COMMENTS

A Proposed Quick Fix To the DMCA Overprotection Problem That Even a Content Provider Could Love . . . or at Least Live With

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A long history of conflict surrounds the scope of copyright protection within the content industries,¹ and the music industry is no exception. Invariably, these conflicts arise as a result of new technologies that threaten the copyright holder’s ability to restrict reproduction, distribution, and ultimate control of a work.² This conflict has manifested itself both within the different branches of the music industry³ and between the industry and the consuming public.⁴

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2. See MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154, 1158 (9th Cir. 2004) (“From the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners, often resulting in federal litigation.”); Jane C. Ginsburg, Copyright and Control over New Technologies of Dissemination, 101 COLUM. L. REV. 1613, 1613 (2001) (“The relationship of copyright to new technologies that exploit copyrighted works is often perceived to pit copyright against progress.”).

3. See, e.g., A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002) (record label sued provider of online peer-to-peer network that was primarily used to share music files for contributory infringement); Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (broadcaster alleged illegal price fixing in the form of blanket licensing against performing rights societies); Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960) (music publisher sued another music publisher for copyright infringement); White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1 (1908) (copyright holders sued manufacturers of player pianos for copyright infringement).

4. See PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 717 (5th ed. 2002) (“Private uses of copyrighted works have presented a persisting challenge to copyright law.”).
The first copyright struggles arising from new technologies divided the music industry from within and threatened to shift control of copyrighted works in favor of nontraditional, competing distribution formats. For example, the development of player pianos at the turn of the century pitted music publishers against manufacturers of the then-new player piano. Similarly, the development of radio caused record labels and recording artists to worry about how they would collect royalties in the new media. Each of these new technologies was, at one point, thought to infringe upon the rights of intellectual property holders so egregiously that proliferation of the technology might mean an effective end to intellectual property rights' protection. Despite the development and proliferation of each new technology, however, the industry survived and grew.

With the advent of home recording, the scope of the conflict shifted away from internal conflict and toward a new threat: the consumer. Home audio and video recording enabled consumers to make multiple copies of a protected work, at the same time possibly infringing on the copyright holder's exclusive right to reproduce those works. With each new technological innovation, users were able to make more uses of copyrighted works at the expense of the copyright holders' control over content. More recently, digital copying and distribution technology, including P2P networks, "ripping" software, and other digital copying technologies, have further complicated the copyright landscape.  

7. Craft, supra note 5, at 48. Interestingly, as history played out, terrestrial radio broadcasters never had to pay royalties to record labels to play their sound recordings over the air. Kimberly L. Craft, The Webcasting Music Revolution Is Ready to Begin, As Soon As We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself, 24 Hastings Comm. & Ent. L.J. 1, 6 (2001).
8. For a complete discussion of the history of conflicts surrounding the technology-copyright debate, see Jessica Litman, Digital Copyright 35–69 (2001).
11. See Ginsburg, supra note 2, at 1614 ("With the arrival of [new] technologies, the . . . balance [of control] substantially shifted to users.").
12. "P2P" is short for "peer-to-peer." The phrase "P2P network" describes a kind of network in which Internet users connect directly to one another's computers in order to share files. These files
technologies, threatened copyright holders’ control over protected works. The industry reacted by lobbying for the enactment of the Digital Millennium Copyright Act of 1998 ("DMCA").

Among other things, the DMCA outlawed the use or importation of tools that others use to circumvent copy-protection measures that copyright owners have installed in their content. However, the DMCA provisions disallowing copy protection and the importation of circumvention tools endow copyright holders with far too much power to control their works because those provisions prevent fair uses of those works. Congress must amend the DMCA to restore the balance of power between the content providers and the public by creating a meaningful fair use defense in the digital age.

This Comment first explains the evolution of the fair use doctrine, which historically prevented copyright holders from having too much control over their works by allowing certain legal and noninfringing fair uses of protected works. Part II explains how the United States Supreme Court developed the Betamax standard to apply the doctrine of fair use to a new technology: home video recorders. Part II also addresses how fair use and the Betamax standard might apply to digital technologies. Part III explains how the DMCA effectively abolished the defense of fair use and its application under the Betamax standard. Finally, Part IV concludes that the fair use defense must co-exist with the DMCA in order to maintain an appropriate balance of power between copyright owners and the public. Part IV then proposes a solution for restoring that balance.

I. THE EVOLUTION OF FAIR USE

The United States Constitution grants Congress 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." This clause endows Congress with the power to grant monopolies, or copyrights, to authors for limited periods of time. The monopoly may only extend as far as necessary in order to

may include copyrighted works such as music, books, and movies. See Peer-to-peer, in WIKIPEDIA: THE FREE ENCYCLOPEDIA, at http://en.wikipedia.org/wiki/P2p (last visited Mar. 23, 2005).


“Promote the Progress of Science and useful Arts.” Thus, Congress’s power is limited to serving the purpose of promoting progress.

This “purpose” language ensures that “copyright legislation . . . under the terms of the Constitution is not based upon any natural right that the author has in his writings.” Instead, the monopoly privileges that Congress may authorize are “intended to motivate the creativity of authors and inventors” and induce authors to release those works to the public, ultimately allowing the public complete access to the product after the monopoly period has expired. Thus, the monopoly “confers a benefit upon the public that outweighs the evils of the temporary monopoly.” The reward to an individual author is merely “a secondary consideration.” Overall, the copyright laws strive to balance the protection of property rights, which encourage innovation and creativity, against the public’s interest in having access to the free flow of ideas and creative works.

In order to preserve the balance between property rights and the public’s interest in access, copyright law has never granted a copyright owner complete control of his work; control is limited even during the monopoly period. Under 17 U.S.C. § 106, a copyright holder’s control is limited to five exclusive rights during the monopoly period, or six where the copyright is in a sound recording. Those exclusive rights are the rights to reproduce the work, prepare derivative works, distribute copies of the work, perform the work publicly, display the work publicly, and perform a sound recording publicly through digital transmission. The rights granted in § 106 are explicitly limited not only to the terms of the list itself, but also by §§ 107–122. Notably absent from the list of exclusive rights is the copyright holder’s right to control fair uses.

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22. Sony, 464 U.S. at 429.
23. Id. at 429 n.10 (citing H.R. Rep. No. 60-2222, at 7 (1909)).
24. Paramount Pictures, 334 U.S. at 158.
26. Id. at 433 n.13.
27. Id. at 431–32.
29. Id.
30. Id. (granting rights “[s]ubject to sections 107 through 122”).
31. Sony, 464 U.S. at 433 (explaining that “the copyright owner does not possess the exclusive right to such a [fair] use”).
The concept of fair use first evolved as a judicial doctrine\(^{32}\) as early as 1841,\(^{33}\) and although it is not constitutionally mandated,\(^{34}\) "some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose [of] 'promot[ing] the Progress of Science and useful Arts.'"\(^{35}\) Fair use developed after the courts found that rights granted under the pre-1976 versions of the Act were broad enough to encompass almost any possible activity associated with a copyrighted work.\(^{36}\) Consequently, the courts consistently refused to read the statute strictly\(^{37}\) and instead developed the doctrine of fair use by recognizing a class of exceptions to the exclusive rights in copyrighted works.\(^{38}\) Congress first acquiesced in the application of the fair use doctrine by doing nothing to counteract it, and then in 1976, Congress explicitly ratified the doctrine by codifying the fair use exception in the Copyright Act of 1976.\(^{39}\)

\(^{32}\) See H.R. Rep. No. 94-1476, at 65, reprinted in 1976 U.S.C.C.A.N. 5659, 5678 (explaining that the doctrine of fair use was originally a judicial doctrine that was not codified until 1976).

\(^{33}\) The first judicial finding of noninfringement for a fair use in the United States occurred in 1841 in Folsom v. Marsh, 9 F. Cas. 342 (C.C. Mass. 1841); however, the term "fair use" did not appear in case law until 1869, in Lawrence v. Dana, 15 F. Cas. 26, 44 (C.C. Mass. 1869). The concept is not wholly original to U.S. jurisprudence, however. Fair use doctrine had its earliest beginnings in English cases interpreting the Statute of Anne. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994).

\(^{34}\) Universal City Studios, Inc. v. Corley, 273 F.3d 429, 458 (2d Cir. 2001) ("[T]he Supreme Court has never held that fair use is constitutionally required.").

\(^{35}\) Campbell, 510 U.S. at 575 (citing U.S. CONST. art I, § 8, cl. 8); see also Sony, 464 U.S. 417 (asserting that Congress confers copyright privileges "to motivate the creative activity of authors and inventors by the provision of a special reward").

\(^{36}\) Sony, 464 U.S. at 447 n.29.


\(^{38}\) See, e.g., Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) (recognizing singing in the shower and listening to the radio within a commercial establishment where the listening is for private enjoyment as noninfringing uses of copyrighted works).

\(^{39}\) Pub. L. No. 94-553, (codified at 17 U.S.C. § 107 (1976)). The current version of § 107 provides the following:

Notwithstanding the provisions of sections 106 and 106A, 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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

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

When Congress enacted § 107 as part of the Copyright Act of 1976, it emphasized that future advances in technology demand an elastic formulation of fair use.\textsuperscript{40} It explained that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."\textsuperscript{41} Congress's decision proved prudent and, as technology has developed, the fair use test has been adapted, interpreted, and customized to fit new technologies.\textsuperscript{42} In 1984, with the development of personal video recording devices, the Court dramatically adapted the fair use test when it adopted the Betamax standard.\textsuperscript{43}

II. THE BETAMAX STANDARD

The Betamax standard developed as a result of litigation between Universal Studios and Disney on one side and Sony on the other. This section will first examine the development of the Betamax standard, and then it will turn to a discussion on the application of the Betamax standard today, more than twenty years after it was first developed in \textit{Sony v. Universal City Studios, Inc.}

\textbf{A. Sony v. Universal City Studios}

In 1969, Sony developed the Betamax, a video tape recorder that could be used at home to record television programs onto magnetic tape.\textsuperscript{44} Sony began marketing the Betamax to the public for home use in 1975;\textsuperscript{45} soon after, Universal and Disney filed suit. The claim against Sony was that Betamax users were infringing television and movie copyrights and that Sony was contributorily liable for that infringement.\textsuperscript{46} The Court made two significant holdings with respect to fair use. First, the sale of equipment capable of copyright infringement is not contributory infringement if that equipment is capable of "substantial noninfringing uses."\textsuperscript{47} Second, creating unauthorized copies of television broadcasts for personal use at a later time is a fair use of those broadcasts.\textsuperscript{48}

\textsuperscript{41} Id.
\textsuperscript{42} See generally \textit{Sony}, 464 U.S. at 417.
\textsuperscript{43} See \textit{id.}; see also discussion \textit{infra} at notes 44--97 and accompanying text.
\textsuperscript{44} \textit{Sony}, 464 U.S. at 420. The video tape recorder is similar to a video cassette recorder.
\textsuperscript{45} \textit{Craft, supra note 5}, at 23.
\textsuperscript{46} \textit{Id.} at 420.
\textsuperscript{47} \textit{Id.} at 442.
\textsuperscript{48} \textit{Id.} at 454--55.
1. Sale of Equipment Capable of “Substantial Noninfringing Uses” Not Contributory Infringement

The Court’s first conclusion, that the sale of equipment capable of “substantial noninfringing uses” is not contributory infringement, was based upon an analogy to patent law. Because the Copyright Act of 1976 was silent on the issue of contributory infringement, the Court looked to patent law’s clear definition of contributory infringement for guidance. Analogizing to patent law, Sony not only established a contributory infringement cause of action in copyright law, but it also defined the scope of liability for contributory infringement.

In patent law, “[t]he prohibition against contributory infringement cannot be extended to the sale of a staple article or commodity of commerce that is suitable for substantial noninfringing use.” The Court in Sony borrowed the “substantial noninfringing use” standard from patent law, holding that anyone selling equipment capable of substantial noninfringing uses was not liable as a contributory copyright infringer. To save Sony from liability, therefore, it was enough that one use of the Betamax “plainly” satisfied the substantial noninfringing use standard: private, noncommercial time-shifting in the home.

Home time-shifting was considered a substantial noninfringing use for two reasons. First, Disney and Universal alone had no right to prevent other copyright holders from authorizing time-shifting of their broadcasts. Disney’s and Universal’s programming each made up only a fraction of the amount of total programming that viewers may wish to record. Sony presented substantial evidence that other copyright hold-
ers authorized recording of their programs, specifically those holding copyrights in sports, religious, and educational programming. Therefore, because the plaintiffs did “not represent a class composed of all copyright holders” and a significant number of copyright holders welcomed the practice of time-shifting, the plaintiffs had no right to a remedy that would deny the sale of “an article of commerce” that would prevent other copyright holders from meaningfully authorizing time-shifting. The second reason that home time-shifting was a substantial noninfringing use was tied to the Court’s second significant holding, that home time-shifting is a fair use of a copyrighted work.

2. Unauthorized Home Time-Shifting As a Fair Use

The Court’s second important holding with respect to fair use was that unauthorized home time-shifting constituted fair use of a copyrighted work. Applying the fair use balancing test in 17 U.S.C. § 107, the Court found that the first factor, the purpose and character of the work, clearly weighed in favor of a finding of fair use because time-shifting for personal viewing was clearly a noncommercial use. The second factor, the nature of the copyrighted work, weighed in favor of a finding of fair use because the broadcast was one that the viewer “had been invited to witness in its entirety free of charge.” The third factor, the amount copied, may have weighed in favor of the copyright holders if not for the nature of the works copied; because the works were offered in their entirety free of charge to begin with, “the fact that the entire work is reproduced . . . [did] not have its ordinary effect of militating against a finding of fair use.”

The Court went into greater detail in discussing the fourth factor, the effect on the potential value of the work. It found that Universal and Disney failed to fulfill their burden of demonstrating that “some meaningful likelihood of future harm [to the value of Universal’s and Disney’s copyrights] exist[ed].” The Court supported its finding with a number of observations. First, the Court observed that the plaintiffs had not demonstrated any past harm. Second, the Court reasoned that the plaintiffs

58. Id. at 444–46.
59. Id. at 444.
60. Id. at 446.
61. Id. at 442.
62. Id. at 449.
63. Id.
64. Id. at 449–50.
65. Id.
66. Id. at 451.
67. Id. at 452.
and their advertisers would likely benefit by the larger audience that time-shifting allowed. Finally, the Court explained that the plaintiffs provided no factual basis for their assertions that viewers would abandon live television and movies in favor of Betamax tapes. Therefore, the Court concluded that all four factors weighed in favor of a finding that private, noncommercial time-shifting was a fair use.

3. The Betamax Standard

Although users of Sony’s Betamax were making unauthorized copies of Universal’s and Disney’s copyrighted television programs, the Court found that Sony was not contributorily liable because the sale of equipment capable of substantial noninfringing uses does not give rise to contributory liability, and at least one use of the Betamax—private time-shifting—was a noninfringing fair use. These two holdings constitute what has become known as the Betamax standard.

Since the decision in Sony, courts have refined the analysis for determining what constitutes contributory and vicarious copyright infringement. The Betamax standard today makes up only a part of that larger analysis. The current test for contributory infringement consists of three elements: (1) direct infringement by a primary infringer; (2) knowledge of the direct infringement on the part of the defendant; and (3) material contribution to the direct infringement on the part of the defendant.

It is the knowledge element that requires a court today to engage in a Betamax analysis. Whether the Betamax standard applies will determine the level of knowledge that the plaintiff must demonstrate in order to meet this element of the three-part contributory infringement test. If the technology at issue does not meet the Betamax standard of being capable of substantial noninfringing uses, then the plaintiff must demonstrate only that the defendant had constructive knowledge of the infringement. If the technology at issue does fulfill the Betamax standard of being capable of substantial noninfringing uses, then the requisite

68. Id. at 454.
69. Id. at 452–53.
70. Id. at 454–55.
71. Compare id. at 417, with MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1160 (9th Cir. 2004), cert. granted, 125 S. Ct. 686 (2004) (explaining that Sony’s standard is an element of the larger contributory infringement analysis).
72. Grokster, 380 F.3d at 1160.
73. See id. at 1160–61 (citing A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001); A&M Records v. Napster, 284 F.3d 1091, 1095–96 (9th Cir. 2002)).
74. Grokster, 380 F.3d at 1160–61.
75. Id. at 1161.
level of knowledge to impose liability is "reasonable knowledge of specific infringing [content]," and the plaintiff must also prove that the defendant "failed to act on that knowledge to prevent infringement." 76

The Betamax standard is alive and well today in current copyright law. Sony demonstrated the flexibility of the doctrine of fair use, and the Betamax standard has proved useful for many years. However, as technology continued to develop and new digital technologies challenged the traditional distribution mediums of the content industries, Sony's Betamax standard was put to the digital test.

B. Fair Use and Digital Technology

The fair use doctrine and the Betamax standard, as understood before the enactment of the DMCA, apply relatively simply to digital technologies. Illustrative digital technologies include digital music and movies on compact disc ("CD"), digital video disc ("DVD"), or computer files (such as MP3 77 audio files), ebooks, digital video recorders, and P2P networks. This section will briefly examine the possible fair uses of those technologies and how the Betamax standard would have applied before the enactment of the DMCA.

1. Fair Uses of Digital Technologies

Digital fair use commonly occurs in the educational setting. For example, a professor displaying a scene from two different films to illustrate a point on cinematography would be engaging in a fair use of those works. 78 The professor may copy each of those scenes onto a single medium; for example, a single videotape in the analog classroom 79 or a single DVD in the digital classroom. Whether the demonstration is recorded onto analog video or digital video, the professor has engaged in a lawful

76. Id.

77. MP3 is short for "MPEG-1 Audio Layer 3." Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 190 F.3d 1072, 1074 (9th Cir. 1999). It is the common name of a digital format for sound recordings that uses algorithms to compress audio files in order to make them smaller and more manageable. Id. at 1073–74.

78. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000); see also H.R. REP. No. 94-1476, at 65, reprinted in 1976 U.S.C.C.A.N. 5659, 5678 (providing examples of fair use including "reproduction by a teacher or student of a small part of a work to illustrate a lesson").

79. An analog signal is one that uses a property of the medium itself to transmit information. See Analog, in WIKIPEDIA: THE FREE ENCYCLOPEDIA, at http://en.wikipedia.org/wiki/Analog (last visited Mar. 23, 2005). In the case of traditional recording media, the medium is magnetic tape, and the property that transmits information is the electrical property; thus, the varying electrical impulse generated by the magnetized tape transmits audio from the media to the playing device. See id. This differs from a digital format, where the information is encoded in binary code. Id. An "analog classroom" would be a classroom using works fixed in an analog format; this is in contrast to a "digital classroom," which would use works fixed in a digital format. Id.
fair use of the work. Likewise, a schoolchild may make fair copies of a page of a book to hand out to students as part of a presentation on literary analysis. In the digital era, rather than making photocopies, the instructor could download from the Internet an electronic copy of the book, also known as an “ebook,” select the pages to print, and print the number of copies needed. In both examples, the students receive the same end product (the book page); the only difference is the source of each student’s copy.

Education is not the only setting in which a person may make fair use of a digital work to the same effect as using an analog or traditional version of a work. A library may fairly copy a portion of a work to replace a damaged or missing part of a lawfully acquired copy. In the digital age, rather than making a photocopy of the book, the library might legally print out the damaged pages from an ebook copy of that same work. Just as in the other examples, the process and the result are the same because the library has replaced the damaged pages with fairly made copies. Only the source of those copies is different: traditional on the one hand, digital on the other.

Digital fair use may also occur in a commercial context. A social commentator may fairly copy a part of a work in order to parody that work, and the result is the same whether the parody was based on analog or digital master recordings of the original. For example, a musical group making a parody of an original song may copy parts of the song, such as the accompaniment, in order to comment on it by inserting new lyrics. In the analog age, the parody could be created fairly by copying the underlying musical accompaniment to the song from the master tape (analog) recordings. The end result of the digital parody is no different, except that the parodist would use digital master recordings.

As the above examples illustrate, the fair use of copyrighted works is the same whether the work being copied is embodied in a digital or analog medium; only the source of the copy varies, and then only in format and not in content. Like the traditional fair use standards, the Betamax standard is also applicable to digital media in cases of contributory infringement.

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80. See Reimerdes, 111 F. Supp. 2d at 322 (“[C]ertain uses . . . might qualify as ‘fair’ for purposes of copyright infringement—for example, the preparation by a film studies professor of a single CD-ROM or tape containing two scenes from different movies in order to illustrate a point in a lecture on cinematography, as opposed to showing relevant parts of two different DVDs.”).
81. See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001).
84. See Campbell, 510 U.S. at 569.
85. See id.
2. Betamax Uses of Digital Technologies

The most obvious application of the Betamax standard to digital media is in the case of a digital video recorder ("DVR"). A DVR operates much like a VCR or video tape recorder ("VTR") by recording television broadcasts for consumption, or viewing, at a later time. Rather than recording onto an analog magnetic tape, however, a DVR records digital information onto a hard drive. Like the Betamax VTR, a DVR is capable of substantial noninfringing uses, and its manufacturers would likely not be liable for contributory copyright infringement because its users engage in a quintessential Betamax fair use—time-shifting—when recording television broadcasts.

Even P2P networks are most likely capable of substantial noninfringing uses, in which case owners of P2P networks may not be liable for contributory infringement under the Betamax standard. That precise

87. See id.
88. Some articles have stressed potential new uses that DVRs might present in the future and have pointed out that those potential uses might change the result of a Betamax analysis. See generally Matthew W. Bower, Note, Replaying the Betamax Case for the New Digital VCRs: Introducing TiVo to Fair Use, 20 CARDOZO ARTS & ENT. L.J. 417 (2002). There is, however, no evidence that these new features are widely used or even widely available, and thus far consumers seem to be using DVRs almost identically to VCRs.
89. The only case that has decided the issue directly, MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004), is currently in front of the United States Supreme Court, cert. granted, 125 S. Ct. 686 (2004), so the issue has not yet been definitively resolved. The district court in A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), was given the opportunity to address this precise issue five years ago when it granted a preliminary injunction against Napster for offering P2P network services. While the court found that A&M had demonstrated a likelihood of prevailing at trial that justified the injunction against Napster, it left the door open for other P2P network operators to use a Betamax defense. Id. at 927.

On appeal, the court found that the Betamax standard did not protect Napster for two reasons. First, the appellate court accepted the district court’s finding of fact that, unlike Sony, Napster had actual and constructive knowledge of its users’ direct infringement. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 (9th Cir. 2001). However, the appellate court was careful to explain that it would “not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs’ copyrights.” Id. at 1020–21 (emphasis added). By qualifying its holding and distinguishing Sony, the court left the door open to find liability lacking under the Betamax standard in future P2P cases.

The second door that the Napster appellate court left open to future P2P operators was its holding that the district court had erred by holding that Napster had not proven that its network was currently actually used for substantial noninfringing uses. Id. at 1021. The district court’s error was that it had considered only current, actual uses of the Napster network. Id. On appeal, the Ninth Circuit explained that the lower court “improperly confined the use analysis to current uses, ignoring the system's capabilities,” when it considered the network’s capability for substantial noninfringing uses. Id. By overturning the finding that Napster’s P2P network was incapable of substantial noninfringing uses, the Ninth Circuit once again left the door open for other network providers to use a Betamax fair use defense, because future courts must consider not only a system’s actual use, but also its potential uses.
issue is currently before the United States Supreme Court in the case of *MGM Studios, Inc. v. Grokster, Ltd.* Grokster offers free P2P software to the public that allows computer users to search other Grokster users’ files and make copies of those files for themselves. When a number of film studios, authors, and record labels sued the company for contributory and vicarious copyright infringement, Grokster invoked the Betamax standard as a part of its defense.

Before the Ninth Circuit, the plaintiffs applied lessons from the *Sony* decision to persuade the court that Grokster’s software was not capable of substantial noninfringing uses. For example, whereas the *Sony* Court explained that the plaintiffs in that case owned less than ten percent of the infringed programming and had no right to prevent all other copyright holders from authorizing home copying, the plaintiffs in *Grokster* alleged that they owned more than seventy percent of the materials shared with Grokster’s software. In the end, however, Grokster prevailed in establishing that its software was capable of substantial noninfringing uses, having also taken a lesson from *Sony.* The defendants demonstrated to the court that their software was capable of substantial noninfringing uses by submitting statements from a number of recording artists and public domain distribution companies that the Grokster software enabled authorized distribution of their works. The court explained that, even if only ten percent of the use was legitimate, as the plaintiffs alleged, the volume of hundreds of thousands of legitimate file exchanges helped to demonstrate the capability for substantial noninfringing use. In this way, Grokster escaped liability with the help of the Betamax standard.

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90. 380 F.3d 1154, 1154 (9th Cir. 2004), cert. granted, 125 S. Ct. 686 (2004).
91. See generally id. at 1158–60.
92. See generally id.
93. Id. at 1158.
94. Id. at 1162.
95. Id. The court explained that the plaintiffs had misunderstood the *Sony* standard when they argued that the software was primarily used for infringing activities. Id. In the Ninth Circuit, “probable” use is irrelevant; capability for substantial noninfringing use is the only issue. Id.; cf. *In re Aimerst Copyright Litig.,* 334 F.3d 643, 653 (7th Cir. 2003) (holding that an important additional factor in determining a P2P network’s capability for substantial noninfringing uses is how probable those uses are).
96. Grokster, 380 F.3d at 1162 n.10.
97. Of course, the defendants in that case had to prove more than just a Betamax defense. See discussion supra notes 90–96 and accompanying text. In the *Grokster* case, the issue of a direct primary infringement was not at issue. 380 F.3d at 1160. Therefore, the court focused its analysis on Grokster’s knowledge of the infringement and its material contribution. See id. at 1160–64. The Ninth Circuit held for Grokster on both elements. Id. at 1162–63.

Having held that the Betamax standard applied, the court required plaintiffs to demonstrate that Grokster “had reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement.” Id. at 1161. Reasonable knowledge and the failure to act must occur at the
The Betamax standard transfers relatively simply to the use of digital technologies in fair uses. Even in the case of P2P networks, where there is no analogous predigital technology, the Betamax standard has been used to protect technologies capable of substantial noninfringing uses. Therefore, the content industries sought other ways to maintain their control of their copyrighted content; the result was the Digital Millennium Copyright Act of 1998.

III. DEFENSE: THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

Following the Betamax ruling, the industry slowly adapted and the parties reached a new balance that promoted, at least for a time, peace between content providers and consumers. However, the digital age brought with it both benefits and problems for copyright law. Both the industry and consumers wildly embraced the new digital recording technologies because consumers could purchase music with a sound quality never before experienced by most. The format also made it easier for consumers to infringe on the industry’s copyrights because home digital copying and distribution could happen at the click of a mouse, and computers could generally copy media much more quickly than a home tape recorder or VCR. Before content providers realized the threat, P2P networks had popped up on college campuses across the country and CDs were easily reproduced in the home. Copy-protection measures were seldom used before the digital age, as the technology required to mass copy and mass distribute copyrighted works was not generally available to the public. With the advent of the Internet, however, this

same point in time. Id. at 1162. Because the court held that Grokster had no right or ability to act to prevent infringement, the plaintiff’s notices of infringement were irrelevant as to knowledge, and therefore the defendants did not have the requisite level of knowledge. Id. at 1162–63. As the court observed, “even if [Grokster] closed [its] doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.” Id. (internal quotation marks omitted).

While a Betamax analysis is not a factor in an analysis of the third element—material contribution—the district court also found for Grokster on that issue. Id. at 1163. Therefore, having met only the first element of contributory infringement—a primary act of direct infringement—the court refused to hold Grokster liable for contributory infringement. Id. at 1164.

98. See Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1073 (9th Cir. 1999).


100. See LITMAN, supra note 8, at 153–56.

101. Diamond Multimedia, 180 F.3d at 1072, and A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), are the first examples of litigation involving significant amounts of copying and distribution by the public. Even in Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), the consumers using VCRs did not have the ability to record and distribute content on a significantly large scale.
changed dramatically. Special software allowed consumers to not only create nearly perfect copies of lawfully purchased recordings, an activity explicitly allowed under copyright law, but technology also allowed them to distribute copies to hundreds or thousands of strangers across P2P networks.

In response, content providers developed a number of tools to protect against unauthorized copying and distribution. These mechanical and software measures protect against unauthorized mass distribution, but are also equally effective at limiting traditional fair use and other legal uses. In turn, the consumer markets responded with new devices that circumvent these mechanical and software protections. Additionally, while software protections put the ability to copy content out of reach of the average consumer, clever programmers quickly developed hacks and cracks for the technological protections and made those tools available to John Q. Public on the Internet. The industry, in a desperate attempt to stave off the threat that the digital age posed, lobbied hard for the DMCA. Realizing that traditional copyright enforcement may no longer adequately protect in the digital age, copyright holders lobbied for the DMCA to combat piracy even before it begins.

A. Operation of the DMCA

While the DMCA dramatically changed a number of provisions of copyright law, it also added a number of new sections to Title 17. Most relevant are the provisions related to fair use and circumvention of technological copy protection. Prior to the enactment of the DMCA, there were no laws disallowing the circumvention of technological protection. The DMCA significantly amended circumvention law, and consequently fair use law, by adding § 1201 to the Copyright Act. Sec-

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103. See Napster, 239 F.3d at 1004; see also Litman, supra note 8, at 154–55.
104. See Litman, supra note 8, at 151–57.
105. See discussion infra Part IV.
106. See, e.g., Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).
108. See United States v. Elcom, Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002), for an explanation of how a software circumvention tool may work and how those tools can be subsequently posted to the internet.
109. Litman, supra note 8, at 122–45.
110. Corley, 273 F.3d at 435.
tion 1201 directly addresses the circumvention of technological protection measures.\textsuperscript{113} The section is concerned with two particular activities: the act of circumvention itself and the manufacture or trafficking of tools for circumvention.\textsuperscript{114} Sections 1201(a)(2) and 1201(b)(1) make it illegal to offer to the public any tool primarily designed to circumvent copyright protections.\textsuperscript{115} The language of each of these two subsections is nearly identical,\textsuperscript{116} except that § 1201(a)(2) prohibits a person or entity from trafficking tools designed to access a technologically protected work,\textsuperscript{117} while § 1201(b)(1) prohibits trafficking tools designed to copy a technologically protected work.\textsuperscript{118}

While § 1201(a)(2) and § 1201(b)(1) address the manufacture, sale, or trafficking of tools designed to circumvent protections on a technologically protected work, § 1201(a)(1)(A) regulates the act of circumven-

\textsuperscript{113} See § 1201.

\textsuperscript{114} ELECTRONIC FRONTIER FOUNDATION, UNINTENDED CONSEQUENCES: FIVE YEARS UNDER THE DMCA, at http://www.eff.org/lP/DMCA/_unintendedconsequences.php (last visited Apr. 15, 2004); see also § 1201(a)(1), (2), (3); Corley, 273 F.3d at 435 (explaining that “Congress targeted not only those pirates who would circumvent these digital walls . . . but also anyone who would traffic in a technology primarily designed to circumvent a digital wall”).

\textsuperscript{115} § 1201.


\textsuperscript{117} Section 1201(a)(2) of the Copyright Act reads as follows:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

\textsuperscript{118} § 1201(b)(1) reads as follows:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; has only limited commercially significant purpose of use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

This provision prohibits circumvention tools aimed at copying the work. The statute itself refers to circumventing technology that “protects a right of a copyright owner under this title.” Id. Those rights are the rights laid out in 17 U.S.C. § 106, and included among them is the exclusive right to make and distribute copies. Because copying is the main potentially infringing use that technology allows, I will refer to this kind of circumvention, for simplicity’s sake, as circumvention protecting against unauthorized copying of a work.
tion itself.\textsuperscript{119} Like §§ (a)(2) and (b)(1), § (a)(1)(A) maintains the distinction between circumvention for the purpose of gaining access to a work and circumvention for the purpose of bypassing copy-protection technology.\textsuperscript{120} Section 1201(a)(1)(A), however, makes the act of circumvention illegal only if it is intended to gain access to a work.\textsuperscript{121} No provision outlaws the act of circumvention in order to copy a protected work.\textsuperscript{122}

Together, these sections allow content holders to combat piracy in court even before a single infringement of the copyrighted work has occurred. They do this by prohibiting the conduct and tools that enable infringers to access and copy a work in the first place.\textsuperscript{123} The DMCA does not ask whether infringement has actually occurred;\textsuperscript{124} rather, a § 1201 violation may occur before a pirate has made or distributed a single infringing copy, thus cutting off piracy at the source.\textsuperscript{125} In fact, the DMCA works to prevent piracy even earlier by assuring that potential pirates do not have access to tools designed for infringement.\textsuperscript{126}

Notably, nothing in the DMCA expressly changes the doctrine of fair use.\textsuperscript{127} In fact, the legislation itself suggests that it would have no effect in the litigation of fair use issues. Specifically, § 1201(c)(1) clearly states that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."\textsuperscript{128} Also, nowhere does the DMCA reference any fair use exceptions to the prohibitions on circumvention.\textsuperscript{129} Moreover, the DMCA does not in any way alter § 107 as a defense to an action for infringement.\textsuperscript{130} In addition, the DMCA does not explicitly overrule the decision in \textit{Sony}.\textsuperscript{131} Finally, since the DMCA does not outlaw circumvention in order to copy a work, a user could theoretically skirt the protection legally to make a fair copy of the work.\textsuperscript{132} Nevertheless, largely due to the

\textsuperscript{119} "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." § 1201(a)(1)(A).
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} See generally § 1201.
\textsuperscript{123} See § 1201(a)(1)(A), (a)(2), and (b).
\textsuperscript{124} See generally § 1201.
\textsuperscript{125} See § 1201(a)(1)(A).
\textsuperscript{126} See § 1201(a)(2), (b).
\textsuperscript{127} See generally § 1201.
\textsuperscript{128} § 1201(c)(1).
\textsuperscript{129} See generally § 1201.
\textsuperscript{130} See \textit{id.}
\textsuperscript{131} See \textit{Sony} Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); see generally § 1201. At least one court has found that the DMCA implicitly overrules \textit{Sony} to the extent that the terms of the DMCA are inconsistent with the rule set forth in \textit{Sony}. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000).
\textsuperscript{132} See generally § 1201.
§ 1201 prohibitions on both circumvention and offering tools of circum-
vention, fair use law has changed under the DMCA.

B. An Effective End To Fair Use

The most important way that the DMCA alters the concept of fair
use is by preventing a consumer, who legally cannot circumvent protec-
tion measures, from legally engaging in a fair use of a technologically
protected work.133 Under the DMCA, consumers are unable to gain legal
access to a protected work at all in order to make a fair use of it.134 Also,
unless the consumer is a programmer with a high level of encryption or
other protection expertise, she is effectively barred from copying a work
or a portion thereof because others cannot legally offer her the tools with
which to create a fair copy.135 The result of these seemingly innocuous
restrictions is that copyright owners can unilaterally eliminate all fair
uses of their works by implementing technology that protects against
access or copying.136

The case of United States v. Elcom, Ltd.137 provides an example of
one way in which copyright holders have used the DMCA to keep users
from engaging in fair uses of technologically protected works. In that
case, Adobe, a digital media and software company, developed software
called “eBook,” which allowed book publishers to publish books as
computer files that the consumer could then download, open with Adobe
Reader software, and then read on a computer.138 Special technological
protections in Adobe’s eBook software also allowed publishers to place
restrictions on an electronic book distributed in Adobe format, including
controls on the ability of the user to print, copy, lend to a friend, or per-
mit the ebook to be read aloud by a text to speech engine.139 The soft-
ware also ensured that only the computer to which the ebook was original-
ly downloaded could open a copy of the ebook.140 These restrictions
worked by putting access and copy controls on the ebooks that, under the
DMCA, would be illegal to circumvent.141

Consider, however, a blind person who purchases an ebook and
wishes to have the computer read the book aloud or translate the book
into Braille. Current technology can filter the book through software

133. See infra notes 135–137 and accompanying text.
134. See § 1201(a)(1)(A).
135. See § 1201(b)(1).
136. ELECTRONIC FRONTIER FOUNDATION, supra note 114.
137. 203 F. Supp. 2d 1111 (N.D. Cal. 2002).
138. Id. at 1117–18.
139. Id. at 1118.
140. Id.
141. See generally id.
programs that transfer that book into a format usable for the blind person. Under the standard fair use analysis, this would be a fair and non-infringing use of the work. This constitutes a fair use because, first, the purpose and character of the blind reader’s use is noncommercial—she intends to use the translated copy only for herself. Thus, while it is true that the nature of the copyrighted work, a book, “falls within the core of copyright’s protective purposes,” and that the reader would be copying the entire book, the fourth fair use factor, the use of the work upon the potential market for the original, weighs heavily in favor of fair use because allowing more readers access to a legitimately purchased copy of a work would actually increase sales of the copyrighted work. Therefore, the blind reader would most likely be engaging in a legal, fair use of the work.

However, the blind reader may only read her book legally if the translation technology is allowed access to the original work. Section 1201(a)(1)(A) criminalizes and makes the blind reader liable for circumventing controls to allow her Braille or audio reading software access to the original book. Even if she could circumvent the protections legally in order to read the work, § 1201(a)(2) criminalizes and makes software developers liable for offering her circumvention tools. Under these circumstances, a blind purchaser of an ebook would have no access to that work except through circumvention.

It is possible, however, that an ebook publisher did not implement access controls on a particular publication and chose instead only to implement copy controls. In this circumstance, the blind reader is still effectively disallowed fair use of the work. While no provision in the DMCA prevents the blind reader from circumventing copy controls to create a Braille copy of the book, if this particular reader is not technologically savvy and able to break the encryption or otherwise crack the copy control on her own, she will be effectively barred from creating a Braille copy of the work because § 1201(b) criminalizes and makes anyone liable who offers her the tools with which to make her legal Braille copy of the book. In this example, a significant segment of the population is denied access to the work itself, despite copyright’s traditional policy and constitutional mandate that the public benefit from the fruits

142. See id. at 1118–19.
145. See id. § 1201(a)(1)(A); see also United States v. Elcom, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).
147. See generally § 1201.
148. § 1201(b).
of creative labor.\textsuperscript{149} It is this exact situation that the defendant in \textit{Elcom} faced.\textsuperscript{150}

In \textit{Elcom}, the defendant software developer, Elcomsoft, developed a piece of software called Advanced eBook Processor that enabled users to remove use restrictions on ebooks.\textsuperscript{151} While this software could enable a user to engage in copyright infringement,\textsuperscript{152} it also enabled a user to engage in fair uses of her legally purchased ebook.\textsuperscript{153} Elcomsoft was indicted under § 1201(b)(1)(A) and (C) of the DMCA for trafficking in and marketing its access and copy circumvention tool.\textsuperscript{154} The district court of the Northern District of California denied the defendant’s motion to dismiss,\textsuperscript{155} finding that the DMCA prohibits all circumvention tools, regardless of suitability for substantially noninfringing uses.\textsuperscript{156} This result seems less than just, but as one court has observed, “The fact that Congress elected to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so is a matter for Congress.”\textsuperscript{157}

It is true that the worst case scenario demonstrated by the facts of \textit{Elcom} could only come into play if the digitally protected format of the book were the only form in which the book was available. However, this has already been the case with at least one very popular work. In March 2000, Stephen King released his then-latest tale, \textit{Riding the Bullet}, available only in ebook format.\textsuperscript{158} Readers without access to the story because

\begin{footnotesize}
\begin{enumerate}
\item[149.] See discussion supra Part I.
\item[150.] See generally \textit{Elcom}, 203 F. Supp. 2d at 1111.
\item[151.] \textit{Id.} at 1118.
\item[152.] The \textit{Elcom} court stated that “[t]he same technology, however, also allows a user to engage in copyright infringement by making and distributing unlawful copies of the ebook.” \textit{Id.} at 1119. This statement is misleading to the extent that it implies that the Advanced eBook Processor enables the distribution itself. While it is true that the software allows a user to copy the ebook, distribution requires independent, intervening action on the part of a person as well as the aid of other software tools, such as a P2P program or a file transfer protocol program.
\item[153.] \textit{Id.} at 1118.
\item[154.] \textit{Id.} at 1119.
\item[155.] \textit{Id.} at 1117.
\item[156.] \textit{Id.} at 1124. ("Taken in combination [with § 106], § 1201(b) . . . bans trafficking in any device that bypasses or circumvents a restriction on copying or performing a work. Nothing in the express language would permit trafficking in devices based on the uses to which the device will be put.").
\item[157.] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000). It should also be noted that the court underestimated the range of users who would be affected by the DCMA. It is not that the DMCA leaves technologically \textit{unsophisticated} persons without the means to make a fair use of a work; the term “unsophisticated” connotes below average sophistication, and it is unlikely that even the average user would be able to circumvent controls on her own. Rather, it is that the DMCA leaves all those who are not especially technologically sophisticated—most of the population—without the technical means of making fair uses of works.
\end{enumerate}
\end{footnotesize}
of disability or other reasons, including interoperability restrictions, would have no access whatsoever to King’s work without violating the DMCA.

Thus, the Betamax standard, though not expressly overruled by the DMCA, was overruled by it in effect. It has been contended that, because the DMCA differentiates between access-prevention measures and copy-protection measures, circumvention for fair uses is still allowed. In reality, however, most consumers have neither the technical skill nor the knowledge to circumvent copy-protection technologies on their own without the help of tools illegally “offered to the public” under § 1201(b)(1). Thus, “[b]y prohibiting the provision of circumvention technology, the DMCA fundamentally altered the landscape. A given device or piece of technology might have ‘a substantial noninfringing use, and hence be immune from attack under Sony’s construction of the Copyright Act—but nonetheless still be subject to suppression under section 1201.’” Accordingly, under the DMCA’s language, fair use and the Betamax standard still exist in law, though not in fact.

C. A Need to Amend the DMCA

The DMCA has fundamentally altered the copyright landscape for the worse by effectively failing to “Promote the Progress of Science and useful Arts,” as required by the Constitution. First, the DMCA stifles the development of new and legitimate technologies that could otherwise be put to productive and beneficial uses. Second, the DMCA chills expression by effectively requiring a copyright holder’s permission in order to parody or criticize a work. Third, the DMCA allows one copyright holder to dictate how another copyright holder can exercise his § 106 right to “do and authorize” otherwise infringing activities. Finally, the DMCA reduces competition among content media providers.

1. The DMCA stifles the development of new and legitimate technologies.

The DMCA stifles the development and distribution of new and legitimate technologies for productive and beneficial uses simply because

159. See 17 U.S.C. § 1201 (date).
160. Reimerdes, 111 F. Supp. 2d at 323 (explaining that “Sony involved a construction of the Copyright Act that has been overruled by the later enactment of the DMCA to the extent of any inconsistency between Sony and the new statute”).
163. U.S. CONST. art. 1, § 8, cl. 8.
a person may use that technology to circumvent controls on a work. The case of *Universal City Studios, Inc. v. Corley* provides an example. In *Corley*, a Norwegian teenager developed a simple program that decoded the standard encryption, CSS, on DVDs. The teenager appropriately named the program “DeCSS.” Shortly thereafter, 2600.com, the online version of the magazine 2600, published an article detailing how the code was cracked and what the crack program did: It “facilitated the creation of previously unavailable open source DVD players for Linux.” To supplement the article, 2600.com published the source code of the crack program on its web site, along with several links to other sites posting the code to DeCSS. The trial court ultimately issued an injunction under § 1201 prohibiting 2600.com from either posting the code itself or linking to other sites providing the code. Posting the code itself was found to violate § 1201(a)(2)(A)’s prohibition on “offering to the public” circumvention tools, and posting a link was found to violate the same under the “trafficking in” language.

The Corley defendants argued, among other things, that DeCSS was protected by the Betamax fair use standard because it was capable of significant noninfringing uses. Namely, DeCSS could enable the development of a CD player for the Linux operating system. Congress seemed to write this protection into the DMCA in § 1201(a)(2)(A) when it limited liability to only those tools “primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.” In applying the

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164. 273 F.3d 429 (2d Cir. 2001).
165. “CSS, or Content Scramble System, is an access-control and copy-prevention system for DVDs developed by the motion pictures companies . . . . It is an encryption-based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs.” *Reimerdes*, 111 F. Supp. 2d at 308.
167. *Id*.
168. *Id* at 439. While the magazine 2600 “cover[s] some issues of general interest to computer users—such as threats to online privacy—the focus of the publications is on the vulnerability of computer security systems.” *Id*.
170. *Corley*, 273 F.3d at 435–36. Defendant David Corley is the owner of both the print and online versions of 2600. *Id* at 439 n.7.
171. *Id* at 434–35.
173. *Id*.
language of the statute, however, the Corley court distinguished between noninfringing uses and the act of circumvention. The "significant non-
infringing use" standard applied as a defense only to contributory in-
fringement. Section 1201, as the Second Circuit explained, did not deal with contributory infringement; rather, it dealt directly with the act of circumvention and did not concern itself with any ultimate use to which that circumvention might be put. The court went on to hold that, "as the legislative history demonstrates, the decision not to make fair use a defense to a claim under § 1201(a) was quite deliberate." Therefore, the Second Circuit found that 2600.com's linking to and posting of the DeCSS code was a violation of § 1201 of the DMCA.

The Corley ruling sets a dangerous precedent that threatens the very creativity and development that copyright law aims to promote. As the court in Elcom explained: "Congress sought to ban all circumvention tools." If a developer or manufacturer cannot market, traffic in, or otherwise offer to the public tools that would allow users to engage in perfectly legal, legitimate activities, including fair uses and the development of new technologies, simply because those tools also have a circumvention use, those developers and manufacturers will have no economic incentive to develop new tools at all. Developers will have no market for goods that they cannot offer legally, and therefore they cannot benefit from such technologies.

The lack of economic incentives is not the only problem, however. Corley provided a specific example of a case in which the DMCA prevented development because the DeCSS code enabled the development of a DVD player for computers running the Linux operating system. Since the court banned trafficking that code, it made the code unavailable to other developers seeking to develop either a Linux DVD player or new technology based on the Linux DVD player. In this way, the DMCA has impeded further technological development.

Without an economic incentive to develop new tools, developers have at least one less reason to develop technologies that could be used for lawful circumvention. In fact, the DMCA discourages development of new tools because people offering those tools will be liable not only when the primary purpose of the tool is infringement, but also when the tool has any capability of infringing uses. If potential technology remains

177. See id. at 323–24.
178. Id. at 319, 322.
179. Id. at 322.
182. See DVD Encryption Cracked, supra note 169.
undeveloped, it begins a cycle of retardation in the development of derivative technologies. Thus, other derivative tools based on the same technology, yet developed for wholly noninfringing uses or unrelated productive uses altogether, will remain undeveloped.

The purpose of the DMCA is "to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age." However, the DMCA actually stifles the very progress that copyright law ideally strives to promote by hindering the development of new digital technologies for legitimate and lawful purposes. Ironically, as the court in *Elcom* stated, "[t]hat is part of the sacrifice Congress was willing to make in order to protect against unlawful piracy and promote the development of electronic commerce and the availability of copyrighted material on the Internet."184

2. The DMCA chills expression.

The DMCA chills expression by requiring potential commentators to obtain the copyright holder's permission in order to parody or criticize a work. If copyright holders' access and copy protections are immune to circumvention for legal purposes, a parodist or critic will be unable to use part of an original digital copy to create the parody or criticism. The only alternative would be to seek a license from the copyright holder, who is not likely to grant a license for a use designed to criticize or make fun of his valuable content. Therefore, the DMCA may effectively put parodists and commentators at the mercy of copyright holders. A few hypotheticals provide excellent examples.

The DMCA could prevent a commentator from making a musical parody of another song. Consider the situation in which a musical social commentator, such as the band 2 Live Crew, wishes to parody the classic rock song "Pretty Woman," as was the case in *Campbell v. Acuff-Rose Music, Inc.* The *Campbell* Court explained that this parody was a fair use of the original work. The Court's reasoning rested in part on the fact that the allegedly infringing parody was critical of the original song.

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186. See id. at 594.
187. See id. at 591–92.
Now, assume that the original recording of "Pretty Woman" had been released to the public solely on access-protected CDs. In this situation, the parodist would be unable to access the digital copy of the music in order to use the original as a part of the parody. This inability to access is because, under § 1201(a)(1)(A) and (a)(2), the parodist would be unable to access the original work in its digital form. First, § 1201(a)(1)(A) prohibits the parodist from circumventing the access controls. Second, § 1201(a)(2) prohibits others from offering the parodist tools with which to circumvent those controls. Short of creating a second generation recording, \textsuperscript{188} the parodist would be forced to seek a license from the holder of the copyright in the original work. Thus, the original copyright holder may withhold a license in order to dissuade critique of his intellectual property. \textsuperscript{189}

In addition to parody uses, outright critique of media content could face alarming obstacles under the DMCA. The DeCSS technology, which allows for the circumvention of DVD encryption, illustrates this situation. \textsuperscript{190} In 2004, the controversial film director Michael Moore released \textit{Fahrenheit: 9/11}. \textsuperscript{191} The film was released in theaters and subsequently released on DVD. \textsuperscript{192} A film critic wanting to use select short clips of the film to criticize Michael Moore’s political views or the charged message in his film would be unable to do so without either obtaining a license from Mr. Moore, which he is unlikely to grant, \textsuperscript{193} or employing the DeCSS code illegally to access and copy the necessary footage. In this way, the DMCA can prevent productive criticism.

By protecting technology that effectively prevents parody and criticism, the DMCA puts control over critical commentary into the hands of the copyright holders, who have an interest in suppressing critical commentary to protect the value of their content. Therefore, the DMCA potentially chills the development of critical and parodic expression.

\textsuperscript{188} See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001). A second-generation recording is a recording made from another recording.
\textsuperscript{190} See supra notes 174–181 and accompanying text.
\textsuperscript{191} See \textit{Michael Moore (II)}, in IMDB, at http://www.imdb.com/name/nm0601619/ (last visited Apr. 16, 2005).
\textsuperscript{193} See \textit{Campbell}, 510 U.S. at 592 ("Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").
3. The DMCA treads on copyright holders’ rights.

The DMCA is, of course, a tool intended to protect copyright holders’ rights.\(^\text{194}\) However, for those copyright holders seeking out new markets and new channels of digital distribution, the DMCA may actually prevent these innovative copyright holders from exercising their § 106 right “to authorize” otherwise infringing uses.\(^\text{195}\) This would happen because the DMCA prohibits making or “offer[ing] to the public” tools to circumvent access or copy controls.\(^\text{196}\) The DMCA prohibits these tools, as well as their employment,\(^\text{197}\) regardless of whether the copyright holder would wish these tools to be used on their works. For example, imagine the case of an ebook publisher.\(^\text{198}\) Because allowing a Braille translation program to access and copy the book for a blind reader would also allow infringing uses, the publisher chooses to protect against the potential infringement by enabling access and copy controls on the book. In this case, the publisher may want the blind reader to be able to purchase a copy of the ebook legally and then circumvent the protections on her own in order to create a single Braille translation for her personal use. After all, this means an additional sale for the publisher because it is unlikely that the blind reader would have purchased the book otherwise, since she would not be able to read the book without the Braille translation. However, the DMCA does not distinguish between this case and the one in which the blind purchaser subsequently makes infringing copies that she distributes over the Internet,\(^\text{199}\) thereby costing the publisher sales.

This situation demonstrates the potential of the DMCA to allow a few copyright holders who are fearful of piracy to prohibit other copyright holders from authorizing desirable and even profitable uses of their works. Just as the plaintiffs in Sony had “no right to prevent other copyright holders from authorizing [copying] for their programs,”\(^\text{200}\) so too should modern copyright holders have no right to prevent other copyright holders from authorizing circumvention for their content. Thus, the DMCA effectively allows a few copyright holders to prevent other copyright holders from exercising their exclusive § 106 rights.

\(^\text{197}\) § 1201(a)(1)(A).
\(^\text{198}\) See discussion supra notes 137–163 and accompanying text.
\(^\text{199}\) The DMCA prohibits both all circumvention tools and the circumvention itself to gain access without any mention of the use to which the consumer puts her subsequent copies. See § 1201.
4. The DMCA reduces market competition.

The software at issue in *Elcom*—ebook protection circumvention software—provides an example of ways in which the DMCA would allow companies to engage in unfair trade practices by restricting interoperability. Adobe ebooks are encoded so that only the Adobe Reader can display them. The ability to circumvent this technology would allow users to choose which platform they prefer, thereby creating competition among software developers to create the best product. By preventing users from circumventing controls to gain access by other reader programs, the DMCA allows Adobe to create a market monopoly on reader software. Therefore, if a large number of ebooks are distributed as Adobe files, consumers have no choice but to use the Adobe Reader to read those ebooks. This is true regardless of how poor the quality of the software may be, what kinds of undesirable terms users may have to agree to in order to use it, what kinds of privacy issues may accompany use of the software, and what kinds of restraints that may create on free trade.

5. The DMCA causes harm overall.

The DMCA has effected fundamental changes to the copyright law without making those changes expressly. In order to “Promote the Progress of Science and useful Arts,” the law must remedy the alarming problems born with the enactment of the DMCA. The law must allow for development of new, legitimate technologies that could otherwise be put to productive, beneficial uses; enable expression through parody and critical commentary; allow copyright holders to effectively exercise their right to authorize § 106 activities; and promote competition among content media providers.

### IV. THE ANSWER: TWO CLAUSES

There is a simple, mutually beneficial solution to the DMCA problems. Legislation should be passed that makes minor changes to the DMCA to allow lawful and fair uses to coexist with the copyright holder’s interest in protecting her work while counteracting the negative effects of the DMCA, and to change what many see as an oppressive

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202. See id.
203. U.S. CONST. art. 1, § 8, cl. 8.
favoritism of the content industries.\textsuperscript{205} The legislation would read as follows:\textsuperscript{206}

\textbf{FAIR USE RESTORATION.}— § 1201(c) of title 17, United States Code, is amended—

(1) in paragraph (1), by inserting before the period at the end the following:

"and it is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention is not for the purpose of infringing the copyright in the work;" and

(2) by adding at the end the following new paragraph:

"(5) It shall not be a violation of this title to manufacture, distribute, or make noninfringing use of a hardware or software product capable of substantial noninfringing use of a copyrighted work."\textsuperscript{207}

Merely by subjecting § 1201 to traditional fair use principles, the amended DMCA would allow for development of new and legitimate technologies that could otherwise be put to productive and beneficial uses, enable expression through parody and critical commentary, allow copyright holders to exercise their right to authorize § 106 activities, and promote competition among content media providers.

The provisions seek to accomplish this goal in two ways. First, they carve out an exception in the DMCA that allows circumvention when that circumvention is for a noninfringing use, such as a fair use. The

\textsuperscript{205} See 149 Cong. Rec. E20 (Jan. 8, 2003) (introducing the Digital Media Consumers’ Rights Act of 2003 ("DMCRA"), Rep. Boucher explained that "the DMCA dramatically tilted the balance in the Copyright Act towards content protection and away from information availability").

\textsuperscript{206} This proposal is based largely on section 5 of Rep. Boucher’s 2002 proposed DMCA amendment, the DMCRA. See Digital Media Consumers’ Rights Act of 2003, H.R. 107, 108th Cong., 1st Sess. 2003. However, this proposal varies from Rep. Boucher’s in that paragraph (1) of this proposal focuses on the purpose of the circumvention, and Rep. Boucher’s proposal focuses on the actual result of circumvention by only outlawing circumvention that actually results in an infringement. See id. See infra Part IV.B for a discussion of the significance of focusing on the purpose of the circumvention, rather than the actual result.

\textsuperscript{207} The amended § 1201(c) of the DMCA would read:

(c) Other rights, etc., not affected.—(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title, and it is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention is not for the purpose of infringing the copyright in the work.

(5) It shall not be a violation of this title to manufacture, distribute, or make noninfringing use of a hardware or software product capable of substantial noninfringing use of a copyrighted work.
amended § 1201 accomplishes this fix by explaining that “it is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention is not for the purpose of infringing the copyright in the work.” Second, the provisions reestablish the Betamax standard by allowing the distribution of circumvention tools, regardless of whether those tools are used to gain access or to copy, when those tools are capable of substantial noninfringing uses. The new language accomplishes this second goal by explaining that “[i]t shall not be a violation of this title to manufacture, distribute, or make noninfringing use of a hardware or software product capable of enabling significant noninfringing use of a copyrighted work.” The amended DMCA is a valuable piece of legislation that ought to be enacted because it resolves the problems of the DMCA while maintaining the DMCA’s key benefits to copyright holders.

A. The amended DMCA would remedy the problems of the DMCA.

Under the proposed amendments, the DMCA would no longer threaten to stifle the development of new, legitimate technologies. This is because the language in paragraph (1), that “[i]t shall not be a violation of this title to manufacture, distribute, or make noninfringing use of a hardware or software product capable of enabling significant noninfringing use of a copyrighted work,” applies a Betamax standard to circumvention technologies. Thus, in the case of the online magazine 2600.com, where the magazine made a noninfringing use of the DeCSS technology, and assuming that the technology is capable of substantial noninfringing uses, the magazine would have been allowed by law to post the DeCSS code and the links to it as a supplement to its article. The DeCSS technology, as a supplement to an article about the technology, would have been made available lawfully for others to use as a building block for other technologies, thereby removing a significant roadblock to the development of new technologies.

Similarly, the amended DMCA would ensure that potential parodists and critics have access to the works they need in order to comment upon those works. First, the parodist or critic would be allowed to circumvent access technologies under the amendments because “it is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention is not for the purpose of infringing the copyright in the work.” Thus, because a parody or criticism would be a fair use of the work and therefore not an infringement of the copyright, the parodist’s and critic’s circumventions would escape criminal and civil liability under the DMCA.
The amended DMCA would also help to put the copyright holder’s “right to authorize”208 back in the hands of the copyright holders. Because circumvention tools capable of substantial noninfringing uses would be permitted under the amended DMCA,209 a copyright holder wishing to allow users to make certain uses of a work that technology would otherwise prohibit may effectively, not merely nominally, do so. This is so because those allowed uses would be made possible by circumvention tools “capable of enabling significant noninfringing use of a copyrighted work.”210 Thus, injecting a Betamax standard into circumvention law directly avoids one problem that Sony explicitly sought to prevent: a few copyright holders suppressing technology that would allow other copyright holders to exercise their right to “authorize” § 106 activities.

Yet another benefit of the amended DMCA is that it solves the DMCA problem of a reduction in market competition as a result of interoperability. First, paragraph (2)’s protection of circumvention tools capable of substantial noninfringing uses could enable the ebook reader in the hypothetical above211 to access the ebook with a competitor’s reader software. Additionally, the user’s act of circumvention would be lawful under paragraph (1)’s provision allowing circumvention when that circumvention would not result in an infringement of the copyright, assuming that the competing software does not require the creation of an unauthorized copy of the ebook in order to read the file.

B. The amendments retain key benefits of the DMCA while maintaining a proper balance of power between content provider and consumer.

Some would argue that the amendments proposed above would take the teeth out of three important provisions of the DMCA: the two anti-trafficking provisions212 and the anti-circumvention provision.213 It is true that the DMCA provides a powerful tool against unauthorized copying and access; it enables copyright holders to restrict any kind of copying or access that the copyright holders deem necessary in order to protect their valuable content.214 Under an amended DMCA, however, tools capable of substantial noninfringing uses may also be capable of infringing uses;

209. See supra note 207.
210. Id.
211. See supra Part III.C.4.
213. § 1201(a)(1).
214. See supra Part III.A.
thus copyright holders would be back at square one as far as protecting their digital content goes because the tools allowing lawful circumvention would enable pirates to do exactly what the DMCA aimed to stop.\footnote{See supra notes 132–136 and accompanying text.}

According to this argument, the amendments would prevent copyright owners from controlling illegal access to and copying of their works because circumvention for fair use is indistinguishable from piracy by whatever technology protects the content. This would provide the public with tools not only for fair use circumvention, but also for piracy. If the public is allowed to distribute and use those tools for fair use, content owners would be in the same position they were before the DMCA was enacted, in which they would have no effective means to control the digital copying and distribution of their works.

The argument ultimately fails for two reasons. First, the amended DMCA would continue to provide a valuable tool for putting an end to infringement before it even begins. Second, any perceived loss of control over copyrighted content is outweighed by the costs to the public of not being able to access and fairly use copyrighted works at all.

1. The amended DMCA would continue to enable copyright holders to stop infringement before it begins.

The amended DMCA would continue to enable copyright holders to prevent piracy before it begins. Under the amendments, copyright holders would no longer have absolute control of access to and copying of their works; however, the potential for absolute control is not the only, nor even the primary, benefit that the DMCA granted to copyright holders. In addition to disallowing all circumvention of access and copying controls, the DMCA also made additional remedies available to copyright holders. For example, § 1203(a) of the DMCA created a new civil cause of action for content providers injured by a violation of any of the circumvention provisions.\footnote{See supra note 136.} This remedy is available whether the circumvention results in actual infringement or not.\footnote{See § 1203.} The amended DMCA would not change this provision; the content holder could still enforce circumvention violations regardless of whether or not an infringement occurred because the amended DMCA retains the core anticircumvention provisions.\footnote{See supra note 207.} The only difference under the amendments is that the circumventor engaging in a fair or other lawful use of the work would be
able to rely upon fair use as an affirmative defense.\textsuperscript{219} The pirate would not.\textsuperscript{220}

The amended DMCA would still provide copyright holders with a cause of action against infringers, or even potential infringers, for circumvention violations. Before the DMCA, a copyright holder’s strongest remedy to prevent infringement was the infringement action itself.\textsuperscript{221} In the case of equipment manufacturers, vicarious liability was an available cause of action.\textsuperscript{222} However, an action based on infringement or contributory infringement arises only \textit{after} the work has been infringed because one of the elements of copyright infringement is actual infringement of a work.\textsuperscript{223} Therefore, a major benefit to copyright holders under the DMCA is that it provides copyright holders with a cause of action that prevents infringement before any infringement occurs, thereby securing greater protection of their works by preventing the threatened harm. The DMCA accomplishes this in § 1201, which gives a copyright holder a cause of action against a potential infringer who circumvents controls in order to infringe, but who does not accomplish infringement;\textsuperscript{224} the copyright holder need not prove actual infringement.\textsuperscript{225} Section 1201 allows a copyright holder to enjoin a manufacturer from distributing tools for circumventing access and copying controls before the manufacturer takes his product to market and before the harm has actually been done.\textsuperscript{226} This section also allows a copyright holder to enjoin and receive damages for the act of circumvention itself, whether or not that circumvention results in actual infringement.\textsuperscript{227}

The amended DMCA would continue to allow copyright holders these additional causes of action to protect against the harm of potential, as distinct from actual, infringement. Under the amendments, a copyright holder could sue a pirate for violating the circumvention provisions of the DMCA even before the pirate copies or distributes unauthorized copies of the work.\textsuperscript{228} This is so because the amendments focus on the purpose of the circumvention, and do not require proof of actual infringe-

\textsuperscript{219} See id.
\textsuperscript{223} See id. at 435 n.17 (explaining that a direct infringement is an element of contributory liability); see also 2 GOLDSTEIN, COPYRIGHT § 7.1 (2d ed. 1996) ("To prevail in an action for copyright infringement, a plaintiff must prove . . . that the defendant copied from plaintiff’s work.").
\textsuperscript{225} See id. § 1008.
\textsuperscript{226} See id. § 1201.
\textsuperscript{227} See id.
\textsuperscript{228} See supra notes 223–227
ment. In this way, the content owners' ability to prevent potential infringement is not hindered under the amendments and they retain the benefits granted under the DMCA. The amendments would merely mandate consideration of the Betamax standard in these preemptive and additional causes of action, a standard that would have already been applied to the same infringement action had the harm, or copying and distribution, actually occurred.

2. The amendments benefit both consumer and content providers.

The amended DMCA benefits both consumers and copyright holders by providing a legal framework that would allow the traditional purchasing patterns of consumers to continue. The law of any culture shapes behavior within the culture that it governs. The case is no different with regard to copyright law and the behavior of consumers subject to that law. Throughout much of recording technology history, consumers have been able to legally space- and time-shift their content for personal use. The continued availability of lawful space- and time-shifting ensured under the amended DMCA will benefit consumers and content providers alike.

Consumers benefit by the ability to continue space- and time-shifting, thereby reducing consumer costs. With the ability to circumvent lawfully for the purpose of space- and time-shifting, consumers are able to make free use of their purchased works for a single price. In 1992,

229. See supra note 228.
233. Space-shifting is the process of transferring content from one form of media to another. By this process, a consumer could purchase an audio CD and convert it into an MP3 to listen to on his or her computer or MP3 player, record it to a cassette tape to listen to in the car, or put a protected copy on her personal server to listen to on a different computer. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), for an example of space-shifting across the Internet.
234. See id.; see also 17 U.S.C. § 1008 (2000). Section 1008 provides: No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.
See also Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072, 1079 (9th Cir. 1999) (holding that ripping MP3s from a personal copy of a legally acquired compact disc and copying them to a portable MP3 player facilitates personal use under the Audio Home Recording Act of 1992 and that such space-shifting is analogous to time-shifting in Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 455 (1984)).
Congress first explicitly authorized private home recording.\textsuperscript{235} Congress also required that blank media have included in the sale price a royalty payable to content providers\textsuperscript{236} to compensate for private copies made.\textsuperscript{237} This measure allows consumers to pay a single fee for blank media that includes a royalty payment for all of their home taping and copying needs. Therefore, the consumer is able to pay a single low royalty rate for her private, lawful uses rather than a separate fee for each and every use she may wish to make. Paying only once affords the consumer flexibility in her uses of lawfully acquired copies of works, and in this way the music itself is not all that consumers purchase; they also realize a benefit from the many potential uses of lawful circumvention.

This capability benefits copyright holders, who can sell copies of their content and still receive payment for private, lawful copies made without having to anticipate and market every potential use to which a consumer may want to put a copyrighted work. The copyright holders benefit by the increased marketability of products that are useful to a number of different consumers in a number of different settings. The consumer can purchase a music CD and, through lawful circumvention under an amended DMCA, lawfully copy it to his computer to listen to from the hard drive.\textsuperscript{238} Without giving consumers freedom to circumvent access and copy controls, the record label will have to provide copies in many different file formats to reach its entire potential market. Whereas one consumer may want an MP3 format, another may use a player requiring a WMA format, and a third may require OGG or FLAC file formats.\textsuperscript{239} Offering products in a potentially infinite number of different incarnations would result in record or distribution companies incurring increased costs to manufacture and market the different formats. Logically, then, by marketing a single CD product to the entire potential market and then allowing the users to choose their formats through lawful circumvention, the content providers both lower their own distribution and marketing costs and avoid the risk of ousting potential purchasers seeking formats either not offered or not yet discovered by the content providers.

An amended DMCA would remedy this problem by allowing consumers to continue to freely consume works privately in a variety of

\textsuperscript{235} See § 1008.
\textsuperscript{236} Id. §§ 1003, 1004.
\textsuperscript{238} See § 1008.
\textsuperscript{239} Each of these is an example of a different kind of audio file format. See Audio codec, in WIKIPEDIA: THE FREE ENCYCLOPEDIA, at http://en.wikipedia.org/wiki/Audio_codec (last visited Apr. 4, 2005); List of codecs, in id., at http://en.wikipedia.org/wiki/List_of_codecs (complete list of currently available audio filed formats) (last visited Apr. 4, 2005).
formats. Content providers would benefit by maintaining the marketability of their works while still engaging technological protections that prevent mass piracy.

C. An amended DMCA is effective and valuable.

As amended, the DMCA would continue to provide content holders with valuable protection against both actual and potential infringements by retaining the anticircumvention language of § 1201. At the same time, subjecting the DMCA to a Betamax standard would fix a number of problems with lawful uses that have arisen under the DMCA. Additionally, an amended DMCA would provide economic benefits to consumers and content providers alike by enabling consumers to make lawful uses of copyrighted works for a single price and enabling content providers to protect against piracy while maintaining a broad market for copies of their works.

V. CONCLUSION

The response of copyright law to the ever-changing technological landscape keeps the music industry in a state of flux and promises to do so in the future. In the past, courts have dealt with the ups and downs of the delicate balance between the public’s interest in creative works and the copyright holder’s property interest by developing doctrines such as fair use and the Betamax standard. These doctrines mitigate many of the potentially harsh and unfair effects of overly broad copyright protection.

Since its enactment, however, the DMCA has caused a major shift in the delicate balance of interests essential to a fair copyright system. This shift is a result of the DMCA allowing content providers to effectively eliminate fair uses of a work, thus limiting the application of the Betamax standard. On the one hand, the DMCA puts a disproportionate amount of power into the hands of copyright holders to control how, when, why, and where their works are used. On the other hand, allowances for fair uses and other lawful uses in § 1201 of the DMCA may deprive copyright holders of some of their newly acquired defenses against unauthorized copying and distribution in the digital age. In this digital age, the balance cannot remain the same and it will tip one way or the other with or without additional legislation. A look at the consequences of failing to amend the DMCA demonstrates the need for a change to protect both consumer and industry interests.

The amended DMCA would tip the scales back into equilibrium by allowing users access to both the works themselves and the tools necessary to engage in fair uses. It would guarantee consumers the ability to engage in fair use and other legal uses of a work. It would also guarantee
them access to circumvention tools capable of substantial noninfringing uses. The amendments do this all without immobilizing the effectiveness of the DMCA because copyright holders could still protect against potential infringement and are still provided with additional remedies. An amended DMCA will ultimately prove to be an invaluable piece of legislation that will help restore the traditional balance of interests in copyright law and benefit copyright holders and consumers alike.