

**COPYRIGHT AND THE INTERNET:
AN INTRODUCTION TO THE DIGITAL MILLENNIUM
COPYRIGHT ACT AND RELATED ISSUES**

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This paper provides an introductory survey of the Digital Millennium Copyright Act of 1998 (“DMCA”) and recent caselaw developments affecting the application of copyright to the Internet.

I. BACKGROUND

A. Copyright Law: A Balancing Act.

U.S. copyright law, codified at 17 U.S.C. 101 *et seq.*, protects “original works of authorship” that are “fixed in a tangible medium of expression” such as paper or a computer’s memory. Protected works of authorship include text, graphics and clip art, software, audiovisual works, music compositions and lyrics, and sound recordings. The owner of a copyright has the legal right to prevent others from copying, distributing, making derivative works of, publicly displaying, and publicly performing the copyrighted work.

The copyright law aims to benefit society by fostering the creation and dissemination of works of authorship. It achieves this goal by providing copyright owners with just enough protection so that they have a meaningful incentive to create and commercialize their works. Inherent in this strategy is a policy of balancing copyright owners’ rights against the right of the public to access, use and build upon the copyrighted work. The law’s objective is not simply to reward copyright owners but to promote the free use and exchange the ideas expressed in copyrighted works.

The policy of balancing rights can be seen throughout the Copyright Act. For example, one of the copyright owner’s exclusive rights under §106 is the right “to distribute copies or phonorecords of the copyrighted work to the public, by sale, or other transfer of ownership, or by rental lease or lending.” Tempering this right, however, is §109, which provides “the owner of a particular copy or phonorecord

lawfully made under this title . . . is entitled, without authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.” Thus, once a copyright owner distributes a copy of a work, its right to control further distribution of that copy is exhausted.

The balance struck by the copyright law has been established over many years of judicial and legislative policy-making. From time-to-time, this balance has been upset when new technologies, such as the VCR and the Internet, have emerged for reproducing and distributing copyrighted works. These perturbations typically lead to protracted legal battles and, in many cases, a legislative recalibration of copyright owners’ and users’ rights.

For example, §109 allows owners of copies to freely resell those copies, as discussed above, but prohibits the owner of a phonorecord or copy of a computer program from *renting* the phonorecord or program. Why this fine tuning of users’ rights? Because with the advent of home recording (and later home computing) technology, it became clear that rental of records of software would lead to wholesale piracy of the copyrighted work. Hence, as technologies permitting such piracy emerged, the rights of users were reigned in (*i.e.*, no renting) to reestablish the desired balance.

B. Impact of the Internet

As disruptive technologies go, digital technology, particularly the Internet has been a Titan. Some commentators have even suggested that these technologies will spell the end of copyright as we know it.

Before the advent of these technologies, the rights of copyright holders were effectively buttressed by the practical fact that copying and distribution, whether or not lawful, usually entailed some degree of cost and logistical difficulty. For example, an infringer in 1970 who sought to reproduce a

copyrighted book would have expended substantial resources on ink, paper and shipping. Not only would such an operation be costly, but it would also be relatively conspicuous and therefore subject to detection by the copyright owner and subsequent enforcement action. These costs, coupled with the threat of liability under the copyright law, proved an effective deterrent to infringement.

In a similar fashion, the limitations of analog recording technology also restrained serial copying (*i.e.*, where an unauthorized copy is used to make another unauthorized copy). For example, a teenager in 1977 could create a reasonably clear copy of a record album on a cassette tape; however, future copies derived from that taped copy would be of markedly poorer quality.

With digital technology, the physical and logistical factors that traditionally restrained copyright infringement have been eliminated. Indeed, the Internet is a copy and distribution machine of unimaginable power. Once a work is posted on the Internet, it may be serially copied a million times over, with each copy a perfect reproduction of the last. Those copies can be distributed throughout the world by millions of users, each acting independently with little or no cost and rarely any credible threat of civil or criminal liability. In short, the Internet presents an immense challenge to the legal enforcement of copyrights.

Copyright owners have responded to this challenge in the courts and in Congress, where they have lobbied – and continue to lobby – for changes to the Copyright Act. These efforts have been opposed by many groups, who believe copyright owners are seeking to overcompensate for the changes wrought by the Internet, in effect skewing the balance of rights too far in favor of copyright owners.

As the battle lines have been drawn, we have seen the formation of two opposing camps: copyright owners,

represented most frequently by the purveyors of popular music and film, on the one hand, and online distributors and users of copyrighted content, such as Web site operators, on the other hand.

These groups have clashed frequently in the courts, in the Copyright Office, and in Congress. They have even carried the fight to the arena of public opinion, with each camp competing to instill its values in the public's mind through various advertising and public relations efforts.

In sum, what we have witnessed over the past 10 years is a dramatic contest between owners and users of copyrights to redefine, in cultural, political, and legal terms, the balance of power under copyrights in the aftermath of the digital revolution.

C. Statutory Developments Leading Up to DMCA.

Copyright owners, alarmed by the Internet and digital technology, had made several forays to Capital Hill in the years preceding enactment of the DMCA. Three of these resulted in amendments to the Copyright Act, namely the Audio Home Recording Act of 1992, the Digital Rights in Sound Recordings Act of 1995, and the No Electronic Theft Act of 1997.

These are discussed as follows:

Audio Home Recording Act. The Audio Home Recording Act created chapter 10 of the Copyright Act, 17 U.S.C. 1001 *et seq.*, to provide a statutory scheme for regulating digital audio recording devices such as DATs. Under this scheme, manufacturers of such devices are required to include controls to manage serial copying and further are required to pay royalties to the music industry.

Digital Performance Rights in Sound Recordings.

The Digital Performance Right in Sound Recordings Act (DPRA) amended §106 of the Copyright Act to provide a limited performance right for sound recordings by means of a *digital audio transmission*. The Act divided digital audio transmissions into three categories:

- **Exempted Transmissions.** DPRA specified that certain transmissions would be exempt from the performance rights in sound recordings. These exempted transmissions consisted principally of the transmissions and retransmissions of nonsubscription broadcasts by FCC-regulated radio stations.
- **Compulsory License Transmissions.** DPRA specified a limited range of transmissions to which the performance right applied, but for which service providers could secure a compulsory license that would enable them to digitally perform copyrighted sound recordings. These transmissions consist of certain subscription services and, by virtue of an amendment imposed under the DMCA, certain so called eligible non-subscription transmissions. This later category is intended to cover Webcasting, whether by pure-play Internet operators or by terrestrial broadcasters that simultaneously transmit their over-the-air signal via the Internet. Section 114 provides complex reporting and other requirements that Webcasters and other digital audio services must meet if they are to qualify for the compulsory license.
- **Everything Else.** All other transmissions -- principally interactive transmissions such as

Internet jukeboxes -- are subject to the copyright holder's exclusive rights. Providers of these transmissions must attempt to negotiate a consensual license from the copyright owners (typically the record labels).

To make sense of these complex statutory provisions, a little background on the copyrights in music is helpful. A song embodies two distinct types of copyright interests: the copyright in the underlying musical work (*i.e.*, notes and lyrics) and that in the sound recording (*i.e.*, recording of a singer singing). Typically, the songwriter or music publisher holds the copyright in the musical work, and the performing artist or record company holds the copyright in the sound recording. Under §106, copyrights in both music and sound recordings bestow on their owners exclusive rights of reproduction and distribution; however, the right of public performance under §106(4) does not apply to sound recordings. The only performance right accorded to sound recordings is the right provided under the DPRA, now codified at §106(6), for public performance by digital audio transmissions.

The ongoing public debate about the royalties to be paid by Webcasters deals principally with the rate of the compulsory license for the digital audio transmission of sound recordings.

No Electronic Theft Act. In 1997, Congress enacted the No Electronic Theft Act, Pub. L. 105-147 (NET), amending §506 of the Copyright Act to criminalize certain willful infringements, even in cases where the infringer was not acting for purposes of financial gain. The Act was intended to overrule the decision in *U.S. v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994) in which an MIT graduate student was charged with wire fraud for running an illegal online software exchanges. The court in *LaMacchia* had dismissed the charges, holding that the wire fraud statute

under which LaMacchia had been charged was not violated because LaMacchia had not operated the exchange for monetary gain, an element required to establish criminal copyright infringement.

II. DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

A. Overview.

The Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), was enacted on October 28, 1998. The act is available at: <http://thomas.loc.gov>. An excellent summary is available from the Copyright Office at: <http://lcweb.loc.gov/copyright/legislation/dmca.pdf>.

In many respects, the DMCA, rather than the capstone of “online copyright law” is just a single, albeit a significant, step in the ongoing attempt to rebalance the copyright regime in the aftermath of the Internet.

The DMCA is divided into five titles:

- Title 1, the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998,” implements two WIPO treaties.
- Title II, the “Online Copyright Infringement Liability Limitation Act,” limits the liability of online service providers for copyright infringement.
- Title III, the “Computer Maintenance Competition Assurance Act,” allows computer owners to use certain programs for maintenance purposes.

- Title IV contains six miscellaneous provisions, including provisions further refining the performance right in digital audio transmissions under DPRA.
- Title V, the “Vessel Hull Design Protection Act,” creates a *sui generis* form of protection for the design of vessel hulls.

B. Implementation of WIPO Treaties.

Title I implements the WIPO treaties by adding a new Chapter 12 to the Copyright Act banning the circumvention of certain protection and management systems.

New §1201 prohibits users from circumventing a “technological measure that effectively controls access to a work protected under this title.” It also prohibits the sale of devices that circumvent technological measures that control access to a work or that protect the rights of a copyright owner. These include devices that:

- are primarily designed or produced to circumvent;
- have only a limited commercially significant purpose or use other than to circumvent; or
- are marketed for use in circumventing.

Note that §1201 addresses two types of “technological measures,” namely: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of a copyrighted work. It is only illegal to circumvent access control measures. There is no prohibition against the mere act of circumventing copy control measures. Congress did not outlaw circumvention of

copy control measures because it wanted to preserve the public's ability to make fair use of copyrighted works.

This distinction does not apply to devices or services used to circumvent protective measures. The DMCA bans trafficking in devices that circumvent either type of measure.

Query: as a practical matter, how users will circumvent copy control devices without commercially available circumvention products?

Section 1201(d) exempts nonprofit library, archive and educational institutions from the prohibition on the act of circumventing access control measures for the sole purpose of determining whether they want to obtain authorized access.

Section 1201(e) exempts law enforcement, intelligence and other government activities carried out for lawfully authorized investigative, protective, intelligence or information security activities.

Section 1201(f) exempts circumvention for reverse engineering as necessary to achieve interoperability of an independently created computer program, but only to the extent that such acts do not otherwise constitute copyright infringement.

Section 1201(g) exempts certain types of encryption research.

Section 1201(h) allows a court applying the prohibitions against circumventing access controls to consider the necessity for its incorporation in technology that prevents access of minors to material on the Internet.

Section 1201(i) permits circumvention in certain circumstances when the technological measure or the work it

protects is capable of collecting or disseminating personally identifying information about the online activities of a natural person.

Section 1201(j) permits circumvention of access control for testing computer security with the authorization of its owner or operator.

New §1202 addresses copyright management information. Section 1202(a) bans use of false copyright management information with intent to infringe.

Section 1202(b) prohibits: (1) the intentional removal or alteration of copyright management information, (2) the distribution or importation for distribution of copyright management information knowing same to have been removed or altered, or (3) the distribution, importation for distribution, or public performance of works knowing that the copyright management information has been removed or altered. “Copyright information management” means the title, copyright notice, name of the author, terms and conditions for use of the work, and other specified information.

Section 1203 specifies civil remedies. These include injunctions, impoundment, damages, costs, attorneys’ fees at the courts discretion, and certain other remedial measures. Damages are either actual damages and the violator’s profits, or statutory damages. Damages may be trebled for certain repeat offenders.

Section 1204 specifies criminal penalties. Under that section, any person who violates §§1201 or 1202 “willfully and for purposes of commercial advantage or private financial gain” is subject to a fine of up to \$500,000 or five years in prison for the first offense and a fine of up to \$1,000,000 or ten years in prison for any subsequent offense.

C. Online Copyright Infringement Liability Limitation.

Industries that depend on copyright protection have sought to vigorously enforce copyrights in the face of online infringement. Because alleged infringers are often individuals who are hard to locate or judgment proof, copyright owners have also resorted to suing alleged infringers' service and technology providers. *See, e.g., Religious Technology Center v. Netcom On-Line Communication*, 923 F. Supp. 1231 (N.D. Cal. 1995); *Sega Enterprises Ltd. v. MAPHIA* 948 F. Supp. 923 (N.D. Cal. 1996); *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1522 (M.D. Fla. 1993); *Playboy Enterprises, Inc. v. Webworld, Inc.*, 911 F. Supp. 543 (N.D. Tex. 1997).

Title II of the DMCA adds a new §512 to the Copyright Act to limit the liability of online service providers from these types of claims. There are four types of limitations:

- Transitory communications
- System caching
- Storage of information on systems or networks at direction of users
- Information location tools.

These limitations are safe harbors in that a service provider is not necessarily liable for copyright infringement if it fails to qualify for a limitation. The copyright owner must still prove infringement, and the provider may assert defenses such as fair use.

Limitation for Transitory Communications. Section 512(a) limits the liability of service providers who merely act as a passive data conduit. This limitation covers acts of transmission, routing, or providing connections for the information, as well as the intermediate and transient copies

that are made automatically in the operation of a network. Additional requirements are that:

- transmission must be initiated by a person other than the provider; transmission, routing, provision of connections, or copying must be carried out by an automatic technical process without selection of material by the service provider;
- provider must not determine the recipients of the material;
- any intermediate copies must not ordinarily be accessible to anyone other than anticipated recipients, and must not be retained for longer than reasonably necessary; and
- material must be transmitted with no modification to its content.

Limitation for System Caching. Section 512(b) limits the liability of service providers for online caching. The limitation applies only to intermediate and temporary storage, when carried out through an automatic technical process for the purpose of making the material available to subscribers who subsequently request it. To take advantage of this limitation, the provider must:

- not modify the content of the cached material;
- comply with rules about “refreshing” material when specified in accordance with a generally accepted industry standard data communication protocol;
- not interfere with certain technology that returns “hit” information;

- limit users' access to the material in accordance with conditions on access imposed by the person who posted the material; and
- promptly remove or block material posted without the copyright owner's authorization once the service provider has been notified that it has been removed, blocked, or ordered to be removed or blocked, at the originating site.

Limitation for User's Information. Section 512(c) limits the liability of service providers for infringing material placed by users on their systems. To take advantage of this limitation, the provider must:

- not have the knowledge of the infringing activity;
- not receive a financial benefit directly attributable to the infringing activity if the provider has the right and ability to control the infringing activity;
- must expeditiously take down or block access to the material upon proper notice of infringement; and
- must have filed with the Copyright Office a designation of an agent to receive notifications of claimed infringement.

On October 28, 1999, the Copyright Office published an interim regulation for allowing service providers to designate an agent to receive notices of infringement pursuant to the Digital Millennium Copyright Act. The regulations can be found at:

<http://lcweb.loc.gov/copyright/fedreg/da59233.pdf>

The form for designating an agent with the Copyright Office is available at <http://www.loc.gov/copyright/onlinesp>. A list of agents registered with the Copyright Office is at <http://www.loc.gov/copyright/onlinesp/list>.

Limitation for Linking. Section 512(d) limits liability for hypertext linking when the link points users to a site containing infringing material. To take advantage of this limitation, a provider must:

- not have knowledge that the material is infringing;
- not receive a financial benefit directly attributable to the activity if the provider has the right and ability to control the infringing activity; and
- expeditiously take down or block access to the material upon receiving proper notification of claimed infringement.

Section 512(k) defines “service providers” entitled to the safe harbor protection. For the caching limitation, “service provider” is defined in §512(k)(1)(A) as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” For all other limitations, “service provider” is defined in §512(k)(1)(B) as a “provider of online services or network access, or the operator of facilities therefore.”

Section 512(i) sets forth two additional conditions that a service provider must meet to be eligible for the limitations: (1) it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and (2) it must

accommodate and not interfere with “standard technical measures.”

D. Computer Maintenance or Repair.

Title III amends §117 of the Copyright Act to allow the owner or lessee of a computer to make or authorize the making of a copy of certain computer programs in the course of maintaining or repairing that computer.

E. Distance Education.

Title IV, directs the Copyright Office to report on how to promote distance education through digital technologies. The Copyright Office issued its report in May 1999. It can be found at <http://www.loc.gov/copyright/disted/>.

F. Webcasting.

The Digital Performance Right in Sound Recordings Act of 1995 (DPRA), discussed above, created an exclusive right to publicly perform sound recordings by means of a digital audio transmission. DPRA provided for certain classes of digital audio transmission that would enjoy the benefit of a compulsory license.

When DPRA was drafted, in the mid-1990s, its authors (principally record industry lobbyists) envisioned that music would be distributed online by subscription services. Under the original DPRA, these subscription services are characterized as either non-interactive (and thus eligible for a compulsory license) or interactive (and thus not eligible for a compulsory license).

As events unfolded, the real driver of online distribution of music became *Webcasting*, which in general terms is non-interactive, non-subscription services that

broadcast music, including the Internet simulcast of traditional FCC-regulated radio stations.

Webcasting did not fit into the categories articulated in the original DPRA, so the DMCA added “eligible nonsubscription transmissions” as a new category subject to compulsory license provisions of §114. This new category was intended to cover Webcasting, although it contains numerous conditions and limitations that might exclude many existing services. The DMCA also provided for a compulsory license under §112 for certain ephemeral recordings made incident to digital audio transmissions.

On November 27, 1998, the Copyright Office initiated the six-month voluntary negotiation period required under the DMCA for negotiating terms and rates for two compulsory licenses relating to ephemeral sound recordings and sound recordings transmitted in digital format over the Internet.

The voluntary negotiations failed and so the Copyright Office convened a Copyright Arbitration Royalty Panel (“CARP”). After many months of testimony and deliberation, the CARP released its report on February 20, 2002. The CARP recommended a royalty many times higher than proposed by Web broadcasters, leading some commentators to predict that many Webcasters will be forced out of business.

III. SELECTED RECENT CASES RELATING TO DMCA AND COPYRIGHT ON THE INTERNET

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Defendant Napster provided software and services that allowed users to exchange sound recordings, on a peer-to-peer basis, in digital MP3 format. Plaintiffs, a group of record companies, sued Napster for contributory and vicarious copyright infringement and related state law

claims. The district court granted a preliminary injunction enjoining the Napster service. The court found that Napster had knowingly encouraged and assisted its users in infringing plaintiffs' copyrights and that its software materially contributed to the infringing activity and had no substantial non-infringing uses. The court rejected Napster's fair use defense. The court also rejected Napster's argument that it was protected by the home recording privilege of §1008 and the §512 safe harbors.

The Ninth Circuit affirmed the district court, although with a mandate that the injunction be narrowed to cases when Napster knew of specific infringing files available on its systems and failed to prevent their dissemination.

As to Napster's defense under §1008, the Ninth Circuit held that computers were not "digital audio recording devices" and did not make "digital music recordings," as defined under the Audio Home Recording Act. As to Napster's defense under §512, the court disagreed with the district court's blanket conclusion that §512 did not apply to secondary infringers, but it did find that there were substantial questions as to whether Napster was entitled to the §512 defense, questions the court concluded that would need to be resolved at trial.

ALS Scan, Inc. v. Remarq Communities, Inc., 239 F.3d 619 (4th Cir. 2001). Plaintiff notified defendant ISP of two newsgroups containing hundreds of postings by defendant's subscribers that infringed plaintiff's copyrighted photographs. After defendant took no action to remove such postings, plaintiff sued defendant for direct copyright infringement and for violations of Title II of the DMCA. Defendant argued that it was entitled to "safe harbor" protection under §512 of the DMCA because plaintiff did not provide defendant a sufficiently detailed notice of the infringing works. The court disagreed, stating that

§512(c)(3)(A) of Title 17 does not require “perfect” notice, but rather notice that includes “substantially” the information necessary to identify and locate the infringing works. By providing a representative list of infringing works with information “reasonably sufficient” to locate such works, the court held that the plaintiff substantially complied with the notice requirements of the DMCA; the defendant was therefore not entitled to safe harbor protection. The court did, however, deny the plaintiff’s direct copyright infringement claim, stating that Title II of the DMCA rules out ISP direct infringement liability for passive, automatic acts initiated by another.

CoStar Group Inc. v. LoopNet, Inc., 164 F. Supp. 2d 688 (D. Md. 2001). Plaintiff sued defendant for direct and contributory copyright infringement for allowing users of defendant’s commercial real estate website to post over 300 of plaintiff’s copyrighted pictures. The court granted the defendant’s summary judgment motion with respect to direct infringement, stating that the defendant lacked the element of “volition or causation” necessary for direct infringement liability. As to contributory copyright infringement, plaintiff argued that because the defendant reviewed all user submitted photographs before uploading them onto the website, the photographs were not stored at the direction of the user; as such, the defendant would not be eligible for safe harbor protections under §512 of the DMCA. The court denied the plaintiff’s argument, holding that a mere low level screening process is not enough to conclude that such materials are not stored at the user’s direction. However, the court did find that issues of material fact existed as to whether defendant adequately and expeditiously removed the infringing materials from its website after receiving notification from the plaintiff. Thus the court denied both parties’ summary judgment motion on the contributory copyright infringement claim.

Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (D. Utah 1999). The district court granted a preliminary injunction in favor of a copyright owner against a defendant who had posted on its Web site links to other Web sites which contained infringing copies of the plaintiff's book. The court held that users who browsed third party Web sites were infringing the plaintiff's copyright and that the defendant, by linking to those third party Web sites and actively encouraging end users to access infringing materials, had contributed to such infringement.

Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002). Defendant operated a visual search engine which generated images of Web sites in lieu of descriptive text. The images were reduced "thumbnail pictures" of the sites. By clicking on a desired thumbnail, a user could view a full-size version of the image importing the image directly from the originating website, framed by defendant's website. Defendant's search engine maintained an index database of approximately 2,000,000 thumbnail images, including 35 images belonging to plaintiff, a photographer. Plaintiff sued after defendant refused to remove his images, claiming copyright infringement. The district court granted defendant's motion to dismiss, holding that defendant's use of the images was a fair use under §107 of the Copyright Act.

The Ninth Circuit upheld the district court's ruling as to the thumbnails, agreeing that such use of thumbnails constituted fair use. However, the court reversed the decision as to the defendant's inline linking and framing of the full-sized images, stating that the analysis weighed against a finding of fair use. Key to the Ninth Circuit's decision was the fact that, unlike with thumbnails, the defendant's inline linking and framing of the full-size images was neither transformative in purpose nor character. Because the inline linking and framing was not a fair use, the court held that the defendant violated the plaintiff's exclusive right to publicly display his works.

Los Angeles Times v. Free Republic Electronic Orchard, 54 U.S.P.Q.2d 1453 (C.D. Cal. 2000). Plaintiff newspaper publishers sued defendant, an operator of a bulletin board Web site which allowed its members to post news articles, in their entirety, to which the members would add remarks or commentary. Defendant moved for summary judgment, arguing that the posting of news articles on their Web site is protected under the Fair Use Doctrine. The court held otherwise, stating that the balance of the four factors codified at 17 U.S.C. §107 militates against a finding of fair use. The court reasoned that the postings involved no transformative uses, but rather were mere copies. Although the primary purpose of the postings was to facilitate discussion, criticism, and comment, the ends could have been obtained without copying the articles (such as, for example, by hypertext linking to the original publishers' Web sites).

RealNetworks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 U.S. Dist. LEXIS 1889 (W.D. Wa. 2000). The court granted a preliminary injunction against defendant prohibiting distribution of programs that circumvented the copy protection features included in the plaintiff's RealAudio player in violation of §1201 of the DCMA. The court declined to grant a preliminary injunction against defendant's programs that merely converted audio and video files from RealMedia to other formats. These programs, the court reasoned, could be used for legitimate purposes. RealNetwork had not presented any evidence that the RealMedia format by itself was a "technological measure" under the DMCA to prevent violations of copyrights.

Recording Indus. Assn. of America v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999). Affirmed dismissal of a suit by the Recording Industry Association of America against makers of Rio, a portable music player designed to play MP3-formatted audio recordings. RIAA had sued Diamond, contending that its Rio player was a "digital audio recording device" as that term

is defined in the Audio Home Recording Act of 1992 (AHRA), and as such, the Rio player must include a Serial Copyright Management System. After analyzing the statute, the court concluded that neither computers, their hard drives, nor the Rio player met the AHRA's definition of digital audio recording device. In reaching this result, the court relied on the fact that the Rio player did not have the capability of making serial copies. From the court's perspective, "the Rio's operation is entirely consistent with the AHRA's main purpose -- the facilitation of personal use." The court explained that the Rio "merely makes copies in order to render portable, or 'space-shift', those files that already reside on a user's hard drive." The court drew an analogy to the "time-shifting" concept articulated by the Supreme Court in its *Sony v. Universal City* opinion holding that consumer VCR taping of TV shows was fair use.

Tasini v. New York Times Co., 533 U.S. 483 (2001). Plaintiffs were a group of freelance writers who wrote articles for publication in defendants' periodicals. They sued when defendants republished the articles in the LEXIS-NEXIS electronic database. The district court granted a motion for summary judgment in favor of defendants. The district court reasoned that the plaintiffs' articles were contributions to defendants' collective works. Defendants, as publishers of "collective works," had a privilege under §201(c) of the Copyright Act to distribute the articles in electronic format as a revision of the original collective work. The Supreme Court affirmed the Second Circuit's reversal, holding that an electronic database was more than a mere revision of the original collective work and therefore exceeded the scope of defendants' privilege under §201(c).

Telecomm Technical Services, Inc. v. Siemens Rolm Communications, Inc., 51 U.S.P.Q.2d 1793 (N.D. Ga. 1999). Court held that new §117(c) of Copyright Act applied retroactively to copying occurring prior to the adoption of the DMCA.

UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000). Plaintiff record company sued defendant MP3 for copyright infringement based its “my.MP3.com” service. That service allowed owners of music CDs to store, customize and listen to those recordings via the Internet. In establishing its service, MP3 uploaded CDs onto its server. Plaintiff record company moved for summary judgment on infringement, and MP3 asserted the affirmative defense of fair use. MP3 argued that it merely provided a “space shift” by which subscribers who owned CDs would enjoy those sound recordings without lugging around the physical disk. The court rejected MP3’s fair use argument concluding that the “space shift” was not a transformative fair use but simply another way of saying that the unauthorized copies are being retransmitted in a different medium.

Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000). Plaintiffs were eight major motion picture studios who distributed movies in DVD format. DVD disks are subject to an industry-wide copy protection scheme known as the Content Scramble Systems (or CSS), an encryption-based security and authentication system that requires the use of appropriately configured hardware such as a DVD player to decrypt, unscramble and play back motion pictures on DVDs. Defendants developed and distributed a computer program that would enable users to circumvent the CSS copy protection scheme and hence make and distribute digital copies of DVD movies. Plaintiffs sued under §1201(a)(2) of the DCMA, which prohibits unauthorized offering of products to circumvent technological measures that effectively control access to copyrighted works. Defendants argued that their conduct came within several statutory exceptions contained in the DMCA and constituted fair use under the Copyright Act. In addition, the defendants argued that their actions were protected by the First Amendment.

The court denied each defense. First, the court held that the defendant did not fall under the DMCA §1201(f) exception for reverse engineering, the §1201(g) exception for encryption research, and §1201(j) exception for security testing. As to the fair use defense, the court held that §107 of the Copyright Act only protected defendants from liability for copyright infringement. Claims under §1201(a)(2) were directed to unlawful circumvention products, not copyright infringement. Therefore, the court concluded, fair use did not apply. The court also rejected defendants' First Amendment arguments. This First Amendment holding was affirmed by the Second Circuit in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2002).

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