

# Now Playing on an iPod Near You: Rip, Mix, Burn. It's Your Music.\* But Is It Your Video?

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\* When Apple Computer introduced its iMac computer line, the company used the message "Rip. Mix. Burn. It's your music. Burn it on a Mac. Dig?" in an advertising campaign to promote the computer's digital music capabilities. See Rob Walker, *Ad Report Card: Mac 'n' Roll*, SLATE, Mar. 19, 2001, <http://www.slate.com/id/102809>.

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## I. INTRODUCTION

Weighing six and a half ounces and able to hold about one thousand songs, the device that would significantly transform the portable digital media world was born in 2001.<sup>1</sup> First, it played music. Then, improvements allowed for digital photos and later, podcasts.<sup>2</sup> And recently, Apple introduced the fifth generation of the iPod,<sup>3</sup> known in the marketplace as the “iPod with video.”<sup>4</sup> But the latest trend in the rapid iPod evolution is not coming from Apple. Rather, the marketplace itself has realized that although the iPod has been extremely successful so far, the product is not reaching its full consumer potential.<sup>5</sup> Specifically, a new iPod out of the box is useless without a computer and a library of digital music or video files. While consumers currently have the right to copy their legally owned digital music for their own private use under the Audio Home Recording Act of 1992 (AHRA),<sup>6</sup> the Digital Millennium Copyright Act of 1998 (DMCA) prohibits consumers from copying their legally owned digital versatile discs (DVDs) and even some newer compact discs (CDs) containing copy protection.<sup>7</sup> The market’s response: iPods for sale, preloaded with content.

The preloaded iPod in general has emerged in multiple forms. Some individuals are selling their used iPods through online auction venues like eBay and Craigslist and then using the proceeds to upgrade to a newer version of the iPod. But the introduction of the new video iPod has led to start-up companies emerging solely to purchase DVDs for individual consumers, load copies of the video content onto a brand new

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1. Rob Walker, *The Guts of a New Machine*, N.Y. TIMES, Nov. 30, 2003, § 6 (Magazine) at 78.

2. John Markoff, *Apple Adds Radio Programming to iPod Player*, INT’L HERALD TRIB., June 30, 2005, § 4, at 18.

3. An “iPod” is a portable MP3 player that holds up to 20,000 songs. Apple Computer, Inc., <http://www.apple.com/ipod/ipod.html> (last visited Feb. 24, 2006).

4. Richard Baguley, *First Look: Apple’s Video-Ready iPod*, PC WORLD, Oct. 20, 2005, <http://www.pcworld.com/article/id,123118-page,1/article.html>.

5. Selling thirty-two million iPods in 2005, Apple Computer captured sixty-seven percent of the digital music player market share in the United States. See Saul Hansell, *Amazon Will Take on iPod with Its Own Music Player*, N.Y. TIMES, Feb. 17, 2006, § C (as corrected on Feb. 18, 2005).

6. See 17 U.S.C. §§ 1001-1010 (2000).

7. *Id.* §§ 1201-1332. Virtually all DVDs utilize content scrambling system (CSS) encryption that effectively prevents copying, and, therefore, a consumer is violating this statute by using software to copy DVDs. While some record companies have begun selling music using a CD format that prevents music from being copied to the computer, the copy-protected CD is not encrypted with any anticopying program at all that would require circumvention to make a copy. See Rachel Gader-Shafran, *Confessions of a Serial Infringer: Can the Audio Home Recording Act of 1992 Protect the Consumer from Copy-Protected CDs?*, 21 A.B.A. INTELL. PROP. L. NEWSL., Winter 2003, at 10.

iPod, and then sell the original DVDs along with the preloaded iPod to the consumer.<sup>8</sup> Initially targeted at older consumers and people without high-speed Internet connections, these transfer services have grown to interest even more technologically savvy consumers, primarily because the DMCA prevents Apple's user friendly iTunes application from allowing users to transfer a legally purchased DVD onto a video iPod.<sup>9</sup> One company selling the preloaded video iPods claims that its business model does not violate the DMCA because the company's method does not decrypt the DVDs when loading them.<sup>10</sup>

Nevertheless, as this latest trend continues to evolve, the Recording Industry Association of America (RIAA) contends that selling a preloaded iPod is a "clear violation of U.S. copyright law."<sup>11</sup> While the issue remains to be resolved in court, this latest conflict illustrates the lack of definitive guidance as to the scope of rights copyright law grants to consumers who simply want to watch or listen to their legally owned copyrighted works in the format and on the device of their choosing. This confusion exists partly because Congress has taken a piecemeal approach to addressing digital copying, enacting legislation that regulates digital technology only in response to specific and distinct problems.<sup>12</sup> Namely, Congress enacted the AHRA in response to a fear that the introduction of the digital audio tape (DAT) recorder would decrease commercial music sales in the late 1980s.<sup>13</sup> Congress then passed the DMCA in response to concerns that digital technology and the widespread use of the Internet were making it easier to copy and distribute copyrighted works.<sup>14</sup>

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8. Kevin Maney, *Preloaded iPods Prompt Legal Ponderings*, USA TODAY, Jan. 24, 2006, at 1B. TVMyPod is now known as Load 'N Go Video. Load 'N Go Video Frequently Asked Questions, <http://www.loadngovideo.com/faq.asp> (last visited Nov. 6, 2006).

9. See Declan McCullagh, *Can Video iPod Lead to DMCA Reform?*, CNET NEWS, Jan. 23, 2006, [http://news.com.com/Can+video+iPod+lead+to+DMCA+reform/2010-1028\\_3-6029611.html](http://news.com.com/Can+video+iPod+lead+to+DMCA+reform/2010-1028_3-6029611.html).

10. See Maney, *supra* note 8.

11. The RIAA is a trade organization representing the commercial interests of record companies that control over ninety percent of the distribution of recorded music in the United States. See Cynthia Kurkowski, *MP3 Beats the Odds: Industry Trend or Event*, COMPUTER USER, May 2000, at 18; Mark Evans, *Why Selling That iPod May Be a Headache*, JOURNAL (Newcastle, Eng.), Feb. 16, 2006, at 35, available at 2006 WLNR 2792053.

12. See, e.g., S. REP. NO. 102-294, at 52 (1992) ("[I]n crafting this legislation, the committee intends to address the longstanding issue of audio recording, and only audio recording. . . . The committee has been careful to make clear that this legislation is limited to this issue and to avoid affecting other technologies or other interests even by implication.").

13. Aaron L. Melville, *The Future of the Audio Home Recording Act of 1992: Has It Survived the Millennium Bug?*, 7 B.U. J. SCI. & TECH. L. 372, 378-79 (2001).

14. *Id.* at 386-88.

Despite these two statutory responses to changes in digital technology, consumers are still uncertain about the scope of their legal rights under copyright law. For example, does a mother commit a federal offense under the DMCA when she copies a few of her legally owned DVDs onto her laptop for her children to watch on their next family road trip? Do movie collectors who live along the Gulf Coast commit crimes when they make backup copies of their DVDs so that they will not lose their entire collections when the next hurricane strikes? This Comment analyzes the AHRA, the DMCA, as well as the interplay between the two statutes and concludes that Congress's approach to providing legal protection against the unauthorized copying of current, emerging, and future digital media should be modeled after the AHRA. Specifically, when a consumer purchases a CD or DVD, the content on that media should be entirely the consumer's to use as she pleases so long as she neither sells the content nor profits from it.

## II. THE GROWTH OF DIGITAL TECHNOLOGY IMPACTS COPYRIGHT LAW

United States copyright law has always attempted to strike a balance between providing incentives for authors to engage in creative activity and ensuring that the public benefits from the widespread dissemination of creative works.<sup>15</sup> Incentives to create come predominately from the bundle of exclusive rights copyright law grants authors over their works including the right to produce copies or reproductions of the work and to sell those copies, to create derivative works, to perform or display the work publicly, and to sell or assign these rights to others.<sup>16</sup> These rights reveal the effort Congress made to reach a balance between public and private interests, acknowledging that "the public benefits from the creative activities of authors and that the copyright monopoly is a necessary condition to the full realization of such creative activities."<sup>17</sup> But to balance this monopoly with the public interest, Congress placed limitations on these exclusive rights by limiting their duration<sup>18</sup> as well as limiting their scope with the affirmative defense doctrines of "fair use"<sup>19</sup>

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15. This is even evident from the Constitution's grant of authority for Congress to pass laws "[t]o Promote the progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." See U.S. CONST. art. I, § 8, cl. 8.

16. See 17 U.S.C. § 106 (2000).

17. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03(A) (2005).

18. See 17 U.S.C. § 302.

19. See *id.* § 107. The fair use of a copyrighted work does not require the copyright owner's permission. As the Copyright Act does not specify what constitutes a fair use, this is decided on a case-by-case basis taking into account the purpose and character of the use, the

and “first sale.”<sup>20</sup> However, the recent digital technology revolution has brought new challenges to balancing the rights of copyright holders against the protection of the public. In particular, new technological advances have made it quite easy to make copies of works without permission from copyright holders, thereby sparking conflicts and requiring that the scope of legal copyright protection be reevaluated.<sup>21</sup>

In particular, the late 1980s and early 1990s marked the beginning of a new age in which consumers have been able to purchase and enjoy copyrighted music, movies, photographs, and even books in digital formats. Nevertheless, these digital files can be perfectly replicated such that the copy is indistinguishable from the original.<sup>22</sup> Therefore, almost anyone with a computer and basic computer skills can make perfect copies of copyrighted works without losing sound or picture quality. For example, consumers can “rip” music files from a CD to a computer or digital media player such as an iPod.<sup>23</sup> Similarly, the growth of the Internet has created further controversy, as consumers have discovered their ability to share and redistribute digital content.

### III. RESPONDING TO THE EMERGENCE OF DIGITAL MUSIC TECHNOLOGY: THE AUDIO HOME RECORDING ACT OF 1992

#### A. *The Recording Industry’s Compromise with Consumers*

The first wave of digital copying technology made its debut in 1987 with the introduction of DAT recorders.<sup>24</sup> DAT recorders permit users to make multiple copies of tapes without the reduction in sound quality that occurs in producing analog copies.<sup>25</sup> Recognizing that this technology had the ability to facilitate widespread pirating of copyrighted works,

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nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the potential economic effects of that use on the market for, or value of, the copyrighted work. *Id.*

20. See *id.* § 109(a). The first sale doctrine provides that certain of the copyright owner’s exclusive rights end after the first sale of a particular copy of the work. *Id.*

21. Adam P. Segal, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 100-01 (1996).

22. See Julie M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 391 (2004).

23. “Ripping” is the process of copying audio or video data from a CD or DVD onto a hard disk. The copied data is usually encoded and compressed into an MP3 format, which can then be used to rapidly transmit the files between computers or onto a digital audio player such as the iPod. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

24. See William Sloan Coats et al., *Streaming into the Future: Music and Video Online*, 20 LOY. L.A. ENT. L. REV. 285, 298 (2000).

25. Audio Home Recording Act of 1991, H.R. 3204, 102d Cong. (1991) (recognizing that a single prerecorded work might be used to produce hundreds of copies and copies of copies that would be virtually indistinguishable from the original).

record companies, artists, and other copyright owners were concerned with the potential for enormous losses.<sup>26</sup>

In response, the recording industry wanted a broad legislative mandate to require that technical protection measures be built into technologies capable of recording digital works.<sup>27</sup> However, Congress responded with the Audio Home Recording Act of 1992 (AHRA), which imposed only a narrow technological mandate on defined “digital audio recording devices.”<sup>28</sup> As described in further detail below, the AHRA is essentially a compromise between the recording industry and consumers. Specifically, in exchange for receiving protection against serial copying and a royalty payment system, the recording industry agreed to allow the noncommercial consumer use of digital audio recording technology.<sup>29</sup>

The provisions of the AHRA that protect against serial copying require that all digital audio recording devices possess a mandated Serial Copy Management System (SCMS) or equivalent, which only allows copies of sound recordings to be made from original recordings.<sup>30</sup> This provision reflects Congress’s intent of permitting users to make unlimited copies of an original recording, but prohibiting users from making copies from any copy of the original.<sup>31</sup> In addition, the act provides that a royalty from the sale of all consumer digital audio recording equipment and digital recording media be paid to the performers, composers, record companies, and music publishers whose recorded product has been copied.<sup>32</sup> To balance these mandatory royalty obligations on the manufacturer with the public interest, the AHRA provides an exemption from infringement liability for manufacturers of digital audio devices and consumers who use the protected devices for “noncommercial uses.”<sup>33</sup>

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26. *See id.*

27. Copyright Issues Presented by Digital Audio Tape, H.R. 1384, 100th Cong. (1987).

28. *See* 17 U.S.C. § 1001(3) (2000) (defining “digital audio recording device”).

29. *See id.* §§ 1001-1008.

30. *See id.* § 1002. The AHRA defines “serial copying” as the “duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording.” *See id.* § 1001(11).

31. In the legislative history of the AHRA, Congress explains:

SCMS is intended to prohibit [digital audio recording] devices from recording “second-generation” digital copies from “first-generation” digital copies containing audio material over which copyright has been asserted via SCMS. It does not generally restrict the ability of such devices to make “first-generation” digital copies from “original” digital sources such as prerecorded commercially available compact discs, digital transmissions or digital tapes.

138 CONG. REC. H9029, at 9043 (daily ed. Sept. 22, 1992).

32. *See* 17 U.S.C. §§ 1003-1007.

33. *Id.* § 1008 (“No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording

While the AHRA does not explicitly describe this exemption as “fair use,” the legislative history of the statute illustrates Congress’s concern for protecting consumers who make copies for their own personal use.<sup>34</sup>

*B. Post 1992: The Growth of Digital Compression Files*

Digital music technology has made significant breakthroughs since the passage of the AHRA. For example, data compression technology has enabled users to store copies of musical recordings as files on their computer hard drives.<sup>35</sup> This compressed format enables users to listen to the music on a computer, send the files as e-mail attachments, and even post the files on Web sites, making the copied files available to the public. In 1987, the Moving Picture Experts Group created a standard format used to store such compressed audio files called MPEG-3, commonly abbreviated as “MP3.”<sup>36</sup> Because they are highly compressed but still provide high sound quality, MP3 files have become a standard and popular format for downloading music.<sup>37</sup> Nevertheless, as with any digital format, users can copy and distribute MP3 files infinitely without any resulting reduction in sound quality.

*C. The AHRA Proves Underinclusive*

The first case to interpret the scope of the AHRA came in 1998 when the RIAA filed suit against Diamond Multimedia, alleging that the manufacture and sale of the Rio PMP 300 player (Rio player) violated the AHRA.<sup>38</sup> The Rio player is a small portable music player sold with software that allows a user to convert music from a CD into MP3 format so that the music can then be stored on a computer hard drive.<sup>39</sup> Users can subsequently connect the Rio player to a computer and transfer the

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device, a digital audio recording medium . . . or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings . . .”).

34. See S. REP. NO. 102-294, at 51 (1992).

35. See Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 99 (2002-2003).

36. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001). MP3 is the acronym for Moving Picture Experts Group 1, Audio Layer 3. *Id.*

37. *Id.*

38. See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc. (Diamond I)*, 29 F. Supp. 2d 624, 625 (C.D. Cal. 1998).

39. See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc. (Diamond II)*, 180 F.3d 1072, 1074-75 (9th Cir. 1999).

MP3 files to the player itself.<sup>40</sup> As a result, the Rio player was one of the first products allowing MP3 files to be enjoyed on a portable device.<sup>41</sup>

The RIAA claimed that the Rio player violated the AHRA because the device did not have any copy control mechanisms and Diamond was not making any royalty payments from sales of the device. In response, Diamond argued that its Rio player is exempt from the AHRA as a device.<sup>42</sup> Specifically, according to Diamond, the Rio is not a “digital audio recording device” because the source of the copy, the computer hard drive, is not a “digital musical recording.”

Rejecting Diamond’s argument that the Rio player was not covered by the AHRA, the United States District Court for the Central District of California only stated that the Rio player may fall within the definition of a “digital audio recording device.”<sup>43</sup> The district court focused on the fact that the inclusion of SCMS technology on the Rio player would not accomplish anything since MP3 files do not even contain SCMS information.<sup>44</sup> Therefore, the district court found a Rio player without SCMS technology to be the functional equivalent of a Rio player with SCMS technology incorporated into it.<sup>45</sup> Moreover, finding that illegitimate uses of MP3 files were possible even without the Rio player, the district court found that the RIAA suffered no irreparable harm from sales of the Rio player and denied the association’s motion for a preliminary injunction to enjoin the manufacture and distribution of the device.<sup>46</sup>

On appeal, the United States Court of Appeals for the Ninth Circuit definitively found that the Rio player is not a “digital audio recording device” under the AHRA because it does not make copies from “digital music recordings.”<sup>47</sup> In reaching this conclusion, the court explained that

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40. *See id.*

41. *Id.*

42. *See* 17 U.S.C. § 1001(3) (2000):

[A] digital audio recording device is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use . . . .

43. *See Diamond I*, 29 F. Supp. 2d at 632.

44. *Id.*

45. *Id.*

46. *Id.* at 633.

47. *See* Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc. (*Diamond II*), 180 F.3d 1072, 1076 (citing 17 U.S.C. § 1001(5)(A)) (defining a “digital musical recording” as “a material object in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and from which the sounds and

to qualify as a “digital audio recording device” under the AHRA, a machine or device must be able to make a “digital audio copied recording” of a “digital music recording.” The court concluded that computer hard drives fall outside the definition of “digital music recordings” since § 1001(5)(B) of the AHRA specifically exempts devices that are “material objects in which one or more computer programs are fixed.” Finding that computer hard drives fall within this category of material objects, the Ninth Circuit held that computer hard drives are exempted from the AHRA.<sup>48</sup>

The court went on to describe that the primary purpose of computers does not include the making or copying of digital audio recordings.<sup>49</sup> As the court explained, “[u]nlike digital audio tape machines, for example, whose primary purpose is to make digital audio copied recordings, the primary purpose of a computer is to run various programs and to record the data necessary to run those programs and perform various tasks.”<sup>50</sup> Therefore, because the Rio player does not constitute a digital audio recording device, the court held that the player is not subject to the requirements of the AHRA.<sup>51</sup>

#### *D. Diamond Creates a Large Loophole*

In effect, the *Diamond* decision recognized a loophole in the AHRA, thereby providing a legal framework in which to continue the distribution of the Rio player and other handheld MP3 players offered by market reactors. Specifically, based on the Ninth Circuit’s analysis, the AHRA does not apply to computers and storage media such as Compact Disc-Recordables (CD-R), even though these mediums can store, transmit, and produce copies of unauthorized recordings. Furthermore, because a hard drive can be used other than as an audio recording device, computers are not required to comply with the AHRA’s SCMS mandate.

Consequently, the determination of whether or not a device is within the scope of the AHRA lies in the primary purpose for which a product is designed and sold. As a result, the manufacturers of multipurpose devices that are equally capable of infringing and noninfringing digital recording are neither required to pay the statutory royalties nor to include an SCMS system. This result seemingly

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material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”).

48. *Id.* at 1078.

49. *Id.*

50. *Id.*

51. *Id.* at 1081.

emulates the standard of secondary liability for dual-use technologies established by the United States Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.* In that case, a supplier of such technology is not liable even if the technology can be used to infringe on copyrights, provided that the technology also has substantial noninfringing uses.<sup>52</sup> While the standard for exemption established in *Diamond* is more restrictive than the *Sony* principle, the AHRA is still limited in its ability to regulate unauthorized copying. Therefore, as technology has expanded, copyright holders have looked to other mechanisms for protection.

#### IV. ENHANCING PROTECTION OF DIGITAL TECHNOLOGY: THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

##### A. *Legal Protection for Technological Protection Measures*

With the rapid expansion of the Internet, the recording and motion picture industries became increasingly concerned about the ease of replicating and distributing their copyrighted works.<sup>53</sup> In response, copyright holders began installing their own methods of technological protection on their works including password protection, copy protection, encryption, digital “watermarking,” and rights management systems.<sup>54</sup> For instance, most commercial DVDs are protected by an access mechanism known as Content Scrambling System (CSS), which encrypts the digital information stored on the DVD so that it cannot be played or copied by a DVD player without a decryption key.<sup>55</sup> The motion picture industry charges a licensing fee to manufacturers of DVD players for the use of this decryption key, called a player key.<sup>56</sup> But as technology continues to grow at lightning speed, the public will virtually always discern a way to get around such technological protection measures. Consequently, the movie and record industries lobbied Congress to provide legal protection for the technological protection measures on their copyrighted content.<sup>57</sup>

Title I of the Digital Millennium Copyright Act of 1998 (DMCA) seeks to provide legal protection to copyright holders by prohibiting the circumvention of these technological protection measures and banning

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52. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 440 (1984).

53. *See* Menell, *supra* note 35, at 134.

54. *See* Besek, *supra* note 22, at 391-92.

55. *See* 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1089 (N.D. Cal. 2004).

56. *Id.*

57. *See* Menell, *supra* note 35, at 133.

devices whose primary purpose is to enable the circumvention of technical protection measures.<sup>58</sup> The DMCA was also enacted as a means of implementing the United States' obligations to two World Intellectual Property Organization (WIPO)<sup>59</sup> international treaties addressing copyright protection in the digital age.<sup>60</sup> Essentially, Congress sought to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development and education in the digital age."<sup>61</sup> While the DMCA is highly complex and comprised of five different titles, this Comment will focus only on the provisions pertaining to the circumvention of copyright protection technology contained in Title I.<sup>62</sup>

The anticircumvention provisions of the DMCA provide three broad prohibitions that apply to any copyrighted work for which a "technological measure" restricts access or use.<sup>63</sup> First, § 1201(a)(1) prohibits circumventing a technological measure that controls access to a protected work.<sup>64</sup> Circumvention is defined in the statute as "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."<sup>65</sup> Second, § 1201(a)(2) bans the trafficking or distribution of devices that facilitate

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58. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 1201-1332 (2000)). The Act is currently incorporated into chapters 12 and 13 of Title 17 of the United States Code and the anticircumvention provisions discussed in this Comment appear in §§ 1201-1205. See 17 U.S.C. §§ 1201-1205. Prior to the enactment of the DMCA, several copyright holders threatened to remove their products from the market unless Congress granted them some kind of protection against digital piracy. See H.R. REP. NO. 105-551, pt. 1, at 10 (1998) ("When copyrighted material is adequately protected in the digital environment, a plethora of works will be distributed and performed over the Internet.").

59. See 17 U.S.C. § 101 (stating that the DMCA implements the two WIPO treaties). WIPO is a specialized United Nations agency responsible for promoting the protection of intellectual property among nations throughout the world. World Intell. Prop. Org., <http://www.wipo.org/about-wipo/en> (last visited Feb. 25, 2006).

60. See H.R. REP. NO. 105-551, pt. 2, at 20 (1998); see also WIPO Copyright Treaty, Apr. 12, 1997, Sen. Treaty Doc. No. 105-17 (1997). The WIPO Copyright Treaty requires, among other things, that countries "provide adequate legal protection against the circumvention of effective technological measures that are used by copyright owners to protect their works from infringement." *Id.*

61. S. REP. NO. 105-190, at 2 (1998).

62. See 17 U.S.C. §§ 1201-1205.

63. *Id.* § 1201. The DMCA states: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." *Id.* § 1201(a)(1)(A). The statute provides that "a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." *Id.* § 1201(a)(3)(B).

64. *Id.* § 1201(a)(1)(A).

65. *Id.* § 1201(a)(3)(A).

circumvention of technological measures used to control access to a protected work.<sup>66</sup> Third, § 1201(b) prohibits trafficking in devices that circumvent technological control measures used to protect against unauthorized use of copyrighted works.<sup>67</sup>

Thus, Congress distinguished between the legal protection afforded to technological measures that control access and those that protect against unauthorized use. While the DMCA prohibits the manufacture and dissemination of technology that circumvents measures that control both access and use, the statute only prohibits the act of circumventing measures that control access.

The statute also provides several exceptions which allow circumvention for nonprofit libraries, archives and educational institutions, law enforcement, intelligence and other government activities, and certain reverse engineering and encryption research.<sup>68</sup> Nevertheless, violations of the DMCA circumvention prohibition are distinct from copyright infringement.<sup>69</sup> Consequently, a user can be technically liable under the DMCA for circumventing a technological protection measure of a digital work even if the work itself does not meet the standards for copyright protection. Therefore, some commentators have argued that the DMCA effectively grants copyright owners an additional right to control access that is entirely distinct from the exclusive rights in § 106 of the Copyright Act.<sup>70</sup>

### B. *Anticircumvention in the Courts*

CSS protection on DVDs has formed the basis of several of the initial cases brought under the DMCA. For instance, the first major opportunity for the courts to interpret the anticircumvention provisions of the DMCA arose when a teenager discovered the CSS encryption algorithm on DVDs, developed a program that could perform the decryption, and then posted the program on his Web site.<sup>71</sup> Eight motion picture companies brought suit against several defendants involved in developing and publishing the software.<sup>72</sup> The United States District Court for the Southern District of New York definitively held that the

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66. *Id.* § 1201(a)(2).

67. *Id.* § 1201(b).

68. *Id.* § 1201(d)-(f).

69. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 974 (2d ed. 2000).

70. *See, e.g.*, Dan L. Burk, *Anticircumvention Misuse*, 50 *UCLA L. REV.* 1095, 1108 (2003).

71. *See* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 437-39 (2d Cir. 2001).

72. *Id.*

software violated the DMCA as “a means of circumventing a technological access control measure.”<sup>73</sup> While the defendants appealed, claiming that the software was entitled to free speech protection and that § 1201 of the DMCA restricted the fair use doctrine, the United States Court of Appeals for the Second Circuit rejected both of these constitutional challenges and affirmed the district court’s opinion.<sup>74</sup>

More recently, two district courts in different jurisdictions analyzed the DMCA’s anticircumvention provisions in suits against the same company that developed and actually sold DVD decryption software.<sup>75</sup> Specifically, 321 Studios’ “DVD Copy Plus” and “DVD-X COPY” enabled users to bypass the CSS on DVDs so that they could copy the contents of the DVD onto recordable CDs or DVDs.<sup>76</sup> Recognizing its potential for DMCA liability, 321 Studios sought a declaratory judgment that distribution of its software does not violate the anticircumvention provisions.<sup>77</sup> The company claimed that its software had many substantial noninfringing uses, including allowing users to make back-up copies of their DVDs and enabling users to copy DVDs that do not contain CSS encryption. However, both district courts rejected this argument, holding that the software was primarily designed and produced to circumvent CSS, and furthermore, was marketed to the public for that purpose.<sup>78</sup>

## V. RECONCILING THE AHRA AND DMCA: REESTABLISHING BALANCE

### A. *Narrow Scope Causes AHRA To Become Nearly Irrelevant*

Unaware of the looming explosion of digital technology and the Internet, Congress deliberately chose to give the AHRA a narrow scope.<sup>79</sup> But this intent has resulted in legislation with limited relevance in today’s world where music is recorded primarily on CDs and MP3s using computers instead of on digital audio tapes using digital audio recorders. As the introduction of the video iPod has illustrated, it is becoming increasingly less difficult to make copies of digital video content. Thus,

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73. *Id.* at 434.

74. *Id.* at 435.

75. *See* 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004); Paramount Pictures Corp. v. 321 Studios, No. 03-CV-8970, 2004 WL 402756 (S.D.N.Y. Mar. 3, 2004).

76. *321 Studios*, 307 F. Supp. 2d at 1085.

77. *Id.*

78. *Id.*

79. *See* S. REP. NO. 102-294, at 52 (1992) (“The committee has been careful to make clear that this legislation is limited to this issue and to avoid affecting other technologies or other interests even by implication. This intent is manifest in several provisions of the bill.”).

the scope of the AHRA must be updated to include new devices and techniques for the reproduction of digital media.

*B. DMCA Removes Benefit of Consumers' Bargain*

While at first glance the anticircumvention provisions in the DMCA might appear to resemble the serial copying components of the AHRA, the DMCA is in fact much broader and more flexible than the AHRA.<sup>80</sup> The stated purpose of the AHRA “is to [e]nsure the right of consumers to make analog or digital audio recordings of copyrighted music for private, noncommercial use.”<sup>81</sup> Yet, the DMCA bans any software, device, or mechanism that could be used to get around the copy protection on the digital media that consumers purchase today. Consequently, consumers have been deprived of the benefit of their bargain under their compromise agreement reached with the music industry in the AHRA.<sup>82</sup>

This effect results, to some extent, from advances in technology. Namely, in the modern digital age, the right to engage in audio home recording is arguably of little practical value since consumers generally perform digital audio recording using a computer rather than a digital audio recording device. While copyright owners might argue that this effect is balanced by their loss of proceeds from the royalty system, copyright owners now have potentially strong means to control and exploit their digital works under the DMCA. Thus, the DMCA seems to tip the scales of the copyright compromise in favor of copyright holders.<sup>83</sup> Furthermore, as many commentators have pointed out, the restrictions of the DMCA are so broad that they apply to individuals who create or use a circumvention tool to make a legal fair use of encrypted material.<sup>84</sup>

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80. See generally Burk, *supra* note 70, at 1108. Instead of implementing regulations that only prevent serial copying like the AHRA, Congress focused the DMCA on granting protection to the technological measures that copyright owners use to control unauthorized access or use.

81. See S. REP. NO. 102-294, at 51.

82. See *id.* at 34 (explaining that “the competing interests have, through negotiation and compromise, reached an agreement which all parties involved feel is equitable,” and the legislation “reflects this agreement”); see also H.R. REP. NO. 102-873, pt. 1, at 13 (1992), reprinted in 1992 U.S.C.C.A.N. 3578, 3583 (presenting the Act “preserves the essentials of the agreement”).

83. See, e.g., Joshua Schwartz, *Thinking Outside the Pandora's Box: Why the DMCA Is Unconstitutional Under Article 1, § 8 of the U.S. Constitution*, 10 J. TECH. L. & POL'Y 93, 96 (2005).

84. See Denis T. Brogan, *Fair Use No Longer: How the Digital Millennium Copyright Act Bars Fair Use of Digitally Stored Copyrighted Works*, 16 ST. JOHN'S J. LEGAL COMMENT. 691, 691-97 (2002); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 711-12 (2000); Derek J. Schaffner, *The Digital Millennium Copyright Act:*

Specifically, the DMCA provides copyright holders with protection against lawful copying of their works that may be essential for purposes of criticism, comment, news reporting, or research.<sup>85</sup>

*C. AHRA and DMCA Not Created Equally*

The legislative history of the DMCA does not even evidence Congress's consideration of expanding the protection scheme set forth in the AHRA to include other forms of digital media as a possible course of action.<sup>86</sup> However, Congress expressed concerns extremely similar to those that sparked the passage of the AHRA.<sup>87</sup> Namely, in enacting the DMCA, the Commerce Committee explained,

the digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate. As technology advances, so must our laws.<sup>88</sup>

Aside from the unique threat of motion picture lobbying groups, the impetus Congress described in passing the DMCA was the rise of digital technology that enabled perfect digital copies to be created without any resulting loss in quality.

*D. Consumers' Right To Use*

While it is important to have measures that prevent unauthorized access to digital works, it is equally important for consumers who own authorized copies to be able to use those copies fully. This idea is consistent with consumers' basic understanding of property rights. Specifically, property can be seen as a bundle of rights including the right to possession of the property, use of the property, exclusion of others from the property, and the right to dispose of the property by sale

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*Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation*, 14 CORNELL J.L. & PUB. POL'Y 145, 148 (2004).

85. Schaffner, *supra* note 84, at 148.

86. The chief congressional initiatives resulting in the DMCA are captured in these reports: Report of the Senate Judiciary Comm., S. REP. NO. 105-190 (1998); Report of the House Judiciary Comm., H.R. REP. NO. 105-551, pt. 1 (1998); Report of the House Commerce Comm., H.R. REP. NO. 105-551, pt. 2 (1998); Joint Explanatory Statement of the Comm. of Conference, H.R. REP. NO. 105-796 (1998), *reprinted in* 1992 U.S.C.A.N. 3578.

87. See S. REP. NO. 105-190; H.R. NO. 105-551, pt. 1; H.R. REP. NO. 105-551, pt. 2; H.R. REP. NO. 105-796.

88. H.R. REP. NO. 105-551, pt. 2, at 25.

or gift.<sup>89</sup> While rights in intellectual property are more limited, Congress made an effort to distinguish access and use so that the DMCA only protects against the circumvention of technological measures that control access, not use. If a consumer purchases a DVD, the DVD becomes her property and she should be entitled to exploit her right to use the DVD. However, the DMCA has created outlandish consequences. Consider the following example: If Candace Consumer gets locked out of her own home, she is legally permitted to call a locksmith to make a duplicate key that will allow her to open the door to her home. But if Candace purchases a copy protected CD or DVD, the DMCA most likely prohibits her from unlocking the digital encryption so that she can transfer the content onto her iPod. As this simple example illustrates, the DMCA anticircumvention provisions go so far in protecting technological protection measures that they harm the public interest by strictly controlling the uses of even legally owned copyrighted works.

#### VI. REFORMING THE DMCA TO REFLECT AHRA'S APPROACH WOULD ALLEVIATE INCONSISTENCIES AND INCREASE ECONOMIC EFFICIENCY

Expanding the AHRA scheme to cover digital video content such as DVDs would actually increase consumer demand for DVDs and spur technological innovation. In particular, DVDs will have a greater value to consumers who know that they can copy the content of the DVD onto a portable media device like an iPod. This would provide a backup of the content to counteract the risk associated with the DVD being stolen, lost, or damaged. If consumers are more confident in investing in DVDs, they will actively purchase greater quantities. Increased consumer demand for both DVDs and portable digital media devices that can store video content will create competition among suppliers, thereby increasing the incentive to innovate. The resulting innovation is consistent with the Copyright Clause, the fundamental rationale behind our system of intellectual property.

#### VII. CONCLUSION

Neither the AHRA nor the DMCA are perfect solutions to promoting copyright policy in the digital age. However, the AHRA represents a more effective mechanism to controlling digital copying without harming the public's ability to use digital works to "promote the

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89. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945).

Progress of Science and the useful Arts.”<sup>90</sup> For example, unlike the DMCA, the AHRA requires manufacturers to include a specific copy protection mechanism in digital technology. However, the overbroad DMCA provides protection to virtually any technological protection mechanism, thereby granting copyright owners new rights beyond those of established federal copyright law. Therefore, expanding the AHRA in light of current, emerging, and future changes in digital music and video technology will help restore balance to the U.S. copyright system in today’s digital age.

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90. See U.S. CONST. art. I, § 8, cl. 8.