

# From Balance to Property: The Dangers of Copywrongs

Jeff White\*

I.	INTRODUCTION .....	247
II.	EXTENSIONS IN THE DURATION OF COPYRIGHT .....	248
III.	EXTENSIONS IN THE POWER OF COPYRIGHT .....	253
	A. <i>The DMCA: Congress Abandons Fair Use</i> .....	253
	1. The Winds of Change Begin to Blow.....	254
	2. How the Machine Operates.....	259
	3. Litigation and Constitutional Failure.....	261
	a. <i>Universal City Studios, Inc. v. Corley</i> .....	262
	b. <i>United States v. Sklyarov</i> .....	265
	B. <i>Contract Law Trumping Copyright Law</i> .....	266
IV.	CONCLUSION .....	270

## I. INTRODUCTION

At one time, copyright law was considered a delicate balance of interests. Congress held the position as the policy maker who generally set forth the rules governing copyright law while staying out of most squabbles. If a major issue arose, it was usually settled in the courts first. Once the courts had framed the facts and reasoning of the issue, Congress would then pick up the pieces and see if the courts had reached the proper conclusion. If they had not, then Congress would analyze the current law to see if something should be done.

Sometime during the last few decades, nearly two hundred years of carefully thought out copyright law was turned on its head. One major part of the balance was left out in the rain, and the already powerful content holders became even more powerful. Gone was the traditional renewal system leading to between twenty-eight and fifty-six years of protection; in was the new system guaranteeing nearly perpetual copyrights. Out with the strongly protected fair use doctrine; in with congressional attempts to undermine the fair use doctrine by abdicating its own role and enacting laws only allowing fair use when the content

---

\* J.D., Tulane University School of Law.

owners felt like granting it. All the while, the talk began to change from “balances” and “interests” to “thievery” and “property rights.”

Conspiracy theorists and anti-government advocates will certainly not be surprised that someone would accuse the First Branch of being captured by powerful corporate interests at the expense of the public at large. Charges of this nature are certainly not new, and it would certainly be easy to hurl the accusation. The fault, however, lies as much with the judiciary as it does with Congress. If Congress chooses to abdicate its constitutional duties (as it does from time to time), the courts have always felt it to be their place to put the limits of the Constitution back where they belong.<sup>1</sup> With copyright, not only have courts opted not to remind Congress of the meaning of the Copyright Clause, they have directly helped to further the problem by adopting new rights theories that allow copyright owners to sidestep the public protections of copyright law altogether.

## II. EXTENSIONS IN THE DURATION OF COPYRIGHT

With the Copyright Act of 1976, Congress drastically altered the duration of copyright law. For an individual author, the previous maximum term had been fifty-six years.<sup>2</sup> The 1976 Act extended the term for the life of the author plus fifty years.<sup>3</sup> Congress claimed that this extension was necessary for several reasons, the most important ones being the increase in the average individual’s life expectancy, the massive growth in communications media which increased the average life expectancy of most works, and the need to bring the United States in line with the rest of the world on copyright duration.<sup>4</sup> Whatever the reason, this was certainly a drastic change from the previous regime. The term extension in the Copyright Act of 1976 was never challenged in a court of law, which might lead one to believe that no one found it to be problematic. This view is somewhat misguided, as will be explained shortly.

In 1998 Congress extended the duration of copyright terms yet again with the Sonny Bono Copyright Term Protection Act (CTEA).<sup>5</sup>

---

1. *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

2. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 302, 90 Stat. 2541 (1976).

3. *See id.*

4. H.R. REP. NO. 94-1476, at 135 (1976) (“A very large majority of the world’s countries have adopted a copyright term of the life of the author and 50 years after the author’s death.”).

5. Sonny Bono Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (also affectionately (or, rather nonaffectionately) known as the Mickey Mouse Copyright Term Extension Act, paying homage to Disney’s role as the primary party pushing for the extension); *see* Ted Bunker, *Capital Focus; Copyright Idea Emerges*, BOSTON HERALD, Jan. 20, 2003, at 23.

This time, however, many people cried foul.<sup>6</sup> Any justifications Congress might have had in extending the copyright term in 1976 just did not apply in 1998.<sup>7</sup> Congress could not possibly have concluded that the extension would persuade future authors to publish their works because the added benefit is so minor.<sup>8</sup> In addition, the extension would harm the public (the oft-forgotten other half of the copyright balance) by preventing them from having full access to copyrighted works for an additional twenty years. Congress, along with the content holders who requested the term extension, countered with the same arguments used to justify the 1976 extension and a few new ones. One such argument was that a term extension was needed in order to encourage people to translate older works into digital form; of course, no one would think of doing such a thing for public domain works as they would not receive compensation for their hard work.<sup>9</sup> Extension supporters must have been at a loss to explain why people had already been doing this translation work for many years before the term extension with public domain works without a single penny's worth of compensation.<sup>10</sup>

Unlike the 1976 Act, the Bono Act was in fact challenged in court. According to Stanford Law professor Lawrence Lessig, who filed and argued the case on behalf of the plaintiffs, Congress had exceeded the scope of its constitutional powers when it enacted the CTEA.<sup>11</sup> Lessig's argument, simply put, was that the Framers of the Constitution clearly meant for copyright terms to end at some point.<sup>12</sup> If Congress has the power to extend the term of a copyright that has already vested (a "retrospective" copyright extension), then the Constitution's requirement of "limited Times" is meaningless because Congress can just continue to incrementally extend the term.<sup>13</sup> Should Congress continue to extend the term, it could achieve indirectly what it could not achieve directly, i.e.,

---

6. See Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 417-18 (Nov. 2002) (noting heavy opposition from academics and public interest groups).

7. See *id.* at 415-16.

8. See *id.* at 417-18. It is important to note that this does not claim that the massive extension in 1976 would not have persuaded reluctant authors. The argument is simply that it is unreasonable to believe that there is an author (or any significant group of authors) that would not publish their works under a "life plus 50" copyright term but would be persuaded if they just got another twenty years in which their heirs could profit. See generally *id.*

9. See *id.* at 418.

10. See Project Gutenberg, at <http://www.gutenberg.net> (describing a vast volunteer project translating public domain works into digital formats since 1971); see also Eldritch Press, at <http://eldritchpress.org> (doing the same since the early 1990s).

11. LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 197 (2001).

12. *Id.* The language of the Constitution could not possibly be clearer on this point; rights will be secured to authors "for limited Times." U.S. CONST. art. I, § 8, cl. 8.

13. LESSIG, *supra* note 11, at 197.

“perpetual copyright on the installment plan.”<sup>14</sup> Therefore, Lessig’s challenge to the CTEA was only to the extent the CTEA purported to extend the term of copyrights that had already been granted to authors.

This was by no means an open and shut case, if for no other reason than history stood firmly against Lessig. Congress has extended copyright terms numerous times since the founding of the Republic.<sup>15</sup> In each instance, Congress decided to treat existing copyrights in the same way it treated new copyrights; that is, any copyright terms already in effect would be extended to give those authors more or less the same benefit that future authors would receive under the new term.<sup>16</sup> History then dictates an unbroken congressional practice, arguably going back to the first Copyright Act in 1790, of extending both existing and future copyright terms.<sup>17</sup> In all this time, the power of Congress to extend existing copyrights had never been challenged in a court of law. The question was/is this: How can we now say that Congress lacks the power to do this if nobody else has found the practice problematic in over two hundred years? It is a difficult question, one that Lessig himself had to face during oral argument before the Supreme Court.<sup>18</sup>

The answer comes from the Supreme Court’s decision in *United States v. Lopez*.<sup>19</sup> In *Lopez*, the Court was faced with interpreting the scope of Congress’s power under the Commerce Clause.<sup>20</sup> Prior to *Lopez*, when faced with the question of whether or not Congress had the power to enact a particular law under an enumerated power, courts would only ask whether or not the enactment was a “necessary and proper”

---

14. Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1071 (2001) (quoting Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary, 104th Cong. (1995), available at 1995 WL 10524355).

15. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 775 (2003).

16. *Id.* at 775-76.

17. *Id.* at 775.

18. The transcript of *Eldred v. Ashcroft* revealed this dialogue questioning the plaintiff’s attorney:

[Justice O’Connor]: Mr. Lessig, I’ll tell you what bothers me about your position, and that is that Congress has extended the term so often through the years, and if you are right, don’t we run the risk of upsetting previous extensions of time?

....

[Chief Justice Rehnquist]: Well, doesn’t that itself mean something, Mr. Lessig? The fact that they were never challenged, perhaps most people, and perhaps everybody felt there was no basis for challenging them.

The transcript is available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/01-618.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-618.pdf).

19. 514 U.S. 549 (1995).

20. See *id.*

exercise of Congress's power.<sup>21</sup> *Lopez*, however, brought about a change in that particular thinking. If *Lopez* stands for nothing else, it stands for the principle that all of Congress's enumerated powers have limits.<sup>22</sup> The Framers, according to the Court, sought to create a federal government whose powers were sharply limited in their scope in order to retain the ultimate sovereignty of the states.<sup>23</sup> The power of Congress to enact laws pursuant to the powers granted by the Constitution must then be subject to limits.<sup>24</sup> If the powers of Congress were not limited, then the fundamental system of liberty envisioned by the Framers would be undone.<sup>25</sup>

The *Lopez* Court did not get rid of the "necessary and proper" analysis. In the ordinary analysis, when Congress is acting within the bounds of its constitutionally granted powers, the "necessary and proper" analysis would still be the correct test to apply. The important changes are the Court's acknowledgement of the limits of Congress's enumerated powers and the warning from the Court that it would reject legislation that showed Congress was acting outside the limits of its powers.<sup>26</sup> The Court also recognized that the limits of Congress's enumerated powers were not always easy to define.<sup>27</sup> Still, the Court's analysis provided a helpful framework for determining whether or not Congress was even within the bounds of its constitutionally granted powers. Courts should look to the principles underlying the grant of power (the "first principles"), examine the interpretation of the enumerated power offered by Congress and the attendant justifications for its interpretation, and then examine the interpretation (in light of the principles the enumerated power is designed to serve) to see if Congress's interpretation offers any realistic boundaries to its power.<sup>28</sup> If either the act or the interpretation destroy the meaning of the limits on Congress's power, then they must be rejected.<sup>29</sup>

By couching his argument in terms of *Lopez*, Lessig solved a number of problems. First, he took the analysis outside of the "mere

---

21. *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001). Courts have also phrased the inquiry as one for "mere rationality." *See Eldred v. Ashcroft*, 123 S. Ct. at 781.

22. *See Lopez*, 514 U.S. at 553.

23. *Id.* at 552.

24. *Id.* at 553.

25. *Id.* at 552.

26. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

27. *See Lopez*, 514 U.S. at 552-53.

28. *See id.* at 564.

29. *See id.* at 564-65.

rationality” test, which often acts as little more than a rubber stamp on congressional action.<sup>30</sup> Second, and most importantly, he answered the question posed by history: Why had no one previously sued on these grounds? As Lessig himself put it:

[B]eginning with the *Lopez* case, and then confirmed in *Morrison*, Chief Justice Rehnquist articulated a different way of thinking about enumerated powers. The question was no longer simply rational basis. The question was now also, is there a stopping point. Does a particular interpretation of Congress’s enumerated power yield the conclusion that its power is unlimited. If it does, then that interpretation must be rejected . . . our view was that this principle of constitutional law showed precisely why the power perpetually to extend copyright terms mean that copyright terms were not “limited. . . .” The most astonishing moment in the whole of the case was Chief Justice Rehnquist’s question, why hasn’t anyone ever raised this challenge before. The simple and obvious answer was this: “Because before your decisions in *Lopez* and *Morrison*, Mr. Chief Justice, there was no possible ground on which to argue against the exercise of an enumerated power. . . .”<sup>31</sup>

Ultimately, the Supreme Court dealt two harsh blows to Lessig. First, the Court ruled that the CTEA was a valid exercise of congressional power.<sup>32</sup> Analyzing under a rational basis standard, the Court determined that Congress could have rationally concluded that there were some potential evils that would be remedied by this statute.<sup>33</sup> Accordingly, it was not for the Court to return later and substitute their judgment for that of Congress.<sup>34</sup> Brushing aside a few minor arguments from Lessig, the Court simply affirmed the judgment of the lower court.<sup>35</sup>

The second blow was much harsher than the first, specifically because of the lack of citations to it. Browsing through the majority opinion, one case is noticeably absent: *Lopez*. As noted earlier, Lessig’s entire argument was based upon the theory of constitutional interpretation that the Court announced in *Lopez*. The Supreme Court refused to even discuss any part of this argument, focusing instead on whether or not the act was “rational.”<sup>36</sup> If they had taken the time to distinguish or overrule *Lopez*, that would have at least answered the

---

30. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 781 (2003).

31. Web-log of Lawrence Lessig, *The Silent Five*, at [http://cyberlaw.stanford.edu/lessig/blog/archives/2003\\_01.shtml#000869](http://cyberlaw.stanford.edu/lessig/blog/archives/2003_01.shtml#000869).

32. *Eldred*, 123 S. Ct. at 775.

33. See *id.* at 781-83.

34. See *id.* at 775.

35. See *id.* at 783-89.

36. See *id.* at 781.

question presented to the Court. This omission is quite baffling, because five active members of the Court supported *Lopez* and would normally be expected to at least discuss it.<sup>37</sup>

### III. EXTENSIONS IN THE POWER OF COPYRIGHT

In addition to the extraordinarily long copyright term, the scope of power granted to content holders has also greatly increased. These increases in power work to upset the careful historical balance of interests that copyright law is meant to protect by giving too much to one side, the content holders. I could not hope to go into every way the power of content holders has increased through the years. For the sake of brevity, I will focus on two developments from the past few years that are the most egregious. The first, the Digital Millennium Copyright Act (DMCA), occurred at the federal level and is a grant of a host of new rights upon copyright owners.<sup>38</sup> While many of the DMCA's provisions have constitutional flaws, the most problematic section (hence the only one covered by this Comment) is section 1201, the anti-circumvention and anti-trafficking provisions. The second development, "click-wrap" licensing, is more of a market anomaly that was created by the content holders as an attempt to combine the power of copyright with the flexibility of state contract law. Unfortunately, as will be shown, this mixture has led to the curtailment of formerly protected rights, and the problem has been helped by some favorable court decisions.

#### A. *The DMCA: Congress Abandons Fair Use*

The Copyright Act, as it stands today, is largely the Copyright Act of 1976 with a few amendments added through the years. This was the date of the last major overhaul of the American copyright system. The idea behind the revision of 1976 was that the Copyright Act of 1909 was inadequate to cope with the many technological changes of society.<sup>39</sup> In 1909 we did not have television or radio, at least not the way it was in 1976. Congress needed to create a new, more flexible system designed to adapt to new technologies. As the House Report to the new Copyright Act noted, these new advances "generated new industries and new methods for the reproduction and dissemination of copyrighted works,

---

37. See Web-log of Lawrence Lessig, *supra* note 31, for Lessig's discussion of the *Silent Five*, posted the day after the Court released *Eldred v. Ashcroft*.

38. 17 U.S.C. §§ 1201-1205 (2000).

39. See The Report of the Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure* 13 (1995) [hereinafter *White Paper*], at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

and the business relations between authors and users has evolved new patterns.”<sup>40</sup> As such, copyright law had to change in order to preserve the balancing of interests between the public and the author of the work.

### 1. The Winds of Change Begin to Blow

Much as public television was unimaginable in 1909, the Internet could not have been foreseen by the framers of the 1976 Act. Once this technological behemoth was unleashed in the late 1980s through the early 1990s, society was once again challenged with a new medium of communication that the current copyright law was not designed to handle. Certain major questions remained open about just how the old copyright law would apply to the new information superhighway. In response, President Clinton organized the Information Infrastructure Task Force “to articulate and implement the Administration’s vision for the National Information Infrastructure (NII).”<sup>41</sup> One branch, The Working Group on Intellectual Property Rights, was responsible for examining all laws relating to intellectual property and recommending changes necessary to continue wide-reaching advances in new technologies.<sup>42</sup> After numerous public hearings, recommendations from the private sector, a public comment period, and a heavily commented rough draft, the Working Group finally released its white paper, *Intellectual Property and the National Information Infrastructure* [hereinafter White Paper], in September 1995, along with proposed legislation to implement their recommendations.<sup>43</sup>

Most of the recommendations from the White Paper are well beyond the scope of this Comment. Important for our purposes are the recommendations regarding technological protections of copyrighted materials.<sup>44</sup> The Working Group felt that legal protections would not be enough to protect copyrighted works in the digital age, so many authors would likely turn to technological measures to curb unauthorized copying and distribution of their works.<sup>45</sup> Therefore, it would increase the incentive to create if the United States would offer additional legal

---

40. H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660.

41. *White Paper*, *supra* note 39, at 1.

42. *See id.* at 2.

43. *See generally id.*

44. *See id.* at 230.

45. *See id.*



protection to copyright owners by banning devices that circumvent these technological measures.<sup>46</sup>

The Working Group's proposed legislation was introduced to Congress shortly thereafter as the NII Copyright Protection Act of 1995.<sup>47</sup> A few hearings were held, but the bill ultimately went nowhere,<sup>48</sup> for reasons that will be discussed soon. Meanwhile, on the other side of the Atlantic, the United States was involved in treaty negotiations that were about to take on a new twist.

The major international treaty on copyright law is the Berne Convention Treaty, originally ratified in 1886.<sup>49</sup> Berne tended to suffer from the same general limitations as all other copyright laws in that it was not well equipped to deal with changes in technology. This necessitated revisions to Berne about every ten to twenty years.<sup>50</sup> As such, when the governing body of the Berne Union asked the World Intellectual Property Organization (WIPO) to organize a committee to consider a possible supplementary agreement to Berne in the early 1990s, no one was really surprised.<sup>51</sup> The world was well aware of the tremendous technological advances of the previous years, and the impact of these advances on existing copyright law was not fully known.<sup>52</sup> WIPO's committee, therefore, would be charged with nearly the same function as President Clinton's Working Group on Intellectual Property Rights would be in a few years: to analyze the existing copyright laws and suggest possible changes to better conform them to the new digital age.<sup>53</sup>

Nothing about the formation of this committee should raise an eyebrow. Copyright law has, by its very nature, always been a delicate balance between the interests of authors and the public generally.<sup>54</sup> As previously noted, the dawn of the Internet Age brought about quite possibly the largest technological change copyright law had ever faced.

---

46. *Id.* ("The Working Group finds that prohibition of devices, products, components and services that defeat technological methods of preventing unauthorized use is in the public interest and furthers the Constitutional purpose of copyright laws.")

47. H.R. 2441, 104th Cong. (1995).

48. See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 429 (1997).

49. *Id.* at 375.

50. See *id.* at 376.

51. See *id.* at 375-76.

52. See *id.* at 376.

53. See *id.*

54. See S. Treaty Doc. No. 105-17, 105th Cong., 1st Sess., at 4 (1997), available at <http://www.wipo.int/treaties/ip/copyright/copyright.html> ("[R]ecognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention. . .").

A close examination of the impact of the Internet on the law of copyright is more than warranted; in fact it was probably necessary to ensure that the delicate balance was still intact. The problem came not from the committee itself, but from the digital agenda the United States pushed starting in 1995.

Shortly after the release of the Working Group's white paper, the U.S. delegation to the WIPO negotiations introduced draft language for the upcoming treaty that very closely mirrored the legislation sent to Congress for approval.<sup>55</sup> Bruce Lehman, as the chairman of the Working Group and now the head of the U.S. delegation in WIPO,<sup>56</sup> submitted the draft language and heavily pressured the other delegations for its adoption into the final treaty.<sup>57</sup> It is important that we pause here a moment and give consideration to the dates, as they reflect a general problem that permeates throughout the DMCA. As has been previously mentioned, WIPO had been negotiating possible revisions to Berne as early as 1991. The White Paper, which was first to mention the possibility of extending broad anti-circumvention protection, was not published until September 1995.<sup>58</sup> The final version of the WIPO treaty was agreed to in December 1996.<sup>59</sup> This means that the U.S. proposal for anti-circumvention protection, along with the rest of the digital agenda, came very late in the game. Furthermore, it would not be possible to fully explore the impacts of such a dramatic protection scheme in the time allowed. Lehman's plan was to push the proposal through both Congress and the negotiations in Geneva as quickly as possible to avoid any sort of extended debate over the full impacts of the proposal.<sup>60</sup> While acceptance did not come without a great deal of skepticism and opposition, as we will see, Lehman was ultimately successful in getting most of what he wanted out of Congress.

Despite Lehman's hopes for a quick adoption of the White Paper's proposals, the draft language for the convention was derailed almost as quickly as the NII Copyright Protection Act was in Congress. The ultimate enemy was the openness of the democratic process.<sup>61</sup> Almost as soon as the NII Copyright Protection Act came to Congress, massive

---

55. See Samuelson, *supra* note 48, at 428-29.

56. Lehman was also the Commissioner of Patents and Trademarks and a former copyright lobbyist. *Id.* at 379.

57. *Id.* at 427-28.

58. *Id.*

59. *Id.* at 370 n.8.

60. See *id.* at 428.

61. See *id.* at 429.

opposition arose from scientists, librarians, and fair use advocates.<sup>62</sup> The opposition was so great that the bill never got out of the relevant subcommittees.<sup>63</sup> However, Lehman was not to be deterred. Instead of rethinking his position, he decided the best thing to do would be to *strengthen* the wording of the draft language for the WIPO treaty. The defeated bill banned devices that circumvent for purposes not authorized by the content owner “or the law.”<sup>64</sup> This could be easily understood as allowing circumvention devices meant to allow users to exercise their fair use rights, as those rights are authorized by the law. However, the “authorized by law” provision was dropped from the Geneva proposal out of a fear that other countries would decide to grant consumers a sufficiently broad number of exceptions to actually allow them to exercise the rights the law guaranteed them.<sup>65</sup> The new proposed treaty language banned all circumvention devices for use “without authority,” presumably meaning that circumvention devices would be allowable only if content owners explicitly authorized their use.<sup>66</sup> This is completely meaningless in the context of fair use rights, because if a content owner actually wanted consumers to copy their content, they would not be utilizing copy protection technology in the first place.

The draft proposal met with some support from the European Union, but the rest of the world echoed the same concerns fair use advocates did in congressional hearings.<sup>67</sup> While the United States was ultimately successful in getting some protection built into the treaty, both the language of the preamble reinforcing the “delicate balance” of copyright law and article 11 (the anti-circumvention article) dealt a serious blow to Lehman’s original idea of extreme copyright protectionism. As adopted, Article 11 of the WIPO Copyright Treaty reads:

Contracting Parties shall 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 under this Treaty or the Berne Convention and that restrict acts, in

---

62. See Jeff Sharp, *Coming Soon to Pay-Per-View: How the Digital Millennium Copyright Act Allows Digital Content Owners to Circumvent Digital Fair Use*, 40 AM. BUS. L.J. 1, 30 (2002).

63. Samuelson, *supra* note 48, at 429.

64. NII Copyright Protection Act of 1995, H.R. 2441, 104th Cong., § 1201 (1995).

65. See Samuelson, *supra* note 48, at 411-12.

66. See *id.* at 411.

67. *Id.* at 413.

respect of their works, which are not authorized by the authors concerned or permitted by law.<sup>68</sup>

The language of Article 11 allows for extremely broad discretion in deciding how to implement the treaty, and it leaves open a broad fair use exception by not requiring the restriction of acts that are permitted by law. By only allowing “adequate legal protection,” a vague term that could mean virtually anything, the treaty might not actually require any implementing legislation from Congress based on the limited protection already given to some copyright protection schemes in U.S. law.<sup>69</sup> Once the treaty was signed, it was sent to the Senate and ratified without opposition.<sup>70</sup>

The foundation was now laid for the DMCA itself. With the international treaty now in place, the Clinton administration returned to Congress to attain the anti-circumvention protection it was unable to get before. Backed by the powerful entertainment lobby and an international treaty, opposed only by fair use advocates and libraries, it became quickly apparent that the fight was no longer over whether or not Congress would pass anti-circumvention legislation; the fight would instead be over the exact wording of the act and just how far it would go in banning circumvention technology.<sup>71</sup> Unfortunately for the fair use advocates, the possibility of a strong fair use exception was foreclosed early in the drafting process by Allan Adler, testifying on behalf of the American Association of Publishers.<sup>72</sup> His argument, exquisite in its simplicity and attractiveness, immediately caught the attention of many influential members of Congress and killed the broad fair use exception.<sup>73</sup> Adler analogized the debate to a simple matter of breaking and entering:

[T]he fair use doctrine has never given anyone a right to break other laws for the stated purpose of exercising the fair use privilege. Fair use doesn't allow you to break into a locked library in order to make “fair use” copies

---

68. S. Treaty Doc. No. 105-17, art. 11, 105th Cong., 1st Sess., at 10 (1997).

69. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 530 (1999) (“Because of the substantial accord between the WIPO treaty norms and existing U.S. law, the Clinton Administration initially considered whether the WIPO Copyright Treaty might even be sent to the Senate for ratification ‘clean’ of implementing legislation.”).

70. See generally S. Treaty Doc. No. 105-17, 105th Cong., 1st Sess. (1997).

71. See Sharp, *supra* note 62, at 37.

72. See Samuelson, *supra* note 69, at 539.

73. See *id.*

of the books in it, or steal newspapers from a vending machine in order to copy articles and share them with a friend.<sup>74</sup>

This argument, attractive as it may seem, is fatally flawed. No one was asking for a fair use right to break down the doors of a library, nor was anyone asking for a blanket exemption from all civil and criminal laws as long as they were trying to make a fair use of something. People were, however, asking for the right to actually make fair uses of products they had already purchased and possessed. The analogy works better if we imagine someone purchasing a paper book with a metal lock on the front. If one has purchased such a book, and it is locked for whatever reason, then that person should be allowed to break that lock apart if it is necessary to engage in some activity that the person is legally entitled to do.

Unfortunately, the DMCA's supporters seized upon the strength and simplicity of the breaking and entering analogy, regardless of its faults, and immediately adopted a hard-line position: an absolute ban was the standard, and the only exemptions left open for discussion would be exact situations fair use advocates could identify that would be so problematic as to necessitate exemption from the law.<sup>75</sup> Once the final wording of the DMCA was in place, it sailed through both houses of Congress without opposition.<sup>76</sup>

## 2. How the Machine Operates

The anti-circumvention provisions are now codified at 17 U.S.C. § 1201. Section 1201(a)(1)(A) says that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”<sup>77</sup> Section 1201(a)(2) and (b)(1) deal not with use of copyrighted material, but instead with the marketing and production of tools that can circumvent technological measures: “No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof . . .” that circumvents protection measures.<sup>78</sup> The liability parts of (a)(2) and (b)(1) are qualified; they only reach tools that (1) are primarily

---

74. *Id.* (quoting Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Cts. and Intellectual Property of the House Comm. on the Judiciary 105th Cong. at 208 (1997) (prepared statement of Allan Adler)).

75. *See id.* at 541.

76. *See* 144 CONG. REC. H10615 (daily ed. Oct. 12, 1998) (noting unanimous votes in both houses); 144 CONG. REC. S11887 (daily ed. Oct. 8, 1998) (same).

77. 17 U.S.C. § 1201(a)(1)(8) (2000).

78. *Id.* § 1201(a)(2)-(b)(1).

designed/produced for circumvention, (2) have little value beyond their ability to circumvent, or (3) are marketed for use in circumvention.<sup>79</sup> The “or” here is important because the third statutory qualification, marketing, is not defined and could be quite broad in its scope.

The problem with the DMCA (if it can possibly be limited to one problem) is its complete failure to incorporate a general fair use defense. In so doing, Congress has ignored a very important aspect of copyright law. Fair use is not simply a doctrine of convenience invented by Congress on a whim; it is the most important vehicle by which the limited monopoly on expression granted by copyright law is reconciled with the free expression principles embodied in the First Amendment.<sup>80</sup> Fair use is a defense to copyright infringement. This implicitly requires that whatever “use” it protects is without the consent of the copyright owner.<sup>81</sup> After all, if the copyright owners consented to a person’s use, there would be no reason to have a fair use doctrine in the first place. What Congress has done through the DMCA is to take certain fair uses, those that can be limited by access and copy control technologies,<sup>82</sup> and place them in the hands of content owners.<sup>83</sup>

Congress did at least make some attempt to save fair use in the context of circumvention, but these attempts are ultimately meaningless to most consumers. First, Congress decided only to outlaw acts of circumvention around “access” controls, but not outlaw the circumvention of “copy” controls.<sup>84</sup> The idea is that if a consumer has purchased an item containing access controls they will also receive a legitimate means of accessing the work they have purchased; therefore, only someone who has not purchased the work will need to circumvent. If the controls on a work prevent copying, on the other hand, this could affect users’ fair use rights by interfering with their ability to make lawful copies; therefore, circumvention of these devices should not be banned.

---

79. *Id.*

80. *See Eldred v. Ashcroft*, 123 S. Ct. 769, 789 (2003).

81. *See* 17 U.S.C. § 107.

82. Examples of these include: time shifting, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984); space shifting, *Recording Industry Ass’n of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999); and copying as a necessary step to legitimate reverse engineering, *Sony Computer Entertainment v. Connectix Corp.*, 203 F.3d 596, 602-03 (9th Cir. 2000).

83. Congress has not placed all fair use at the whim of content holders. This they could not do without an explicit statute purporting to do so, although such a statute might raise its own constitutional issues. *See Eldred*, 123 S. Ct. at 789.

84. *See* 17 U.S.C. § 1201(a)(1)(A).

While nice in theory, this distinction is meaningless in practice.<sup>85</sup> Furthermore, section 1201(a)(2)(A) notwithstanding, Congress has banned the trafficking of devices that circumvent both access and copy control protections.<sup>86</sup> This ensures that regardless of what consumers might theoretically be able to do, they would still not be able to get their hands on the tools necessary to engage in lawful circumvention.

The other attempt by Congress to preserve fair use is found in section 1201(c)–(j), the qualifications for the anti-circumvention and anti-device provisions.<sup>87</sup> Section 1201(c) states that it should not be construed as limiting “rights, remedies, limitations, or defenses to *copyright infringement*, including fair use.”<sup>88</sup> This sure sounds nice, but it only protects defenses to *infringement*, not *circumvention*. These are two different offenses. At most, section 1201(c) will protect a consumer who circumvents against liability for copyright infringement following circumvention (assuming that the use of the work would be protected by the fair use doctrine), but the circumvention itself (or trafficking in a circumvention device) remains banned. The remainder of the subsections is comprised of specifically delineated exceptions which, in the grand scheme of things, offer absolutely no help to the average consumer looking to make a fair use of a work he or she has purchased.<sup>89</sup>

### 3. Litigation and Constitutional Failure

There are two primary cases testing the constitutionality of section 1201. One involves a magazine that committed the serious ethical crime of reporting on the breaking of DVD encryption, while the other resulted in the jailing of a twenty-seven-year-old Russian programmer who committed the devious criminal act of writing a program that was perfectly legal in Russia. In both instances the courts backed away from the serious constitutional problems at hand.

---

85. DVDs, for example, are protected by an encryption scheme that would be considered an “access” control under the statute, so circumvention of this encryption scheme would be illegal. However, by encrypting the information on the DVD, users would still not be able to engage in certain fair uses, such as cutting out parts of the video for use in a video compilation to show a class you are teaching. *See generally* LESSIG, *supra* note 11.

86. *See* 17 U.S.C. § 1201(a)(2)-(b)(1).

87. *See id.*

88. *Id.* § 1201(c)(1) (emphasis added).

89. *See* Samuelson, *supra* note 69, at 539.

a. *Universal City Studios, Inc. v. Corley*

The technical issues of this case are complex, but the core legal theories are not. Whittled to its core, this case is about a group of young programmers who tried to actually watch the DVD movies they had legally purchased, and a magazine that tried to report on their efforts.<sup>90</sup> The DMCA stopped them both in their tracks.<sup>91</sup>

After seeing the widespread piracy plaguing the recording industry after the release of unprotected compact discs, Hollywood studios insisted that any digital technology used to offer home movies to the public be secured with some sort of protection measure.<sup>92</sup> The technology became the Digital Versatile Disk (DVD); the protection measure is the Content Scrambling System (CSS).<sup>93</sup> For the sake of brevity, we will just say that CSS would be an access control system within the meaning of section 1201(a)(2).<sup>94</sup> Only licensed DVD players were capable of decrypting a DVD to allow the user to watch the movie contained on the DVD.<sup>95</sup> In the world of computers, the only licensed DVD decoders were designed for Microsoft Windows and MacOS.<sup>96</sup> A group of programmers made a program (DeCSS) to allow users of other operating systems, such as BSD and Linux, to view the DVD movies they had legally purchased on their computers as well; they then posted the program on the Internet.<sup>97</sup> In order to function properly, the program had to decrypt the DVD without permission from the copyright owner (read: “circumvention device”).<sup>98</sup>

When the major Hollywood studios got wind of the program, they went into full-out litigation mode and fired off cease-and-desist letters to any Web sites hosting a copy of the program.<sup>99</sup> One such Web site belonged to 2600 Magazine, an online and print publication dedicated to security issues.<sup>100</sup> Universal received an injunction banning 2600 Magazine from hosting DeCSS, linking to DeCSS, or linking to a Web

---

90. 87a. *See* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459-60 (2d Cir. 2001).

91. *See id.* at 437-38.

92. *See* LESSIG, *supra* note 11, at 188-89.

93. *See id.* at 189.

94. *See generally id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* at 189-90.

100. *See id.* at 190. *2600 Magazine* is a self-described “hacker” publication, a designation that made them extremely attractive defendants for the movie studios. *See* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 439 (2d Cir. 2001).



site hosting DeCSS.<sup>101</sup> All of this was done to stop a group of teenagers from watching movies they had legally purchased. It is important to note here that Universal was unable to find one single instance of piracy attributable to DeCSS, meaning that they could not actually show that the program hurt them in any way.<sup>102</sup>

The defendants challenged the DMCA's constitutionality based primarily upon the First Amendment.<sup>103</sup> The Second Circuit was willing to follow the lead of earlier courts that held computer code to be eligible for protection as speech under the First Amendment.<sup>104</sup> The problem for 2600 Magazine came immediately thereafter, when the Second Circuit reasoned that computer code is only eligible for "content-neutral" protection in the context of the DMCA.<sup>105</sup> This was, according to the court, because computer code has a functional aspect.<sup>106</sup> So long as a regulation targets what the code is supposed to tell a computer to do and not what message it might communicate to a human reader (as the DMCA does), then the regulation will be content-neutral.<sup>107</sup>

Applying "content-neutral" scrutiny to the defendants' distribution of an access control circumvention device, the Second Circuit found the burden on speech to be "incidental" and upheld the DMCA's provisions as a valid regulation.<sup>108</sup> In so doing, the Second Circuit denied any actual protection for computer code under the First Amendment. The Second Circuit's reasoning, based on a "functional" aspect of computer code,<sup>109</sup> misses the point of the message sent by computer code. In the normal case, there is a distinction between the conduct being regulated and the message being sent. As an example, Gregory Lee Johnson was trying to send a message when he set the flag of the United States on fire: he wanted to stage a political protest of the Republican National

---

101. See LESSIG, *supra* note 11, at 190.

102. See *id.* at 189.

103. See *Corley*, 273 F.3d at 442. The Second Circuit properly dismissed the appellants' attempts to invoke a defense of fair use, *id.* at 458, as the DMCA quite clearly provides no fair use defense for trafficking. The Second Circuit failed, however, to engage in any constitutional analysis of this obvious problem, claiming the evidence on curtailment of fair use rights to be "scanty." *Id.* at 459.

104. See *id.* at 449.

105. *Id.* at 453-54. The issue of "content-based" versus "content-neutral" regulations is central to First Amendment law as it determines how closely the court will look at the statute. If a statute is content-based, it will receive "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988). Content-neutral statutes, on the other hand, receive a much lower level of scrutiny. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

106. See *Corley*, 273 F.3d at 453.

107. *Id.*

108. *Id.* at 454.

109. *Id.* at 451.

Committee.<sup>110</sup> However, burning the flag is not an expressive activity standing alone. It only becomes expressive when a person, such as Gregory Lee Johnson, burns the flag with the intent to send a message.<sup>111</sup> The expression, therefore, lies not in the act itself but in the intent of the speaker.

No such distinction exists with computer code. Here, the “function” of the code, as the Second Circuit described it, is the message that is being sent.<sup>112</sup> The two are so completely intermingled that it is impossible to separate them. In fact, code can only send a message if its “functional” aspect is complete; that is, a person cannot accurately send a message about the overall weakness of a given encryption scheme using code unless the code itself actually functions to break the encryption. Communicating in code is also the preferred way of communicating a message to an audience with the ability to read it.<sup>113</sup> As an example, to illustrate the simplicity of the encryption guarding DVD movies, I could write a detailed white paper carefully explaining the ins and outs of the scheme itself (a paper that would likely span hundreds of pages), or I could simply say:

```
#!/usr/bin/perl
# 472-byte qrpff, Keith Winstein and Marc Horowitz <sipb-iap-
dvd@mit.edu>
# MPEG 2 PS VOB file -> descrambled output on stdout.
# usage: perl -I <k1>:<k2>:<k3>:<k4>:<k5> qrpff
# where k1..k5 are the title key bytes in least to most-significant order
s"$/=2048;while(<>){G=29;R=142;if((@a=unqT="C*",_)[20]&48){D=8
9;_=_unqb24,qT,@
b=map{ord qB8,unqb8,qT,_^$a[—
D]}@INC;s/. .$/1$&/;Q=unqV,qb25,_;H=73;O=$b[4]<<9|256|$b[3];Q=
Q>>8^(P=(E=255)&(Q>>12^Q>>4^Q/8^Q))<<17,O=O>>8^(E&(F=(S=
O>>14&7^O)
^S*8^S<<6))<<9,_=(map{U=_%16orE^=R^=110&(S=(unqT;"\xb\ntd\xbz
\x14d")[_/16%8]);E
^=(72,@z=(64,72,G^=12*(U-
2?0:S&17)),H^=_%64?12:0,@z)[_%8]}(16..271))[_]^((D>>=8)+=P+(~F
```

110. See *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

111. See *id.* at 411 (noting that one could burn the flag with the intent to dispose of it and send no message).

112. See *Corley*, 273 F.3d at 451.

113. See *id.* at 448.

```
&E))for@a[128..$#a]}print+qT,@a}';s/[D-HO-  
U_]^\$&&/g;s/q/pack+/g;eval114
```

To the untrained eye, the above is gibberish. To someone who understands the Perl computer language, the above explains in six lines exactly how to decrypt a DVD. The message I tried to communicate above, however, could not possibly be sent unless the code worked. This shows how closely the “functional” aspects of the code are mingled with the “expressive” aspects. The Second Circuit, by failing to recognize this distinction, has in fact allowed the regulation of the message that is always sent by code that runs afoul of the DMCA. Because the message is targeted and cannot be separated into a “functional” aspect, the code should have received strict scrutiny review.

b. *United States v. Sklyarov*

Software giant Adobe makes a product called the Adobe eBook Reader.<sup>115</sup> Authors distributing electronic books in Adobe’s eBook format can restrict what eventual readers will be allowed to do with the eBook (i.e., can they print and how many copies, can they send the file to another computer, etc.).<sup>116</sup> Dmitry Sklyarov, a Russian programmer at a Russian software company called Elcomsoft, wrote a program (in Russia) that would decrypt eBooks to undo all of the restrictions placed upon them.<sup>117</sup> This would allow readers to do such things as back up their eBooks and print paper copies to take with them, as well as allowing text reading programs for the blind access to eBooks.<sup>118</sup> When Sklyarov came to Las Vegas to speak at a conference on security issues, Adobe had him arrested and charged with criminal violation of the DMCA’s anti-circumvention provisions.<sup>119</sup> Sklyarov sat in jail for months until the public outcry over his jailing became so great the Justice Department dropped all charges against him.<sup>120</sup> Charges were continued against his

---

114. Source code of Perl program *QRPF*, by Keith Weinstein & Marc Horowitz, available at <http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/qrpf.pl>, and it does indeed work. A group called Copyleft, <http://www.copyleft.net>, put this code on a T-Shirt, and they were promptly sued by the DVD Copy Control Association for their efforts. See *EFF DVD Update*, Aug. 3, 2000, available at [http://www.eff.org/IP/Video/DVD\\_Updates/20000803\\_dvd\\_update.html](http://www.eff.org/IP/Video/DVD_Updates/20000803_dvd_update.html).

115. Cassandra Imfeld, *Playing Fair with Fair Use? The Digital Millennium Copyright Act’s Impact on Encryption Researchers and Academicians*, 8 COMM. L. & POL’Y 111, 129 (2003).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Jon Healey, *Russian Firm Cleared in Digital-Piracy Trial*, L.A. TIMES, Dec. 18, 2002, at C1.

employer Elcomsoft, but Elcomsoft was ultimately acquitted because prosecutors failed to prove the Russian software firm “knowingly” violated American law as required by section 1204 of the Copyright Act.<sup>121</sup> While this certainly is a good result from Elcomsoft’s point of view, the decision is largely bad for the public. Since Elcomsoft was only acquitted because they were unaware that their products violated the DMCA (or were unaware of the DMCA at all), this implies that the DMCA does indeed apply to activities conducted in foreign countries, even if those activities would be perfectly legal in that country. Given the increased amount of attention surrounding the DMCA, the next Dmitry Sklyarov might not have such good fortune.

### *B. Contract Law Trumping Copyright Law*

Let us say that I wrote a book one day and sold a copy of that book to a random person on the street. Let us further imagine that the person I sold the book to decides that she wants to write an article reviewing the book and quotes three lines from the text. I have a problem with this, for whatever reason (maybe the review was bad?); is there anything I can do under federal copyright law to stop her from publishing her article? Of course not. While the four-part fair use test in section 107<sup>122</sup> might not be entirely clear, I believe that it is fair to say that any court looking at these facts would say that her minor use of my copyrighted expression amounts to fair use; therefore, she would be protected.

Now, let us throw a monkey wrench into the hypo. Let us say that I buried a “Terms and Conditions of Use” statement on the last page of the book I wrote. The statement purports to be a licensing agreement dictating the terms upon which I will allow a user to own and read a copy of my book. In this statement, I claim that anyone who buys my book is bound by the terms contained in the statement by state contract law. Among other things, I claim that no person who buys my book can avail themselves of their fair use rights from section 107. Does this then mean that the buyer has infringed my copyright by violating the terms of the licensing agreement?

Assume the answer is yes. This result seems to be in direct conflict with the text and purpose of the Copyright Act. By binding my readers with the “Terms and Conditions of Use” statement, I have given to myself more rights in a copyrighted work than the federal copyright law would allow. If my agreement were upheld as a valid contract, and that

---

121. *Id.*

122. 17 U.S.C. § 107 (2000).

contract was found not to be in conflict with the Copyright Act, I could rely solely upon state contract law to secure the rights of my work. Federal copyright law grants a limited monopoly: limited in time, limited in scope. However, under contract law, I (as a seller of certain goods, the “offeror”) am the master of the terms upon which I am willing to make a sale.<sup>123</sup> It could be fairly said then that, until the point of sale, I contain a complete monopoly of rights in that individual product and could dictate anything under the sun (subject, of course, to traditional contract limitations like unconscionability) as the terms of the sale and it would be so.

This entire line of thinking is utterly contrary to the idea of fair use. As discussed earlier in Part III(A), a fundamental part of the doctrine of fair use is anything that would qualify as a fair use does not fall within the exclusive bundle of rights an author has in his or her work.<sup>124</sup> If fair use is not a part of those rights, then an objection from the copyright holder would not be enough to prevent someone from making a fair use. Why then would we expect the law to allow authors of works to make an end run around the Copyright Act and achieve indirectly that which the Copyright Act specifically forbids them from achieving directly? Thus, the question is framed. However, we cannot fully explore this question without an understanding of why it must be asked in the first place.

The move to contract law as a “supplement” for federal copyright protection is a relatively new development. While copyright owners have frequently sought out ways of removing the word “limited” from “limited monopoly,” the move to contract law is a symptom of a larger problem. The problem has its origins in an attempt to redefine the purpose of copyright law from the original “careful balance” to a property based system.<sup>125</sup> Indeed, the very term we use to identify the legal grouping to which copyright is said to belong, “Intellectual Property,” is a relatively young term that aids in turning our views of copyright away from the original protection of intellectual expression to the idea of copyright as a property right.<sup>126</sup> Conceptualizing copyright as “property,” it only makes sense then that state contract law governing sales of goods would have some role to play in how that property would be distributed to the public.

---

123. See *Kroeze v. Chloride Group Ltd.*, 572 F.2d 1099, 1105 (5th Cir 1978) (“An offeror may prescribe as many conditions, terms or the like as he may wish, including but not limited to, the time, place and method of acceptance.”).

124. See 17 U.S.C. § 107.

125. See SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 11 (2001).

126. See *id.* at 11-12.

Copyright owners have, historically speaking, charted the course towards property rights by identifying copyright infringement as “theft,” a term which immediately draws the listener to thoughts of criminal behavior involving another’s sacred property rights.<sup>127</sup> The idea of “copyright-as-property” dates back at least to the time of Mark Twain, who often invoked discussions of property rights in copyright to move the discussion away from what was good for the public to what was good for successful authors.<sup>128</sup> While one can find precious little in the law of Twain’s time to support the property comparison, the idea has gained some support in modern academic circles and, as we shall soon see, in court decisions involving hidden license terms like the one I described in my earlier hypo.

The body of academic literature underpinning the “copyright-as-property” theory is firmly grounded in neoclassical economic theory.<sup>129</sup> Supporters tend to support brushing aside the historical basis of copyright law in favor of more “efficient” economic systems.<sup>130</sup> The contract, they claim, offers the best and most efficient way of managing copyright.<sup>131</sup> By their beliefs, under a property based system, doctrines like fair use and the famous “idea/expression dichotomy” of historical copyright law have nothing inherent to make them “good” for either society or for individual authors.<sup>132</sup> They are instead burdens upon the property rights of authors, instituted merely to address market failures and prohibitive transactional costs in the existing system, and these burdens can be brushed aside at any time if the market finds a way to eliminate their utility to authors.<sup>133</sup> Through the use of “click-through” contracts and rights management systems, the market for authors’ property can “correct” any failures (at the same time perfecting authors’ monopoly rights) that fair use and the idea/expression dichotomy were instituted to correct, and therefore, we can safely leave them by the wayside now that we have code and contract to protect works.<sup>134</sup> Under this property based argument, the reliance upon contract law neither

---

127. *See id.* at 12.

128. *Id.*

129. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462, 474 (1998).

130. *See id.*

131. *See id.* at 481.

132. VAIDHYANATHAN, *supra* note 125, at 157.

133. *Id.*

134. *See id.*; *see also* Cohen, *supra* note 129, at 482.

supplements nor conflicts with federal copyright law; it is merely a more efficient means of accomplishing the goals of copyright.<sup>135</sup>

The reader will surely note the complete failure to mention the rights and interests of the public in the above paragraph. I assure you it is not because I left it out intentionally. It is because if copyright becomes a complete property right, the public becomes irrelevant. There is no longer a weighing of conflicting interests, and we are no longer truly concerned with determining the best balance to “promote the Progress of Science and the useful Arts.”<sup>136</sup> Protecting the total monopoly of the property owner becomes the sole pursuit; anything else amounts to theft of the author’s property. As copyright scholar Siva Vaidhyanathan said, there is no argument within the realm of property to not give maximum protection, for “[h]ow can one argue for theft?”<sup>137</sup>

Already, we have federal case law to support the property proposition. In *ProCD v. Zeidenberg*, the Seventh Circuit upheld the terms of a restrictive “shrink-wrap license.”<sup>138</sup> The court faced two distinct questions: (1) Whether or not the terms of the shrink-wrap license are part of a contract of sale, and (2) if so, would federal copyright law preempt the use of state contract law to grant rights in works beyond that which the copyright law itself would?<sup>139</sup> After concluding that the terms of the license were part of a contract,<sup>140</sup> the court reasoned that federal copyright law only pre-empts state laws that explicitly create rights within the territory of federal copyright law.<sup>141</sup> According to the court, federal law only preempts rights created at the state level by law; the contrary rights contained in the license, however, were created by private action between two market players.<sup>142</sup> This reasoning is clearly an adoption of the neoclassical view of copyright as property, and the logical conclusion from the court’s reasoning is that any

---

135. VAIDHYANATHAN, *supra* note 125, at 157.

136. U.S. CONST. art. I, § 8, cl. 8.

137. VAIDHYANATHAN, *supra* note 125, at 12.

138. It is called “shrink-wrap” because the terms are not visible to consumers at the time of purchase, but are instead located inside the shrinkwrapped box of software. 86 F.3d 1447, 1450 (7th Cir. 1994).

139. *Id.* at 1448-49.

140. The opinion, written by Justice Frank Easterbrook (a noted neoclassical theorist), has been roundly criticized for its conclusion that the terms of the license formed any part of a contract. Some parts of the court’s reasoning simply defy all possible logic, such as the conclusion that U.C.C. § 2-207 is irrelevant unless there is more than one form, a conclusion that ignores both the plain text of § 2-207 and Official Comment No. 1 which expressly says otherwise. *Id.* at 1452. For a more in-depth discussion of the applicable contract principles, see *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000).

141. See *ProCD*, 86 F.3d at 1454.

142. *Id.*

contract that creates rights in a copyrightable matter will be upheld absent a clear violation of state contract law.<sup>143</sup>

The *ProCD* court, of course, never bothers to mention “the public” anywhere in the opinion. Although the court discusses the preemption doctrine to an extent, the question of whether or not this new property theory is inconsistent with the mandate of the Copyright Clause appears nowhere. This should come as no surprise, as this new “copyright-as-property” theory is advanced by the same people who delivered unto the public the DMCA. The lack of concern for the public is frightening. Unless this new thinking of copyright is rejected soon, we may well face a world within our lifetimes in which authors (meaning, predominantly, large corporations that have “authored” nothing) are granted limitless rights in their works. Is that the point where “fair use” is relocated to the criminal code?

#### IV. CONCLUSION

If copyright is a careful balance, and over two hundred years of case law says it is, then the balance of power has dramatically shifted in a dangerous way. Content owners are constantly clamoring for more rights, longer terms, and different theories of law under which they can transform their “limited” copyright monopoly into a “complete” monopoly. In so doing, they not only ignore the needs of the important other half of the balance (the public at large), but they do long term damage to their own interests by keeping themselves from freely using the more recent work of others the way the public domain is supposed to allow them to do. It is quite ironic that Disney, a company that made billions by freely taking the work of others from the public domain, would lead the way in the march towards ensuring that no one else would be able to do with their works what Disney did to the Brothers Grimm.

Congress has offered little in the way of hope. While there are a few potential fixes for some of these copyright problems kicking around,<sup>144</sup> Congress has always been more interested in sending the problem to the negotiating table to let the most powerful interests fight out a compromise amongst themselves. This domination by the most

---

143. This is somewhat qualified by the court’s insistence that the terms of the contract would not bind the individual who happens to find the software on the street and does not pay for it, because that person would never see the contract and hence could not be bound by it. *See id.* Ultimately, this is a meaningless qualification because the person who did not pay for the software and did not see the contract would be in violation of federal copyright law by using the software in the first place.

144. *See* The BALANCE Act of 2003, H.R. 1066, 108th Cong. (2003).



powerful interests, usually representing only one side of the balance (the content holders, and even then only the select few of those) negotiating against unrelated industries that are uninterested in what is best for the public has led to bad law. Not just bad policy, but constitutionally defective laws. Courts, at one time, respected the rights of the public and defended the doctrine of fair use diligently. Now, courts often act as a rubber stamp on the interests of content holders as we march slowly further towards a society in which content holders are given the veto power on new technologies the Supreme Court warned us against in *Sony Corp. of America v. Universal City Studios*.<sup>145</sup> Very soon, we will have to ask ourselves if this is truly the society that we want. If the answer is no, then it is time for the courts to return to their role as guardian of the public, for Congress has made it clear that the interest of the “other half” is not one that they particularly care to protect.

The clock begins running today. The time limit is twenty years from now. That is the period during which we will see whether the courts are willing to keep Congress and the powerful content holders in check. Why twenty years? Because in twenty years, the copyright for Steamboat Willie will be up again. Disney will return to Congress for their next “installment,” and it will be time for the Supreme Court to decide *Eldred II*. If the Supreme Court does not by then turn their skepticism from *Eldred* into concrete action recognizing limits on Congressional copyright power, then it is unlikely that anything will be able to persuade them.

---

145. See 464 U.S. 417, 456 (1984).