

# The U.S. Digital Millennium Copyright Act and the E.U. Copyright Directive: Comparative Impact on Fair Use Rights

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*The doctrine of fair use allows a modest amount of access to and use of copyrighted works. The fair use test consists of four factors for courts to consider in deciding whether a use is fair: (1) whether the use of the work adds something new, (2) the amount of creativity in the work, (3) whether the user took more of the work than was necessary, and (4) the amount of impact upon the work's potential market value.*

*An inherent conflict exists between the legal rights of creators of copyrighted works and the fair use rights of the general public. A workable balance between these two categories of rights must be achieved. Over time, the pendulum has swung back-and-forth; sometimes fair use rights have increased at the expense of copyright protection, and vice versa. Since 1998, the Digital Millennium Copyright Act (DMCA) seems to have increased the rights of copyright holders to the detriment of the general public's fair use rights.*

*The purpose of the DMCA is to update the copyright laws to take into account the growing prevalence of protected works being kept in digital form. It was inspired by the issuance of international copyright standards for digitally stored materials in two international treaties developed by the World Intellectual Property Organization (WIPO). The DMCA prohibits three categories of acts of circumvention of copyright protections of digital works: (1) circumvention of controls over access to the protected works, (2) trafficking in technologies or devices that circumvent access controls, and (3) trafficking in technologies or devices that circumvent rights protection.*

*The DMCA contains eight fair use exemptions: (1) Librarian of Congress Exemption, (2) Educational Institutions' Exemption, (3) Law Enforcement Exemption, (4) "Reverse Engineering" Exemption, (5) Encryption Research Exemption, (6) Personal Information Access Exemption, (7) Security Testing Exemption, and (8) Parents' Monitoring Exemption. Notwithstanding these exemptions, the DMCA needs to be amended in order to provide greater fair use protections. The DMCA's fair use exemptions are too weak. Furthermore, it is not enough merely to allow access to the protected materials; some degree of access to the circumvention devices themselves must also be allowed.*

*The European Union's Copyright Directive (Directive) was adopted in 2001. It provides a general framework upon which the Member States have enacted their national laws pertaining to copyright protections of digitally stored works. The Directive brings the Member States into compliance with the copyright standards adopted by the WIPO; however, both the Directive and the DMCA are more specific than the WIPO mandates. The Directive's article 6 is the counterpart to the DMCA's section 1201; it requires the Member States to generally prohibit circumvention activities. Like the DMCA, the Directive not only prohibits access to protected works gained by circumvention, but also contains antitrafficking provisions. For a circumvention device to be illegal, both the Directive and the DMCA require it to have only a limited commercially significant purpose or use other than circumvention.*

*Despite the overall similarity of the DMCA and the Directive, there are differences. To be illegal, article 6 of the Directive requires that a person must have knowingly committed the*

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circumvention; there is no such requirement of a mental state in the DMCA's section 1201. Also, the Directive protects both access and copy control measures, but the DMCA only protects access control measures.

Article 5 of the Directive also contains a list of fair use exemptions: copying on any medium for private use; copying by a library, museum, educational institution, or social institution; use for the purpose of parody; and quotations for purpose of criticism or review. Article 6(4) mandates copyright holders to allow access to protected works to the beneficiaries specified in article 5. However, it is difficult to predict the final impact of the Directive on fair use rights because the Directive is a general framework only, and the specific national laws of the Member States will ultimately determine whether fair use rights are to be emphasized or deemphasized in the European Union.

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I. OBJECTIVES OF THE ARTICLE

The objectives of this Article are to:

1. Explain the fair use doctrine and elements of the fair use test;
2. Describe the fair use doctrine’s inherent conflict with copyright and the need for a balance between fair use rights and copyright;
3. Cover selected aspects of the United States Digital Millennium Copyright Act (DMCA), to include:
  - a. the WIPO background;
  - b. the anticircumvention provisions;
  - c. the fair use exemptions;
  - d. proposed amendments; and
4. Concisely summarize the parts of the European Union’s Copyright Directive (Directive) pertaining to anticircumvention and fair use, and to compare them with their DMCA counterparts.

II. THE UNITED STATES CONSTITUTION’S COPYRIGHT CLAUSE

The United States Constitution requires Congress to enact laws that “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>1</sup> Because the copyright period is of “limited” duration, the “writings and discoveries” enter the public domain when the copyright expires. The Framers wanted to create an incentive for authors and inventors by recognizing property rights in their work for a limited period of time, while simultaneously promoting the achievement

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1. U.S. CONST. art. I, § 8, cl. 8.

of an informed citizenry by providing easy access to literary, artistic, and musical works.

### III. THE FAIR USE DOCTRINE AND THE FOUR ELEMENTS OF THE FAIR USE TEST

In a free society, it is very important to maintain a free marketplace of ideas. In a democracy, “society depends upon the ability to access ideas, viewpoints, and factual information relating to virtually limitless topics in order to develop perspective, forge consensus, and devise ideologically-based resolution to social, political, and cultural exigencies.”<sup>2</sup>

With the objective of promoting a free marketplace of ideas, the concept of “fair use” developed in U.S. case law in the nineteenth century.<sup>3</sup> The doctrine of fair use allows the consuming public (including universities, libraries, and scholars) to have a modest amount of access to copyrighted literary works. Fair use is “a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright.”<sup>4</sup> A California federal district court used another definition: “a defense to copyright infringement, allowing a certain amount of direct copying for certain uses without the permission of the copyright owner and notwithstanding the copyright owner’s exclusive rights.”<sup>5</sup>

In 1976, the doctrine of fair use was codified for the first time in the Copyright Act.<sup>6</sup> The “fair use test” was created, consisting of four factors for courts to consider<sup>7</sup> in determination of whether a use is fair.<sup>8</sup> They are:

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2. Jacqueline Lipton, *A Framework for Information Law and Policy*, 82 OR. L. REV. 695, 744 (2003) (quoting MADELEINE SCHACHER, INFORMATIONAL AND DECISIONAL PRIVACY 199 (2003)).

3. See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1841), cited in Pete Singer, Comment, *Mounting a Fair Use Defense to the Anti-Circumvention Provisions of the Digital Millennium Copyright Act*, 28 DAYTON L. REV. 111, 114 (2002).

4. H. Ball, *The Law of Copyright and Literary Property* 260 (1944), cited in 2 PAUL GOLDSTEIN, COPYRIGHT § 10.1 (2d ed. 1996).

5. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1121 (N.D. Cal. 2002) (citation omitted).

6. See 17 U.S.C. § 107 (1976).

7. For discussion of a case in which the four factors were applied, see Stacey L. Dogan, *Infringement Once Removed: The Perils of Hyperlinking to Infringing Content*, 87 IOWA L. REV. 829, 871-72 (2002).

8. See 17 U.S.C. § 107(1)-(4).

*A. The Purpose and Character of the Use*

The defendant's use of the work should add something new with a different purpose or different character than the original work.<sup>9</sup> Transformation of the original work's purpose or character is not absolutely necessary for a finding of fair use, but the greater the transformation, the greater the likelihood that a fair use finding will occur.<sup>10</sup> Additionally, this factor considers whether the use is for a commercial reason or for a noncommercial reason (e.g., education).<sup>11</sup> A noncommercial use will increase the likelihood that a fair use finding will occur.<sup>12</sup>

*B. The Nature of the Copyrighted Work*

An evaluation of the characteristics of the copyrighted work, and a categorization of it, must occur.<sup>13</sup> The greater the level of creativity involved in the work, the lesser the probability that a use will be held to be fair.<sup>14</sup> On the other hand, if the work is merely a compilation of facts, the greater the probability that a use will be held to be fair.<sup>15</sup>

*C. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*

The court must determine whether the user took more of the copyrighted work than was necessary to achieve the purpose of the user's work.<sup>16</sup> If the user took more than was necessary to achieve her purpose, the court is less likely to find that fair use occurred.<sup>17</sup>

*D. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work*

If the use has a negative impact upon the potential market or value of the copyrighted work, there is less likelihood that the use will be considered fair.<sup>18</sup> However, if the use has little or no impact upon the

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9. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

10. See *id.*

11. See 17 U.S.C. § 107(1).

12. See *Campbell*, 510 U.S. at 584.

13. See *id.* at 586.

14. See *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 157 (2d Cir. 1990).

15. See *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 349-50 (1991).

16. See *Campbell*, 510 U.S. at 586.

17. See *id.*

18. See *id.* at 587.

potential market or value of the copyrighted work, it is more likely that the use will be considered fair.<sup>19</sup>

#### IV. THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

The Copyright Act of 1976 was written before the existence of the Internet. Since the dawn of the digital age, more and more “publishing” of literary works occurs in cyberspace. Because of the nuances posed by the Internet on publication of literary works, the existing copyright laws had to be changed.

##### A. *WIPO Influence*

In 1996, the World International Property Organization (WIPO) issued international copyright standards for publications in digital form.<sup>20</sup> The Performances and Phonograms Treaty pertained to copyright protections for sound recordings in digital format.<sup>21</sup> The Copyright Treaty was designed to reinforce the Berne Convention Copyright Treaty and covered computer programs, public distribution rights, and Internet communication rights.<sup>22</sup> The United States signed both treaties in 1997.<sup>23</sup> The treaties mandated that the United States “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 . . . and that restrict acts . . . which are not authorized by the authors.”<sup>24</sup>

In order to comply with the WIPO treaties and to make necessary changes in U.S. copyright law, the United States enacted the Digital Millennium Copyright Act (DMCA) in 1998.<sup>25</sup> The purpose of the DMCA expressed in its introduction was a reiteration, almost *verbatim*, of the WIPO mandate.<sup>26</sup>

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19. *Id.*

20. Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 J. ART & ENT. L. 397, 401-02 (1999).

21. *See id.* at 402.

22. *See id.* at 401.

23. *See* WIPO Copyright Treaty, Apr. 12, 1997, art. II, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65 (1997).

24. *Id.*, quoted in David V. Lampman, II, Comment, “A Prologue to a Farce or a Tragedy?” *A Paradox, a Potential Clash: Digital Pirates, the Digital Millennium Copyright Act, the First Amendment & Fair Use*, 38 GONZ. L. REV. 367, 390 (2002).

25. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

26. *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 315-16 (S.D.N.Y. 2000) (citations omitted), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

### B. *The Anticircumvention Provisions*

The portions of DMCA which have the greatest impact on the fair use doctrine are the so-called “anticircumvention” provisions. Their purpose is to “ban acts of circumvention and the distribution of tools and technologies that can be used for circumvention.”<sup>27</sup> The following acts are prohibited:

#### 1. Acting to Circumvent Access Control

It is illegal to circumvent a “technological measure that effectively controls access to a work protected under this title.”<sup>28</sup> A “technological measure that effectively controls access” is considered to be a mechanism which “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.”<sup>29</sup> “Circumvention of a technological measure” is defined as descrambling, decrypting, or otherwise avoiding, bypassing, removing, deactivating, or impairing a technological measure, without authorization from the copyright owner, to gain access to the protected work.<sup>30</sup>

#### 2. Trafficking in Technologies or Devices that Circumvent Access Control

It is illegal to “manufacture, import, offer to the public, provide, or otherwise traffic in any technology [or] product[s] . . . primarily designed or produced to circumvent a technological measure that effectively controls access to a work protected under this title.”<sup>31</sup> “Technological measure” and “circumvention of access control” are defined the same as in Part IV.B.1, *supra*.

#### 3. Trafficking in Technologies or Devices that Circumvent Rights Protection

It is illegal to manufacture, import, offer to the public, provide, or otherwise traffic in technology or products primarily designed or

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27. 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, 123 (2003).

28. 17 U.S.C. § 1201(a)(1)(A) (2000).

29. *Id.* § 1201(a)(3)(B), quoted in Myron Hecht, *Reconciling Software Technology and Anti-Circumvention Provisions in the Digital Millennium Copyright Act*, 2004 UCLA J.L. TECH. 3, 9.

30. *Id.* § 1201(a)(3)(A).

31. *Id.* § 1201(a)(2).

produced to circumvent a technological measure that effectively protects a right (i.e., the reproduction right) of a copyright owner.<sup>32</sup> The phrase “technological measure that effectively protects a right of a copyright owner” is defined as a mechanism which “in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner.”<sup>33</sup> Copying is the primary copyholder’s right which is protected in this section, and circumvention is considered to be any acts of “avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure.”<sup>34</sup>

### C. Fair Use Exemptions in the DMCA

The DMCA recognizes the following fair use exemptions from the anticircumvention provisions:

#### 1. Librarian of Congress Exemption

A portion of the first anticircumvention provision, § 1201(a)(1), seemingly has the intention of the preservation of fair use.<sup>35</sup> The Librarian of Congress is mandated to determine in rulemaking “whether persons who are users of a copyrighted work are, or are likely to be . . . adversely affected by the [anticircumvention] prohibition in their ability to make non-infringing uses under this title of a particular class of copyrighted works.”<sup>36</sup> This looks good for fair use, ostensibly. However, these words are rendered impotent because the second and third anticircumvention provisions, the “antitrafficking provisions,”<sup>37</sup> do not allow a person to provide another with the means of accessing or duplicating the copyrighted material.<sup>38</sup>

#### 2. Educational Institutions Exemption

Section 1201(d) contains an exemption for nonprofit libraries, archives, and educational institutions to access copyrighted works for the sole reason of determining whether to purchase the item. These institutions may only obtain access if they are unable to obtain a copy by other means and limits are placed on the amount of access time. Just as

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32. *Id.* § 1201(b)(1).

33. *Id.* § 1201(b)(2)(B).

34. *Id.* § 1201(b)(2)(A).

35. *Id.* § 1201(a)(1)(C).

36. *Id.* § 1201(a)(1)(C) (Supp. V 1999).

37. *See id.* § 1201(a)(2), (b).

38. *See* Ryan L. Van Den Elzen, Note, *Decrypting the DMCA: Fair Use as a Defense to the Distribution of DeCSS*, 77 NOTRE DAME L. REV. 673, 687 (2002).



in (1), however, trafficking in the devices necessary to gain access is prohibited. Although some commentators have contended that these institutions have an implied right to circumvent the technological protection measures in order to make a copy for an individual user, the specific, very narrowly worded phrases in section 1201(d) make this contention difficult to defend.<sup>39</sup>

### 3. Law Enforcement Exemption

Section 1201(e) allows circumvention for the furtherance of law enforcement and intelligence activities. The circumventing persons may be federal, state, or local government employees, or employees of independent contractors of federal, state, or local governments. The exemption of independent contractors allows private firms to develop anticircumvention devices for use in law enforcement.

### 4. “Reverse Engineering” Exemption

Section 1201(f) allows some trafficking in anticircumvention devices but only for the narrow purpose of reverse engineering, i.e., “to achieve interoperability of an independently created computer program with other programs.”<sup>40</sup> This is only allowed if the means of attaining interoperability are not otherwise available and if the reverse engineering is otherwise available under the copyright law.<sup>41</sup> Section 1201(f) applies to all three of the anticircumvention provisions in section 1201.<sup>42</sup> Additionally, the language in section 1201(f) was taken directly from Article 6 of the European Union Software Directive.<sup>43</sup> “This is one of the rare cases where language from a EU Directive has been incorporated into U.S. law.”<sup>44</sup>

*Universal City Studios, Inc. v. Reimerdes* was the first case to apply the DMCA to reverse engineering through circumvention of computer source code.<sup>45</sup> Defendants contended they were not in violation of the

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39. JESSICA LITMAN, *DIGITAL COPYRIGHT* 145 (2001); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 418 (1999), cited in Markus Fallenberg, *On the Technical Protection of Copyright: The Digital Millennium Copyright Act, the European Community Copyright Directive and Their Anticircumvention Provisions*, 7 INT’L J. COMM. L. & POL’Y 4, 30 (2002).

40. 17 U.S.C. § 1201(f)(1), (3).

41. See Fallenberg, *supra* note 39, at 26.

42. See *id.*

43. See *id.* at 27.

44. *Id.*

45. 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

DMCA<sup>46</sup> because the DMCA's antitrafficking provisions rendered illegal devices that are necessary for fair use.<sup>47</sup> The district court did not agree with defendants' argument, however, and found them to be in violation of the DMCA. The trial court's decision was upheld by the United States Court of Appeals for the Second Circuit:

If a software user successfully obtained access to source code by circumventing a technological "lock" or barrier . . . without authorization from the copyright holder of the computer program, the circumvention would not be excused by the doctrine of reverse engineering under the DMCA . . . unless the defendant could persuade the court that her purpose for [circumvention] was to determine how the two programs interoperate.<sup>48</sup>

In this case, the court found defendants did not have this purpose.<sup>49</sup>

##### 5. Encryption Research Exemption

Section 1201(g) allows circumvention to occur for the purpose of encryption research. This exemption allows encryption researchers to "circumvent and traffic in a technology to circumvent access but does not allow [them] to traffic in a technology to circumvent a *copy*-control measure."<sup>50</sup> Circumvention is allowed under this exemption only if these conditions are met: The copyrighted work must have been obtained lawfully; circumvention is a necessary part of the research; a good faith effort to obtain permission from the copyright holder occurred before the circumvention; and the circumvention is otherwise legal. Additionally, three other factors should be considered by the court: whether the information obtained in the research was disseminated to advance the state of knowledge or was used as a means of infringement, whether the person is a *bona fide* encryption researcher, and whether the researcher informed the copyright owner of the research findings.<sup>51</sup>

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46. See Glenn M. Schley, *The Digital Millennium Copyright Act and the First Amendment: How Far Should Courts Go To Protect Intellectual Property Rights*, 3 J. HIGH TECH. L. 115, 129 (2004).

47. See Joshua Panas, *Universal City Studios v. Reimerdes: The Best Balance for Copyright Law*, 1 GEO. J.L. & PUB. POL'Y 445, 456 (2003).

48. Rod Dixon, *Breaking into Locked Rooms To Access Computer Source Code: Does the DMCA Violate a Constitutional Mandate When Technological Barriers of Access Are Applied to Software?*, 8 VA. J.L. & TECH. 2, 5 (2003) (citing *Reimerdes*, 111 F. Supp. 2d at 319-20).

49. *Id.* at 2, 5.

50. Van Den Elzen, *supra* note 38, at 688 (citing 17 U.S.C. § 1201(g)(2), (4) (2000) (emphasis added)).

51. See *id.*

#### 6. Personal Information Access Exemption

Section 1201(i) permits circumvention in order to gain access to personal information of the circumventer. However, this does not allow trafficking of circumvention technology. Circumvention is allowed only to identify and disable “technological means such as a ‘cookie’ which collects or disseminates personally identifying information reflecting the online activities of the user.”<sup>52</sup> This excuse for circumvention is only recognized if the user was not given adequate notice that personal information was being collected, not told how to control the collection of the information, and the circumvention has no impact on the ability of others to access the work.<sup>53</sup> This exemption is rather impotent because it only applies to the first anticircumvention provision but not to the second and third; thus, trafficking is still forbidden.

#### 7. Security Testing Exemption

Section 1201(j) provides an exception for security testing. This permits circumvention and trafficking in technologies to perform security tests. However, this exception only applies to circumvention of access controls; it does not allow circumvention of *copy* controls. Security testing is defined as obtaining access, with the authorization of the owner or operator of the computer system, for the sole purpose of testing, investigating, or correcting a potential or actual security flaw or vulnerability. In determining whether this exemption will be allowed, the court considers whether the information collected in the testing was used solely to promote the security measures and whether the tester took measures to prevent infringement.<sup>54</sup> Additionally, this exemption permits the development, production, and distribution of technologies utilized in security testing.<sup>55</sup>

#### 8. Parents’ Monitoring Exemption

The anticircumvention provisions do not prohibit parents from monitoring their children’s use of the Internet. Section 1201(e) allows for the lawful development of circumvention technologies that will facilitate parents’ ability to determine whether their children have visited restricted Web sites.

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52. Fallenbock, *supra* note 39, at 29.

53. *See* 17 U.S.C. § 1201(i).

54. *Id.* § 1201(j)(3).

55. *See id.* § 1201(j)(4).

## V. THE DELICATE BALANCE: THE PENDULUM SWINGS AGAINST FAIR USE RIGHTS

A delicate balance must be maintained between the rights of authors and the right of the general public in a free society to reasonably unfettered access to literary, artistic, and musical works. On the one hand, the creator of a work needs to recoup her investment in the work; on the other hand, the consuming public needs as much access to the work as possible.<sup>56</sup> Over the years, the pendulum has swung back-and-forth, sometimes favoring the law of copyright, at other times favoring fair use rights. Since Congress did include eight fair use exceptions in the DMCA, discussed *supra*, it would appear that Congress did not intend to dismantle the doctrine of fair use.<sup>57</sup> However, the fair use provisions in the DMCA are too weak and inadequate to provide sufficient protection for fair use and the public domain.<sup>58</sup>

The DMCA's anticircumvention provisions—the access control measures and copy control measures designed to protect digitized literary works on the Internet—are of unlimited duration. Arguably, these measures upset the delicate balance between copyright protections of authors and fair use rights of universities, libraries, and scholars. “Anti-circumvention provisions encourage overprotection.”<sup>59</sup> What was once a copyright of limited duration under the Copyright Act of 1976 now has taken on the form of a patent with unlimited duration under the DMCA.<sup>60</sup> The balance of rights seems to have tilted toward more property rights for authors, with fewer fair use rights for universities, libraries, and scholars.<sup>61</sup> “One of the primary checks placed on the exclusive power of the copyright owners is the right of fair use. The anticircumvention prevention measures, however, do not allow for fair use of material that is locked behind encryption technology.”<sup>62</sup>

This situation is unfortunate because it is contrary to the basic goal of copyright—“to give the creator limited control over her work to

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56. See Matt Jackson, *Using Technology To Circumvent the Law: The DMCA's Push To Privatize Copyright*, 23 HASTINGS COMM. & ENT. L.J. 607, 613 (2001).

57. See Laura L. Mendelson, Comment, *Privatizing Knowledge: The Demise of Fair Use and the Public University*, 13 ALB. L.J. SCI. & TECH. 593, 604 (2003).

58. See *id.*

59. Fallenbock, *supra* note 39, at 24.

60. See Eugene R. Quinn, Jr., *An Unconstitutional Patent in Disguise: Did Congress Overstep Its Constitutional Authority in Adopting the Circumvention Prevention Provisions of the Digital Millennium Copyright Act?*, 41 BRANDEIS L.J. 33, 70-73 (2002).

61. See Denis T. Brogan, Note, *Fair Use No Longer: How the Digital Millennium Copyright Act Bars Fair Use of Digitally Stored Copyrighted Works*, 16 ST. JOHN'S J.L. COMM. 691, 725 (2002).

62. Quinn, *supra* note 60, at 71-72.

provide an incentive for the creation of new works *for the public's benefit*.<sup>63</sup> The copyright balance sought is that between allowance of the creator to recoup her investment in the work and the objective of giving the public as much access to the work as possible.<sup>64</sup> The overriding aim, however, is to serve the public interest—by allowing as much access as possible—instead of serving the creator's private interest. This idea—that the rights of access of the general public ultimately trump any property rights of the private creators—has been stated clearly on many occasions by the United States Supreme Court:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.<sup>65</sup>

## VI. THE DMCA NEEDS TO BE AMENDED IN ORDER TO PROVIDE GREATER FAIR USE PROTECTIONS

### A. *The Doctrine of Fair Use Requires Access to the Digital Content*

The Supreme Court has stated: “[From] the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose. . . .”<sup>66</sup> The advent of the Digital Age has raised new issues about how best to implement principles of fair use, but the principles themselves have not changed. Congress itself has issued a friendly warning that the elements of fair use must change as technology advances.<sup>67</sup> Accordingly, the DMCA needs to be amended to allow some degree of access to the digital content of works protected by anticircumvention devices. However, it is important to keep in mind that the fair use doctrine does

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63. Jackson, *supra* note 56, at 612-13 (citing William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 326 (1989) (emphasis added)).

64. See Jackson, *supra* note 56, at 613.

65. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes and citations omitted).

66. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994), *cited in* Panas, *supra* note 47, at 453.

67. See H.R. COMM. ON JUDICIARY, COPYRIGHT ACT OF 1976, H.R. DOC. NO. 94-1476, *cited in* Panas, *supra* note 47, at 453-54.

not mandate the allowance of perfect reproduction or perfect access with no controls.<sup>68</sup>

Exceptions need to be written in section 1201 of the DMCA for all noninfringing uses, subject to certain conditions. For example, an exception needs to be added allowing noninfringing consumers to circumvent copy protection devices. As it is presently written, the DMCA overreaches, somewhat analogous to prohibition of roadside assistance because some people might trick a towing service into hauling off another person's car parked on the side of a road.<sup>69</sup>

*B. The Doctrine of Fair Use Also Requires Access to the Devices that Facilitate Such Access*

Although they lost the case, the defendants in the *Universal City Studios* case were correct: The DMCA's antitrafficking provisions render illegal the very devices that are necessary for fair use.<sup>70</sup> The American Civil Liberties Union, in their *amicus* brief in the same case, agreed:

The constitutional interests embodied in fair use . . . do not evaporate merely because a copyright owner uses technological wrappers to protect copies of its works. And just as Congress could not repeal the fair use provision of U.S. copyright law without creating serious conflicts with the First Amendment, it cannot accomplish the same result indirectly by banning all technologies through which fair uses can be made.<sup>71</sup>

In order to facilitate fair use rights, the DMCA needs to be amended to require that anticircumvention devices have some degree of accessibility by fair users. The specific degree of access to anticircumvention devices is, of course, debatable and must have conditions attached. Some have called for the Federal Communications Commission (FCC) to begin to regulate these devices and for the FCC to ensure the devices are sufficiently modular or open to allow for new fair uses.<sup>72</sup>

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68. See Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1634-35, cited in *Panas*, *supra* note 47, at 454.

69. See Peter Moore, Notes and Comments, *Steal This Disk: Copy Protection, Consumer's Rights, and the Digital Millennium Copyright Act*, 97 NW. U. L. REV. 1437, 1464 (2003).

70. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 321-22 (S.D.N.Y. 2000).

71. Brief of Amici Curiae American Civil Liberties Union et al. at 13, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (No. 00-9185), cited in *Panas*, *supra* note 47, at 456.

72. See Chad Woodford, Comment, *Trusted Computing or Big Brother? Putting the Rights Back in Digital Rights Management*, 75 U. COLO. L. REV. 253, 293 (2004).

## VII. ANTICIRCUMVENTION AND FAIR USE PROVISIONS OF THE EUROPEAN UNION'S COPYRIGHT DIRECTIVE: A COMPARISON WITH THE DMCA

The European Union adopted its Copyright Directive (Directive) in May 2001.<sup>73</sup> The purpose of the Directive is to comply with the international copyright standards contained in the two WIPO Treaties.<sup>74</sup>

The Directive's article 6 is comparable to DMCA section 1201; it requires the Member States to provide legal protection against circumvention activities.<sup>75</sup> To be illegal, a circumventer must have no authority to do so. The circumvention activities must be directed against technological measures protecting any copyright or the *sui generis* right mentioned in Chapter III of the EC Database Directive.<sup>76</sup>

Article 6(2) mandates the Member States to proscribe the manufacture or distribution of products or components, or the provision of services, which: (1) are promoted as having a purpose of circumvention, (2) have only a limited commercially significant purpose or use other than to circumvent, or (3) are primarily designed or produced to facilitate circumvention.

Article 6(3) defines "technological measures" as any technology, device, or component that, in its normal use, is designed to prevent or inhibit the infringement of any copyright or any right related to copyright as provided by law or the *sui generis* right provided for in chapter III of the EC Database Directive.<sup>77</sup> "Effective" technological measures include encryption, scrambling, or other transformation of the work or a copy control mechanism.

Article 7(1) mandates the Member States to provide adequate legal protection from any person who would knowingly, without authorization, commit the following acts: remove or alter any electronic management-rights information, or distribute works procured after the management-rights information has been tampered with or removed.

Article 5 contains a list of exemptions to the rights of copyright owners. If applicable, they allow users of protected works to perform certain activities without being held liable for copyright infringement. The following activities are allowed: copying on any medium for private use; copying of a protected work by a library, museum, educational

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73. Copyright Directive, 167/10, 2001 O.J. (L 167) (EU). The Directive was required to be transposed into national laws of the Member States before December 22, 2002. *Id.*

74. See Marie-Therese Huppertz, *The Pivotal Role of Digital Rights Management Systems in the Digital World*, COMPUTER UND RECHT INTERNATIONAL 105 (2002).

75. See *id.* at 106-09.

76. Database Directive 96/9, 1996 O.J. (L 77) 20 (EC).

77. See *id.*

institution, or social institution; use for the purpose of parody; and quotations for purposes of criticism or review.

*A. Similarities of the Directive and the DMCA*

The DMCA and the Directive have some similarities because both were created in response to the mandates of the two WIPO Treaties. The Directive is rather less specific and more flexible than the DMCA; this is natural and understandable given that the Directive establishes general parameters within which the Member States will create specific laws. However, considered together, the Directive and the DMCA are both far more specific than the requirements outlined in the inspiration for both of them—the WIPO Treaties. Both proscribe not only acts of circumvention but also preliminary acts (e.g., trafficking in circumvention devices). Under both, acts are prohibited only if they have a limited commercially significant purpose or use other than to circumvent. The effect is that general-purpose equipment and services are not illegal merely because they may also be used for circumvention activities. Under both, copyright owners must be able to demonstrate the effectiveness of the technology chosen for protection. Unauthorized decryption and descrambling are illegal under both; section 1201 of the DMCA and article 6 of the Directive generally prohibit circumvention activities.<sup>78</sup>

*B. Differences Between the Directive and the DMCA*

Despite the preceding likenesses of the DMCA and the Directive, differences exist. Article 6 requires an offender to have committed the prohibited acts “knowingly.” Section 1201 does not have a mental state requirement and, accordingly, may appear to be the stronger provision of the two. However, the DMCA and the Directive have different focal points: whereas the DMCA focuses on distinguishing acts of *access* and *copy* circumvention, the Directive does not. Instead, the Directive places more emphasis on the distinction between the prohibition of circumvention and the prohibition of trafficking. Although DMCA section 1201’s proscriptions apply only to the circumvention of technological measures controlling *access* to protected work (and not copying), the distinction between access and copy circumvention is not so clear in article 6. Because of this, the strength of Directive article 6 may actually exceed that of DMCA section 1201: Article 6 prohibits the

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78. See Fallenbock, *supra* note 39, at 39.



impugning of *both* access controls and copy controls if committed in the furtherance of *either* an act of circumvention itself or an act of trafficking in circumvention devices.<sup>79</sup>

The Directive and the DMCA are also different in terms of the relationship between circumvention and copyright infringement. A common criticism of DMCA section 1201 is that it prohibits circumvention regardless of whether the underlying use is privileged; circumvention is illegal irrespective of whether copyright infringement occurred thereby. Defendants, therefore, cannot rely upon traditional defenses of copyright law but may employ only those defenses contained in section 1201 itself. By comparison, the position taken by Directive article 6 is rather unclear. Article 6(1) prohibits the circumvention of technological measures. Article 6(3) defines them as any technology, device, or component designed to prevent or inhibit the infringement of a copyright. The European Commission's interpretation is that article 6 only proscribes activities having the objective of copyright infringement, a related right or a *sui generis* right in databases granted by EU and Member States' law. It would seem, therefore, that only those acts of circumvention resulting in copyright infringement would be prohibited by article 6. This was the position taken by the Commission—that the exemptions of article 5 would generally prevail over the anticircumvention measures of article 6. However, the European Council objected to the Commission's approach and adopted a much broader definition of protected technological measures. The Council's definition does not require a nexus between the prohibited acts and copyright infringement. Accordingly, the Council's definition brings this part of Directive article 6 much closer to DMCA section 1201 and seems to establish an independent prohibition on circumvention regardless of whether it leads to copyright infringement. To make this even more murky than it already was, the Council added a new paragraph 4 to article 6, mandating the Member States "to ensure that right holders make available to the beneficiary of an exemption provided for in national law . . . or the means of benefiting from that exemption." The outcome is rather vague; at first, the Council established a general proscription on circumvention, and then it turned around and went in the direction of trying to ensure the survival of fair use rights.<sup>80</sup>

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79. See *id.* at 40.

80. See *id.* at 39.

### C. Comparative Impact on Fair Use

It is difficult to compare the Directive and the DMCA in terms of protection of fair use rights. As mentioned, the DMCA seems to have had a rather negative impact on fair use rights. The impact of the Directive is more difficult to evaluate, mainly because of the flexibility and relative lack of specificity inherent in the Directive and because it will be finally implemented by the individual laws of each of the Member States. The Directive's article 6(4), mentioned in the previous paragraph, would seem to offer some hope for those desiring fair use protection. However, article 6(4) is very general and relies primarily on private initiatives by affected industry and user associations. Article 6(4) pertains to the private copying exemption and allows Member States to take appropriate measures to ensure that users are able to benefit from the exemption to the extent necessary and where the users have legal access. Since the Directive gives Member States a degree of latitude in its implementation, this leeway makes it difficult to compare the ultimate impact of the Directive and the DMCA on fair use rights: This is because one must consider the national laws of the Member States which implement the Directive.<sup>81</sup>

## VIII. SUMMARY AND CONCLUSIONS

1. The doctrine of fair use allows a modest amount of access to and use of copyrighted works. The fair use test consists of four factors for courts to consider in deciding whether a use is fair:
  - a. If the use of the work adds something new with a different purpose or character than the original work, this increases the likelihood of a finding of fair use;
  - b. The greater the amount of creativity in the work, the lesser likelihood of a finding of fair use;
  - c. Taking more of the copyrighted work than is necessary to achieve the user's purpose reduces a likelihood of a finding of fair use; and
  - d. The use's detrimental impact upon the work's potential market value decreases the likelihood that a fair use will be found.
2. An inherent conflict exists between the legal rights of creators of copyrighted works and the fair use rights of the general public. A workable balance between these two categories of rights must be achieved. Over time, the pendulum has swung back-and-forth;

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81. See *id.* at 56-57.

sometimes fair use rights have increased at the expense of copyright protection, and vice versa. Since 1998, the Digital Millennium Copyright Act (DMCA) seems to have increased the rights of copyright holders to the detriment of the general public's fair use rights.

3. The purpose of the DMCA is to update the copyright laws, taking into account the growing phenomenon of digitization of protected works.
  - a. The inspiration for the DMCA was the issuance of international copyright standards for digitally stored materials by the WIPO. These standards were contained in two treaties which were adopted by the United States: the Performances and Phonograms Treaty and the Copyright Treaty. The enactment of the DMCA brought the United States into conformity with the WIPO international copyright standards.
  - b. The DMCA prohibits three categories of acts of circumvention of copyright protections of digital works:
    - i. Circumvention of controls over access to the protected works;
    - ii. Trafficking in technologies or devices that circumvent access controls; and
    - iii. Trafficking in technologies or devices that circumvent rights protection.
  - c. The DMCA contains eight fair use exemptions:
    - i. The Librarian of Congress determines in rulemaking whether users will be adversely affected by anticircumvention provisions and seemingly may take actions to preserve their fair use. However, this is unworkable in practice because users are forbidden from acquiring the means of accessing or duplicating protected material.
    - ii. Nonprofit educational institutions may access a copyrighted item in order to determine whether to purchase that item, but they are prohibited from trafficking in the devices necessary to gain access.
    - iii. Law enforcement agencies and their independent contractors may engage in circumvention in the furtherance of police work and intelligence.
    - iv. The "reverse engineering" exemption allows some trafficking in anticircumvention devices to determine whether an independently created computer program of

- the user is interoperable with another program that is protected by copyright.
- v. Encryption researchers are allowed to engage in access circumvention but are not allowed to circumvent a copy-control measure. This exemption is very narrowly defined and requires the presence of four conditions.
  - vi. Circumvention is allowed in order to access the personal information of the circumventer for the purpose of confirmation of its accuracy. However, this exemption is weak because trafficking remains forbidden.
  - vii. It is legal to circumvent access controls, with permission of the owner or operator of a computer system, for the purpose of testing, investigating, or correcting an actual security flaw or vulnerability. However, this exemption does not allow circumvention of copy controls.
  - viii. It is legal to develop circumvention technologies which facilitate parents' monitoring of their children's Internet "surfing."
- d. The DMCA needs to be amended in order to provide greater fair use protections.
    - i. The DMCA'S fair use exemptions are too weak. They need to be strengthened in order to allow greater access and more allowance for copying.
    - ii. It is not enough merely to allow access to the protected materials. In order to facilitate fair use rights, some degree of access to the circumvention devices themselves must be allowed. This is currently forbidden by the antitrafficking provisions, so they need to be liberalized.
4. The European Union's Copyright Directive was adopted in 2001. It provides a general framework upon which the Member States enacted their national laws pertaining to copyright protections of digitally stored works. The purpose of the Directive was to bring the Member States into compliance with the copyright standards adopted by the WIPO.

The Directive and the DMCA both are much more specific than their precursor—the WIPO mandates. The Directive's article 6 is the counterpart to the DMCA's section 1201; it requires the Member States to generally prohibit circumvention activities. Like the DMCA, the Directive not only prohibits access to protected works gained by circumvention but also contains antitrafficking provisions. For a

circumvention device to be illegal, both the Directive and the DMCA require it to have only a limited commercially significant purpose or use other than circumvention. In other words, both allow the utilization of general-purpose equipment which may have only a tangential use for circumvention. Both also place the onus on the copyright holder to demonstrate that the technology chosen effectively protects her work.

Despite the overall similarity of the DMCA and the Directive, there are differences. To be illegal, article 6 of the Directive requires that a person must have *knowingly* committed the circumvention. There is no such requirement of a mental state in the DMCA's section 1201. Because of this point, the DMCA appears to be the more stringent of the two. However, on further reflection, this may not be the case: The Directive protects both access and copy control measures, but the DMCA only protects access control measures. The DMCA prohibits circumvention activities regardless of whether they result in copyright infringement. This is also the position taken by the E.U. Council, but it is at odds with the position formerly taken by the E.U. Commission, which would have prohibited only circumvention resulting in copyright infringement.

Article 5 of the Directive also contains a list of fair use exemptions. They include: copying on any medium for private use; copying by a library, museum, educational institution, or social institution; use for the purpose of parody; and quotations for purpose of criticism or review. Article 6(4) mandates copyright holders to allow access to protected works to the beneficiaries specified in article 5. However, it is difficult to predict the final impact of the Directive on fair use rights because the Directive is a general framework only, and the specific national laws of the Member States will ultimately determine whether fair use rights are to be emphasized or deemphasized in the European Union.