

**SOLVING THE DIGITAL PIRACY PUZZLE: DISAGGREGATING
FAIR USE FROM THE DMCA’S ANTI-DEVICE PROVISIONS**

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I. INTRODUCTION

In June of 2005, the United States Supreme Court handed down its highly anticipated decision in *MGM Studios, Inc. v. Grokster, Ltd.*,¹ the digital file-sharing case that pitted the digital content industries against manufacturers of peer-to-peer file-sharing software.² In the majority opinion, Justice Souter noted: “The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.”³ This observation rings true in many areas of copyright law, including the question of unauthorized access to digitally encrypted copyrighted works — currently prohibited under the anti-circumvention⁴ and anti-trafficking⁵ provisions of the Digital Millennium Copyright Act (“DMCA”).

As with file-sharing technologies, circumvention technologies have the potential to be utilized for harmful purposes, such as copyright piracy, as well as for socially beneficial purposes, such as facilitating legitimate uses of encrypted copyrighted works. Overzealous enforcement of copyright laws could impede technological innovation in cryptography and file-sharing, while under-enforcement could impede artistic innovation. The Supreme Court’s solution to this trade-off in the context of file-sharing technologies was to introduce an inducement test for secondary copyright liability. In other words, a service like Grokster can be held liable for secondary copyright infringement if it intended to induce its customers to use its products to infringe copyrights.⁶

However, such an approach does not appear to be particularly effective when used in regulating circumvention technologies. The DMCA’s anti-trafficking provisions already incorporate what could be regarded as a legislative analog to the *Grokster* inducement test. The DMCA prohibits trafficking in a device that is knowingly marketed for use in circumventing an access-control or a copy-control measure.⁷ This liability test is based on the defendant’s knowledge that the technology in question is being used for a prohibited purpose. Thus, the DMCA is not unlike the approach taken in *Grokster* with respect to file-sharing technologies. Knowingly marketing a technol-

1. 125 S. Ct. 2764 (2005).

2. See generally Alfred C. Yen, *Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 CASE W. RES. L. REV. (forthcoming 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=661168 (discussing peer-to-peer file-sharing and associated legal issues).

3. *Grokster*, 125 S. Ct. at 2775.

4. 17 U.S.C. § 1201(a)(1)(A) (2000).

5. *Id.* §§ 1201(a)(2), (b)(1).

6. *Grokster*, 125 S. Ct. at 2779–80.

7. 17 U.S.C. §§ 1201(a)(2)(C), (b)(1)(C).

ogy for a prohibited purpose is similar to marketing a device with the aim of inducing copyright infringement. The problem for circumvention technologies is that courts have generally been unconvinced that circumvention devices do not infringe the DMCA's anti-trafficking provisions even when there is little to no evidence of a clear intention on the part of the defendants to infringe the plaintiffs' rights.⁸ Courts typically take an all-or-nothing approach to circumvention technologies, usually resulting in a complete ban on marketing them.⁹

This Article focuses on the question of how to protect legitimate uses of a copyrighted work where initial access to the work is denied by digital rights management ("DRM")¹⁰ measures bolstered by the DMCA. If the DMCA has the practical effect of banning most circumvention technologies, it has negative consequences for those seeking access to a DRM-protected work for fair use purposes. If the law does not ban circumvention devices, however, copyright protection for digital works risks significant erosion. As a direct consequence of its structure, a law such as the DMCA that focuses on regulating circumvention technologies per se simply cannot facilitate socially desirable access to and use of works while at the same time prohibiting harmful access and use for digital piracy.

For example, imagine that you are a student taking a musicology course. Your professor has asked you to research Alban Berg's Violin Concerto for a term paper on atonal musical forms. You are not remotely interested in Berg, violin concerti, or the atonal music movement. In fact, you enrolled in the musicology course because you needed the additional credits and it fit your class schedule. You certainly do not intend to invest large sums of money on research materials for the course.

While searching online for research sources for your term paper, you notice an advertisement for a new online service that will allow you to listen to samples of relevant musical works and to access commentaries on those works by leading musicologists. You are extremely interested in this service, as you estimate it will cut your research time in half. On further investigation, however, you discover that it is prohibitively expensive. You mention the service to your professor and ask if there is some way she can get you free or dis-

8. See, e.g., *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002); 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

9. See, e.g., 321 Studios, 307 F. Supp. 2d at 1107–08.

10. "Digital rights management is a general term that refers to technology-based protections that permit a rights holder to restrict a user's access to and control of digital content." Declan McCullagh & Milana Homsy, *Leave DRM Alone: A Survey of Legislative Proposals Relating to Digital Rights Management Technology and Their Problems*, 2005 MICH. ST. L. REV. 317, 318 (2005). DRM systems are generally characterized as "secure packaging and delivery software designed to prevent purchasers and third parties from making unauthorized uses of digital works." Dan L. Burk & Julie E. Cohen, *Fair Use InfraStructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 48 (2001).

counted access to it through the music department. She tells you that she has been aware of this service for some time and highly recommends it, but informs you that the operators of the service do not currently provide academic or student discounts. She herself spent a sizeable amount of her own faculty budget on a subscription to the service.

Nevertheless, if your professor has access to the service, you assume that she can make you copies of the relevant material. Presumably, this would be the same as her making copies of her personal textbooks and musical recordings for you. Unfortunately, the law is not that simple. For one thing, even before the advent of digital technology, the extent of your professor's ability to make students copies of old forms of media was not particularly clear-cut.¹¹ Over the years, laws¹² and guidelines¹³ developed surrounding this issue, but some academic and educational copying likely amounts to copyright infringement. Content industries may have tolerated such copying as a necessary inconvenience because it has traditionally been too difficult for content owners to police and enforce their copyrights aggressively in all classrooms and private homes around the world.¹⁴ However, DRM technologies now allow content owners to exercise more control over unauthorized reproductions of their works.¹⁵

Returning to your predicament, the owner of the new online service described above has imposed DRM measures to restrict access to, and copying of, the relevant music and commentaries unless the appropriate fee has been paid. Thus, in this situation your professor can access the relevant material provided that she maintains payment of her subscription fees, but because of the DRM protection she is unable to make a digital copy of the music or the commentary. The Copyright Act would not technically prevent her from cracking the DRM copy-control measure¹⁶ and making copies of the relevant mate-

11. See RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT: UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP 437-43 (9th ed. 2005) (discussing classroom copying generally and the guidelines for classroom reproductions).

12. 17 U.S.C. § 107 (2000) (fair use in copyright law).

13. See, e.g., Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals, H.R. REP. NO. 94-1476, at 68-70 (1976), reprinted in BROWN & DENICOLA, *supra* note 11, at 439-41; Guidelines for Educational Uses of Music, H.R. REP. NO. 94-1476, at 70-71 (1976).

14. See BROWN & DENICOLA, *supra* note 11, at 437-43; cf. Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) (finding copyright infringement for university photocopying of "coursepacks" on a larger scale than contemplated in the example here).

15. See *supra* note 10 and accompanying text.

16. The DMCA prohibits you from gaining unauthorized access to a DRM protected work, even for a fair use purpose. 17 U.S.C. § 1201(a)(1)(A) (2000). However, the DMCA does not contain language prohibiting circumventing a copy-control measure in order to make fair use. *Id.* Thus your teacher can circumvent the copy-control measure while you cannot — because you do not have authorized access to the materials.

rial for students, assuming that she could establish that the copying was for a fair use purpose.¹⁷ Because she does not have the necessary technical expertise to break the DRM measures¹⁸ and copy the materials, this does not solve your problem. Your professor needs a device or service that would help her override the DRM and make copies. But, if digital anti-piracy laws have effectively put out of business most companies that used to manufacture and distribute circumvention technology, there is no way for her to help you. Thus, although copyright law technically allows circumventing technologies in order to make a fair use, the lack of technological resources has effectively destroyed this allowance.

On one hand, you are pretty frustrated with this outcome. On the other hand, you understand the reason why the online music service chose to restrict access to and use of its works in this way. If it were not so restrictive, the company could not protect its content and its business model might no longer be profitable; digital copyright pirates could utilize technology to make fast, cheap, and near-perfect copies of the materials¹⁹ and could distribute them globally at the push of a button without compensation.²⁰

This hypothetical exemplifies the puzzle underlying attempts to regulate circumvention technologies. Fair use is under threat by the current regulation of these devices. However, if circumvention devices are not effectively regulated, digital content industries may be unable, or less able, to rely on encryption technologies that could protect their works against digital copyright piracy.²¹ A lack of protection for digital assets alters the structure of the industries' business and the prices and contractual terms on which companies will be prepared to make digital works available to the public.

The DMCA contains provisions which try to balance the competing needs of fair use and digital content protection. First, the DMCA

17. See 17 U.S.C. § 107.

18. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 551 (1999) ("It is unclear whether Congress intended for the technologically savvy who could 'do it themselves' to be the only ones who could engage in privileged acts of circumvention.").

19. *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2775 (2005).

20. The DMCA mirrors the content industries' concerns here. See Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1135 (2003) (stating that the legislative aims behind the drafting of the DMCA were to prevent 'piracy' in digital works); Electronic Frontier Foundation, *Unintended Consequences: Five Years Under the DMCA* (Sept. 24, 2003), http://www.eff.org/IP/DMCA/unintended_consequences.php.

21. Since all good encryption measures can likely be hacked even if it takes some time to do so, legal sanctions against decryption at least provide some additional comfort to content industries who want to rely on digital encryption measures. See Bruce Schneier, *Why Computers are Insecure*, CRYPTO-GRAM NEWSLETTER, Nov. 15, 1999, <http://www.schneier.com/crypto-gram-9911.html> ("It might be a bitter pill for the entertainment industry to swallow, but software content protection does not work. It cannot work.").

itself expressly states its operation is not intended to affect fair use rights.²² Second, the DMCA does not prevent circumventing a copy-control measure, as opposed to an access-control measure, for a fair use purpose. Finally, the DMCA also incorporates a triennial review to be conducted by the Librarian of Congress on the advice of the Register of Copyrights to create necessary exemptions for particular classes of works from the operation of certain aspects of the anti-circumvention provisions of the act.²³

As this Article will demonstrate, none of these measures has proved particularly effective in protecting fair use. With regards to the first two provisions, the above example demonstrates that the loss of circumvention technology because of aggressive DMCA enforcement creates an effective ban on the activities of fair users.²⁴ The distinction between access-control and copy-control circumvention is mitigated because these different DRM measures are becoming increasingly merged in practice.²⁵ The triennial review mechanism also does not fully protect fair users because it only exempts classes of works, and does not regard an individual fair user's needs and demands.

The solution to the piracy puzzle may be to disaggregate the regulation of circumvention technologies from competing individual rights and interests in copyrighted works. This Article suggests a new approach for solving the digital piracy puzzle. It advocates preserving the current anti-circumvention provisions in the DMCA, while at the same time developing a separate administrative complaint mechanism for individual fair users to obtain particular fair uses of given works. The proposed system would also impose affirmative legal duties on copyright holders to make access to given works available to those seeking to make a fair use of those works. Fair use would be defined and protected as a legal right, and not a mere defense to claims of infringement because one of the underlying assumptions of the system would be that fair use is an important part of the copyright structure and of the social bargain underlying the grant of a copyright.

Unlike current approaches, this mechanism could be individually tailored to specific fair use complaints, and it would accommodate the timescale of individual fair users and their particular needs. Unlike the triennial review, it would not be based on identifying classes of works that may be exempted from the anti-circumvention provisions of the

22. 17 U.S.C. § 1201(c)(1) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”).

23. 17 U.S.C. § 1201(a)(1)(B)–(D).

24. See Samuelson, *supra* note 18, at 551.

25. It is difficult to think of a circumstance where circumvention of a copy-control measure would not also be prohibited as circumvention of a commensurate access-control measure. See R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619 (2003).

DMCA, nor would there be three-year time lags between determinations. The proposed system would prevent the balance of interests in digital copyrighted works from becoming too skewed against fair users between sets of administrative determinations.

Copyright holders would still retain a cause of action against those trafficking in anti-circumvention devices under the existing provisions of the DMCA. If fair use could be protected in other ways, without the potential fair user having to avail herself of such a device in the open market, there would be no reason to object to stringent enforcement of the anti-trafficking provisions. The assumption here is that if a simple, inexpensive, and individually-tailored complaint procedure could be put in place to preserve fair use, then there would be much less cause for concern about the effect of aggressive enforcement of the DMCA. Enforcement of the DMCA would also be easier because one could reasonably assume that much of the market for such circumvention technology would be to promote illegal digital piracy.

Another benefit of the proposed system is that it would provide a way to monitor changes in social norms relating to the boundaries of fair use in the digital age, thereby allowing the law reform process to respond to the new challenges posed by digital technology that threaten the existing balance of interests in digital copyrighted works. Additionally, such a system might ultimately encourage private settlement of complaints about lack of fair use for digital copyrighted works. In due course the market may create its own solutions for balancing these rights, particularly if the administrative mechanism generates data as to the boundaries of the fair use right in the digital age.

In order to explain the full impact of the system proposed in this Article, Part II sets out the relevant background to the enactment of the DMCA, including legislative intentions in relation to fair use and judicial interpretations of the DMCA with respect to fair use. Part III places the problem in a broader global context and surveys similar legislation in the European Union, with particular emphasis on recent British regulations which implemented a balance between copyrights and competing legitimate interests in copyrighted works different from the DMCA. Part IV develops the contours of the new administrative complaints procedure in more detail, including the suggestion that the nature and scope of the fair use doctrine needs to be more fully developed for the doctrine to be a meaningful part of copyright law in the digital age. Part V draws conclusions from the observations made in the previous sections and sets out ideas for future legal developments in balancing competing rights and interests in digital copyrighted works.

II. FAIR USE UNDER THE DMCA

A. The Legislative Framework

Concerned that the advent of digital technology could stifle rather than promote innovation in content industries, the World Intellectual Property Organization (“WIPO”) adopted two 1996 treaties to protect content industries against digital piracy.²⁶ The treaties encouraged signatories to provide legal sanctions for unauthorized circumvention of DRM measures that encrypted a copyrighted work²⁷ in order to promote the adoption of DRM measures. These measures did not have to be foolproof or unbreakable to attract legal protection. Provided that a given measure was sufficiently effective in operation to be categorized as an effective technological protection measure under relevant legislation, a remedy would be available to a content owner who claimed unauthorized access to or use of the work as a result of someone cracking a DRM system.²⁸

With the focus on regulating decryption technologies, the issue of protecting legitimate interests in copyrighted works against restrictive DRM measures was sidelined. Legislation enacted pursuant to the WIPO treaties inadequately protects the ability of individuals to make fair uses of a digital copyrighted work, partly because fair use is not regarded as a legal right to access and use a protected work. Instead, the prevailing view is that fair use is a mere defense to an act of copyright infringement.

Legislation that prevents acts of circumvention or trafficking in circumvention devices will encroach on fair use if it does not place affirmative obligations on copyright holders to make some allowance for fair use. To place such affirmative obligations on copyright holders realistically requires acceptance that fair use is a legally guaranteed right and not merely a tolerated allowance. Absent recognition of such a right, there appears no legal basis for the proposed obligation.

Although the acceptance of fair use as a legal right may seem like a new concept in copyright law that unfairly shifts the balance of interests away from copyright holders, it is not such a conceptual departure from the current law. While it is unclear whether fair use is

26. WIPO Copyright Treaty, *adopted* Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 65 [hereinafter WIPO Copyright Treaty of 1996]; WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 76 [hereinafter WIPO Performances and Phonograms Treaty of 1996].

27. *See* WIPO Copyright Treaty of 1996, *supra* note 26, art. 11; WIPO Performances and Phonograms Treaty of 1996, *supra* note 26, art. 18.

28. *See, e.g.*, 17 U.S.C. § 1201(a)(3)(B) (2000) (providing that “a technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work”).

recognized as a legal right, fair use has been established as an integral part of the social bargain embodied by copyright law.²⁹ Along with the idea-expression dichotomy,³⁰ fair use is an essential part in the balance of rights and interests to ensure an appropriate flow of information and ideas throughout society. Thus, even if there were good reasons in the past for relegating fair use to the status of a mere defense to copyright infringement, the advent of DRM measures that can restrict access to copyrighted works may require a shift in thinking, and elevation of that defense to an independent right of action. In other words, perhaps digital technology necessitates transforming fair use from a shield into a sword.³¹

Following the requirements of the 1996 WIPO treaties, Congress drafted the DMCA which, among other things, inserted a new chapter 12 into title 17 of the U.S.C. The WIPO Copyright Treaty of 1996 requires that:

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 respect of their works, which are not authorized by the authors concerned or permitted by law.³²

The WIPO Performances and Phonograms Treaty of 1996 contains similar provisions.³³ These treaties do not say anything more about the

29. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (containing majority and minority disagreement over the extent of transformative use necessary for finding of fair use); *321 Studios v. MGM Studios*, 307 F. Supp. 2d 1085, 1011 (N.D. Cal. 2004); cf. WILLIAM CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHTS, TRADE MARKS AND ALLIED RIGHTS* 808 (5th ed. 2003) (noting that British law generally assumes that fair dealing exceptions to copyright infringement, the British equivalent to fair use, are guaranteed rights of access and use, although there has historically been little actual debate about it).

30. See MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* § 2.03[D] (1978) (copyright may be claimed in the expression of a work but not in its underlying idea; this protects freedom of speech).

31. See *infra* Part IV.C.

32. WIPO Copyright Treaty of 1996, *supra* note 26, art. 11.

33. See WIPO Performances and Phonograms Treaty of 1996, *supra* note 26, art. 18.

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Id.

effect these requirements might have on interests in copyrighted works such as fair use, other than the above statement that legal protection shall be available for DRM measures used to restrict activities that are not permitted by law. Thus, the drafters of the treaties may have assumed that the domestic implementation of the relevant treaty terms would not adversely affect activities that are permitted by law, such as fair use.

The new chapter 12 of title 17, the DMCA, contains prohibitions on circumventing access-control measures,³⁴ as well as trafficking in devices that can circumvent access-control³⁵ and copy-control measures.³⁶ These prohibitions are buffered by both civil remedies and criminal penalties.³⁷ There is, however, no specific restriction on circumventing a copy-control measure because of the Congressional intention to preserve this fair use of copyrighted works.³⁸ In fact, Congress inserted a provision into the DMCA to make this clear. Subsection 1201(c)(1) provides that: “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”³⁹ Despite this language, fair use may not be an adequate defense to a DMCA claim.⁴⁰

Sections 1201(a)(1)(B) to (D) set out an administrative procedure to exempt certain classes of works from the provisions of § 1201(a)(1)(A). The exemption from the DMCA allows circumvention of access-control measures for those select classes of works. This procedure requires the Librarian of Congress to make triennial determinations of relevant classes of works based on the advice of the Register of Copyrights.⁴¹ In particular, such determinations are intended to be made by taking into account some of the classic fair use factors⁴²

34. 17 U.S.C. § 1201(a)(1)(A) (2000).

35. *Id.* § 1201(a)(2).

36. *Id.* § 1201(b).

37. *Id.* §§ 1203–1204.

38. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1120 (N.D. Cal. 2002) (stating that Congress did not ban the act of circumventing use restrictions — as compared with access restrictions — because it sought to preserve the fair use rights of persons who had lawfully acquired a work).

39. 17 U.S.C. § 1201(c).

40. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 322–24 (S.D.N.Y. 2000) (holding that fair use is not a defense to DMCA infringement), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); Burk, *supra* note 20, at 1137–38 (“[T]he DMCA makes no explicit provision for fair use with regard to the anticircumvention right itself, as distinct from the copyright in the underlying work.”). *But see Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1200–01 (2004) (suggesting there must be a link between access and copyright infringement for the DMCA anticircumvention provisions to apply in a given case).

41. 17 U.S.C. § 1201(a)(1)(C).

42. *See id.* § 1201(a)(1)(C)(i)–(iv) (requiring the Librarian of Congress to take into account, among other things: (a) “the availability for use of works for nonprofit archival, preservation, and educational purposes”; (b) “the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment,

as well as other relevant issues.⁴³ The first set of exemptions was published in October 2003 and exempted four classes of works from the access-control prohibitions.⁴⁴ The limited scope of the determinations is somewhat disappointing from the perspective of protecting legitimate interests in copyrighted works from restrictive DRM measures bolstered by the DMCA. Additionally, as the following discussion will demonstrate, the current triennial administrative mechanism has other deficiencies in practice.

B. The Role of Fair Use in Copyright Law

Fair use has always been a problematic concept within copyright law. Although it is an important defense against a claim of copyright infringement, its precise boundaries have never been clear.⁴⁵ Indeed, fair use is an equitable doctrine that has historically benefited from flexibility.⁴⁶ Fair use began as a judicially created doctrine and was later codified in § 107 of Title 17. The fair use provision as set forth in the United States code is vague. It provides neither a clear definition of fair use nor a clear description of how the fair use doctrine operates in practice. Rather, it mentions classes of uses that might

news reporting, teaching, scholarship, or research”; and (c) “the effect of circumvention of technological measures on the market for or value of copyrighted works”).

43. *Id.* § 1201(a)(1)(C)(v) (stating that in making a determination, the Librarian of Congress should consider “such other factors as the Librarian considers appropriate”).

44. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, 62,013–14 (Oct. 31, 2003) (to be codified at 37 C.F.R. pt. 201), *available at* <http://www.copyright.gov/fedreg/2003/68fr2011.html>. This rule exempts the following classes of works from the access control provisions:

1. Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail. . . .
2. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. . . .
3. Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. . . . [and]
4. L fr202L(ter)4(n)-35stri mrmeBook0016 Tc 0.0266 Tw -04812 -1.1madia 9(ewhen)5(vl3(e)28

typically be thought of as fair use in an inclusive, as opposed to exclusive, manner.⁴⁷

Section 107 lists four factors to which courts can refer in determining whether a particular use is a fair use. Again, these factors are not decisive, but are intended to allow courts the flexibility to develop the doctrine appropriately in the face of new factual circumstances and new technologies.⁴⁸ The four factors are:

(1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁹

Obviously, nothing in § 107 defines clear boundaries for the fair use doctrine, leaving this a matter for incremental judicial determinations. However, two questions have come to plague the fair use doctrine in recent years because of the challenges new technologies pose to copyright law. These questions are:

1. How should fair use be characterized legally? In other words, is fair use a legally guaranteed right, a bare privilege, or a mere tolerated inconvenience for the copyright holder?
2. How productive or transformative does a use have to be in order to qualify as fair use?⁵⁰

Courts and commentators have found different answers to these questions.⁵¹ Although in the past these inquiries may have seemed somewhat academic, they have both become extremely important in

47. See 17 U.S.C. § 107 (listing fair use purposes including “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”).

48. See LEAFFER, *supra* note 45, at 429.

49. 17 U.S.C. § 107(1)–(4).

50. Productive or transformative uses might be described as uses that “build on the works of others by adding their own socially valuable creative element.” LEAFFER, *supra* note 45, at 430. A discussion of this issue was notably absent in the recent Supreme Court decision in *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005). There, the Court chose to focus instead on creating a new inducement test for secondary copyright liability rather than revisiting the fair use factors that were considered by the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

51. See, e.g., *Sony*, 464 U.S. 417 (disputing between majority and minority judges over the extent of transformative use necessary for finding fair use); LEAFFER, *supra* note 45, at 428 (citing *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966)) (discussing fair use as a privilege); CORNISH & LLEWELYN, *supra* note 29.

the face of digital technologies that can easily restrict access to, and unauthorized uses of, copyrighted works. The first question is the most important for the purposes of this discussion. If fair use is a legally guaranteed right, technological measures should not be employed by copyright holders to the extent that they curtail such rights. If the only way to prevent digital copyright piracy is to employ such measures, it should be incumbent on copyright holders to facilitate the right to fair uses of their works. On the other hand, if fair use is only a tolerated inconvenience, then arguably a copyright holder has every right to utilize whatever technological and contractual measures possible to prevent digital piracy, and if fair use is a casualty in this battle, so be it.⁵²

It is therefore important in the digital age to answer this question about the nature of fair use. This Article takes the stance that developments in digital technology require fair use to be accepted as a legally guaranteed right capable of forming the basis of a legal action to impose a duty on a copyright holder to facilitate a permitted use. Even if fair use has not been characterized in this way under pre-digital age copyright law, the time has come to elevate its status to combat the imbalances created by DRM measures, now bolstered by legislation such as the DMCA.

As to the second question about productive or transformative uses, this issue attains great significance in the digital age because of the abundance of copying enabled by peer-to-peer file-sharing software.⁵³ It may seem more immediately relevant in situations like the *Napster*⁵⁴ and *Grokster*⁵⁵ file-sharing scenarios than in the DRM context. However, if fair use is to be acknowledged as, or elevated to the status of, a legally guaranteed right, it is important to have some idea of its scope. File-sharing technologies raise the issue previously considered by the Supreme Court in the well-known *Sony Corp. v. Universal Studios, Inc.*⁵⁶ litigation regarding the scope of fair use in terms of personal copying, although more recently the Supreme Court avoided revisiting or clarifying these issues in *Grokster*. If fair use is a legal right, it will be important to make decisions as to whether even small-scale copying of digital works for personal uses will fall within its scope. Are these uses sufficiently productive or transformative to be regarded as fair uses and, indeed, do they have to be?

52. Most of the discussion in this Article focuses on the use of DRM measures to prevent unauthorized access to, and use of, digital copyrighted works. However, contractual restrictions obviously also play an important role here and are mentioned throughout the following discussion where appropriate.

53. See generally Yen, *supra* note 2.

54. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

55. *Grokster*, 125 S. Ct. 2764.

56. *Sony*, 464 U.S. 417 (1984).

This question does not necessarily need to be answered for the purposes of the discussion here about protecting fair use in light of DRM measures. It is worth noting, however, that a mechanism that facilitates fair use, such as that presented in this Article, may generate important and useful data about emerging social norms relating to fair use — including in the personal copying context. Such a mechanism has a significant advantage over waiting for legislative and judicial determinations on the questions raised above. A fast and inexpensive administrative procedure can generate data faster, and perhaps capture a greater range of social interests, than judicial proceedings. This data can, in turn, inform future legal developments at the legislative and the judicial levels. The mechanism proposed here is, in effect, an evolving system where administrative decisions and data feed into judicial and legislative processes, whose determinations ultimately feed back into the administrative procedure. After several years of this system, a much more sophisticated picture of socially and economically appropriate norms relating to competing uses of digital copyrighted works could be generated and applied within the legal process.

The other advantage of the proposed administrative procedure is that it removes the current conflict between regulating circumvention technologies and preserving fair use. If legitimate uses are preserved under a stand-alone system, then DMCA enforcement against marketed decryption technologies would not have its current negative effect on potential legitimate users of an encrypted work. A successful claim of a DMCA violation would no longer adversely affect legitimate uses of copyrighted works, though it would likely stifle the availability of a decryption technology that has both legitimate and illegitimate possible uses. Protection of fair use as a stand-alone entitlement unaffected by the anti-piracy provisions of the DMCA would likely quiet many objections to aggressive enforcement of the DMCA. In other words, the piracy puzzle could be solved by disaggregating the issue of facilitating fair use from the issue of regulating piracy-enabling technologies.

C. Criticisms of Fair Use Protection Under the DMCA

The DMCA's anti-circumvention and anti-trafficking provisions have attracted a great deal of criticism over the years, notably for their failure to maintain an adequate balance of interests in digital copyrighted works.⁵⁷ Professor Samuelson has noted that even though the

57. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (arguing that the DMCA will compromise the diversity of available information sources and abridge freedom of speech); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000) (exploring the deficiencies of the user exemptions in the DMCA); Tricia J. Sadd, *Fair Use as a Defense Under the Digital Millennium Copyright*

DMCA appears to protect fair use rights by failing to expressly prohibit the circumvention of copy-control measures, the legislation in fact does little to support fair uses of protected works⁵⁸ because most potential fair users do not have the technological know-how to access protected works in order to make a fair use of them,⁵⁹ and because there is no provision in the DMCA to permit the distribution of circumvention tools to enable fair use.⁶⁰ The DMCA should contain an exemption for accessing a protected work in order to make a fair use of it.⁶¹ More recently, Professor Reese has argued that the distinction between access prohibitions and use prohibitions under the DMCA is blurred through judicial merger of the two DRM measures and corporate moves to merge the controls.⁶² He pointed out that access and copy control measures are increasingly merged in practice.⁶³ Accord-

Act's Anti-Circumvention Provisions, 10 GEO. MASON L. REV. 321 (2001) (arguing that courts have given incentives to copyright holders at the cost of limiting non-infringing uses by prohibiting fair use defenses to violations of the DMCA); Samuelson, *supra* note 18 (arguing that the DMCA's anti-device rules are overbroad and must be constrained to preserve fair uses and prevent harm to technological innovation and competition); John R. Therien, *Exorcising the Specter of a "Pay-Per-Use" Society: Toward Preserving Fair Use and the Public Domain in the Digital Age*, 16 BERKELEY TECH. L.J. 979 (2001) (warning that the DMCA will over-propertize digital information if courts do not take an adequate stance on protecting fair uses); Harry Mihet, *Universal City Studios, Inc. v. Corley: The Constitutional Underpinnings of Fair Use Remain an Open Question*, 2002 DUKE L. & TECH. REV. 0003 (2002), <http://www.law.duke.edu/journals/dltr/articles/PDF/2002dltr0003.pdf> (noting that the DMCA's provisions potentially pose constitutional problems by simultaneously prohibiting and safeguarding expression).

58. See 17 U.S.C. § 1201(b)(1) (2000) (prohibiting trafficking in a device that can circumvent a copy-control measure, but not circumvention of a copy-control measure per se); *Id.* § 1201(c)(1) ("Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."); Samuelson, *supra* note 18, at 539–57.

59. Samuelson, *supra* note 18, at 551 ("It is unclear whether Congress intended for the technologically savvy who could 'do it themselves' to be the only ones who could engage in privileged acts of circumvention.").

60. *Id.* at 548 ("[S]ection 1201 contains no provision enabling the development or distribution of circumvention tools to enable fair use or other privileged uses in terrain which section 1201(a)(1)(A) doesn't reach (i.e., making fair uses of lawfully acquired copies).").

61. There are several bills before Congress that attempt to clarify this situation. See, e.g., Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, H.R. 1066, 108th Cong. (2003) [hereinafter BALANCE Act]; Digital Media Consumers' Rights Act of 2003, H.R. 107, 108th Cong. § 5 (2003) [hereinafter DM CRA].

62. See Reese, *supra* note 25, at 619.

63. *Id.* at 621.

Copyright owners may . . . be able to employ technological protection systems that incorporate both an access control and a rights control. So far, courts have treated such merged control measures as entitled to the legal protections of both access- and rights-control measures, even when the system was essentially directed only at preventing copying and distribution, rather than at controlling access. If courts continue to treat merged control measures in this manner, copyright owners may have an incentive to use such merged controls in order to maximize their legal protection.

Id.

ingly, a legislative prohibition on unauthorized access effectively prohibits use, even if the use in question would otherwise be preserved under fair use doctrine.⁶⁴

The DMCA thus has the potential to enhance the rights of copyright holders in digital works significantly. Indeed, this may have been the legislative intention — the government has been concerned with the promotion of digital commerce⁶⁵ and the prevention of digital piracy.⁶⁶ These are difficult tasks to achieve in a borderless digital world. In particular, it is difficult to strike a legislative balance that protects the interests of copyright holders from the very real threat of digital piracy, without at the same time compromising other legitimate interests in digital content, such as fair use.

Outside of the nominal attempts to protect fair use interests in digital copyrighted works, the enactment of the DMCA demonstrates congressional intent to protect other specific legitimate interests in digital copyrighted works. The legislation contains provisions that exempt persons from DMCA liability in situations involving: (a) non-profit libraries, archives, and educational institutions making copies of works for the purpose of evaluating their suitability for activities permitted by copyright law;⁶⁷ (b) law enforcement and other government activities;⁶⁸ (c) reverse engineering;⁶⁹ (d) encryption research;⁷⁰ (e) protecting personally identifying information;⁷¹ and (f) security testing.⁷² The DMCA also requires the Librarian of Congress to conduct triennial reviews of § 1201(a)(1).⁷³

Some of the activities protected under the DMCA may overlap with fair use. For example, reverse engineering has been held to con-

64. *See id.*

65. *See* United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1129 (N.D. Cal. 2002) (noting the government's interest in promoting electronic commerce).

66. Burk, *supra* note 20, at 1135; *see* Electronic Frontier Foundation, *supra* note 20.

67. 17 U.S.C. § 1201(d) (2000).

68. *Id.* § 1201(e).

69. *Id.* § 1201(f). Reverse engineering has been associated with fair use doctrine prior to the enactment of the DMCA, at least in American jurisprudence. *See, e.g.*, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1993) (holding that decompilation of a computer program to create a compatible non-infringing program is a fair use); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 843 (Fed. Cir. 1992) (discussing how reverse engineering can be a fair use); LEAFFER, *supra* note 45, at 450–52 (discussing generally reverse engineering and fair use in the software context). It is not clear, however, that fair use applies as a defense to a DMCA infringement claim, as distinct from a copyright infringement claim. *See, e.g.*, Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 321–24 (S.D.N.Y. 2000) (holding that the need for circumvention tools to make fair use copies is not a defense to a DMCA violation); Burk, *supra* note 20, at 1137–38 (noting that the DMCA makes no explicit provision for fair use with regard to the anti-circumvention right itself, as distinct from the copyright in the underlying work).

70. 17 U.S.C. § 1201(g).

71. *Id.* § 1201(i).

72. *Id.* § 1201(j).

73. *Id.* § 1201(a)(1)(B)–(D).

stitute a fair use in a number of copyright cases.⁷⁴ Most of the specific DMCA defenses are, as yet, judicially untested and some commentators are concerned about their likely efficacy in practice.⁷⁵ Regardless of how effective these defenses may be, the list of protected purposes does give some indication as to what Congress felt were legitimate uses of a copyrighted work in the digital age.

Despite the express intentions of the drafters of the DMCA to preserve legitimate interests in accessing and using otherwise protected works, judicial interpretations have chilled innovation and stifled certain legitimate interests in copyrighted works. Examining some of the recent case law interpreting the DRM-related provisions of the DMCA is the best way to illustrate the tensions currently arising in relation to the balance of rights and interests in digital content.

1. *Universal City Studios, Inc. v. Reimerdes*

The first significant judicial interpretation of the DMCA's anti-trafficking provisions was the case of *Universal City Studios, Inc. v. Reimerdes*.⁷⁶ This case deals with issues arising from the introduction of DVDs and DVD encryption. When major American motion picture studios began to market movies in DVD format, they were concerned about the ease with which digital content could be cheaply, quickly, and near-perfectly copied by pirates.⁷⁷ They thus employed a DRM measure called Content Scrambling System ("CSS") to encrypt DVDs and protect them against unauthorized copying.⁷⁸

Prior to the *Reimerdes* litigation, the movie studios had made agreements with manufacturers of DVD players for those manufacturers to incorporate software code into DVD players that would enable them to decrypt the CSS code and play a protected DVD, but not copy its content. Shortly after DVDs were released into the market, however, a decryption algorithm for the CSS code was developed by a Norwegian teenager as part of a high school science project. The de-

74. See, e.g., *Sega Enters.*, 977 F.2d 1510; *Atari Games*, 975 F.2d at 842.

75. See, e.g., Burk, *supra* note 20, at 1138–39 (suggesting that the 17 U.S.C. § 1201(f) exemption to anticircumvention liability only applies to the creation of interoperable software and does not extend to reverse engineering hardware or data). Presumably this implies that the exemption will not save reverse engineering undertaken for the purpose of creating an interoperable tangible good that incidentally incorporates the software in question.

76. 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

77. See generally *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2770 (2005) (describing the characteristics and advantages of peer-to-peer networks for information sharing).

78. CSS code can also be used to regionally encode digital works such as movies in DVD format and digital video game cartridges, a fact that has some significance in the Australian case of *Sony v. Stevens*. *Kabushiki Kaisha Sony Computer Entm't v. Stevens* (2002) 200 A.L.R. 55, *aff'd in part, rev'd in part* *Kabushiki Kaisha Sony Computer Entm't v. Stevens* (2003) 200 A.L.R. 96.

ryption code was called “DeCSS.” Eventually, the DeCSS code made its way to the United States via the Internet, and became widely available to those who wished to decrypt, and therefore copy, DVDs in the United States.⁷⁹

The movie studios were obviously concerned about the impact of DeCSS on their ability to profit from marketing DVDs. They were unable to take direct action against the student in Norway who invented DeCSS, however, because he was not within the jurisdiction of the United States. In any event, the decryption activities he engaged in took place before the effective date of the DMCA.⁸⁰ It was also unwieldy for the motion picture studios to attempt to proceed against individuals who may have downloaded the DeCSS code to decrypt and copy DVDs. It would have been difficult to identify prospective defendants and to gather necessary evidence against each of them individually. In any event, it may have been assumed that much of the individual private copying of DVDs could be justified under the fair use doctrine.⁸¹

Thus, the studios proceeded against the operators of a computer hacking website that posted the DeCSS code, encouraged others to download and use it, and provided links to other websites that contained copies of the DeCSS code for download.⁸² The case proceeded on the basis that the operators of the website had trafficked in a device (the DeCSS code) that had no significant purpose other than to circumvent a copy-protection measure. The movie studios were successful in obtaining injunctions against the operators of the hackers’ website containing the DeCSS code. The injunctions prevented the website operators from including the code on their website and also required them to remove hyperlinks to other websites where the DeCSS code was available for download.

The defendants raised arguments based on the First Amendment to the effect that software code, such as the DeCSS code, is protected speech, and any legislation impeding the dissemination of this code is an unjustified restriction on speech. They also argued that the fair use doctrine is a constitutionally protected right based on the First Amendment. The defendants were unsuccessful on both counts. The

79. *Reimerdes*, 111 F. Supp. 2d 294.

80. The Motion Picture Association of America (“MPAA”), however, later apparently brought pressure on Norwegian authorities to prosecute the student who decrypted CSS under Norwegian criminal law once he had attained the age of majority in Norway. The student was eventually acquitted of all criminal charges. *See* Press Release, Electronic Frontier Foundation, Norwegian Teenager Jon Johansen Acquitted in DVD Case: Legal to Descramble his DVDs on Linux Computer in Norway (Jan. 7 2003), http://www.eff.org/IP/Video/Johansen_DeCSS_case/20030107_eff_pr.html.

81. As noted above, it is unclear whether personal private copying of this kind would be excused under the fair use doctrine.

82. 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff’d sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

trial and the appellate court both held that although software code does have an expressive component that may be protected as First Amendment speech,⁸³ the DMCA satisfied the intermediate scrutiny test developed for content-neutral regulation of such expression.⁸⁴ Further, and more importantly for the purposes of this discussion, the Second Circuit noted that the Supreme Court has never held that the fair use doctrine is constitutionally guaranteed, even though previous cases have referred to it as being part of the balance between copyright law and free speech.⁸⁵

The court also made the point that the defendants could not, in any event, avail themselves of the fair use defense because they were not engaging in fair uses of copyrighted works, even if their conduct involved in part the dissemination of circumvention tools to enable others to engage in such uses. The court noted that the express legislative preservation of the fair use defense in the DMCA⁸⁶ said nothing about rights to circumvent a digital lock, or to traffic in a device that could circumvent a digital lock for the purposes of making a fair use. In this context, the appellate court noted that § 1201(c)(1) “simply clarifies that the DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred.”⁸⁷ In other words, the DMCA should be interpreted to ensure that fair use is not prohibited, even if access to the copyrighted work was originally obtained in a manner made illegal by the DMCA.⁸⁸

2. *United States v. Elcom Ltd.*

Subsequent to the *Reimerdes* decision there have been two other federal court cases that involved similar factual situations. They each resulted in an outcome similar to that in *Reimerdes*. One of the cases involved the motion picture industry, like *Reimerdes*, and the other

83. *Universal City Studios v. Corley*, 273 F.3d 429, 447 (2d Cir. 2001).

Computer programs are not exempted from the category of First Amendment speech simply because their instructions require use of a computer. A recipe is no less ‘speech’ because it calls for the use of an oven, and a musical score is no less ‘speech’ because it specifies performance on an electric guitar.

Id.

84. *See id.* at 455 (“[A] content-neutral regulation need not employ the least restrictive means of accomplishing the governmental objective. . . . It need only avoid burdening ‘substantially more speech than is necessary to further the government’s legitimate interests.’”).

85. *Id.* at 458 (“[T]he Supreme Court has never held that fair use is constitutionally required, although some isolated statements in its opinions might arguably be enlisted for such a requirement.”).

86. 17 U.S.C. § 1201(c)(1) (2000).

87. *Corley*, 273 F.3d at 443.

88. *Id.*

involved Adobe's digital eBook format. The eBook case, *United States v. Elcom Ltd.*, arose from an unusual series of events involving the activities of a Russian corporation, Elcom Ltd., and one of Elcom's employee's — a computer programmer named Dmitri Sklyarov.⁸⁹ *Elcom* was the first time software developers were prosecuted under the criminal provisions of the DMCA.⁹⁰

The eBook technology at issue in this case gave online book publishers and distributors the ability to limit a purchaser's use of an eBook. For example, the technology could allow a purchaser to read the book on one computer, but not to copy it to another computer or print out a hard copy.⁹¹ Elcom and Sklyarov developed software called the Advanced eBook Processor ("AEBPR") that could disable these restrictive features of Adobe's proprietary eBook format. Their software could enable activities not authorized by the original publisher or distributor of an eBook.

AEBPR's ability to convert a restricted eBook file into a standard PDF file enabled purchasers of eBooks to engage in fair uses of legitimately purchased eBooks without infringing standard copyright law.⁹² The *Elcom* court assumed that fair use included the right to read an eBook on a different computer than the one to which it was originally downloaded, to make a back-up copy of the eBook, and to print a hard copy of the eBook. While AEBPR facilitated these fair uses of the eBook, it also allowed a user to infringe copyrights by making and distributing unlawful copies of the eBook.

United States v. Elcom Ltd. commenced with Sklyarov's arrest when he attended a computer science conference in Las Vegas in 2001.⁹³ American authorities detained him from July 16th to December 13th of 2001. He was charged with five counts of violating federal law: four counts of alleged circumvention offenses including aiding and abetting circumvention offenses under the DMCA, and one charge of conspiracy to traffic in a circumvention program. Sklyarov faced up to 25 years in prison and a fine of up to \$2,250,000. His employer, Elcom, faced a penalty of \$2,500,000. He was eventually released from custody and allowed to return to Russia as part of an agreement that he would testify in the criminal case against his employer, and that criminal charges against him would be dropped.

In the ensuing litigation, the defense raised arguments similar to those raised in the *Reimerdes* case, arguing that the DMCA was constitutionally invalid under the First Amendment, and that the decrypt-

89. 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

90. Electronic Frontier Foundation, *US v. ElcomSoft & Sklyarov* FAQ, http://www.eff.org/IP/DMCA/US_v_Elcomsoft/us_v_sklyarov_faq.html#ChargedWith (last visited Oct. 2, 2005).

91. *Elcom*, 203 F. Supp. 2d at 1117–18. Facts in this paragraph all come from this source.

92. *Id.* at 1118–19. Facts in this paragraph all come from this source.

93. See Electronic Frontier Foundation, *supra* note 90.

tion technology in question, AEBPR, could be used by purchasers for fair use purposes that were protected by the First Amendment.⁹⁴ The *Elcom* court rejected these arguments for reasons consistent with *Reimerdes*. Although *Elcom* was ultimately acquitted by a jury because it did not intend to violate the law, the jurors agreed that the AEBPR product was illegal.⁹⁵

The court in *Elcom* made some telling observations about the DMCA and fair use that are central to the argument made in this Article in favor of an administrative mechanism to facilitate the fair uses of protected copyrighted works in the face of digital anti-piracy legislation. In particular, with respect to the argument that the DMCA adversely affected fair use rights, the court noted:

[W]ith regard to the argument that fair use rights are impaired [by the DMCA], the DMCA does not eliminate fair use or substantially impair the fair use rights of anyone. Congress has not banned or eliminated fair use and nothing in the DMCA prevents anyone from quoting from a work or comparing texts for the purpose of study or criticism. The fair user may find it more difficult to engage in certain fair uses with regard to electronic books, but nevertheless, fair use is still available.⁹⁶

The court here expressly accepts that digital technology does have an impact on fair use by making it more difficult for a potential fair user to exercise her fair use right or privilege in the face of DRM measures applied to a work. Additionally, the court implies that the DMCA is effectively neutral on this point and neither hinders nor assists the fair user. However, even if the DMCA does not ban or eliminate fair use as the court suggests, it does have a significant impact.

Arguably the *Reimerdes* and *Elcom* courts should have read more significance into § 1201(c)(1) of the DMCA, given that it expressly preserves fair use in the face of the new anti-circumvention provisions. Lawmakers attempted to clarify this issue through new legislation that would have guaranteed the right of a user to circumvent a DRM measure or to traffic in a circumvention device in order to make

94. *Elcom*, 203 F. Supp. 2d at 1134–35.

95. Lisa M. Bowman, *ElcomSoft Verdict: Not Guilty*, CNET NEWS.COM, Dec. 17, 2002, <http://news.com.com/2100-1023-978176.html>. Interestingly, the defense in the *Elcom* case also argued that the DMCA was unconstitutional for being too vague in terms of what conduct was deemed to be illegal. This argument was also unsuccessful. See *Elcom Ltd.*, 203 F. Supp. 2d at 1135–37.

96. *Elcom*, 203 F. Supp. 2d at 1134–35.

a fair use of a copyrighted work.⁹⁷ Both the Benefit Authors without Limiting Advancement or Net Consumer Expectations Act (“BALANCE Act”)⁹⁸ and the Digital Media Consumers’ Rights Act (“DMCRA”),⁹⁹ if enacted by Congress, would allow circumvention and trafficking in a circumvention device when such a circumvention was excused by the fair use defense.¹⁰⁰

Like the suggestions made in this Article for an administrative complaints procedure to ensure the fair use of digital media, both the BALANCE Act and the DMCRA treat fair use as a constitutionally guaranteed right, or at least implicitly accept that fair use should be viewed as such. However, a significant problem with these legislative initiatives is that they do not impose any affirmative duties on copyright holders to facilitate access to and use of protected copyrighted works for fair use purposes. Again, they rely on the availability of circumvention devices for those who wish to pursue the fair use of copyrighted works. If litigation continues to be resolved in the same manner as *Reimerdes* and *Elcom*, such devices may not be available to potential legitimate users of copyrighted works, and fair use could be severely hindered.¹⁰¹

The balance between the proprietary rights of digital content holders and those with competing interests in proprietary information is shifting. Courts, in their efforts to uphold Congress’ intention to prevent digital piracy, are increasingly opting to promote only the most difficult and old-fashioned methods of copying.¹⁰² Additionally, courts have not found any obligation to make works accessible in the first place so that fair use activities can be pursued. Most of the judicial discourse to date in the United States has focused on use, rather than access, despite the fact that DRM measures prohibiting access and use may often be merged in practice.¹⁰³ While such an approach may be valid given the current drafting of the DMCA, the distinction between access and use restrictions may warrant a new approach.¹⁰⁴

97. See the discussion of similar initiatives under recent amendments to the Copyright, Designs and Patents Act, 1988, c. 48 (Eng.), *infra* Part III.B.

98. BALANCE Act, *supra* note 60.

99. DMCRA, *supra* note 60.

100. *Id.* § 5(b) (allowing circumvention of a technological protection measure if it does not result in a copyright infringement); BALANCE Act, *supra* note 60, § 5 (allowing circumvention and/or trafficking in a circumvention device for the purposes of making a non-infringing use of a copyrighted work in certain circumstances).

101. Similar concerns may also develop with respect to file-sharing technologies depending on how the new *Grokster* inducement test is applied.

102. For example, transcribing a passage of an eBook by hand, rather than making a digital copy, would be acceptable. A user facing DRM measures could not electronically cut and paste the same segment without the use of digital decryption technology.

103. See Reese, *supra* note 25, at 621.

104. *Id.* at 657–65 (suggesting some possible legislative approaches to the current problems of merged access and control measures).

3. *321 Studios v. MGM Studios, Inc.*

The case of *321 Studios v. MGM Studios, Inc.* is a more recent example of the fading focus on fair use in the battle against digital copyright piracy.¹⁰⁵ This case, like *Reimerdes*, involved a defendant trafficking in DVD circumvention software that works against the CSS code employed by the motion picture industry in marketing its DVDs. The defense in *321 Studios* raised similar arguments to those in *Reimerdes* and *Elcom* and was similarly unsuccessful. The court predictably held that creating and marketing products that enable fair use of a digital copyrighted work will infringe the DMCA if they can be used to circumvent a DRM measure. The court noted that there is no clear authority indicating that fair use is a constitutionally guaranteed right.¹⁰⁶ After *321 Studios*, it certainly appears that fair use is not a defense to a DMCA infringement claim.

The main factual distinction between this case and *Reimerdes* is that 321 Studios marketed and sold software products for copying DVDs with a particular emphasis on fair use with their software, such as enabling the production of backup copies of legitimately purchased DVDs. 321 Studios sought declaratory relief in part because their software had substantial non-infringing uses. Nevertheless, this argument met the same fate as the analogous arguments in *Elcom* and *Reimerdes*. The court again took the view that the DMCA does not restrict fair use, and that prohibiting trafficking in circumvention technologies does not impinge on the ability to make fair use of a copyrighted work.

The court in *321 Studios* made some reference to the difficulty of increasingly merged access and copy control measures and accepted that some DRM measures effectively control access and therefore restrict a potential fair user's ability to access a copyrighted work in order to make a fair use of it.¹⁰⁷ However, the court noted that, at least on the facts in *321 Studios*, the purpose of the access control measures employed by the movie studio plaintiffs was to prevent copying even though it incidentally prevented access. Thus, the studios' measure was protected by § 1201(b)(1) of the DMCA. Again, this is an example of how the technical merger of access and copy control measures leads to situations where applying the DMCA as currently drafted impinges on fair use in an undesirable way.

Some of the most obvious concerns about the DMCA and judicial determinations involving its anti-trafficking provisions relate to the balance between the protection of proprietary interests in digital copyrighted works and the protection of other legitimate interests. The fate

105. 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

106. *Id.* at 1101.

107. See Reese, *supra* note 25.

of the fair use doctrine is uncertain given that courts have not regarded it as a legally guaranteed right when interpreting the DMCA. Additionally, the fading distinction between DRM measures restricting access and use of digital copyrighted works appears to be leaving some potential fair users out in the cold. Although there is technically no ban on fair use under the DMCA, as the *Elcom* and *321 Studios* courts take pains to point out, there is little assistance provided to potential fair users who cannot access a work as a result of a DRM measure. There is certainly nothing in the DMCA as it is currently drafted that compels copyright holders to facilitate access to digitally encrypted works for people who wish to make fair use of those works.

The United States and other jurisdictions need to become more proactive to achieve an appropriate balance of interests between access to and use of digital copyrighted works. Indeed, some legislative initiatives have moved in this direction, most notably with the current triennial review of the DMCA by the Librarian of Congress and the proposed BALANCE Act and DMCRA measures described herein. Other countries are experimenting with different approaches to facilitating fair use of digitally encrypted works. The United Kingdom has recently adopted an interesting variation on the idea of an administrative complaints procedure to promote fair uses of such works.¹⁰⁸ The success of these initiatives in practice remains to be seen.

Laws in the digital copyright area should be aimed at encouraging, rather than stifling, innovation. Laws that effectively prohibit all unauthorized access are misguided because copyright holders are naturally more concerned about their rights than about fostering innovations that would allow fair users to access their works. However, it has been difficult to find alternatives, particularly with the digital content industries so focused on regulating technologies that could be used to injure their copyright interests. Thus, the answer may be to separate questions relating to fair use from attempts to prevent digital copyright piracy. Fair use could be facilitated under a stand-alone system, rather than as a defense to the operation of the DMCA. Such an administrative construction might provide a more effective and nuanced solution to the problems identified herein and might strike a better balance between competing interests in copyrighted digital works, while at the same time leaving the existing anti-piracy laws undisturbed.

4. The Triennial Administrative Review Mechanism

As noted in the previous Section, the triennial review is intended to exempt certain classes of copyrighted works from the operation of

108. See *infra* Part III.A.

the anti-circumvention provisions of the DMCA.¹⁰⁹ The relevant provisions do not exempt any activities related to circumventing a copy-control measure, nor do they exempt trafficking in any anti-circumvention devices, whether those devices circumvent access or copy control measures, or both.

The triennial review, while useful in other ways, does not ensure the fair use of DRM-protected works. As with the BALANCE Act and the DMCRA, the triennial review mechanism places no affirmative duties on copyright holders to facilitate fair use. Even for those works that are exempted from the DMCA, the anti-trafficking provisions still apply and effectively restrict the availability of devices that can circumvent DRM. Although the DMCA's anti-circumvention provisions arguably do not apply to accessing a work, these provisions nevertheless fail to require a copyright holder to make access available. As a result, the average person cannot engage in fair use, even though fair use is statutorily allowed. The DMCA effectively destroys fair use when the user does not have the technological savvy to circumvent the technology nor the ability to acquire technology from others.

The triennial review procedure also does not deal with exemptions from copy-control technology. Thus, to the extent that an access-control measure is not merged with a copy-control measure, the ability of an individual to gain access to the work by circumventing the access-control measure does not assist the individual in making a copy for fair use purposes.

The triennial review mechanism is also not well-suited for responding to concerns of potential fair users in a timely manner. Despite the rapid pace of technological development in information technologies, the review is only conducted every three years, and the Librarian of Congress has so far taken a fairly conservative stance on the number and type of exemptions to grant in any given review period.¹¹⁰ In addition, the recommendations made are not specifically tailored to the needs of individual fair users, but rather focus on classes of works that should be exempted from DMCA protection. By definition, this will tend to make the class of available works much smaller than they might be if the Librarian of Congress or another administrative body were instead asked to determine protected uses on a case-by-case basis.

Because the administrative determinations are drafted in terms of exempting classes of works from the DMCA's access-control provi-

109. 17 U.S.C. § 1201(a)(1)(B)–(D) (2000).

110. Only four minor exemptions were made in the initial 2003 review of the operation of the anti-circumvention provisions, despite the fact that representations were made to the Registrar of Copyrights and the Librarian of Congress in relation to other classes of works. See Library of Congress, Copyright Office: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, C.F.R. § 201.40(b) (2004).

sions, rather than specific uses of relevant works, the administrative decision-makers are more likely to defer to copyright interests. When forced to make exemptions on whole classes of works, the Librarian of Congress would be much more likely to protect copyright holders by limiting such exemptions to more obscure or obsolete works so as not to discourage innovation in a particular copyright industry.¹¹¹ Thus, the Librarian is unlikely to exempt many classes of works from the provisions of § 1201(a)(1)(A).

The administrative complaints procedure advocated in this Article, on the other hand, focuses on protecting individual uses of copyrighted works regardless of the type of work. This approach can be tailored to the specific needs of individuals. It is more sophisticated and nuanced than the triennial review mechanism, and it places additional burdens on copyright holders. Given the current tilt of copyright interests in favor of rights-holders this development may be desirable. Further, the fact that copyright holders already possess the technological ability to provide access to particular people for specific purposes decreases the potential impact of additional burdens.

III. THE GLOBAL DIMENSION

A. The European Union Copyright Directive

In the digital copyright age the problem of digital pirates profiting at the expense of copyright holders is not peculiar to the United States. Although the United States was the first to enact DRM-supporting legislation, other countries soon followed suit. With each new iteration of DRM-supporting legislation, the place of fair use in the digital copyright arena was given more consideration. The British regulations adopted in 2003 are a good example of a legislative attempt to strike an effective balance between fair users and copyright holders.

The United Kingdom has generally been more guarded in its approach to the issue of digital copyright anti-piracy legislation than the United States, with an increased focus on protecting an appropriate balance of competing interests in digital information products. The final British legislative package, the Copyright and Related Rights Regulations 2003¹¹² (the “CRR Regulations”) came into effect in October 2003 and has not yet been judicially tested. These regulations give effect to provisions of the European Union Copyright Directive (“Copyright Directive”)¹¹³ that reflect the DRM requirements of the

111. This is arguably what happened in the initial 2003 review. *See id.*

112. The Copyright and Related Rights Regulations, 2003, S.I. 2003/2498 (U.K.).

113. Council Directive 2001/29, On Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 [hereinafter Copyright Directive].

WIPO Copyright Treaty of 1996¹¹⁴ and the WIPO Performances and Phonograms Treaty of 1996.¹¹⁵

The Copyright Directive dictates that Member States should prevent activities undertaken with the intent to or the reasonable understanding that one is going to circumvent a technological protection measure. To qualify as a technological protection measure, the mechanism must have an ordinary function of preventing or restricting unauthorized actions with a copyrighted work.¹¹⁶ Like the DMCA, the Copyright Directive also requires Member States to restrict commercial activity of any device whose purpose is to circumvent protection measures. Under the Copyright Directive a device will be banned if it has little commercial purpose outside of circumvention, or if it is primarily designed or marketed for circumvention.¹¹⁷

The provisions of articles 6(1) and 6(2) of the Copyright Directive are mandatory and must be implemented by all European Union Member States. These provisions are tempered by article 6(4), which requires Member States to “take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law . . . the means of benefiting from that exception or limitation.”¹¹⁸ However, the article 6(4) obligation only needs to be undertaken by national legislatures to the extent necessary for the beneficiary to make use of the relevant exception or limitation, and where the beneficiary has legal access to the protected work in question.¹¹⁹

The contemplated types of exceptions are set out in article 5 and include: (a) reproductions of a work for private use;¹²⁰ (b) use by public libraries, educational establishments, or museums;¹²¹ (c) use by social institutions such as hospitals and prisons that pursue non-commercial purposes;¹²² (d) use for scientific research;¹²³ and (e) use for public security.¹²⁴ Adoption of the Article 5 provision is discretionary, however. The form of any such measures adopted at a na-

114. WIPO Copyright Treaty of 1996, *supra* note 26, art. 11.

115. WIPO Performances and Phonograms Treaty of 1996, *supra* note 26, art. 18.

116. Article 6(3) of the Copyright Directive further defines an effective technological measure as a DRM measure that “achieves the protection objective.” Copyright Directive, *supra* note 113, art. 6(3). This definition is obviously somewhat circular. See Jacqueline D. Lipton, *Copyright in the Digital Age: A Comparative Survey*, 27 RUTGERS COMPUTER & TECH. L.J. 333, 346–47 (2001).

117. Copyright Directive, *supra* note 113, art. 6(2).

118. *Id.* art. 6(4).

119. *Id.*

120. *Id.* art. 5(2)(b).

121. *Id.* art. 5(2)(c).

122. *Id.* art. 5(2)(e).

123. *Id.* art. 5(3)(a).

124. *Id.* art. 5(3)(e). For a more detailed survey of potential exceptions to the anti-circumvention provisions of the Copyright Directive, see CORNISH & LLEWELYN, *supra* note 29, ¶¶ 19-82 to 19-84.

tional level is left to the discretion of each individual Member State, which has created the potential for inconsistent implementations of exceptions to the anti-circumvention regulations among Member States. The specific implementation decisions hinge on the attitude that each national legislature takes towards balancing proprietary rights against competing interests in copyrighted works.¹²⁵ Outside of these discretionary exemptions, the Copyright Directive does nothing to guarantee any form of fair use of a DRM-protected copyrighted work.

B. The British Copyright and Related Rights Regulations

Prior to the implementation of the Copyright and Related Rights (“CRR”) Regulations in the United Kingdom in 2003, some provision had been made in the British Copyright, Designs and Patents Act of 1988 (“CDPA”)¹²⁶ for the protection of digital copyrighted works through anti-circumvention prohibitions. The pre-2003 legislation, the original § 296(1) of the CDPA, allowed for licensed distributors of a copyrighted work protected by a DRM measure to bring a copyright infringement action against those trafficking in devices or services enabling circumvention of copy-protections.¹²⁷ However, this provision did not protect copyright holders to the same extent as required by the Copyright Directive. Thus, the new CRR Regulations incorporate a much more comprehensive anti-circumvention regime into the CDPA.

1. Software Copyrights

The first thing to note about DRM measures in the new digital copyright legislation in the United Kingdom is that copyrighted software are treated differently from other kinds of digital copyrighted works.¹²⁸ The Copyright Directive excludes from its operation matters already covered in the 1991 On Legal Protection of Computer Programs legislation (“Software Directive”).¹²⁹ Thus, the separate treatment of DRM measures for copyrighted software in the CRR Regulations focuses on maintaining the requirements of the Software Directive. The additional provisions of the CRR Regulations that re-

125. See Lipton, *supra* note 116, at 348.

126. Copyright, Designs and Patents Act, 1988, c. 48 (U.K.) (amended 2003) [hereinafter CDPA].

127. *Id.*

128. There may in fact be good theoretical and pragmatic reasons for this outside the historical legislative context. See, e.g., Jacqueline D. Lipton, *Revisiting the Manifesto and Rolling Back Computer Software Copyrights* (Case Research Paper Series in Legal Studies, Working Paper No. 05-28, 2005), available at <http://ssrn.com/abstract=785105>.

129. Council Directive 91/250/EEC, On the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42. See Copyright Directive, *supra* note 113, arts. 1, 11, & rec. 50.

late to works other than software copyrights are a new area for digital copyright law in the United Kingdom¹³⁰ and are more central to this discussion than the software provisions. However, for completeness, it is worth briefly noting the scheme of the software copyright provisions.

With respect to computer software copyrights, the original § 296 of the CDPA was replaced with a new § 296 in 2003. The new provision focuses on computer programs encrypted by a technical device, and sets out the rights of computer software copyright owners and those authorized by right-holders to issue copyrighted computer programs to the public. These rights are enforceable against those who traffic in a device or information capable of enabling or assisting the circumvention of a technical device applied to a computer program.¹³¹ There is no prohibition on circumvention per se with respect to computer software copyrights. Intent is required for liability — the defendant must know or have reason to believe that the circumvention measure in which she traffics will be used to make infringing copies of copyrighted software in order to be held liable.¹³²

There are no specific exemptions to liability set out in relation to the prohibitions contained in § 296. It is possible that this section should be read subject to a number of exemptions from basic copyright liability set out in earlier sections of the CDPA. Nevertheless, it is unclear from the face of the regulations whether the operation of the new § 296 prohibitions contemplates exemptions. The prohibitions only relate to trafficking in circumvention measures, rather than to acts of circumvention per se. Thus, they arguably should not affect exemptions relating to copyright liability concerning a protected computer program such as making a back-up copy,¹³³ decompiling the program to create an interoperable program,¹³⁴ or observing the operation of a program.¹³⁵

As with the DMCA, there is no provision allowing people who want to make legitimate uses of copyright software to obtain the means to do so if they lack the technical ability themselves. If, for example, I own a copy of a DRM-protected software program, and I want to make a back-up copy of the program, how can I engage in my

130. See UK PATENT OFFICE, CONSULTATION ON UK IMPLEMENTATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY: ANALYSIS OF RESPONSES AND GOVERNMENT CONCLUSIONS ¶6.5, *available at* <http://www.patent.gov.uk/about/consultations/responses/copydirect/copydirect.pdf> (last visited Nov. 21, 2005).

131. For the purposes of this provision, technical device is defined as “any device intended to prevent or restrict acts that are not authorized by the copyright owner of that computer program and are restricted by copyright.” CDPA, *supra* note 127, § 296(6).

132. *Id.* § 296(1)(b).

133. *Id.* § 50A.

134. *Id.* § 50B.

135. *Id.* § 50BA.

lawful right to make a back-up copy? Assuming I do not have the technological skill to circumvent the technical device myself, and manufacturers ultimately stop disseminating circumvention devices publicly because of fears of liability under § 296, there may be no viable way for me to exercise my legitimate right to make a back-up copy of the program.

This is obviously not the legislative intent behind § 296. The definition of technical device is limited to a device that is intended to prevent or restrict acts not authorized by the copyright owner that are also restricted by copyright. Making a personal back-up copy is arguably not restricted by copyright in the United Kingdom because § 50A(1) of the CDPA expressly provides that it is not an infringement of copyright for a lawful user of a copy of a computer program to make a back-up copy of the program for lawful purposes. The problem is that many technical encryption devices are not sufficiently sophisticated to facilitate permitted uses while disallowing non-permitted uses. Again, we see evidence of the digital piracy puzzle here. It is impossible to regulate the devices only in terms of potential illegal uses without also encroaching on the ability to use such devices for legitimate purposes. Thus, the current law leaves courts with an all-or-nothing choice on these issues. Either circumvention devices must be completely banned or they must be completely unrestricted. Both are undesirable outcomes, but there is little middle ground built into the current legislation. An administrative mechanism of the kind suggested in this Article would provide some such middle ground by effectively disaggregating fair use concerns from the anti-piracy regulations.

lack of sophistication of many who wish to exercise legitimate, if unauthorized, interests in proprietary information products.

2. Works Other than Software

a. Anti-Circumvention Provisions and Legitimate Use Protections

Unlike the computer software copyright provisions in § 296 of the CDPA, the new sections relating to works other than software provide prohibitions on both circumvention activities¹³⁹ and trafficking in circumvention devices.¹⁴⁰ Section 296ZA provides a right of action against a person who circumvents an effective technological measure¹⁴¹ that applies to a copyrighted work other than a computer program. Section 296ZB provides criminal sanctions for trafficking in anti-circumvention devices, while § 296ZD provides a right of action by a copyright holder, or its authorized agent, against a person who traffics in a circumvention device.

The basic circumvention prohibition in § 296ZA applies to a person undertaking circumvention activities while knowing, or having reasonable grounds to know, that she is pursuing a circumvention objective.¹⁴² Akin to a copyright infringement suit, §296ZA provides a copyright holder, and anyone authorized by the copyright holder to issue copies of the relevant work to the public, with a cause of action against circumvention.¹⁴³ Subsection 296ZA(2) provides exemptions for persons engaging in research into cryptography unless, in so doing, they prejudicially affects the rights of the copyright owner.¹⁴⁴ There are no general fair use or other exemptions from liability set out in the section,¹⁴⁵ although there is a governmentally assisted remedy set out in § 296ZE for situations where the operation of a DRM meas-

139. *Id.* § 296ZA.

140. *Id.* § 296ZB.

141. The component parts of an effective technological measure for the purposes of these provisions are defined in § 296ZF. Section 296ZF(1) defines a technological measure as “any technology, device or component which is designed, in the normal course of its operation, to protect a copyrighted work other than a computer program.” *Id.* Section 296ZF(2) provides that a technological measure is effective if the use of the work in question is controlled by an access control or copy control mechanism that achieves the intended protection. For the purposes of the § 296ZF(1) definition of technological measure, subsection 296ZF(3)(a) further defines the concept of protection of a work as “the prevention or restriction of acts that are not authorised by the copyright owner . . . and are restricted by copyright.” *Id.* § 296ZF(3)(a).

142. *Id.* § 296ZA(1)(b).

143. *Id.* § 296ZA(3).

144. *See id.* §296ZA(2).

145. UK PATENT OFFICE, REGULATORY IMPACT ASSESSMENT at xviii, <http://www.patent.gov.uk/copy/notices/2003/copyria.pdf> (last visited Nov. 21, 2005) (noting that no fair use exemptions are contemplated in the U.K. legislation or in the EU Copyright Directive).

ure prevents certain permitted acts in relation to a copyrighted work other than a computer program.

Subsection 296ZE(2) provides that where the application of an effective technological measure prevents a person from carrying out a permitted act in relation to a copyrighted work, other than a computer program, then that person, or a representative of a class of persons prevented from carrying out the permitted act, may issue a complaint to the Secretary of State.¹⁴⁶ A permitted act is defined in this context as an act that may lawfully be done in relation to a copyrighted work by virtue of a series of provisions of the CDPA listed in part 1 of schedule 5A to the CDPA.¹⁴⁷ These activities include fair dealing for research and private study, along with various other basic exemptions to copyright infringement relating to permitted activities by librarians and archivists, for parliamentary and judicial proceedings, and statutory enquiries.¹⁴⁸ Notably absent from the list of permitted acts are fair use activities related to criticism, review, and news reporting purposes.¹⁴⁹

This complaint procedure provides the Secretary of State with the discretion to give the owner of a copyrighted work, or an exclusive licensee of the work, such directions as appear to be requisite or expedient for the purposes of: (a) establishing whether any voluntary measure or agreement relevant to the copyrighted work exists; or (b) where there is no such measure or agreement in place, ensuring that the copyright owner or exclusive licensee makes available to the complainant the means of carrying out the permitted act to the extent necessary to benefit from it.¹⁵⁰ Subsection 296ZE(5) provides that it will be a legal duty of any person given a direction by the Secretary of State under this procedure to give effect to that direction.¹⁵¹ This duty is owed to the original complainant or each member of a class of complainants, and breach of the duty is legally actionable by such persons. However, the procedure is only available to persons who have lawful access to the protected copyrighted work.¹⁵²

The advantage of this approach over the current position taken under United States law is that it takes a more proactive stance on balancing competing interests in valuable copyrights, rather than focusing on protecting the interests of copyright holders at the expense of other legitimate interests in a copyrighted work. The British regula-

146. See CDPA, *supra* note 126, § 296ZE(2).

147. *Id.* sched. 5A, pt. 1.

148. *Id.* § 296E(2). The complete list of permitted acts includes the following sections of the CDPA: §§ 29, 31A, 31B, 31C, 32(1), 32(2), 32(3), 35, 36, 38, 39, 41–50, 61, 68, 69, 70, 71, 74, and 75. CDPA, sched. 5A, pt. 1.

149. See *id.* § 30 & sched. 5A, pt. 1.

150. *Id.* § 296ZE(3).

151. *Id.* § 296ZE(5).

152. *Id.* § 296ZE(10).

tions achieve a better balance of these interests by disaggregating the protection of legitimate interests in copyrighted works from questions relating to the regulation of circumvention technologies.¹⁵³ Britain made an attempt to not only protect and preserve legitimate interests in digitally encrypted copyrighted works, but also to bolster those protections with the assistance of the very government that created and strengthened the original property rights. In particular, the British legislature has been willing to impose affirmative legal duties on copyright holders and exclusive licensees of copyrighted works in order to give effect to an administrative direction made by the Secretary of State. These duties apply regardless of the regulation or availability of circumvention technologies in a relevant market. In other words, it is arguably irrelevant to fair use in the United Kingdom if an aggressive stance is taken on regulation of circumvention technologies per se, since separate stand-alone duties can be placed on copyright holders to facilitate specific legitimate uses of copyrighted works.

The main problem with this approach, at least as currently drafted, is that the duties of the Secretary of State are vague. The Secretary of State has discretion as to whether to act on any given complaint.¹⁵⁴ There is no guarantee of governmental assistance for a complainant seeking to make a permitted use of a work. Further, even though the procedure imposes an affirmative legal duty on a copyright holder or exclusive licensee to facilitate permitted uses of a particular work, there may still be practical problems if the beneficiaries of such duties do not have sufficient financial resources to enforce those duties in legal proceedings. Additionally, it might be more effective to provide some governmental assistance in initiating proceedings to enforce such duties. After all, governments are increasingly willing to bring criminal proceedings against those who are accused of violating anti-circumvention and anti-device provisions.¹⁵⁵ It would seem only fair that the same governments should be equally willing to protect their individual citizens' countervailing rights in relation to the same information products.

153. *See id.* §§ 296ZB, 296ZD (dealing with the regulation of circumvention technologies).

154. Subsection 296ZE(3) states that the Secretary of State *may* give directions to the owner of a copyrighted work or an exclusive licensee to facilitate the complainant's access to, or use of, a relevant work. *See id.* § 296ZE(3).

155. For example, the United States government was very proactive in the *Elcom* case in bringing criminal proceedings against the Russian programmer and his employer under the DMCA. It also encouraged the Norwegian government to take criminal action against the student who created the DeCSS code ultimately at issue in the *Reimerdes* litigation at the behest of the motion picture industry. *See supra* note 79. The British legislature has instituted criminal penalties for trafficking in circumvention devices. *See CDPA, supra* note 126, § 296ZB.

b. Anti-Device Provisions

Section 296ZB creates an additional criminal offense relating to trafficking in a circumvention device.¹⁵⁶ The prohibited activities include various permutations of manufacturing, importing, distributing, advertising, or possessing a circumvention device.¹⁵⁷ Most of the specific prohibitions relate to commercial activities. Thus, possession of a circumvention device is only prohibited in the context of business activities.¹⁵⁸ Presumably, possession for personal purposes would not be prohibited. Importing a circumvention device for private and domestic purposes also appears to be exempted by the statutory language that prohibits importing such a device “otherwise than for . . . private and domestic use.”¹⁵⁹

Section 296ZB(3) carves out an exemption from liability for law enforcement or intelligence agency activities in the interests of national security, preventing crime, investigating an offense, or conducting a prosecution.¹⁶⁰ Section 296ZB(5) also provides a defense when the defendant can establish that she neither knew, nor had any reasonable grounds for believing, that the device or service in question enabled or facilitated the circumvention of an effective technological measure.¹⁶¹

The criminal sanctions on trafficking in circumvention devices are supplemented by the availability of civil proceedings under § 296ZD.¹⁶² This section follows the basic structure of the § 296ZA anti-circumvention provisions. It creates a new cause of action for a copyright holder and for a person authorized by a copyright holder to distribute a work to the public against a person who has trafficked in a circumvention device or service. There are no exemptions from liability set out under this provision. Section 296ZD(1)(b) of the CDPA refers to trafficking in devices or services that: (a) are promoted, advertised, or marketed for the purpose of circumventing a technological protection measure;¹⁶³ (b) have only a limited commercially significant purpose or use other than to circumvent a technological protection measure;¹⁶⁴ or (c) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of a technological protection measure.¹⁶⁵

156. See CDPA, *supra* note 126, § 296ZB.

157. *Id.* § 296ZB(1).

158. *Id.* § 296ZB(1)(c)(iv).

159. *Id.* § 296ZB(1)(b).

160. *Id.* § 296ZB(3).

161. *Id.* § 296ZB(5).

162. *Id.* § 296ZD.

163. *Id.* § 296ZD(1)(b)(i).

164. *Id.* § 296ZD(1)(b)(ii).

165. *Id.* § 296ZD(1)(b)(iii).

Were it not for the disaggregation of the legitimate use issue in § 296ZE, this anti-device provision in and of itself would likely run the same risks of stifling individual legitimate use innovations as the anti-trafficking provisions of the DMCA. Disaggregating the issue of facilitating fair uses of a protected work from the question of regulating decryption technologies may be the best policy approach here. Britain has, to date, only implemented this disaggregation in a limited fashion. Such an approach might ultimately achieve the most effective societal balance of competing interests in a protected work.

The question of appropriate regulation of decryption technologies, like the question of appropriate regulation of file-sharing technologies in copyright law, will continue to develop. Those battles are likely to be protracted and complex. It is important that individual legitimate interests in copyrighted works are not incidentally sacrificed in the fray. The new administrative procedure in § 296ZE of the CDPA in Britain shows how facilitating legitimate interests can be disaggregated from broader issues of balancing technological innovations with strong copyright protections. However, there is still room for improvement. If the United States addresses these issues now, it can retain its place as a world leader in the development of effective approaches to the balance of competing interests in digital copyrighted works. It will not then be relegated to following less satisfactory approaches from other countries or to creating a disharmonized approach to these problems vis-à-vis other countries.

IV. DIGITAL ENCRYPTION AND THE PRESERVATION OF FAIR USE

A. Crafting a Disaggregated Approach to Fair Use

The above discussion suggests that the emerging DRM legislation and related judicial interpretations fail to facilitate legitimate interests in digital copyrighted works. Such legitimate interests include: making back-up copies of software; decompiling software to create interoperable software products; various scientific, technological and educational uses of copyrighted works; and copying for some level of private, non-transformative use.¹⁶⁶ The laws in different jurisdictions vary on the extent to which these kinds of activities are permitted under general copyright law or as defenses to the DMCA or other related claims. This leaves two problems unresolved: (a) identifying permis-

¹⁶⁶ It has been a point of contention whether private, non-transformative copying should qualify as fair use in American copyright law. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

sible uses of copyrighted works with any degree of certainty;¹⁶⁷ and (b) facilitating access and use of protected copyrighted works for those permissible purposes. The following proposal seeks to address both issues.

The current imbalance of interests exists because of the complex challenge of protecting digital copyrighted works and the nature of technologies currently available to encrypt, access, copy, and disseminate digital works. However, this imbalance suggests that it is time to develop a more nuanced approach to the regulation of digital copyrighted works — one that promotes legitimate interests in relation to those works while preventing digital copyright piracy.

If, for example, copyright holders were required to facilitate access to and use of protected works for users seeking to make limited legitimate uses of a work, the regulation of circumvention technologies per se would be less of a threat to the balance of interests in copyrighted works in the digital age. This Article suggests a simple administrative procedure to encourage copyright holders to facilitate such accesses and uses, while ensuring that copyright holders are still protected from digital piracy through the mechanisms currently in place to regulate circumvention technologies. This approach would not necessarily resolve the problem of stifling innovation in decryption technologies. However, that problem would be mitigated if content holders were required to provide decryption mechanisms to those seeking to make legitimate uses of digital copyrighted works. Under such circumstances, one could perhaps assume that any external market for decryption technologies would be focused on facilitating impermissible uses of copyrighted works. Such a market would thus be appropriately regulated by aggressive judicial enforcement of the DMCA and similar legislation in other countries.

The scheme suggested here would require the development of an administrative agency to hear complaints brought directly by those seeking to make legitimate use of a copyrighted work. The agency would be empowered to order a copyright holder to make access available to a petitioner for a limited stated purpose. If the agency did not find the use to be legitimate, it would dismiss the claim. Any order made by the agency would be limited to the purposes stated in the order. The copyright holder would retain the right either to raise a complaint with the administrative agency or to bring a standard copyright infringement action if someone exceeded the scope of their permitted use of the copyrighted work.

The detailed operation of this procedure requires resolving: (a) how to determine whether a particular use is a fair use; (b) how to

167. Some may argue that certainty here is neither desirable nor plausible. However, generating data on social norms in relation to fair use in the digital age would certainly be useful for the further evolution of copyright principles and policies into the 21st century.

ensure continued access to courts for review of administrative orders made under this process; (c) how the procedure would affect contractual restrictions on access or use of a protected digital copyrighted work; and (d) the implications of elevating the idea of fair use into the legal basis for an administrative complaint against a copyright holder.

B. Determining Protected Uses

A number of legislative and executive steps would be necessary to implement the approach advocated here, but such efforts would better protect fair use of a digitally encrypted copyrighted work. The elevation of fair use to a guaranteed right, or formal acknowledgment of fair use as such a right, is necessary in the digital age. It is particularly important, in an era of digital locks and fences, that the law protect fair use and ensure an appropriate balance of information use. If copyright legislation were amended to clarify the nature of fair use as a clear legal right and the basis for an independent cause of action, both administrative and judicial, this would be an important step in the right direction. At the very least, fair use should be formally recognized as a defense to the circumvention of an access-control measure if the purpose of the access was to make a fair use of a protected work.¹⁶⁸

There are a number of possible procedures which can better facilitate fair uses of digital copyrighted works. The basic underlying principle should be that no unreasonable expense should be imposed on either the potential fair user or the copyright holder. Because DRM measures heavily favor copyright holders, it seems reasonable to impose some affirmative obligations on those right-holders to enable fair uses of copyrighted works,¹⁶⁹ provided that these obligations do not impose unrealistic financial burdens on copyright holders. A system embodying this rule would guarantee the protection of fair use, without significantly damaging the other party.

Requiring a copyright holder to make some access and use available to identified individuals for limited stated purposes is not likely to impose an undue burden. This requirement could be met simply and cheaply by the copyright holder through digital means: for example, sending the relevant user a password to obtain limited access to a

168. This approach has been taken in two recent U.S. bills that have not been enacted into law. See DMCRA, *supra* note 60, § 5(b) (2003) (allowing circumvention of a technological protection measure if it does not result in a copyright infringement); Digital Choice and Freedom Act of 2003, H.R. 1066, 108th Cong. § 5 (2003) (allowing circumvention and/or trafficking in a circumvention device for purposes of making a non-infringing use of a copyrighted work in certain circumstances).

169. For a more general discussion of balancing rights and obligations of owners of digital property interests, see Jacqueline D. Lipton, *Information Property: Rights and Responsibilities*, 56 FL. L. REV. 135 (2004).

relevant work for the stated permissible purpose, or perhaps sending a hard copy of a relevant work (depending on the nature of the work) that could be photocopied by the user, but not digitally disseminated.¹⁷⁰ The copyright holder could ensure protection against unauthorized uses of a work outside the scope of the relevant fair use by imposing additional contractual and technological measures. Such measures could be similar to those currently employed by copyright holders to restrict unauthorized access to and use of their works, which would not create a significant additional burden on copyright holders if these protections were already part of their standard business models. Copyright holders would simply need to modify their existing measures to facilitate certain fair uses in given circumstances.

The next task in establishing a procedure to facilitate fair uses is to identify the broad classes of uses that need to be protected. This is an imprecise task, at least in part because the boundaries of the fair use defense in copyright law have never been particularly clear, but the advantage of this imprecision is its flexibility of operation.¹⁷¹ The administrative mechanism suggested in this Article draws on this flexibility by institutionalizing it and giving an administrative agency the power to develop fair use categories. Such a mechanism both keeps pace with social needs and generates data about developing social norms and expectations relating to fair use that can later inform judicial and legislative advances in digital copyright law.

Although some would argue that fair use either cannot or should not be developed in this way, it may be time to rethink the traditional approach to the fair use doctrine. Uncertainty in relation to the scope and nature of fair use may have been acceptable prior to the digital age, however, the ability of copyright holders to lock up copyrighted works through the use of DRM measures necessitates a reevaluation of this approach. Now that digital technology has shifted the balance of rights so profoundly in favor of those utilizing DRM measures to protect digital information, more powerful competing interests may need to be developed and effectively protected by the legal system. Creating a clearer taxonomy of fair use interests in copyrighted works that reflects emerging social norms about the balance of information usage in society may be a good way to start.

Any administrative agency responsible for creating such a taxonomy would still need some initial guidance on the nature and scope of fair use in order to make early determinations on complaints brought before it. The agency might start by adopting some of the uses that

170. While it is true the recipient could go to the trouble of scanning the work into a computer and disseminating it digitally, this would be a direct infringement of copyright, and a copyright holder still retains the right to seek judicial relief from such actions.

171. “[T]he doctrine of fair use . . . permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.” *Iowa State Univ. Research Found., Inc. v. ABC*, 621 F.2d 57, 60 (2d Cir. 1980).

could have been facilitated by the technologies banned in recent DMCA litigation in the United States,¹⁷² as well as the kinds of uses often regarded as fair or permissible under general copyright legislation. Such uses might include: (a) making a back-up copy of a lawfully purchased digital work (DVD, eBook, CD, MP3 file); (b) making limited copies of a digital work for educational or classroom use; (c) accessing a digital work or making a copy, or a limited number of copies, of that work for a research team; and (d) accessing and using a digital work legally purchased but regionally encoded for another jurisdiction.¹⁷³

These are familiar uses, some of which have already been protected as defenses against copyright infringement or anti-circumvention infringement, depending on the jurisdiction. Allowing potential fair users to assert such uses in an administrative proceeding should not be regarded as an unfair change in the law.

C. The Administrative Agency and Its Procedures

Copyright legislation should be amended to create a framework for an administrative mechanism to determine when, and on what basis, a particular fair use should be enabled.¹⁷⁴ Any legislative amendments should first clarify that fair use can be utilized as a legal sword: that is, as the basis for a complaint against a copyright holder for denial of appropriate access to a relevant work. The new administrative agency would make determinations on a case-by-case basis and would be empowered to make orders binding on a copyright holder to enable access and use for particular stated purposes, regardless of restrictive technological and contractual measures the copyright holder may otherwise have put in place with respect to the work.

The parties to the administrative proceeding should also have access to an appeal mechanism available through the administrative body itself, such as an appeal to a more senior administrative officer or panel of officers. Ultimately, the parties could also bring an appeal before the courts. The availability of an ultimate appeal to the judicial system is another important reason why the status of fair use should be legislatively clarified prior to implementing protections against unfair technological or contractual denials of access to a copyrighted

172. See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002); *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

173. This is an issue that has recently arisen in Australian litigation in the *Sony Computer* case. See *Kabushiki Kaisha Sony Computer Entm't v. Stevens* (2002) 200 A.L.R. 55, *aff'd* (2005) 65 I.P.R. 513.

174. This discussion focuses on a domestic approach to this issue. However, the suggestions made here could ultimately be expanded to the international level, particularly if an inexpensive online dispute resolution procedure were to be employed.

work. In this context, fair use should not simply be a defense to a complaint of copyright infringement; it should be a clear stand-alone legal right that can be enforced judicially as well as administratively.

The administrative mechanism would not encroach on the courts' jurisdiction, but would provide an inexpensive initial option for both resolving individual disputes and ultimately generating data on emerging social norms relating to the balance of interests in digital information products. In contrast to a purely judicial approach, the administrative approach advocated here would enable more people to have access to an inexpensive and effective determination of their rights in relation to a particular copyrighted work. Data about emerging social norms relating to fair use generated by the new system could help inform the legal process to assist in future legislative and judicial determinations about balancing competing legitimate interests in digital copyrighted works.

The 2003 amendments to the CDPA in the United Kingdom might be a good starting point for the administrative scheme suggested in this Article. However, the development of a simpler and less discretionary approach than that set out in the CDPA could be more useful. Problems with the British approach might arise due to the fact that under the CDPA, the Secretary of State has discretion whether or not to make particular investigations or orders. The administrative agency contemplated here, on the other hand, is mandatory in nature; it must hear complaints brought before it, although it has no duty to make any particular order in a given case.

This administrative agency could be a stand-alone body or a department established under the auspices of the Copyright Office.¹⁷⁵ The dispute resolution agency or department could collect fees to hear a complaint about the failure of a copyright holder to provide sufficient access to allow fair use of a relevant work. The fees may be sufficient to fund all or part of the administrative operation. This fee requirement may also limit the volume of frivolous complaints brought before the agency. Fees should be significantly lower than the potential costs of judicial proceedings, but their existence should operate as a deterrent to frivolous claims.

The new scheme would accomplish two important ends. First, it would establish fair use as a legally enforceable right against a copyright holder who is utilizing contractual or technological measures to

175. One proposed dispute resolution procedure utilizes a mechanism involving filing complaints with the Copyright Office, with these complaints being decided by an administrative law judge in that office. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004); Mark A. Lemley & R. Anthony Reese, *A Quick and Inexpensive System for Resolving Digital Copyright Disputes*, (UC Berkeley Public Law Research No. 525682, 2004). Adoption of this procedure would only be possible in jurisdictions with Copyright Offices, such as the United States.

restrict access to and use of a relevant work. Second, it would establish a mechanism to facilitate the exercise of a fair use right by utilizing a low cost administrative procedure established under the legislation. The legislation would create, or formalize, a particular conception of a fair use right that would enable administrative action against a copyright holder, but only in the limited area of seeking access to, and associated uses of, an encrypted work for clearly delineated purposes. These purposes would be set out in any administrative order granting access to and use of a relevant work.

Both the complainant and the copyright holder would be entitled to make representations to the administrative agency with respect to the complaint. Thus, the copyright holder would have to be given notice that a complaint had been made. In fact, it may be a requisite precursor to a complaint that the potential fair user has made a good faith effort to contact the copyright holder to seek access to a protected work for stated fair use purposes. Building such a requirement into the administrative procedure may ultimately reduce the number of complaints heard by the agency. If fair users were encouraged to make contact with copyright holders to seek fair use and copyright holders were aware that failure to grant access for legitimate purposes might result in an unfavorable administrative order, over time parties may become better at resolving these situations through private negotiations.

In fact, one of the indirect goals of the administrative procedure would be to assist in such private re-ordering of rights and interests. This would be achieved both by encouraging greater cooperation between right-holders and fair users in this way and by gradually establishing social norms with respect to fair use through the determination of complaints under the procedure. The identification and understanding of such norms would help private parties better determine their rights in the first instance without requiring assistance from the administrative agency or the courts. It would help copyright holders to know when they should grant appropriate levels of access to particular individuals, and it would assist those individuals in understanding if and when they had a valid claim to access and use a given work for a particular purpose. Although flexibility has been the norm in this area in the past, it may be that more certainty is now required in defining and operationalizing precise categories of fair use interests, particularly in the face of the very real threat that copyright holders can unfairly monopolize all types of digital information by utilizing restrictive DRM measures.

The administrative agency could borrow a number of procedures from existing informal dispute resolution mechanisms: for example, the Uniform Domain Name Dispute Resolution Policy (“UDRP”) adopted by the Internet Corporation for Assigned Names and Num-

bers (“ICANN”) for Internet domain name disputes.¹⁷⁶ The UDRP has a simple and straightforward set of forms and procedures for lodging complaints and responses to complaints. Most of the representations are done on paper or in electronic form.¹⁷⁷ Formal in person hearings are hardly, if ever, required,¹⁷⁸ which enables simple, inexpensive determinations to be made. It also enables parties from geographically disparate areas to have their complaints handled without the cost and expense of appearing before a particular court or body in any given jurisdiction. This kind of procedure might ultimately be adopted on an international level for digital copyright complaints, given the increasingly global reach of many digital copyright interests.

The agency would basically have two options in any given dispute. It could either make an order binding on the copyright holder to enable access for stated purposes, or it could refuse to make an order based on an inadequate showing of a legitimate purpose.¹⁷⁹ If it made an order to enable access, the order would set out the extent of access and use permitted, and the copyright holder would have a cause for appeal to the agency and ultimately to a court if the complainant thereafter misused the work by exceeding the scope of the order. The copyright holder could also impose additional contractual and DRM measures to ensure that a complainant did not use a given work outside the scope of a relevant order. If a copyright holder objected to the making, or scope, of any given order, it could also appeal either to a superior level of the administrative body or to a court. In terms of levels of authority, the administrative procedure could allow for initial determinations by a single administrator, with an appeal or reconsideration mechanism to a panel of administrators or to a more senior administrator.

Although these suggestions may, at first glance, seem to change the status quo and unfairly burden copyright holders, it must be kept in mind that the current balance tends to unfairly burden potential fair users who generally have inferior financial, legislative, and judicial assets for protecting their interests in access to and use of copyrighted works. It is also currently unclear whether such individuals have any

176. For a detailed discussion of this procedure, see Jacqueline D. Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 WAKE FOREST L. REV. (forthcoming Jan. 2006), available at <http://ssrn.com/abstract=770246>.

177. Rules for Uniform Domain Name Dispute Resolution Policy, R. 2(b), 3(b), 5(b), <http://www.icann.org/udrp/udrp-rules-24oct99.htm>.

178. *Id.* R. 13 (“There shall be no in-person hearings (including hearings by teleconference, videoconference, and web conference), unless the Panel determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the complaint.”).

179. To some extent, this draws from the UDRP notion of the arbitrator(s) making a simple decision whether to order a domain name registrant to transfer a disputed domain name to a complainant. The analog here is a notion of arbitrator(s) making a decision whether to order a copyright holder to permit a particular use of a copyrighted work.

distinct legal rights to access and use copyrighted works in the first place. Further, it is likely that many of the complaints brought before the administrative agency would be small in scope and unlikely to raise too many concerns for a copyright holder regarding the costs of granting access and use. However, without the procedure in place, those copyright holders may have little to no incentive to grant any access to potential fair users. Thus, the imposition of a third party alters the balance to what it should arguably have been in the first place and simply gives copyright holders added incentive to facilitate that balance without requiring anyone to incur exorbitant court costs in so doing.

All decisions of the administrative agency could be judicially reviewed if either or both parties were unsatisfied with the outcome. The potential risk is that powerful copyright holders might hijack the system by constantly appealing administrative determinations to the courts. However, this would still be less of a risk in terms of achieving an appropriate societal balance of interests in digital copyrighted works than the current system. At least with the new system, there might be something on the record — an administrative order — supporting the fair use rights in the first place. Thus, courts would have some evidence of an administrative agency being convinced of a particular legitimate purpose in a given case. Constantly appealing administrative orders may generate negative publicity for powerful copyright holders. Finally, the costs of such litigation, as opposed to the costs of enabling limited access for legitimate purposes, may not be worth the trouble for copyright holders provided that they could ensure through technological, contractual, judicial, and administrative means that fair users did not exceed the rights granted in any given administrative order.¹⁸⁰

In any event, this system could be beneficial to copyright holders. If copyright holders and fair users could develop access and use strategies based on private negotiations, facilitated by the availability of the administrative procedure, there may be less of a perceived need for legitimate users to seek out circumvention technologies in the first place. Since users could be more confident of obtaining the kinds of access and use they desire, they would not seek out the very technologies that are of the most concern to copyright holders in the modern world — those that might facilitate large scale digital piracy. Copyright holders, by enabling some access to fair users, could lessen the social pressures to develop and disseminate decryption technologies

180. As noted above, it is likely that many of the complaints brought through the administrative proceeding would be small scale and that it would not be particularly costly or difficult for copyright holders to implement relevant orders, nor should it significantly threaten the commercial markets for their works.

that might also be used for large-scale piracy as well as small-scale fair use activities.¹⁸¹

In terms of an administrative decision denying access to a copyrighted work in any given case, there remains the question of whether the complainant could then appeal her complaint to a court within a relevant jurisdiction. Whether an administrative or judicial approach is taken to facilitate fair use for the digital age, it is important that legal systems elevate fair use to the status of a stand-alone right that can support administrative and judicial action. If the right were so elevated, both administrative and judicial recourse should be available to a person claiming fair use in the face of access denied or limited through technological or contractual means by a copyright holder. This Article suggests that an administrative complaint should be the first avenue to assert the right, and then administrative or judicial appeal may follow in a given case.

Because the administrative agency would be limited to one of two options in the first instance — making an order or refusing to make an order enabling access or use in a given case — the procedures could be kept relatively simple and inexpensive. This means, of course, that there are a number of difficult questions concerning copyright and fair use that the administrative agency would not consider. These questions include whether copyright was validly granted in the first place for the work in question.¹⁸² The administrative agency would have a narrow mandate to make orders to enable access and use in specific circumstances where the ability to make a legitimate use has been compromised by technological means. This mechanism will thus redress the imbalance of interests resulting from the digital content industries' utilizing DRM measures to encrypt their works against unauthorized access and use.

When making determinations, the administrative agency could be guided by the factors currently considered by courts in making fair use determinations in cases of copyright infringement. Certain key aspects of the fair use idea are gathered together in § 107. The administrative body could, for example, be guided by the following modified applications of the factors set out in § 107 of the Copyright Act: (1) the purpose and character of the use for which the complainant

181. Thus, situations like the one which arose in *321 Studios v. MGM Studios, Inc.*, involving the manufacture of a device capable of facilitating both infringing and non-infringing uses of a digital copyrighted work could be avoided. 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

182. This question is becoming increasingly problematic in the digital age, particularly with respect to software copyrights. The recent appeal in the *Lexmark* litigation is a good example of courts revisiting issues relating to the initial copyrightability of certain classes of software code. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 537–44 (6th Cir. 2004) (holding that particular software code cannot be copyrighted for various reasons including merger of idea and expression, application of *scènes à faire* doctrine, and because the code operated as a lockout code on the facts in question).

wants to access the work, including whether such use is of a commercial nature;¹⁸³ (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion sought to be accessed and used in relation to the copyrighted work as a whole; and (4) the effect of any permitted use upon the potential market for, or value of, the copyrighted work.

If the copyright legislation were amended in this way and fair use were legislatively elevated to the status of a legal right, there would technically be no additional need for an administrative procedure to assert this right. The complainant could simply go directly to a court to enforce her rights against the copyright holder. Judicial involvement would still be preferable to the current system because it allows fair adjudication of the appropriate balance of rights and interests in a copyrighted work. Currently, the only option for a potential fair user is to request access directly from a copyright holder who will often have little to no incentive to grant that access.

An administrative procedure, rather than judicial procedure, is advocated here because it may be more accessible to the classes of people likely to assert fair use rights in a DRM-protected copyrighted work. Administrative approaches tend to be more flexible and less formal in their procedures than judicial processes and are generally less costly than judicial hearings. All of these factors may prove more welcoming to those who may be interested in making fair uses of protected works. This may well be the reason that an administrative procedure was adopted in the 2003 revisions to the CDPA to facilitate permissible uses of a copyrighted work,¹⁸⁴ rather than a system of judicially enforceable rights to fair uses of copyrighted works. Administrative procedures of the kind contemplated in this Article are also generally faster. Such procedures can also generate data about emerging social norms on fair use, which could prove very useful in future delineations of the boundaries of the fair use concept.¹⁸⁵

D. The Lemley-Reese Approach

It is worth noting that Professors Lemley and Reese have recently suggested a different kind of administrative dispute resolution

183. 17 U.S.C. § 107 (2000) actually contrasts commercial nature with nonprofit educational purposes. The educational purposes criterion has been omitted here to give the test a more general application and allow more flexible development of emerging social norms on fair use in the digital age.

184. See CDPA, *supra* note 126, § 296ZE.

185. To some extent, some data are currently collected in the United States under the triennial Librarian of Congress's review of the anti-circumvention provisions. See 17 U.S.C. § 1201(a)(1)(C)–(E). However, this Article suggests a more comprehensive, and perhaps more efficient, system.

mechanism in the related context of examining the impact of modern digital copyright law on technological innovation in the peer-to-peer file-sharing context. To avoid confusion, it is important to briefly describe their suggestion and to explain the difference between their ideas and the suggestions made in this Article. The key similarity between the two ideas is that they each involve the use of an administrative procedure to streamline the balance of interests in digital copyrighted works. However, Professors Lemley and Reese deal with different issues in a different context. They are concerned with providing administrative remedies for copyright holders in respect to direct copyright infringements by individual file-sharers. This Article, on the other hand, deals with the flipside of that coin: protecting legitimate interests of individuals to access and use digitally encrypted copyrighted works for permissible purposes.

Professors Lemley and Reese suggested the development of a quick and inexpensive dispute resolution procedure, largely in the peer-to-peer file-sharing context, that could refocus copyright holders' attention on direct copyright infringements, and away from secondary liability actions.¹⁸⁶ Their proposed mechanism would make it easier and faster for digital copyright holders to bring complaints against direct copyright infringers, such as peer-to-peer file-sharers, than under existing copyright law.¹⁸⁷ The existing copyright framework generally requires time-consuming and cost-ineffective litigation where a copyright holder proceeds individually against direct infringers who may be difficult to locate. Additionally, it may be difficult to generate sufficient evidence of copyright infringement against this class of direct infringers. Even if judgment was obtained against a large numbers of small-scale infringers, the judicial remedies obtained would likely be inadequate to cover the damages actually suffered by digital content industries. Because of the economic reality of pursuing direct infringers, copyright holders have opted to sue secondary infringers such as the Napster,¹⁸⁸ Aimster,¹⁸⁹ and Grokster¹⁹⁰ file-sharing services.¹⁹¹

Professors Lemley and Reese argue that if copyright holders were given a quick and inexpensive avenue to bring direct infringement proceedings against actual copyright infringers, they would be less

186. Lemley & Reese, *supra* note 175.

187. See *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2776 (2005) (finding that under the current system, when a widely used service or product is used to commit infringement, it may be impossible for copyright holders to effectively enforce rights in the protected works against direct infringers).

188. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

189. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

190. *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *rev'd* 125 S. Ct. 2764 (2005).

191. For a comprehensive discussion of the relevant litigation, see Alfred Yen, *supra* note 2.

inclined to proceed against secondary infringers, such as developers of peer-to-peer file-sharing technologies. Removing the risk of liability would potentially remove the chilling effect on innovations in the area of file-sharing technologies.¹⁹² They suggested amending the Copyright Act to allow a simple dispute resolution procedure for digital content holders to proceed directly against alleged copyright infringers without the need to involve any peer-to-peer file-sharing service that an infringer may have utilized.¹⁹³

The suggestion made in this Article is something of a counterpoint to the Lemley-Reese approach. Rather than advocating a legislatively-enabled avenue to provide copyright holders with an easy way to pursue direct copyright infringers, this Article advocates an easy, legislatively-enabled avenue for persons seeking to make a fair use of a work to bring a complaint directly against a copyright holder. It imposes an obligation on the copyright holder to make the work accessible in appropriate cases. The work could be made accessible with additional contractual and technological restrictions preventing further copying and distribution outside the limited use provisions provided in the proceedings. The underlying idea is that a fair user's interests in accessing and using a relevant work should be effectively protected by the government that has created the copyright protections and the additional DRM legislative supports for digital copyrights.

The protection of fair use rights through administrative procedures may not avoid the chilling of technological innovation to the extent the Lemley-Reese approach does. However, slowing development of circumvention technologies may be acceptable because of the other benefits that would result from preserving fair use. More people making fair use of copyrighted works could lead to greater scientific, technological, educational, artistic, and literary advances which would likely counteract any societal loss from the slowed development of circumvention technology.

Another important point of comparison with Lemley-Reese is that the measures suggested in this Article do not give anything additional to copyright holders, whereas the Lemley-Reese suggestions provide copyright holders with an easy way to sue direct infringers that they do not currently have.¹⁹⁴ Their suggestion would potentially remove, or at least significantly temper, the motivation of copyright holders to proceed against those who develop and distribute digital file-sharing technologies. The approach suggested here, in contrast, might be seen as taking something away from copyright holders without giving them anything in return. In other words, it might be regarded as imposing

192. See Lemley & Reese, *supra* note 175 and accompanying text.

193. To this end, they suggest the insertion of a new § 514 in title 17 of the U.S.C. *Id.*

194. See generally *Grokster*, 125 S. Ct. at 2776 (noting difficulties for content industries of proceeding directly against individual infringers).

additional duties on copyright holders to facilitate fair uses without providing any commensurate benefits.

Imposing a requirement that a copyright holder employing DRM measures should facilitate access to a protected work for fair use purposes is not really taking something away from the copyright holder. If fair use has any real significance, it must be protected by the law. It has certainly been assumed at some level in most relevant jurisdictions that fair use has some significance as a legal right.¹⁹⁵ This proposal only requires the copyright holder to facilitate a right that already exists. If it is not clear whether a relevant right exists in any given case, over time the administrative mechanism would clarify whether relevant rights exist in particular cases.¹⁹⁶ This approach may embody the kind of social bargain that should have been made when legislative measures such as the DMCA were enacted. In fact, it appears to be the bargain that Congress attempted to strike in the DMCA.¹⁹⁷ However, as exemplified by recent judicial determinations on the DMCA involving fair use arguments, the actual drafting and subsequent judicial interpretations have not made that bargain sufficiently clear.¹⁹⁸

A final point of comparison between the administrative procedure advocated here and the Lemley-Reese administrative procedure is that the latter is postulated as an alternative to existing judicial rights of action. Copyright holders currently have the option of bringing judicial proceedings against direct infringers but, for the reasons suggested above, this approach may be more costly and unwieldy for copyright holders than an administrative proceeding.¹⁹⁹ On the other hand, the administrative procedure suggested in this Article to facilitate fair use is not an alternative to a judicial action. Potential fair users cannot currently use the fair use doctrine as a sword to bring an action against copyright holders who deny them access to, or use of, a

195. See, e.g., LEAFFER, *supra* note 45; CORNISH & LLEWELYN, *supra* note 29, at 808.

196. Over time the administrative procedure would generate data relating to emerging social norms about fair use; this would help both copyright holders and potential fair users to know what kinds of uses are likely to be regarded as legally permissible.

197. See, e.g., 17 U.S.C. §§ 1201(c)(1), (a)(1)(B)–(D) (2000).

198. See, e.g., *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1135 (N.D. Cal. 2002) (“The fair user may find it more difficult to engage in certain fair uses with regard to electronic books, but nevertheless, fair use is still available.”); *Universal City Studios v. Corley*, 273 F.3d 429, 458 (2d Cir. 2001) (“[T]he Supreme Court has never held that fair use is constitutionally required, although some isolated statements in its opinions might arguably be enlisted for such a requirement.”). Further, as noted above, it is not currently clear that fair use is, in fact, a defense to a DMCA claim, at least in the United States. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 292, 322–24 (S.D.N.Y. 2000) (finding fair use is not a defense to DMCA infringement); Burk, *supra* note 20, at 1137–38 (stating that the DMCA makes no explicit provision for fair use with regard to the anti-circumvention right itself, as distinct from the copyright in the underlying work); Samuelson, *supra* note 18, at 539 n.108.

199. See *Grokster*, 125 S. Ct. at 2776.

relevant work. Fair use is only a shield in the sense of a defense to a copyright infringement action. Thus, the procedure suggested here would require not only determining the kinds of fair uses that would be protected by the administrative procedure, but also revising relevant copyright legislation to allow fair uses to be utilized as a sword.

V. CONCLUSION

Balancing the interests of digital copyright holders against the interests of those seeking to make a fair use of protected works is an extremely difficult endeavor. The same technologies that enable content holders to market ever more attractive products also enable digital pirates to make fast, efficient, near-perfect copies of relevant works. Caught in the middle are those who want to make legitimate uses of copyrighted works, but who are now effectively prevented from doing so because of the copyright holders' increasing reliance on DRM measures bolstered by restrictive legislative schemes such as the DMCA.

The administrative procedure presented in this Article, coupled with attempts to clarify the nature and scope of the fair use concept, may be a good middle-ground solution that could help to strike a better balance between copyright holders' interests and the interests of those seeking to make fair use of a digitally protected work. The advantages are that it is simple, quick, inexpensive, and straightforward, and it creates an environment that promotes a culture of enabling fair use and developing social norms to clarify the boundaries of fair use over time. Importantly, it disaggregates the question of facilitating fair use from the broader issue of regulating decryption technologies that might enable large-scale copyright piracy.

However, it does leave certain questions open, including the impact of contractual restrictions on access to or use of a digital copyrighted work, as opposed to technological restrictions. This Article assumes that an administrative order to enable fair use in a given case would trump a contractual restriction on such a use. That may be an invalid assumption. It is possible that a law establishing an administrative agency such as the one suggested here is not entitled to preempt contractual license restrictions on access to, or use of, a digital copyrighted work. The answer to this question may depend on the constitutional basis on which any such law is enacted.

There is also the question of what impact the suggested administrative mechanism would have on markets for innovation in circumvention technology. It might be argued that situating disputes about fair use firmly between the copyright holder and the fair user, without the fair user needing to rely on third-party circumvention devices, might lessen the demand for such devices overall, at least for legiti-

mate purposes. If fair users are being better protected, decryption devices are more likely to be intended for illegal uses which may, in fact, strengthen the position of copyright holders in combating the development and dissemination of such devices.

Whether or not this is a desirable outcome, it is important to understand that markets for anti-circumvention devices are not faring well under the current legislative schemes, at least if the recent cases are anything to go by.²⁰⁰ Furthermore, copyright holders are increasingly bringing secondary liability suits against those who create digital copying and distribution technologies, such as peer-to-peer file-sharing services, raising broader questions about digital copyright law that are beyond the scope of this Article. As the majority noted in the recent Supreme Court decision in *Grokster*, the administration of copyright law is an exercise in managing the trade-off between supporting creative pursuits through copyright protection and promoting technological innovation in other areas.²⁰¹ The effective protection of digital copyrighted works has the potential to negatively affect the production and dissemination of circumvention devices and copying and distribution technologies, depending on how the trade-off is ultimately managed.

These are difficult questions that need to be resolved over time as digital information markets develop. However, in the interim, fair use should not be sacrificed in the larger battle between innovation in copyrighted works and innovation in circumvention technologies. Disaggregating the issue of protecting fair use from the issue of regulating circumvention technology should address this concern. The digital piracy puzzle is not, after all, insolvable. It simply requires a more nuanced approach, so that fair uses do not become unintended casualties in the battle of the technologies.

200. See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *United States v. Elcom Ltd.*, 203 F.Supp.2d 1111 (N.D. Cal. 2002); *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

201. *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2775 (2005).