

## The Digital Millennium Copyright Act: Technological Protection, Fears and Risks of Lockup, Fair Use, and Free Speech

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# THE DIGITAL MILLENNIUM COPYRIGHT ACT: TECHNOLOGICAL PROTECTION, FEARS AND RISKS OF LOCKUP, FAIR USE, AND FREE SPEECH

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## INTRODUCTION

Copyright law, and particularly disputes about the proper balance in copyright law – between the rights and interests of creators, on the one hand, and “users,” on the other<sup>1</sup> – has become “hot.” What was once an academic backwater, and an area of concern only to a few specialists, is the focus of increasing attention and controversy. And no revision or proposed revision to copyright law in recent years has set off controversy like the Digital Millennium Copyright Act (“DMCA”), whose anti-circumvention and anti-trafficking provisions have led to bitter disputes before Congress, the courts, and in the law reviews. Sixty-two law professors signed a statement to Congress opposing its enactment. Forty-two have joined an *amici curiae* brief in the Second Circuit, contending that the DMCA violates the Copyright Clause of the Constitution, exceeds Congress’s powers under the Commerce and Treaty Clauses, and violates the First Amendment.

What are the provisions of the DMCA that have occasioned such opposition? What arguments have opponents deployed, and how likely are they to succeed? Is the DMCA really something new under the sun, or just a new variant of the kinds of laws that have long been adopted to protect against burglary, gambling, theft of cable signals, and theft of satellite signals? Does the DMCA really doom fair use and threaten free speech, as opponents have warned?

The attack on the DMCA has so far been rejected by Congress and the courts, and will shortly be before the United States Court of Appeals for the Second Circuit, as one of those cases is presently on appeal. *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *argued and awaiting decision sub nom. Universal City Studios v. Corley*, No. 00-9185 (2d Cir. 2001). Beyond *Universal City Studios*, the issues that the DMCA has raised will be of continuing importance as creators and the content industries<sup>2</sup> attempt to survive and thrive in the new world created by developments in the electronic storage, processing, and distribution of expressive works protected by copyright.

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<sup>1</sup> See, e.g., Jane C. Ginsburg, Copyright Use and Excuse on the Internet, 24 Colum.-VLA J.L. & Arts (Fall 2000), available at <[http://papers.ssrn.com/paper.taf?abstract\\_id=239747](http://papers.ssrn.com/paper.taf?abstract_id=239747)>.

<sup>2</sup> I use the phrase “the content industries” to refer to the industries whose capital is largely intellectual property marketed to the public for entertainment and information uses - the film industry, the publishing industry (books, journals, magazines, and newspapers), the music industry, and the videogame industry.

## I. THE DMCA AND THE REASONS CONGRESS ENACTED IT

The DMCA was enacted in 1998 for two reasons: to comply with the obligations imposed by the then-recently ratified WIPO Copyright treaties, and to protect and maintain the existing incentives of copyright law for the creation and wider dissemination of expression, which were perceived to be threatened by technological developments facilitating the copying and wide distribution of digital copyrighted works.

The WIPO treaties, which the United States had strongly supported, imposed an obligation on member countries to “provide ‘legal protection and effective legal remedies’ against circumventing technological measures, e.g., encryption and password protection, that are used by copyright owners to protect their works from piracy . . . .” See S. Rep. No. 105-190, at 8, 10-11 (1998).

The anti-circumvention provision of the DMCA provides remedies against persons who circumvent such technological measures,<sup>3</sup> and the trafficking proscriptions complement and reinforce that prohibition by barring trafficking in devices designed to circumvent so-called technological access control and copy control measures, like CSS, the encryption-based system that protects the copyrighted content on DVDs.<sup>4</sup> See *generally* NIMMER ON COPYRIGHT section 12A.03[C] at 12A-27 n.105 (2000). Violations of all three provisions are subject to civil suits and, in certain circumstances, criminal prosecution.

The effective date of the anti-circumvention provision, which prohibits circumventing any “technological measure that effectively controls access to a work protected under this title,” was delayed for two years, by which time the Librarian of Congress was to conclude a rulemaking and receive a recommendation of the Register of Copyright concerning whether there were particular “classes of works” that should be exempted from the general prohibition against circumventing access controls.<sup>5</sup>

The DMCA contains two separate, but related, proscriptions of trafficking in circumvention technologies or devices, one addressing access controls and one addressing copy controls. (Whether, as technology has developed, there is the clear distinction between the two that Congress seems to have expected is not at all clear.) Section 1201(a)(2) bars trafficking in devices that circumvent controls over *access* to the content of technologically protected works.<sup>6</sup> Section 1201(b) bars trafficking in devices to circumvent controls that “effectively protect a right of a copyright owner under this title” – e.g., the exclusive right to authorize copying or distribution. The anti-trafficking provisions supplement the section 1201(a)(1) prohibition of circumventing access controls “in order to provide meaningful protection and enforcement of the copyright owner’s right to control access,” copying and distribution. S. Rep. No. 105-190 at 28 (1998). Just as laws barring trafficking in burglary tools supplement the basic laws against burglary, and laws against distribution of gambling devices supplement laws barring gambling,<sup>7</sup> Congress enacted the trafficking proscriptions in an attempt to render enforcement somewhat easier and deterrence more effective.

<sup>3</sup> 17 U.S.C. section 1201(a)(1).

<sup>4</sup> 17 U.S.C. section 1201(a)(2), section 1201(b).

<sup>5</sup> “This rulemaking has been conducted, with extensive input from the “user” community as well as the content industries, and rules exempting two classes of works have issued. See *Exemption to Prohibition of Copyright Protection Systems for Access Control Technologies*, 37 CFR Part 201; *Recommendation of the Register of Copyrights*, 65 Fed. Reg. 64556 (Oct. 27, 2000).

<sup>6</sup> Section 1201(a)(2) provides that:

[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that  
 (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;  
 (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or  
 (C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

<sup>7</sup> See, e.g., *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990).

As the DMCA's legislative history confirms, Congress was attempting to regulate *conduct* – the provision of decryption devices, which Congress expressly analogized to burglary tools – rather than expression. *See, e.g.,* S. Rep. No. 105-190, at 11 (1998).<sup>8</sup> Congress was legislating to facilitate the wider distribution of creative speech, not to eliminate or reduce harm from particular viewpoints, messages or ideas. Concerned that copyright owners were hesitating “to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy” (*id.* at 8), Congress sought (*id.* at 11) to

encourage technological solutions, in general, by enforcing private parties' use of technological protection measures with legal sanctions for . . . producing and distributing products or providing services that are aimed at circumventing technological protection measures that effectively protect copyrighted works. For example, if unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section to defeat or bypass the password and to make the means to do so, as long as the primary purpose of the means was to perform this kind of act. This is roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.

Legislation prohibiting circumvention devices is not unprecedented. The Copyright Act in section 1002(c) already protects sound recordings and musical works by prohibiting devices which circumvent any program or circuit that implements a serial copy management system. . . . The Communications Act in section 605(e)(4) prohibits devices that are ‘primarily of assistance in the unauthorized decryption of satellite programming . . . .’

Taking note of its obligation to comply with the requirement under the WIPO Copyright Treaties to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights,” Congress enacted the trafficking proscriptions to provide “the legal platform for launching the global digital on-line marketplace for copyrighted works.” S. Rep. No. 105-190, at 2, 5 (1998).

In *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *to be argued May 1, 2001*, No. 00-9185 (2d Cir. 2001), Judge Lewis Kaplan held that the trafficking proscriptions further the compelling interest in protecting copyrighted works stored on digital media from the vastly expanded risk of piracy in the electronic age.<sup>9</sup> At trial, the studios demonstrated that Corley violated the anti-trafficking provisions of the DMCA, 17 U.S.C. section 1201(a)(2), because (1) CSS effectively controls access to

<sup>8</sup> Indeed, Congress expected that most decryption devices reached by the DMCA would be hardware, not software, although it plainly intended to proscribe decryption devices however configured. *See* Staff of House Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, (Comm. Print 1998), at 8-9 (“While this legislation is aimed primarily at ‘black boxes’ that have virtually no legitimate uses, trafficking in any product or service that meets one or more of the three points in this test could lead to liability. . . . The *Sony* test of ‘capab[ility] of substantial non-infringing uses,’ while still operative in cases claiming contributory infringement of copyright, is not part of this legislation . . . .”); Conference Committee Report, H.R. Rep. No. 105-796, at 63-65 (1998) (noting that the “black box” or “anti-circumvention” provisions were enacted to comply with the WIPO obligation to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights”).

<sup>9</sup> The facts of this case, familiar to many readers, can only be briefly summarized here. CSS is an encryption-based system that prevents users from copying the content on DVDs. DeCSS is a software utility that enables users to break the CSS copy protection system. In 1999, a European hacker began to distribute DeCSS over the Internet. The motion picture studios checked this distribution by sending a series of cease-and-desist letters advising the operators of web sites posting DeCSS that disseminating it was unlawful under the DMCA. By November 1999, Eric Corley, who publishes a magazine called *2600: The Hacker Quarterly* and a related web site, 2600.com, had posted DeCSS on the 2600 site. In January 2000, the studios brought suit in the Southern District of New York against Corley and two other individuals who were posting DeCSS. Judge Kaplan granted a preliminary injunction prohibiting the defendants from posting the utility, and the two other defendants settled. Corley, however, while complying with the injunction by removing DeCSS from 2600.com, created links from the site to other web sites posting the utility, and encouraged operators of such sites to identify themselves to facilitate linking. The studios sought to expand the injunction to prohibit Corley from linking to such sites. After expedited discovery, the matter was tried in July 2000.

copyrighted works; (2) DeCSS was designed primarily to circumvent CSS; and (3) Corley provided DeCSS to the public. The studios graphically showed how a user could obtain DeCSS from the Internet, use it to make a perfect copy of a DVD movie, and transmit the copy to other users. There was no serious opposition to the studios' factual demonstration. Instead, Corley relied on virtually all of the DMCA's statutory defenses and exemptions, as well as arguing that his conduct should be excused because it was, or facilitated, fair use of copyrighted works, and that the application of the anti-trafficking provisions to his conduct violated his First Amendment right to free speech. The trial court rejected all of these arguments, issuing a permanent injunction prohibiting Corley and 2600 from posting DeCSS and from linking to sites that post it. Corley appealed, concentrating in his appellate brief on First Amendment arguments.

## II. 1984 OR CHICKEN LITTLE !

Unlike the principal major fights in the long copyright revision process of the 1960's and early 1970's, which were characterized as disputes between publishers and authors, the objections to the DMCA's circumvention and trafficking proscriptions have been between creators – i.e., the content industries, the film, music, and publishing communities – and law professors, purporting to represent users (the public at large).<sup>10</sup>

There is a marked late 1960's quality to the debate they frame: defending what was once called “power to the people,” the DMCA's academic critics complain that “large corporate interests” are destroying traditional rights for private gain. Academic critics see the DMCA as the harbinger of 1984, a law that will enable “Hollywood” and media companies generally to increase their control over culture and expression in order to increase profits. By contrast, the DMCA's defenders see it as a vital attempt to preserve traditional rights and interests against the onslaught of technological advances that have so substantially lowered the cost-per-copy of films, books, and musical recordings that infringement and worldwide dissemination of infringing copies is possible and likely today as never before. One side fears the Napsterization of additional kinds of content and sees the DMCA as a last-ditch attempt to prevent the film and book industries from being overwhelmed as the music industry has been; the other believes that Napsterization *is* the promise of the Internet, and that copyright owners seeking to maintain markets are Neanderthals doomed to extinction

### A. Fears.

The opposition to the circumvention and trafficking proscriptions of the DMCA has been spearheaded by a group of copyright law professors – who number somewhere between 40 and 62, depending on the precise issue<sup>11</sup> – and has centered on four objections.

First, the DMCA is said to “eliminate” some potential fair uses by making it unlawful, and more difficult, to circumvent technological access and copy controls. The quick and efficient copying of films or books in whole or in part, and the transmission of those copied portions (or whole works) to others, is now rendered difficult and is likely to entail rights violations beyond simple infringement, which is the only cause of action which such conduct would have courted pre-DMCA. So impassioned are some opponents about

<sup>10</sup> Whether their arguments in *fact* would advance the public interest is open to doubt. “It should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

<sup>11</sup> Most recently, 46 law professors subscribed to the Brief Amicus Curiae of Intellectual Property Law Professors in Support of Defendants-Appellants, Supporting Reversal, which (in addition to rehashing Corley's First Amendment contentions) argued that Congress had no power under the Treaty Clause, the Copyright Clause, the Necessary and Proper Clause, or the Commerce Clause to enact the DMCA. Copies of all the briefs filed in the Second Circuit, together with district court opinions and various briefs in the district court, are reprinted at <[http://www.ef.org/pub/Intellectual\\_property/Video/MPAA\\_DVD\\_cases/](http://www.ef.org/pub/Intellectual_property/Video/MPAA_DVD_cases/)>.

this issue that a copyright professor at Georgetown Law School has published an article defending a First Amendment “right to hack.”<sup>12</sup>

Second, the DMCA is said to permit media companies to exploit works no longer protected by copyright in ways inconsistent with the constitutional limitation of copyrights to limited terms. The encryption of films on DVDs, the professors point out, is not gauged to expire when the copyright does, and those controls are argued to be “unconstitutional” for that reason.

Third, the DMCA is said to “shrink” the public sphere by eliminating the opportunity to browse and view at will in the manner that has previously been available for unprotected books and films. On this view, the opportunities for browsing that have been afforded by the fact that works have been unencrypted, and by the limitations of the first sale doctrine, are a kind of constitutional requirement, and any reduction in those opportunities by encryption or other forms of access control is said to have grave consequences for “public space.”<sup>13</sup>

Fourth, the DMCA is said to worsen the problem of the so-called digital divide by more carefully tailoring reading and viewing of works to persons who have paid for the opportunity to do so. Paper magazines can be passed around within a family, or to neighbors, or within a dormitory. Critics worry that the economically less-well-off will be deprived of the opportunities afforded by the first sale doctrine to read that same content without payment.

The critics refer generally to these problems as “lockup,” for the way in which the technological measures facilitated by the DMCA are said to allow owners to “lock-up” their works, free from the open use that characterizes the pre-DMCA world.<sup>14</sup>

In focusing on lockup, DMCA opponents envision a pay-per-use world where any access to use of films, books, magazines, and the like is subject to access controls and payment obligations. They contrast what they see as the traditional world of fair use – where a book in your study may be copied, pages scanned and faxed, and paragraphs can be dropped into articles and term papers – with what they see as the new, DMCA world in which technological access controls “eliminate fair use.”

## B. Fears downplayed.

None of this makes sense to the DMCA’s proponents and the content industries. They see the DMCA as a means not of *increasing* control but rather of *preserving a least some* of the control over copying and distribution they have traditionally enjoyed. For them, the DMCA is not about taking away users’ rights or opportunities, but trying to retain for copyright owners some of the control they are rapidly losing because of technological developments and the swiftly decreasing cost of copying, storage, and transmission. Absent the DMCA and technological controls, the fate of Hollywood and the publishing industries is foretold by Napster and Gnutella; the DMCA is essential because it affords a possible way to avert that fate and preserve the market for copyrighted works and the incentives to

<sup>12</sup> Julie E. Cohen, *Copyright and The Jurisprudence of Self-Help*, 13 Berkeley Tech. L.J. 1089, 1142 n.200 (1998) (finding in copyright’s fair use doctrine an affirmative right to “hack” technical protection systems to make fair uses). See also Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 Berkeley Tech. L.J. 519, 539-40 (text accompanying n.112); *Developments in the Law: The Law of Cyberspace, Development IV: Internet Regulation Through Architectural Modification: The Property Rule Structure of Code Solutions*, 112 Harv. L. Rev. 1634, 1651-52 (1999).

<sup>13</sup> See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999).

<sup>14</sup> See, e.g., Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 Colum.-VLA J.L. & the Arts 137, 153-54 (1999); Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 Fla. L. Rev. 107, 180-81 (2001).

creation and dissemination that have enriched the public and made our entertainment and publishing industries the envy of the world.

Worrying about the Orwellian risks of encrypted books and films strikes DMCA proponents as ludicrous in a world of Napster and the piracy of copyrighted product in China and certain other markets.

Fundamental to understanding the proponents' view of the DMCA is seeing it in the context of what has been a constantly decreasing cost of copying and of distributing copies. As some thoughtful commentators have noted, infringement is, at all times, a function, in part, of the cost per copy. For proponents, the notion of the DMCA as an attempt to increase control is belied by the reality of increasing loss of control. The constant reduction in the cost per copy of music, books, and films, as a result of twin tape decks, Xerox machines, and digitization and increases in computer storage capacities and transmission speeds, has greatly increased the ease and therefore the risk and likelihood of infringing; the DMCA is an attempt by the content industries to stem the onslaught, to push back to their own 20- or 30-yard line in a game in which they have been driven back from mid-field to the goal line.

The content industries see the fear of a pay-per-use world – where the public, and particularly the less-well-off, are walled off from content that they now enjoy for free – as risible, since it is inconsistent with the basic need for copyright owners to create, develop, and nurture markets and attract the public to the work. Browsing sells books; publishers are therefore not likely to develop models that preclude browsing.

Responding to the prophecy of the appellant and his supporting *amici* in *Universal City Studios* that “most works in a few short years will certainly be” available only in encryption-protected digital media, the motion picture studios (the “Studios”) pointed to the lack of any evidence for that doomsday prediction. As Judge Kaplan noted, “all or substantially all motion pictures available on DVD are also on videotape.” *Universal* at 337. The Register of Copyright noted that the “unique” material on DVDs is *new material* – not copied from an unencrypted platform on which it had previously appeared, but available now for the first time precisely because of the protective umbrella afforded by the DMCA. David Nimmer has mused about a “pay-per-use” world, but observed that technological and economic factors make such a world “not inevitable” and in any event “decades” distant if it materializes at all. Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 740 (2000).

With respect to the four key fears of DMCA opponents,

- proponents consider the impact on fair use (addressed in more detail below) grossly overstated, since only a tiny fraction if any of potential fair use requires digital copying;
- the “post-term” lockup problem is years away from developing, if it ever does, and hardly a sufficient reason to invalidate or repeal the DMCA now. (If and when lockup of copyright-expired work is a problem, there will be plenty of time to deal with it.<sup>15</sup> Note that publishers still profit from publishing works whose copyrights have long expired);

<sup>15</sup> The D.C. Circuit recently rejected the argument that the Copyright Term Extension Act of 1998 unconstitutionally prolongs the term of copyright beyond the “limited Times” contemplated by the Copyright Clause, U.S. Const. Art. I, section 8, cl. 8. See *Eldred v. Reno*, 239 F.3d 372, 377-78 (D.C. Cir. 2001). Given that technologies for reproducing audio and video content become obsolete in a decade or two, and that Congress unquestionably has the power to grant copyrights that endure for a century or more, the notion that an access control device associated with any given digital reproduction technology could lock up content beyond the “limited” lifetime of copyright is dubious.

- there is no realistic chance of a “shrinking public sphere”: for various reasons, not least marketing imperatives and technological developments, the risks lie on precisely the other side, and in any event Congress was entitled to judge that the risk of uncontrolled copying far outweighs the risk of too-tightly-controlled expression, and to legislate accordingly; and
- given public libraries and access afforded in schools and at workplaces, the “digital divide” is no more problematic for digital works protected by technological measures than it has been for books and periodicals over the past hundred years, and no reason not to protect the content industries from increased risks of infringement.

### III. FAIR USE AND ACCESS

In *Universal City Studios* and in the circumvention rulemaking proceeding recently conducted by the Register of Copyright for the Librarian of Congress, DMCA opponents have asserted that the DMCA’s trafficking proscriptions sound the death knell for fair use of copyrighted works delivered on DVDs.<sup>16</sup>

When the ability to make fair use of films of the last 40 years now is compared with what that ability was in 1970, before the VCR was commercially marketed, the argument seems hard to justify. The ability to make fair use of a film depends, at least in part, on the accessibility of the film. Doesn’t the public now have enormously more access to films after initial theatrical release than was ever available before? Doesn’t the public have not only a far greater body of commercially-released films from which to make fair use, but a greater scope for fair use of each of those films, than was ever available prior to the commercial launch of VCRs in the 1970s?

Was the First Amendment really violated by the fact that, in the pre-VCR era and since, fair uses that could have been made of films always have been necessarily impacted by the Studios’ decisions about how frequently, and in what cities and theaters, to release their films? The property rights that have, for example, permitted Disney to release *Snow White* only periodically and for limited times, and that permit both live stage and motion picture theaters to refuse to allow ticketholders to film or videotape plays and films, do not violate the First Amendment. Neither is the First Amendment violated by the state law rights that, together with 17 U.S.C. section 202, permit purchasers of art objects or literary manuscripts (whether or not copyrighted) to keep them out of public view. The Studios are free to release their films exclusively for display in movie theaters, or not to release them at all. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (“nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright”). Studios distributed their works for decades in this manner before the advent of DVDs, or even of videocassettes, and fair uses for film criticism, comment, teaching, scholarship, and research were as common as crabgrass.

Opponents point out that the DMCA makes a category of potential fair uses – those requiring perfect digital copies – unlawful, and another category – those requiring visual quotation – somewhat more difficult to undertake than they might otherwise be. For example, for content on a DVD that does not appear on the videocassette or elsewhere, the encryption on DVDs prohibits taking a digital image from your computer DVD drive and

<sup>16</sup> Variants of this scenario, ranging from the apocalyptic to the merely hysterical, appeared not only in Corley’s appellate brief at (41), but also in the *amici* briefs of Professors Lawrence Lessig and Yochai Benkler (at 10) and of the ACLU (at 4-5, 14-15).



pastings that into your own film, or videoreport. Opponents decry the inefficiency, or suboptimal reproduction, of having to, say, use a camcorder to copy a film off a video monitor.

Defenders point out that only a tiny majority of fair uses require the making of perfect digital copies; that the DMCA leaves the vast majority of potential fair uses unimpaired; and that Congress concluded that the benefits from the DMCA more than outweighed the loss, if any, to fair use, which is, after all, a function of access which has *always* been subject to decisions made by copyright owners' claim in that constitutional objection.

Contrary to the assertion, made in the DVD case by Corley and his supporters, that the DMCA is "unconstitutional because it eliminates fair use of DVD movies," neither the injunction nor the DMCA "eliminate fair use" of anything, much less of any copyrighted work at issue in this action.

The Register of Copyrights recently found the alarms raised by Corley's attorneys and many of his *amici* completely unwarranted. Register of Copyright Marybeth Peters concluded:

[T]here has been no evidence submitted in this rulemaking that access to works available only in a secured format is being denied or has become prohibitively difficult. Even considering the examples presented by various commentators, they merely establish that there are works that exist only in digital form. They have not established that access controls on those works have adversely impacted their ability to make noninfringing uses, or, indeed, that access controls impede their use of those works at all . . . . In the case of motion pictures on DVDs, anyone with the proper equipment can access (view) the work. If there were evidence that technological access controls were being used to lock up material in such a way that there was effectively no means for a user wanting to make a noninfringing use to get access, it could have a substantial adverse impact on users . . . . Nonetheless, that evidence would have to be balanced against an author's right to grant access to a work. . . . [In any event, n]o such evidence has been presented . . . .

65 Fed. Reg. at 64567. To the contrary, the Register reminded opponents that motion picture producers had been "generally unwilling to release their works in DVD format unless they are protected by access control measures," and that "it appears that the availability of access control measures has resulted in *greater availability* of these materials." 65 Fed. Reg. at 64568 n.13.

A movie released on DVD and in no other format could be the subject of innumerable uses potentially qualifying as fair use. Its plot and characters can be imitated or spoofed; its language can be quoted; and it can be shown on a DVD player in a classroom. Further, nothing in the DMCA, for example, would prohibit taking a brief snapshot from a TV or video display, that otherwise meets the statutory fair use criteria, of the content on a DVD (which would not, to be sure, be a perfect digital copy, but that is precisely the point of the trafficking proscriptions). In short, rigorous enforcement of the anti-circumvention provisions would impair, at most, the marginal quality of the image available for certain kinds of exotic fair uses. However, the fair use provision of the Copyright Act, 17 U.S.C. section 107, does not afford a "privilege" to make perfect digital copies of DVD movies; it merely provides a defense in infringement actions for certain permissible uses.

The trafficking proscriptions could be judicially invalidated on fair use grounds only if the courts were prepared to find that the First Amendment requires Congress to afford not just fair use within available access but, rather, a “fair use” right to perfect digital copies regardless of technological measures that restrict access or the rights of copyright owners with respect to copying and distribution. It is hard to find the basis for any such right.

Congress already decided that the interest in making perfect digital copies of works which have been technologically protected by their owners against unconsented access or copying should give way to the interest of copyright owners in safeguarding their works with technological protections to deter unconsented digital copying. If there is any basis for saying that Congress lacked the power to make that decision consistent with the First Amendment, it has not been persuasively articulated so far.

#### IV. PROSPECTS FOR FIRST AMENDMENT CHALLENGES TO THE DMCA’S ANTI-CIRCUMVENTION AND ANTI-TRAFFICKING PROVISIONS

The trafficking proscriptions of the DMCA aim at conduct and are not content-based. Under existing First Amendment doctrine, they should therefore be subject at most to intermediate scrutiny, which they should easily survive. There is no serious expectation that the Second Circuit will decide otherwise.

Although the DMCA’s opponents have complained that it should be subject to - and cannot survive - strict scrutiny, it is not at all clear that the application of the DMCA to the dissemination of trafficking devices is subject to *any* First Amendment review at all. The trafficking proscriptions do not purport to make it unlawful to speak; they proscribe the distribution of devices, however configured, that circumvent technological measures used by property owners to protect their own work. Breaking and entering into a museum after hours is not protected by the First Amendment, and no art historian would have a First Amendment defense if he tried to do so. No different result is likely even if the art historian merely found and attempted to publicly distribute a copy of the numerical combination or key used to open the museum’s front door.

Why is Eric Corley’s distribution of a decryption device any different? The Supreme Court has held that the first amendment is not implicated, and no first amendment scrutiny is required, when laws aimed at conduct are applied to non-expressive conduct. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (“generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news”); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704, 706 (1986) (intermediate review is required only when “it was conduct with a significant expressive element that drew the legal remedy in the first place”).

It is hard to see why the provision of decryption tools embodied in hardware (“black boxes”) would occasion First Amendment review, and equally hard to see why such review should apply in *Universal City Studios* merely because DeCSS has been configured as software rather than hardware.<sup>17</sup>

Even if free speech interests are implicated by application of the trafficking proscriptions to the dissemination of encryption keys on a website, no more than intermediate review would seem warranted. The DMCA is not aimed at the communicative impact of any

<sup>17</sup> See *Mendelsohn*, 896 F.2d at 1185 (treating a software program used for gambling as outside First Amendment protection). See also *CFTC v. Vartuli*, 228 F.3d 94 (2d Cir. 2000) (treating as outside First Amendment protection automatic trading software that “told customers whether to buy or sell yen or Swiss Franc futures.”); *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000) (holding that Internet generic Top Level Domain names, such as “.com,” “.net,” and “.org,” do not “constitute protected speech under the First Amendment”).

speech, but at conduct – the distribution of decryption keys (however configured). Congress’s purpose is unrelated to the suppression of speech and aims neither at speech nor at particular viewpoints or content. The trafficking proscriptions do not single out the media, or speech, for special treatment. The statutory text indicates, and the legislative history confirms, that Congress sought to regulate conduct, the provision of the means for copyright infringement, by analogy to statutes barring the provision of burglary tools.

Corley and his supporters have contended that strict scrutiny is required because the DMCA, at least as applied in his case, results in punishment for disseminating “news” – or at least what they insist is “truthful information.” But the decrypting software utility whose distribution the Studios are attempting to block is a tool, not “truthful information.” Thus, say the Studios, the line of cases exemplified by *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), on which Corley relies, is inapposite.<sup>18</sup> Those cases involve content-based laws aimed at speech. The relevant precedent, accordingly to the Studios and their supporters, is not the *Florida Star* line but rather such cases as *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388 (1973), which upheld the constitutionality of an order enforcing a law prohibiting employers from publishing, or any other person from aiding the publication of, any “notice or advertisement relating to ‘employment’ or membership which indicates any discrimination because of . . . sex.” Rejecting the newspaper’s First Amendment challenge, the Supreme Court held that “[t]he present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication . . . . Moreover, the order is clear and sweeps no more broadly than necessary . . . .” 413 U.S. at 390 (citations omitted). As *Pittsburgh Press* makes plain, the First Amendment does not bar the proscription of speech which is itself unlawful conduct that Congress may prohibit.<sup>19</sup>

Another strand of criticism to which *Universal City Studios* has been subjected centers on Judge Kaplan’s discussion of software generally, and DeCSS particularly, as “functional.” However, Judge Kaplan noted that software (or at least most software) is functional *and* expressive, and treated DeCSS as expressive in analyzing whether distribution of it could nonetheless be enjoined. The court settled on intermediate review not because Corley’s purported speech was “functional” and therefore entitled to less-than-“full” protection, but because the DMCA’s trafficking proscriptions are aimed at conduct, not speech, and are not content-based. Thus, the Studios have argued that the Second Circuit need not, and should not, decide whether software is categorically entitled to less protection than “traditional” speech. The appeal presents no such issue, they say.

The attack on whether the trafficking proscriptions survive intermediate scrutiny centers not on whether the DMCA serves substantial governmental purposes – the appellants and most *amici* concede that it does – but rather on the narrow tailoring part of the intermediate review test, which asks whether a challenged law “promotes a substantial governmental interest that would be achieved less effectively absent the regulation” and does not “burden substantially more speech than is necessary to further” that interest.<sup>20</sup> Statutes rarely fail to survive intermediate scrutiny, and the arguments for why the DMCA as applied to Corley in *Universal City Studios* should be an exception do not seem promising. As the

<sup>18</sup> *Florida Star* reversed a damage award imposed for violating a law barring publication of the names of rape victims; *Smith v. Daily Mail Pub’g Co.*, 443 U.S. 97, 98 (1979), overturned a conviction under a law barring publication of the names of juvenile defendants “in any newspaper”; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 830 (1978), reversed a penalty under a law making it unlawful to “divulge” information about judicial misconduct proceedings; and *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471 n.1, 487 (1975), reversed a damage award under a law prohibiting publication of name of rape victim to protect victim’s identity. The most recent case in this line, *Bartnicki v. Vopper*, 2001 U.S. Lexis 3815 (U.S. May 21, 2001), held that the First Amendment barred a civil damage suit under anti-wiretapping laws against a newspaper that had not itself engaged in or solicited illegal wiretapping. Unlike the law at issue in *Bartnicki* and its predecessors, the trafficking proscriptions of the DMCA are not aimed at prohibiting the communication of speech but, rather, at the dissemination of decryption devices (hardware or software).

<sup>19</sup> See also *Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc.*, 968 F.2d 286, 295-96 (2d Cir. 1992) (citing various laws that “can be violated by speech or other expressive conduct” without First Amendment difficulty); *Mendelsohn*, 896 F.2d at 1185-86.

<sup>20</sup> *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-15 (1997).

Studios and their supporters have argued, absent the DMCA, the interest in deterring infringement of digital works that have been technologically protected would seem to be far less securely advanced. Moreover, the trafficking proscriptions appear to be congruent to the benefits afforded, and the DMCA would appear to interfere with no speech, other than speech (if it is speech) that circumvents a technological measure protecting a copyrighted work.