L. Rep. 1031 (Supreme Court of the United States June 30, 1971, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RVB-1PY0-003B-S02K-00000-00&context=1516831.

against free speech but instead was a ruling that provided interpretation of the nuances in the classification of computer code as speech.

In *Universal Studios v. Corley*, the appellant insisted that the usage of the DMCA as means to stop dissemination of his computer program was a violation of his First Amendment rights. As previously discussed, this program known as DeCSS contained code for the circumvention of DRM. Due to DeCSS code being a clear case of circumvention of DRM, the appellant insisted that the application of the DMCA (in its anti-circumvention provision) was a content-based regulation of speech and thus in conflict with his First Amendment rights. If correct, this would have broader implications for programs functionally similar to DeCSS because code is considered speech making the DMCA potentially in conflict with First Amendment rights in cases where DRM is circumvented with original code. [38]

The appellate court rejected the appellant's First Amendment claim as free speech is subject to various levels of scrutiny dependent on the type of speech that has been exercised. The court found that the DMCA, when applied in the consideration of the legality of circumvention of DRM, represents not a content-based regulation but a content-neutral regulation (time, place and manner restriction) of speech and thus its legality even under the supremacy of the First Amendment, was only required to withstand intermediate scrutiny.[39] In the scope of First Amendment protections the DMCA survives intermediate scrutiny.[40] If the appellate court had found the injunction against DeCSS to be content-based then the regulation of code under the DMCA would need to survive strict scrutiny.

The legal questioning of code as speech arrived before the passage of the DMCA. In 1995 the Electronic Frontier Foundation represented Daniel Bernstein in a case that challenged the United States Department of Justice's restrictions of the export of cryptography. In 1999 the

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[38] "code is speech protected by the First Amendment." Daniel J. Bernstein, Plaintiff, vs. United States Department of State, et al., Defendants., 974 F. Supp. 1288, 1997 U.S. Dist. Lexis 13146, 97 Daily Journal DAR 13899 (United States District Court for the Northern District of California August 25, 1997, Filed). https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3RH6-PKR0-00B1-F0FP-00000-00&context=1516831.

[39] "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward et al. v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661, 1989 U.S. Lexis 3129, 57 U.S.L.W. 4879 (Supreme Court of the United States June 22, 1989, Decided). https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-9W30-003B-413T-00000-00&context=1516831.

[40] Universal City Studios, Inc. v. Eric Corley 273 F.3d 429 (2d Cir. 2001).

Ninth Circuit Court of Appeals case *Bernstein v. United States Dept. Of Justice* was the first Court of Appeals case to initially establish code as expressive speech. This case was ultimately withdrawn upon *en banc* review but is still relevant as a case that sets the timeframe for consideration of code as expressive speech. [41,42] Code is speech but in all cases where First Amendment claims have been deliberated on, it has been deemed content-neutral and thus has, so far, only needed to survive intermediate scrutiny. As was demonstrated in the Appellate opinion for *Corley*, the Second Circuit court asserted that the DMCA represents a content neutral regulation of speech thus requiring code to survive only an intermediate level of scrutiny in regard to protections under the First Amendment. Under the DMCA there has not yet been a case where it seems legally appropriate for the restriction of code to need to survive strict scrutiny. As a result of the intermediate scrutiny designation for code speech, the court affirmed that code should receive a lesser amount of protection under the First Amendment.[43] Although, thus far, the DMCA does not impinge on First Amendment rights for reasons related to the position of code as speech and despite the courts' and the Supreme Court's rejection of First Amendment challenges to the DMCA—the DMCA arguably interferes with First Amendment rights.

The DMCA does not impede First Amendment rights directly as the DMCA did not alter the text of the "inherent balancers" of First Amendment issues within the Copyright Clause. However, the DMCA does infringe on First Amendment rights indirectly as it impedes the functional operation of the right to fair use. Although copyright and freedom of speech both emerged from the United States Constitution they emerged from different powers. The Copyright Clause and its amendments arise from power delegated to Congress in the Patent and Copyright Clause of the Constitution and freedom of speech emerges from First Amendment. Although fair use is often cited as an inherent protector of the First Amendment, the Congressional passage of fair use into the Copyright Act of 1976 did not arise out of consideration of First Amendment protections.

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[41] Bernstein v. United States DOJ, 176 F.3d 1132, 1999 U.S. App. LEXIS 8595, 99 Cal. Daily Op. Service 3283, 99 Daily Journal DAR 4254 (United States Court of Appeals for the Ninth CircuitMay 6, 1999, Filed). https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3WDK-T710-0038-X18B-00000-00&context=1516831.

[42] Berkeley Technology Law Journal 15, no. 1 (2000): 505-524.

[43] Andrea M. Matwyshyn, Hacking Speech: Informational Speech and the First Amendment, 107 Nw. U. L. Rev. 795 (2013). https://scholarlycommons.law.northwestern.edu/nulr/vol107/iss2/10

Legal Analysis

I. Does the DMCA Infringe upon First Amendment Rights?

Justice Sandra Day O'Connor stated in her opinion for the Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, "it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[44] It follows from this idea that the Copyright Clause is in its underpinnings ideally promotive of the First Amendment's protection of free speech. This is due, in part, to the Copyright Clause's incentivizing of the creation of speech for later dissemination. Additionally, in almost all cases where First Amendment challenges have been brought into copyright cases, courts have dismissed these cases.[45] For example, as previously discussed, in *Eldred v. Ashcroft*, the Supreme Court deliberated on First Amendment and Copyright challenges to legislation that impacted individuals' access to the public domain. The Copyright Term Extension Act (CTEA) was legally challenged by the plaintiffs as it delayed the entry of works into the public domain. The Court ruled against the plaintiff's assertion that the CTEA violated their First Amendment rights. The Court held that the time-restricted monopoly of copyright is in line with First Amendment rights as "copyright's purpose is to promote the creation and publication of free expression."[46] In this decision, Justice Ginsburg asserted, "To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.' But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[8]

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[44] Harper & Row, Publrs. v. Nation Enters., 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588, 1985 U.S. LEXIS 17, 53 U.S.L.W. 4562, 225 U.S.P.Q. (BNA) 1073, 11 Media L. Rep. 1969 (Supreme Court of the United States May 20, 1985, Decided). https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:3S4X-BMJ0-0039-N009-00000-00&context=1516831.

[45] L. R. Patterson, Free Speech Copyright, and Fair Use, 40 Vand. L. Rev. 1 (1987).

[46] Eldred v. Ashcroft, 537 U.S. 186 (2003).

As mentioned in the legal background section, the "built-in free speech safeguards" that Justice Ginsburg references are the idea/expression dichotomy and the right to fair use.[47] In the D.C. Circuit where the plaintiff was heard in *Eldred v. Reno*, the court felt so strongly assured of the inherent First Amendment protections within the Copyright Clause, that they declared that, "copyrights are categorically immune from challenges under the First Amendment."[48] Although Ginsburg disagreed with the generalization of this assertion in her Supreme court decision she nevertheless affirms the D.C. Circuits reliance on fair use as reason to rule against Eldred under First Amendment claims.

It is in this reliance on the "built-in free speech safeguards" that the DMCA starts to interfere with First Amendment protections. The DMCA, in its revision of the Copyright Clause, does not represent a change of the content of the idea/expression dichotomy or the fair use doctrine but, instead, in the implementation of the DMCA, the anti-circumvention provision unfairly restricts fair use. More broadly, even if in any amendments to the copyright clause, the idea/expression dichotomy and the fair use doctrine are not changed by Congress, it is always possible that courts can interpret these "built-in safeguards" in a manner that is not duly protective of First Amendment rights. Beyond courts' interpretation, it is additionally possible for Congress to amend the copyright clause in a way that unfairly restricts the effective operation of the idea/expression dichotomy or the right to fair use. Although Congress is prevented by the First Amendment from passing any law that restricts freedom of speech, they are not prevented from passing laws that restrict the operation of these so-called safeguards for the freedom of speech.[7] The anti-circumvention provision is an example of Congress enabling the disruption of the effective operation of these safeguards.

The restriction of computer code under the DMCA has thus far been interpreted as content-neutral. As discussed in the legal background on *Corley*, if the restriction of the dissemination of code were to be interpreted as content-based, this could potentially practically mean that under the First Amendment, any injunction against the dissemination of this code would need to survive strict scrutiny. Despite the fact that the appellant in *Corley* provided a rhetorically convincing argument that DeCSS code is specifically prohibited by the DMCA because of the

[47] Garfield, Alan E. (2007) "The Case for First Amendment Limits on Copyright Law," Hofstra Law Review: Vol. 35: Iss. 3, Article 8.
[48] Eldred v. Reno, 239 F.3d 372, 345 U.S. App. D.C. 89, (2001).

content of its expression—as the code itself dictates the circumvention of CSS—the court disagreed that the content of the code as speech had any relevance to the injunction against the dissemination of DeCSS.

Regardless of the interpretation of the enforcement of the DMCA as content-neutral, the previously mentioned disruption of the First Amendment safeguards within the copyright clause, could mean that the DMCA still provides significant implications for questions regarding its constitutionality under the First Amendment. As stated by Melville Nimmer, "Because Congress is granted authority to legislate in a given field, it does not follow that such a grant immunizes Congress from the limitations of the Bill of Rights, including the First Amendment."[49] However, it is arguable if Congress has indirectly breached the Bill of Rights as the comments by Justice Ginsburg in her opinion for *Eldred* point to important questions for the effective protection of First Amendment rights within copyright law outside of the scope of questions concerning code as speech.

The Courts and the Supreme Court often do not rule against First Amendment challenges to the Copyright Clause because there is a belief that the copyright clause is exempt from First Amendment protection, but instead their ruling is because the copyright clause contains space for the balancing of First Amendment protections through its containment of the idea versus expression dichotomy.[50,51] However, the. *Corley* case represents a significant shift in the types of

[49] Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press, 17 UCLA L. Rev. 1180 (1970)
9 James Gibson, Once and Future Copyright, 81 Notre Dame L. Rev. 167 (2005). Available at: http://scholarship.law.nd.edu/ndlr/vol81/iss1/4
10 USCS Const. Art. I, § 8, Cl 8

[50] "copyright's idea/expression dichotomy 'strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." Worldwide Church of God, a California Corporation, Plaintiff-Counter-Defendant-Appellant, v. Philadelphia Church of God, Inc., an Oklahoma Corporation, Defendant-Counter-Claimant-Appellee., 227 F.3d 1110, 2000 U.S. App. LEXIS 23390, Copy. L. Rep. (CCH) P28,151, 2000 Cal. Daily Op. Service 7761, 2000 Daily Journal DAR 10303, 56 U.S.P.Q.2D (BNA) 1259 (United States Court of Appeals for the Ninth Circuit September 18, 2000, Filed). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4177-9HM0-0038-X173-00000-00&context=1516831.

[51] "Holding an infringer liable in copyright for copying the expression of another author's ideas does not impede First Amendment goals because the public purpose has been served - the public already has access to the idea or the concepts." Suntrust Bank, as Trustee of the Stephen Mitchell trusts f.b.o. Eugene Muse Mitchell and Joseph Reynolds Mitchell, Plaintiff-Appellee, versus HOUGHTON MIFFLIN COMPANY, Defendant-Appellant., 268 F.3d 1257, 2001 U.S. App. LEXIS 21690, Copy. L. Rep. (CCH) P28,326, 60 U.S.P.Q.2D (BNA) 1225, 14 Fla. L. Weekly Fed. C 1391 (United States Court of Appeals for the Eleventh Circuit October 10, 2001, Filed). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4460-WSD0-0038-X3BH-00000-00&context=1516831.

claims made regarding First Amendment infringement as it the first (excluding the withdrawn *Bernstein v. United States Dept. Of Justice)* of multiple cases decided against First Amendment challenges to the copyright clause that contains a reading of the First Amendment while actively considering code as speech. Despite the ruling in *Corley*, and other rulings that have led to computer code occupying a very stable position as speech that is subject to intermediate scrutiny, the degree to which the First Amendment should protect code as expression continues to be debated.[52] Additionally, the Supreme Court has never succinctly articulated the extent of First Amendment Protection for code as speech more generally.[53]

Ultimately, the categorization of code as speech that is subject to intermediate scrutiny is not fully relevant to the question of whether the DMCA impinges on First Amendment rights. As previously mentioned, the DMCA engenders First Amendment issues due to its hampering of an effective operation of the right to fair use. What is more relevant is that because fair use has continued to be relied upon as a protector of First Amendment concerns in copyright law, there needs to be a questioning of if the right to fair use has continued to be adequately protected under the DMCA.

Thus, Corley generates more relevant questions when interrogated in the frame of fair use than when considered in the context of code as speech. In *Corley*, the plaintiffs were successful in obtaining an injunction against the dissemination of DeCSS despite the fact that it is possible for DeCSS to be used for the purposes of fair use. Corley did bring up the right to fair use but in response to Corley's fair use claim, Circuit Judge Jon Newman stated, "In the first place, the Appellants do not claim to be making fair use of any copyrighted materials, and nothing in the injunction prohibits them from making such fair use. They are barred from trafficking in a decryption code that enables unauthorized access to copyrighted materials."[54] In this statement, Newman asserts that Corley did not claim fair use of material. However, by ruling in favor of an injunction against the dissemination of DeCSS the appellate court disallows the usage of DeCSS for any purpose that would fall under fair use. In an additional comment on Corley's fair use claim Newman stated, "Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the

[52] James Gibson, Once and Future Copyright, 81 Notre Dame L. Rev. 167 (2005). https://scholarship.law.nd.edu/ndlr/vol81/iss1/4
[53] Andrea M. Matwyshyn, Hacking Speech: Informational Speech and the First Amendment, 107 Nw. U. L. Rev. 795 (2013). https://scholarlycommons.law.northwestern.edu/nulr/vol107/iss2/10
[54] Universal City Studios v. Corley, 273 F.3d 429, 459 (2001).

'fair use' of information just because that information was obtained in a manner made illegal by the DMCA."[55] This statement highlights a dilemma between the permissibility of the fair use of information obtained as a result of the circumvention of DRM and the illegality of the circumvention technology itself. It is justifiably questionable if the right to fair use has been unfairly restricted under the DMCA if the means to even make fair use of digital material has been made to be illegal. Although DeCSS did not make an exemplary example of the fair use of material, there have been examples of the takedown of media even in cases where the media constitutes fair use.[56]

This stands in contrast to the Betamax decision where the potential for fair use of proprietary content by the Betamax outweighed the potential for use that infringes upon copyright. It is in fact easy to imagine a situation where Universal City Studio's (or any of the other 7 named movie studios') proprietary content is decrypted for the purposes of fair use. The plaintiffs were fortunate in that they filed suit against the tool for decryption and not the outcome of the decryption under an iteration of the Copyright act where specifically a particular functionality of DeCSS is prohibited. In a hypothetical scenario where an artist has appropriated and subsequently made transformative use of material from a Universal Studios DVD using DeCSS, the right to fair use would be at odds with the anti-circumvention provision.

This quandary is further highlighted by Judge Newman's assertion that both, "nothing in the injunction prohibits…fair use" and that the injunction is justified in that it "bar[s]…trafficking in a decryption code that enables unauthorized access to copyrighted material." In the coupling of these two statements, Newman points to an issue with the anti-circumvention provision of the DMCA. The anti-circumvention provision can make access itself unauthorized regardless of the purposes of that access. Arguably the idea of unauthorized access was ill-fitting for some of the uses of DeCSS. DeCSS served to decrypt DVDs. An owner of a DVD could use DeCSS to

[55] Universal City Studios, Inc., Paramount Pictures Corporation, Metro-Goldwyn-Mayer Studios Inc., Tristar Pictures, Inc., Columbia Pictures Industries, Inc., Time Warner Entertainment Company, L.P., Disney Enterprises Inc., Twentieth Century Fox Film Corporation, Plaintiffs-Appellees, v. Eric Corley, also known as Emmanuel Goldstein, and 2600 Enterprises Inc., Defendants-Appellants, United States of America, Intervenor., 273 F.3d 429, 2001 U.S. App. Lexis 25330, Copy. L. Rep. (CCH) P28,345, Comm. Fut. L. Rep. (CCH) P28,345, 60 U.S.P.Q.2D (BNA) 1953 (United States Court of Appeals for the Second Circuit November 28, 2001, Decided). https://advance-lexis-com.ezproxy.cul.columbia.edu/api/document?collection=cases&id=urn:contentItem:44JD-GCS0-0038-X2GY-00000-00&context=1516831.

[56] Alderfer Rock, Rebecca. "Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?" Temple Law Review 86, no. 3 (2014). http://www.templelawreview.org/comment/fair-use-analysis-in-dmca-takedown-notices-necessary-or-noxious/.

decrypt their own copy of a DVD. The code for DeCSS does not include script specifically for the actions of piracy of proprietary content but is only code that allows for the decryption of DRM. Analogously, certainly, no judge would find that there could be fair use made of a Xeroxed drawing originally stolen from the Met but no judge would rule in favor of an injunction against the manufacture of Xerox machines.

Due to the changes in technological context since 1976, the DMCA does not provide adequate protection of fair use. Thus, as a result of this common judicial reliance on fair use to protect First Amendment rights, the DMCA does threaten First Amendment freedoms. Following from this, as the First Amendment states, "Congress shall make no law…abridging the freedom of speech, or of the press,"[57] Congress should amend Section 107 to enable proper protection of fair use rights under the DMCA. Ultimately, it is possible that due to Section 1201 the amendment to the Copyright Act of 1976 represents an imbalanced iteration of copyright law as it disproportionately protects copyright owners to the detriment of protection under fair use laws.

II. How Does the DMCA Unfairly Restrict Fair Use?

Fair use acts as a built-in protector of the First Amendment as it allows courts to deem permissible even the copying of the entirety of a work in a scenario where speech would be unduly restricted.[58] Outside of the idea/expression dichotomy fair use is protective of the First Amendment even when a significant copying of the manner of expression has occurred.

In the Digital Age, fair use has been effectively protected in situations where DRM was not circumvented. Even in cases where the entirety of a form of expression has been copied, the right to fair use has been upheld if the methodology of that copying avoided circumvention of DRM. The significant example of this is *Authors Guild, Inc. v. Google, Inc.* As previously discussed, in this case the Second Circuit found that the "unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works were non-infringing fair uses because the purpose of the copying was highly transformative."[59] As

[57] U.S. CONST. amend. I
[58] Authors Guild v. Google, Inc., 804 F.3.d 202, U.S. App (2015).
[59] Authors Guild v. Google, Inc., 804 F.3.d 202, U.S. App (2015).

discussed, books were scanned by participating libraries. These scans were then turned into a machine-readable text and subsequently indexed for key words which the Second Circuit deemed as transformative use. Although millions of books had been scanned—in their entirety—and made available for key word search on the Internet, the right to fair use remained protective in this case. Although scholarship on this case has highlighted the transformative nature of Google Books as the linchpin for its protection under fair use, it is arguable if this case would have been decided in the same manner if the circumvention of DRM had been involved. Thus, it seems that anti-circumvention provision within the DMCA over-determines the regulatory implications of the DMCA.

The physical parameters of works have always impacted how entities utilize a work, but as a result of illegalizing the circumvention of DRM, under the DMCA the breadth of utilization has been limited. For example, the fact that a book is bound makes photocopying the entirety of a book more time consuming and thus more unappealing to an entity but it is not illegal for an entity to remove a book binding in order to more easily photocopy a book for fair use purposes. Under the DMCA, an entity does not have the ability and/or legal opportunity to alter the work in order to copy it for the purposes of fair use.

The severity of the DMCA in its creation of Section 1201 is in conflict with the aims of copyright law itself. This is in large part due to the fact that the DMCA failed to amend Section 107 of the Copyright Act. An appropriate amendment to Section 107 of the Copyright Act would have been effectively responsive to how fair use operates and looks differently in the Digital Age. Instead the implications of Section 1201 of the DMCA represent a significantly weakened right to fair use.

As an example of an amendment that was reasonable given technological context, in 1976 the Copyright Act was amended to permit teachers to make "multiple copies for classroom use." This amendment considered the invention of automated Xerox technology in 1959—the DMCA should have accounted for how digital technology may be uniquely related to fair use[60]. Under the DMCA a teacher who uses an online tool to strip the DRM from an eBook (without permission from the library of Congress) for use in the classroom is in violation of Section 1201

[60] "Xerox 914 Plain Paper Copier." National Museum of American History. Accessed October 30, 2018. http://americanhistory.si.edu/collections/search/object/nmah_1085916.

of the Copyright Act as with respect to DRM, this section explicitly makes illegal "all acts of circumvention."[61]

Due to section 1201, DRM has been applied by copyright holders in a blanket manner to proprietary content. While section 1201 does contain a ban on most cases of the circumvention of DRM it does not contain a delineation of when it is appropriate or justifiable for proprietary content to contain DRM. Given, the arguably incomplete guidelines of section 1201of the DMCA there is no necessitated reason, under copyright law, for copyright owners to provide copyrighted content that is physically unrestricted and thus possible to consume and distribute legally under fair use. Thus, users of digital content are often left with exclusively illegal means to participate in their legal right to fair use under copyright law.

As introduced previously fair use is often cited as protection against the infringement on First Amendment freedoms by copyright law.[62] For example, in the previously discussed *Eldred*, fair use is cited as an inherent protector of free speech interests.[63] However, as the DMCA amended the Copyright Act of 1976 without any amendments to section 107, it is questionable if fair use continues to serve as protective within the scope of contemporary copyright law. As stated by Paul Goldstein, "More than any other doctrine in copyright, fair use reflects the temper and technologies of its time." As a "technologically contingent" doctrine, fair use cannot be relied upon as a protective measure against First Amendment challenges without an update to its terms within Section 107.[64] Specifically, the anti-circumvention provision of the DMCA disallows for the appropriate consideration of the current technological context in the determination of fair use.[65]

When attempting to answer why the fair use clause was not amended in the DMCA, one could claim that it is because the interpretation and judgement of fair use in claims of copyright infringement is itself intended to be dependent on the context that the claim is made in (per "case-by-case analysis"). The writers of the fair use clause did not specifically reference a

[61] "Unintended Consequences: Sixteen Years under the DMCA." Electronic Frontier Foundation. September 2014. Accessed October 13, 2018. https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf.
[62] Lockridge, Lee Ann W., The Myth of Copyright's Fair Use Doctrine as a Protector of Free Speech (November 2007). Santa Clara Computer and High Technology Law Journal, Vol. 24, p. 31, 2007.
[63] Eldred v. Ashcroft, 537 U.S. 186 (2003).
[64] Paul Goldstein, Fair Use in a Changing World, 50 J. Copyright Soc'y U.S.A. 133 (2002-2003).
[65] "No person shall circumvent a technological measure that effectively controls access to a work protected under this title" § 1201. Circumvention of copyright protection systems, 17 U.S.C. § 1201(a)(1)(A) (Current through PL 115-281, approved 12/1/18). https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTV1-NRF4-40C2-00000-00&context=1516831.

consideration of the technological context. However, because there is no clearly defined rule around what does constitute fair use, a consideration of the four factors, in the Digital Age will likely bring technology into consideration.

For the purposes of this discussion, the argument for or against the non-amendment of the fair use clause is not as relevant as the questioning of the appropriateness with which the technology relevant to each case has been considered in determining fair use. Additionally, especially in light of the fact that fair use presents no bright-line rule, it is not Section 107 that presents the constitutional issue but it is the anti-circumvention provision of the DMCA as it presents a threat to the central intention of copyright law.

Although the stated intention of DRM (to prevent digital piracy) represents an appropriate balance between the rights of copyright owners and the rights to fair use, the common usage of DRM and anti-circumvention laws by copyright owners represents an imbalance in copyright law in that it is skewed toward the legal protection of copyright owners. This imbalance creates an infringement upon right to fair use under copyright law.[66]

III. The Threat of Piracy

Is the severity of Section 1201 scaled appropriately to the issue that piracy represents to private industry? The right to fair use is important, but the fact is also that "there are 16.5 million illegal book downloaders in the United States."[67] The financial losses to just the private industries of music, software and motion picture were approximately $50 billion in 2005 and is estimated to cause $12.5 billion in loss to the music industry yearly.[68,69] The heavy-handedness of the anti-circumvention provisions in Section 1201 likely represented a policy response to the alleged economic losses to private industry in the United States. During the 1980s, an analog age for the purposes of most media, piracy cost was estimated at $500 million per year, which with

[66] Doctorow, Cory. "America's Broken Digital Copyright Law Is about to Be Challenged in Court." The Guardian. July 21, 2016. Accessed October 15, 2018. https://www.theguardian.com/technology/2016/jul/21/digital-millennium-copyright-act-eff-supreme-court.
[67] Fuller, Steve. "Topic: Media Piracy." Statista. Accessed October 17, 2018. https://www.statista.com/topics/3493/media-piracy/.
[68] Music Business Worldwide. "Why Does the RIAA Hate Torrent Sites so Much?" Music Business Worldwide. December 19, 2014. Accessed October 21, 2018. https://www.musicbusinessworldwide.com/why-does-the-riaa-hate-torrent-sites-so-much/.
[69] Dahlstrom, Dana, et al. "Piracy in the Digital Age." December 6, 2006. Accessed October 21, 2018. https://courses.cs.washington.edu/courses/csep590/06au/projects/digital-piracy.pdf.

calculated United States inflation represents $1.4 billion.[70] Thus, when a new significant amendment to the Copyright Act of 1976 was being drafted the media industry had a significant stake in ensuring that digital media copyright was adequately protected against piracy. Although "there are 16.5 million illegal book downloaders," because of the extremity of Section 1201 in its prevention of any act of DRM circumvention by consumers (regardless of the reason for that circumvention) it is possible that the "illegality" of some of these book downloads could fall under fair use. Due to the fact that the Digital Age not only presents changes in how works are created and distributed by private industry but also presents changes in how works are offered for consumption by private industry it follows that consumers would have to participate in some manner of personal distribution to multiple device types to respond to industry creativity.[71] It is thus unclear if the economic threat of piracy necessitates the severity of the anti-circumvention provision.

Conclusion

Due to the juridical reliance on the fair use doctrine as a "built-in free speech safeguard," the question of whether the DMCA infringes upon the First Amendment is more a question of whether the DMCA unduly prevents the effective operation of the right to fair use.

The Supreme Court Ruling in the Betamax case as compared to the Appellate Court ruling in *Corley* demonstrates the manner in which the DMCA has caused an imbalance in the protection of the right to fair use. The Betamax case occurred before the DMCA and the ruling represented an appropriate protection of a technology that could be used both for purposes that fall under fair use and for purposes that fall under copyright infringement. *Corley* occurred after the passage of the DMCA and demonstrates a ruling against a technology that could additionally be used for both aforementioned purposes. A significant change to the Copyright Act that factored into this difference in court opinion is the DMCAs anti-circumvention provision. The

[70] "US Inflation Calculator." US Inflation Calculator. Accessed October 21, 2018. http://www.usinflationcalculator.com/.
[71] Anderson, Monica. "Technology Device Ownership: 2015." Pew Research Center: Internet, Science & Tech. October 29, 2015. Accessed October 22, 2018. http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/.

anti-circumvention provision seems to have overdetermined the regulation of proprietary content. As a further example of this assertion, in *Authors Guild v. Google Inc*., the right to fair use was affirmed in a case where DRM was not circumvented despite the fact that the contents of millions of books were scanned and placed online for keyword search. The DMCA, due to its anti-circumvention provision inhibits the functional operation of the right to fair use. Without a functional fair use doctrine, the Copyright Act ceases to have effective safeguards against its own potential repression of First Amendment freedoms. Congress must act to enable the functional operation of the right to fair use under the DMCA. The anti-circumvention provision must be removed by Congress to ensure that the First Amendment is not indirectly threatened by the DMCA. Short of complete removal—as a more feasible suggestion, the anti-circumvention provision should be reformed so that the circumvention of DRM is analyzed with effective consideration of the potential for fair use, or with consideration of the operational outcome of the circumvention of DRM. This could be achieved through the passage of a Congressional Act that amends the DMCA (similar to the Copyright Term Extension Act of 1998). It is possible that there will one day be a Supreme Court case involving the circumvention of DRM that baldly constitutes fair use. This could potentially enable the anti-circumvention provision's infringement on fair use to be resolved through legal precedent but it is more prudent for Congress to take an active role in this resolution.

Works Cited

Alderfer Rock, Rebecca. "Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?" Temple Law Review 86, no. 3 (2014). http://www.templelawreview.org/comment/fair-use-analysis-in-dmca-takedown-notices-necessary-or-noxious/.

Alfred, Randy. "Oct. 28, 1998: President Signs New Copyright Law." Wired. June 04, 2017. Accessed October 21, 2018. https://www.wired.com/2008/10/oct-28-1998-president-signs-new-copyright-law-2/.

Anderson, Monica. "Technology Device Ownership: 2015." Pew Research Center: Internet, Science & Tech. October 29, 2015. Accessed October 22, 2018. http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/.

Bernstein v. United States DOJ, 176 F.3d 1132, 1999 U.S. App. LEXIS 8595, 99 Cal. Daily Op. Service 3283, 99 Daily Journal DAR 4254 (United States Court of Appeals for the Ninth CircuitMay 6, 1999, Filed)

Berkeley Technology Law Journal 15, no. 1 (2000): 505-524.

Dahlstrom, Dana, et al. "Piracy in the Digital Age." December 6, 2006. Accessed October 21, 2018. https://courses.cs.washington.edu/courses/csep590/06au/projects/digital-piracy.pdf.

Daniel J. Bernstein, Plaintiff, vs. United States Department of State, et al., Defendants., 974 F. Supp. 1288, 1997 U.S. Dist. Lexis 13146, 97 Daily Journal DAR 13899 (United States District Court for the Northern District of California August 25, 1997, Filed).

Digital Millennium Copyright Act, 105 P.L. 304, 112 Stat. 2860, 1998 Enacted H.R. 2281, 105 Enacted H.R. 2281 (October 28, 1998).

Doctorow, Cory. "America's Broken Digital Copyright Law Is about to Be Challenged in Court." The Guardian. July 21, 2016. Accessed October 15, 2018. https://www.theguardian.com/technology/2016/jul/21/digital-millennium-copyright-act-eff-supreme-court.

Doctorow, Cory. "What Happens with Digital Rights Management in the Real World?" The Guardian. February 05, 2014. Accessed October 21, 2018. https://www.theguardian.com/technology/blog/2014/feb/05/digital-rights-management.

Dubin, Joseph S. "E Universal Copyright Convention." California Law Review 42, no. 1 (March 1954).

Eldred v. Ashcroft, 537 U.S. 186, 215 (2003); Harper & Row v. Nation Enters,, 471 U.S. 539, 560 (1985); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577 (1977).

Eldred v. Reno, 239 F.3d 372, 345 U.S. App. D.C. 89, (2001).

Eldred, et al., Petitioners v. John D. Ashcroft, Attorney General, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683, 2003 U.S. Lexis 751, 71 U.S.L.W. 4052, Copy. L. Rep. (CCH) P28,537, 2003 Cal. Daily Op. Service 426, 2003 Daily Journal DAR 512, 65 U.S.P.Q.2D (BNA) 1225, 16 Fla. L. Weekly Fed. S 44 (Supreme Court of the United States January 15, 2003, Decided).

Fuller, Steve. "Topic: Media Piracy." Statista. Accessed October 17, 2018.

https://www.statista.com/topics/3493/media-piracy/.

Garfield, Alan E. (2007) "The Case for First Amendment Limits on Copyright Law," Hofstra Law Review: Vol. 35: Iss. 3, Article 8.

Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983), https://scholarship.law.wm.edu/wmlr/vol25/iss2/2

Gibson James, Once and Future Copyright, 81 Notre Dame L. Rev. 167 (2005).

Goodwin, Tom. "The Three Ages of Digital." TechCrunch. June 23, 2016. Accessed October 18, 2018. https://techcrunch.com/2016/06/23/the-three-ages-of-digital/.

Goldstein Paul, Fair Use in a Changing World, 50 J. Copyright Soc'y U.S.A. 133 (2002-2003).

Harper & Row, Publrs. v. Nation Enters., 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588, 1985 U.S. LEXIS 17, 53 U.S.L.W. 4562, 225 U.S.P.Q. (BNA) 1073, 11 Media L. Rep. 1969 (Supreme Court of the United States May 20, 1985, Decided).

Hudson, David L., Jr. "Copyright & the First Amendment." Newseum Institute. August 05, 2004. Accessed October 12, 2018. http://www.newseuminstitute.org/2004/08/05/copyright-the-first-amendment/.

Ku, Raymond Shih Ray, Jiayang Sun, and Yiying Fan. "Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty " Accessed October 12, 2018. http://vanderbiltlawreview.org/articles/2009/11/Ku-et-al.-Does-Copyright-Law-Promote-Creativity-62-Vand.-L.-Rev.-1669-2009.pdf.

L. R. Patterson, Free Speech Copyright, and Fair Use, 40 Vand. L. Rev. 1 (1987).

Litman, Jessica. Digital Copyright. United States of America: Maize Books, an Imprint of Michigan Publishing, 2017.

Lockridge, Lee Ann W., The Myth of Copyright's Fair Use Doctrine as a Protector of Free Speech (November 2007). Santa Clara Computer and High Technology Law Journal, Vol. 24, p. 31, 2007.

Matwyshyn, Andrea M, Hacking Speech: Informational Speech and the First Amendment, 107 Nw. U. L. Rev. 795 (2013). https://scholarlycommons.law.northwestern.edu/nulr/vol107/iss2/10

Matwyshyn, Andrea M., Technoconsen(t)sus, 85 Wash. U. L. Rev. 529 (2007).

Mullin, Joe. "Appeals Court Rules That Google Book Scanning Is Fair Use." Ars Technica. October 16, 2015. Accessed March 17, 2019. https://arstechnica.com/tech-policy/2015/10/appeals-court-rules-that-google-book-scanning-is-fair-use/.

Music Business Worldwide. "Why Does the RIAA Hate Torrent Sites so Much?" Music Business Worldwide. December 19, 2014. Accessed October 21, 2018. https://www.musicbusinessworldwide.com/why-does-the-riaa-hate-torrent-sites-so-much/.

New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822, 1971 U.S. LEXIS 100, 1 Media L. Rep. 1031 (Supreme Court of the United States June 30, 1971, Decided).

Nimmer, Melville B., Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press, 17 UCLA L. Rev. 1180 (1970)

Office, U.S. Copyright. "Chapter 11: Subject Matter and Scope of Copyright." Copyright. Accessed October 15,

2018. https://www.copyright.gov/title17/92chap1.html.

§ 107. Limitations on exclusive rights: Fair use, 17 USCS § 107 (Current through PL 115-281, approved 12/1/18). https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GM91-NRF4-431H-00000-00&context=1516831.

"17 U.S. Code § 1201 - Circumvention of Copyright Protection Systems." LII / Legal Information Institute. Accessed October 20, 2018. https://www.law.cornell.edu/uscode/text/17/1201.

§ 1201. Circumvention of copyright protection systems, 17 U.S.C. § 1201(a)(1)(A) (Current through PL 115-281, approved 12/1/18).

Samuelson, Pamela, The Generativity of Sony V. Universal: The Intellectual Legacy of Justice Stevens. Fordham Law Review, Vol. 74, p. 1831, 2006; UC Berkeley Public Law Research Paper No. 925127.

Seltzer, Wendy, Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment (March 1, 2010). Harvard Journal of Law & Technology, Vol. 24, p. 171, 2010; Berkman Center Research Publication No. 2010-3.

[Sonny Bono Copyright Term Extension Act; Fairness in Musical Licensing Act of 1998], 105 P.L. 298, 112 Stat. 2827, 1998 Enacted S. 505, 105 Enacted S. 505 (October 27, 1998).

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574, 1984 U.S. LEXIS 19, 52 U.S.L.W. 4090, 220 U.S.P.Q. (BNA) 665, 224 U.S.P.Q. (BNA) 736, 55 Rad. Reg. 2d (P & F) 156 (Supreme Court of the United States January 17, 1984, Decided).

Suntrust Bank, as Trustee of the Stephen Mitchell trusts f.b.o. Eugene Muse Mitchell and Joseph Reynolds Mitchell, Plaintiff-Appellee, versus HOUGHTON MIFFLIN COMPANY, Defendant-Appellant., 268 F.3d 1257, 2001 U.S. App. LEXIS 21690, Copy. L. Rep. (CCH) P28,326, 60 U.S.P.Q.2D (BNA) 1225, 14 Fla. L. Weekly Fed. C 1391 (United States Court of Appeals for the Eleventh Circuit October 10, 2001, Filed).

The Authors Guild v. Google, Inc., Defendant- Appellee., 804 F.3d 202, 2015 U.S. App. Lexis 17988, Copy. L. Rep (CCH) P30,832, Copy. L. Rep. (CCH) P30,832, 43 Media L. Rep. 2981, 116 U.S.P.Q.2D (BNA) 1423 (United States Court of Appeals for the Second Circuit October 16, 2015, Decided).

§ 302. Duration of copyright: Works created on or after January 1, 1978, 17 USCS § 302

U.S. CONST. art. I, § 8.

U.S. CONST. amend. I

"Unintended Consequences: Sixteen Years under the DMCA." Electronic Frontier Foundation. September 2014. Accessed October 13, 2018. https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf.

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

"US Inflation Calculator." US Inflation Calculator. Accessed October 21, 2018. http://www.usinflationcalculator.com/.

USCS Const. Art. I, § 8, Cl 8

Ward et al. v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661, 1989 U.S. Lexis 3129, 57 U.S.L.W. 4879 (Supreme Court of the United States June 22, 1989, Decided).

Worldwide Church of God, a California Corporation, Plaintiff-Counter-Defendant-Appellant, v. Philadelphia Church of God, Inc., an Oklahoma Corporation, Defendant-Counter-Claimant-Appellee., 227 F.3d 1110,

2000 U.S. App. LEXIS 23390, Copy. L. Rep. (CCH) P28,151, 2000 Cal. Daily Op. Service 7761, 2000 Daily Journal DAR 10303, 56 U.S.P.Q.2D (BNA) 1259 (United States Court of Appeals for the Ninth Circuit September 18, 2000, Filed).

"Xerox 914 Plain Paper Copier." National Museum of American History. Accessed October 30, 2018. http://americanhistory.si.edu/collections/search/object/nmah_1085916.