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INTRODUCTION

The movie industry has long been concerned with protecting the copyrights of its productions. With the advent of movies in digital format, currently distributed on DVDs, the ability of pirates to make high-quality illegal copies is a major concern of the movie industry.[1] The industry has responded by adopting a uniform encryption technology known as CSS to prevent the unauthorized copying of DVDs.[2] When a group of individuals created a software program, known as DeCSS, to circumvent CSS and allow DVDs to be copied, the movie industry sued, alleging violations of the Digital Millennium Copyright Act (DMCA).[3]

In the recent case of *Universal City Studios, Inc. v. Reimerdes*,[4] several motion picture studios[5] brought suit against the operators of a web site[6] that was providing a software utility known as

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1 *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 309 (S.D.N.Y. 2000).

2 *See id.*

3 *Id.* at 303 n.1.

4 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

5 Eight motion picture studios were involved as plaintiffs. *Id.* at 303.

6 The original defendants in the lawsuit were Shawn Reimerdes, Roman Kazan, and Eric Corley, all of whom owned or operated websites that were distributing DeCSS. Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 214–15 (S.D.N.Y. 2000) (order granting preliminary injunction). Defendants Shawn Reimerdes and Roman Kazan entered into settlement agreements with the plaintiffs. *Reimerdes*, 111 F. Supp. 2d at 312 n.91. The plaintiffs then amended the complaint to include Eric Corley's company, 2600 Enterprises, Inc. as a defendant. *Id.* Thus, the

DeCSS.[7] To understand why the plaintiffs sued and why they alleged a violation of the DMCA,[8] it is important to gain a basic knowledge of the technology involved in the case.

DVDs are digital disks the same size as CDs. While a typical CD is capable of storing about 650 MB of data, a DVD is capable of storing more than 4.7 GB of data.[9] In the mid-to-late 1990s, motion picture studios began to distribute full-length motion pictures in digital format on DVDs.[10] A major concern of the movie studios was that unlike VHS tapes, the digital information of DVDs can be copied from generation to generation with no degradation in quality, thus leading to an increased threat of piracy.[11] "Discussions among the studios with the goal of organizing a unified response to the piracy threat began in earnest in late 1995 or early 1996."[12] In 1996 the studios agreed to use CSS to protect their copyrighted material in digital format on DVDs.[13]

CSS, Content Scramble System, "is an encryption-based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs."[14] "A CSS-protected DVD can be decrypted by an appropriate decryption algorithm that employs a series of keys stored on the DVD and the DVD player."[15] CSS is licensed to manufacturers of DVD players and drives, subject to strict security requirements.[16] "Moreover, manufacturers may not, consistent with their licenses, make equipment that would supply digital output that could be used in copying protected DVDs."[17]

In September 1999, a group of individuals who met on the Internet "reverse engineered a licensed DVD player and discovered the

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remaining defendants in the case were Eric Corley and his company 2600 Enterprises, Inc., which publishes a computer magazine known as *2600: The Hacker Quarterly* and operates a web site at www.2600.com (2600.com). *Id.* at 308–09.

7 *Reimerdes*, 111 F. Supp. 2d at 309.

8 The plaintiffs alleged a violation of § 1201(a)(2). *Id.* at 303 n.1; *see also Reimerdes*, 82 F. Supp. 2d at 215.

9 *Reimerdes*, 111 F. Supp. 2d at 307.

10 *Id.* at 309. While the movie companies began experimenting with DVDs in the mid-1990s, the first movies in DVD format were released on the consumer market in 1997. *Id.* at 310.

11 *See id.* at 309.

12 *Id.*

13 *Id.*

14 *Id.* at 308.

15 *Id.* at 310.

16 *See id.*

17 *Id.*

CSS encryption algorithm and keys."[18] With this information, the group created DeCSS, a computer program capable of decrypting DVDs, thus allowing the playback on non-licensed devices and the copying of files from DVDs to computer hard drives.[19] Once on the hard drive, the motion picture files can be copied and transmitted just like any other file.[20] The movie industry's main concern is that pirated copies of their movies will be transmitted over the Internet.[21]

The plaintiff movie studios in *Reimerdes* became aware of the existence of DeCSS in October 1999 and filed suit in January 2000 after the defendants failed to comply with a cease-and-desist letter sent out by the movie industry demanding that the defendants remove the DeCSS code from their websites.[22] The plaintiffs alleged a violation of § 1201(a)(2), prohibiting the distribution of a technology used to circumvent a technological measure used to prevent access to a protected work.[23]

The *Reimerdes* court made several findings relevant to this Note. First, the court found that the defendants violated § 1201(a)(2) in posting DeCSS on their web site.[24] The court further held that none of the statutory exceptions in the DMCA applied to the defendants' conduct.[25] In addition, the court held that fair use was not a defense to the distribution of DeCSS, stating that the only fair uses allowed were those included in the statutory exceptions.[26]

With the *Reimerdes* case as a narrative backdrop, it is now necessary to develop an understanding of the DMCA. "The 'Digital Millennium Copyright Act of 1998' is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."[27] As part of the DMCA, three provisions important to this Note

18 *Id.* at 311.

19 *See id.*

20 *See id.* at 313.

21 *See id.* at 314. While the large amount of data stored on a DVD would take a long time to transfer over the Internet, there is a compression program, DivX, that allows the DVD files to be compressed into a more manageable size and thus facilitates easier transfer. *See id.* at 313. It is also a concern of the motion picture studios that compressed copies of the DVDs would be copied onto CDs and distributed. *Id.* at 314.

22 *See id.* at 312.

23 *See id.* at 303 n.1; *see also* Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 215 (S.D.N.Y. 2000) (order granting preliminary injunction).

24 *See Reimerdes*, 111 F. Supp. at 317–19.

25 *See id.* at 319–21.

26 *See id.* at 321–24.

27 *See* S. REP. No. 105-190, at 1–2 (1998).

were added to Title 17 of the United States Code.[28] First, § 1201(a)(1) prohibits the circumvention of technological measures that effectively control access to a protected work (circumvention of access-control measure).[29] Second, § 1201(a)(2) further prohibits the manufacture of or trafficking in any technology that circumvents an effective technological measure used to restrict access to a protected work (trafficking in technology to circumvent an access-control measure).[30] Finally, § 1201(b) prohibits the manufacture of or trafficking in any technology that circumvents an effective technological measure used to prevent copying of a protected work (trafficking in technology to circumvent a copy-control measure).[31] The legislative history explains the difference in these two provisions:

> Although sections 1201(a)(2) and 1201(b) of the bill are worded similarly and employ similar tests, they are designed to protect two distinct rights and to target two distinct classes of devices. Sub-section 1201(a)(2) is designed to protect access to a copyrighted work. Section 1201(b) is designed to protect the traditional copyright rights . . . .[32]

As noted above, DeCSS serves two functions: it allows a user to play a DVD on a non-licensed player, and it permits copying of DVDs. These two functions potentially implicate two different provisions of the DMCA: § 1201(a)(2)'s prohibition on trafficking in a technology to circumvent access-controls, and § 1201(b)'s prohibition on trafficking in technology to circumvent copy-controls. In *Reimerdes*, however, the court seemed to combine the two functions of DeCSS, and to assume that because DeCSS permits unauthorized copying of DVDs, it also permits unauthorized access to DVDs. Part I of this Note will examine the applicability of § 1201(a)(2) to the distribution of DeCSS. This Note will argue that to the extent that DeCSS allows playback of DVDs on non-licensed players, it does not violate § 1201(a)(2). Part II will then look at § 1201(b), the provision prohibiting the trafficking of any technology for circumventing an effective technological mea-

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28 17 U.S.C. § 1201(a)–(b) (Supp. V 1999).

29 *See id.* § 1201(a)(1)(A).

30 *See id.* § 1201(a)(2). The Code specifically prohibits the trafficking of any technology that is primarily designed for, has only limited commercially significant purposes other than, or is marketed as a technology for circumventing an effective access-control measure. *Id.*

31 *See id.* § 1201(b)(1). The Code specifically prohibits the trafficking of any technology that is primarily designed for, has only limited commercially significant purposes other than, or is marketed as a technology for circumventing an effective copy-control measure. *Id.*

32 S. REP. NO. 105-190, at 12.

sure to protect traditional copyrights.[33] This Note will analyze the applicability of § 1201(b) to the distribution of DeCSS. In doing so, this Note will examine the implications of the fair use doctrine on the attempted prohibition on the distribution of DeCSS. In brief, the fair use doctrine allows a person, in some circumstances, to lawfully copy a copyrighted work without the permission of the copyright owner.[34] This Note will argue that there are constitutional dimensions to the fair use doctrine that may prevent Congress from enacting a law as broad as the DMCA.

I. THE APPLICABILITY OF § 1201(a) TO THE DISTRIBUTION OF DeCSS

As stated above, DeCSS does not fall under the scope of § 1201(a)(2) of the DMCA. Section 1201(a)(2) states that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof,"[35] that is primarily designed for,[36] has only limited purposes other than,[37] or is marketed for use in[38] "circumventing a technological measure that effectively controls access to a work protected under [Title 17]."[39] The court in *Reimerdes* seems to have taken for granted that § 1201(a)(2) applies to DeCSS. The only place the *Reimerdes* court acknowledges that there is an argument that DeCSS might not provide unlawful access is in a footnote.[40]

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33 17 U.S.C. § 1201(b) (Supp. V 1999).

34 The fair use doctrine is currently codified at 17 U.S.C. § 107 (1994).

35 17 U.S.C. § 1201(a)(2).

36 *Id.* § 1201(a)(2)(A).

37 *Id.* § 1201(a)(2)(B).

38 *Id.* § 1201(a)(2)(C).

39 *Id.* § 1201(a)(2). The full text of § 1201(a)(2) reads:

> No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—
>
> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
>
> (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
>
> (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

Id.

40 *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 317 n.137 (S.D.N.Y. 2000). While the argument made in the footnote is different from that

The statute states 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."[41] The word "access" is not defined in the statute,[42] and it is not self-evident that DeCSS circumvents an access-control measure as intended by the statute. There are two ways of thinking about what it means to gain "access" to a work. First, "access" may be obtained when a person lawfully acquires a work. Second, a person who lawfully acquires a work may nevertheless not obtain "access" to the work without following the procedure prescribed by the copyright holder. Which of these approaches is correct has important implications in analyzing whether trafficking in DeCSS violates § 1201(a)(2). If the first approach is applied, trafficking in DeCSS probably does not violate § 1201(a)(2), but if the second approach is used, trafficking in DeCSS most likely does violate § 1201(a)(2). As discussed below, the existing case law on § 1201(a)(2) does not compel the use of the sec-

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made in this Note, the *Reimerdes* court dismissed the former as "pure sophistry." *Id.* The full text of the footnote reads:

> Decryption or avoidance of an access-control measure is not "circumvention" within the meaning of the statute unless it occurs "without the authority of the copyright owner." 17 U.S.C. § 1201(a)(3)(A). Defendants posit that purchasers of a DVD acquire the right "to perform all acts with it that are not exclusively granted to the copyright holder." Based on this premise, they argue that DeCSS does not circumvent CSS within the meaning of the statute because the Copyright Act does not grant the copyright holder the right to prohibit purchasers from decrypting. As the copyright holder has no statutory right to prohibit decryption, the argument goes, decryption cannot be understood as unlawful circumvention. Def. Post-Trial Mem. 10-13. The argument is pure sophistry. The DMCA proscribes trafficking in technology that decrypts or avoids an access-control measure without the copyright holder consenting to the decryption or avoidance.
>
> *See* JUDICIARY COMM. REP. at 17–18 (fair use applies "where the access is authorized"). Defendants' argument seems to be a corruption of the first sale doctrine, which holds that the copyright holder, notwithstanding the exclusive distribution right conferred by § 106(3) of the Copyright Act, 17 U.S.C. § 106(3), is deemed by its "first sale" of a copy of the copyrighted work to have consented to subsequent sale of the copy.

Id. The *Reimerdes* court did not correctly interpret the legislative history. *See infra* notes 56–67 and accompanying text.

41 17 U.S.C. § 1201(a)(3)(B).

42 *Id.* Nowhere is access defined. *See id.*

ond approach.[43] Furthermore, the legislative history of § 1201(a)(2) supports the first approach.[44]

There are a few cases interpreting § 1201(a) of the DMCA. In *CSC Holdings, Inc. v. Greenleaf Electronics, Inc.*, the defendant was producing cable boxes that allowed users to view premium channels (such as HBO and Showtime) and pay-per-view channels without paying for the access.[45] The court concluded that the unauthorized cable box allowed a user to obtain unauthorized access, and, therefore, the sale of the device by the defendant likely violated § 1201(a)(2).[46] DeCSS is distinguishable from the cable box in *CSC Holdings*. An illegal cable box, often referred to as a "black box," allows a user to unscramble an encrypted channel that the user has not purchased.[47] DeCSS allows a user to make fair use[48] of, or use a non-licensed player to view, a DVD he or she has *already purchased*. Thus, it is unclear whether DeCSS allows unauthorized access or merely allows a user to make fair use once authorized access has been obtained.[49]

In another case, *Sony Computer Entertainment America, Inc. v. Gamemasters*, the court determined that the distribution of a device, the Game Enhancer, that allowed videogame players to access games not from the same geographic region as the videogame machine probably violated § 1201(a)(2) of the DMCA.[50] Sony markets its PlayStation games according to geographic region.[51] Thus, a game sold in Japan is not useable on a machine sold in the United States.[52] While the distribution of the Game Enhancer is more similar to DeCSS, it is

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43 *See infra* notes 45–55 and accompanying text.

44 *See infra* notes 56–67 and accompanying text.

45 No. 99C7249, 2000 WL 715601, at *3 (N.D. Ill. June 2, 2000) (order granting preliminary injunction).

46 *See id.* at *6.

47 *See id.* at *5.

48 Fair use is defined in § 107 of the Copyright Act. Fair use allows a person, in limited circumstances, to copy or otherwise use a copyrighted work without the permission of the copyright owner. *See* 17 U.S.C. § 107 (1994); *see also infra* notes 125–29 and accompanying text. Applying § 107, it is probably fair use for a film student to copy excerpts from various movies in order to study the directorial techniques. The use by the student is for educational purposes falling within one of the examples listed in § 107. *See* 17 U.S.C. § 107. Furthermore, the film student is not copying the movies for profit, but is only using a small portion of the copyrighted work, and will probably have no effect on the market for the protected work. *See id.*

49 *See infra* note 60 and accompanying text.

50 87 F. Supp. 2d 976, 987–88 (N.D. Cal. 1999) (order granting preliminary injunction). Presumably Sony was concerned that users in America would be allowed to play games that Sony only intended for use in Europe or Japan. *See id.* at 986.

51 *See id.* at 981.

52 *See id.*

still distinguishable. A game marketed and sold in Japan is not intended for use in the United States. Therefore, the Game Enhancer allows users in the United States to obtain access to games only intended for use in other countries. While it is possible that DeCSS can be used to view DVDs marketed for use in other regions, DeCSS also allows users in the United States to potentially make fair use of movies intended for distribution in the United States, which the user has lawfully acquired.

In *Realnetworks, Inc. v. Streambox, Inc.*, the court found that a device known as the Streambox VCR likely violates § 1201(a)(2) of the DMCA.[53] The Streambox VCR allows users to copy onto their computer hard drives music and video files that were intended only for streaming (playing) on the Internet and were formatted specifically to prevent copying.[54] The court found that "[t]o guard against the unauthorized copying and redistribution of their content, many copyright owners do not make their content available for downloading, and instead distribute the content using streaming technology in a manner that does not permit downloading."[55] Similar to the owners of the underlying copyrights in DVDs, the owners of the streamed copyrighted material intended to prevent their material from being copied and pirated. However, unlike DVDs, which consumers purchase and maintain a permanent copy of, streamed material is intended for only one use; if a user wants to view or listen to the material again, it must be re-streamed.

All the cases discussed above deal with technologies that allow a user to view or use content the user *has not* lawfully acquired. However, those cases offer no guidance for interpreting § 1201(a)(2) with respect to content a user *has* lawfully acquired. In other words, the cases discussed above do not preclude the argument that once a user has lawfully obtained a DVD, the person has "access" to the DVD, and thus, DeCSS is not a technology used to circumvent access-control measures. Indeed, the legislative history of the DMCA tends to support this view.

In its report accompanying the DMCA, the House Judiciary Committee stated that the "act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked

53 No. 2:99CV02070, 2000 WL 127311, at *8 (W.D. Wash. Jan. 18, 2000) (order granting preliminary injunction).

54 *See id.* at *5.

55 *Id.* at *2.

room in order to obtain a copy of a book."[56] This analogy does not apply to DeCSS. In order to use DeCSS to decrypt a DVD one must first have the DVD.[57] Once a person purchases a DVD that person arguably has obtained authorized access to the motion picture. To say that a person cannot use DeCSS to view the DVD is like selling a book that only comes with a locking mechanism on the binding preventing the purchaser from reading the book and saying that the only acceptable means of unlocking the book is a key specifically licensed by the publisher. It is hard to imagine anyone arguing that it would violate a right of the copyright owner in the book to have a locksmith make a key to unlock the book rather than use a key licensed by the publisher. DeCSS is simply the locksmith that provides an alternative way of viewing information that the consumer has already paid for and thus obtained authorized access.

Moreover, a DVD player or computer DVD drive is required to read the information on the DVD.[58] Surely some, probably a commercially significant amount, of the users of DeCSS also own a licensed DVD player (thus, continuing with the locked book analogy, they have the key the movie industry tells them they must use).[59] While the above paragraph argues that ownership of a DVD is enough for authorized access, an even stronger argument can be made that ownership of both the DVD and a licensed DVD drive provides the user authorized access. In fact, it is not possible for a consumer to have any more authorization than the legal copy of the DVD and the licensed DVD drive.

A passage from the House Judiciary Committee Report on the DMCA indicates that § 1201(a) was not intended to apply to situations like DVD owners using DeCSS:

> Paragraph (a)(1) does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, *even if such actions involve circumvention of additional forms of technological protection measures.* In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applica-

56 H.R. REP. No. 105-551, pt. 1, at 17 (1998).

57 *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 313 (S.D.N.Y. 2000) (explaining how the "plaintiffs' expert decrypted a *store-bought* copy of *Sleepless in Seattle*.") (emphasis added).

58 *See id.* at 308 (explaining that CSS requires the use of a DVD player or drive).

59 This statement is only an assumption and some research is needed to find out what percentage of DeCSS users actually have licensed DVD drives. This information is something that the court in *Reimerdes* should have required in order to give true consideration to the idea that there may have been authorized access to the work.

> ble. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but *would be able to do so in order to make fair use of a work which he or she has acquired lawfully.*[60]

An owner of a DVD seems to be the type of person the Judiciary Committee was referring to in the above quotation. A person who purchases a DVD has *lawfully acquired* a copy of the movie on that disc and thus has authorized access to the movie. This purchaser who has lawfully acquired the movie may then *legally circumvent additional forms of technological protections.*

A close reading of the legislative history demonstrates the intended scope of the DMCA's access-control measures. The House Judiciary Committee stated that "[j]ust as Congress acted in the areas of cable television and satellite transmissions to prevent unauthorized interception and descrambling of signals, it is now necessary to address the on-line environment."[61] The comparison to cable television and satellite transmission signals, as well as the reference to the *on-line* environment, implies that the access-control provisions were intended to prevent a person from illegally intercepting things such as an encrypted on-line pay-per-view type transmission.[62] The House Judiciary Committee went on to say that § 1201(a) "is drafted carefully to target 'black boxes . . . .'"[63] Again, the reference to black boxes implies the interception of a signal, not the viewing of a movie one has already bought. The House Commerce Committee also weighed in with its opinion stating that the DMCA "defines whether consumers and businesses may engage in certain conduct, or use certain devices, in the course of transacting electronic commerce. Indeed, many of these rules may determine the extent to which electronic commerce realizes its potential."[64] The reference to electronic commerce again strongly

60 H.R. REP. No. 105-551, pt. 1, at 18 (emphasis added). The Senate Judiciary Committee had a similar sentiment: "This paragraph does not apply to subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under title 17, even if such actions involve circumvention of other types of technological protection measures." S. REP. No. 105-190, at 28 (1998).

61 H.R. REP. No. 105-551, pt. 1, at 10.

62 The *Reimerdes* court states that DeCSS "threatens also to impede new, potentially lucrative initiatives for the distribution of motion pictures in digital form, such as video-on-demand via the Internet." 111 F. Supp. 2d at 315. The court was wrong on this point. DeCSS merely allows a user greater access to a movie he already has authorized access to; and thus, does not fall within the provisions of § 1201(a), a technology that would allow a user to intercept and view an encrypted video-on-demand presentation over the Internet is precisely the unauthorized access with which the DMCA is concerned.

63 H.R. REP. No. 105-551, pt. 1, at 18.

64 *Id.* pt. 2, at 22 (1998).

implies that the DMCA's access-control provisions were intended to prevent interception of on-line transmissions of copyrighted works and not to prevent access to a work a consumer has already purchased.

Only once in the legislative history is there a hint that the DMCA may be intended to protect consumer *items* such as DVDs. The House Commerce Committee, in discussing concerns that strict access-control measures might erode fair use, made a reference to videocassettes and CD-ROMs.[65] The Commerce Committee mentioned these consumer goods as examples of media that already implement technological protection measures and went on to express concern that new technological measures might "diminish[ ] the ability of individuals to use these works in ways that are otherwise lawful."[66] While this part of the legislative history could be interpreted as bringing DVDs within the scope of § 1201(a), it is more likely just the Commerce Committee expressing concern regarding fair use as new technological measures are implemented. Neither the Senate nor the House Judiciary Committees gave any mention to videocassettes or CD-ROMs.[67]

Even if the DMCA was intended to prohibit owners of DVDs from accessing the information on the discs on unlicensed players or drives, a person with both the DVD and a licensed drive surely has authorized access to the information. In fact, there is no further access "key" available to the consumer. "A CSS-protected DVD can be decrypted by an appropriate decryption algorithm that employs a series of keys stored on the DVD and the DVD player. In consequence, only players and drives containing the appropriate keys are able to decrypt DVD files and thereby play movies stored on DVDs."[68] If a consumer has both the DVD and a licensed DVD drive, he or she must have authorized access to the work as there is no further level of authorization available. Once authorized access is obtained, the consumer can circumvent "in order to make fair use of a work which he or she has acquired lawfully."[69] DeCSS merely provides a means to *legally* circumvent a technological measure *after* the work has been lawfully acquired.

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65 *See id.* at 37.

66 *Id.*

67 *See generally* S. REP. No. 105-190 (1998); H.R. REP. No. 105-551, pt. 1. Nowhere in the discussion of § 1201(a) is there a discussion of videocassettes or CD-ROMs in either of these reports. *See* S. REP. No. 105-190; H.R. REP. No. 105-551, pt. 1.

68 Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 310 (S.D.N.Y. 2000).

69 H.R. REP. No. 105-551, pt. 1, at 18.

If one believes that both a DVD and a licensed player, not just the DVD, are required for authorized access, the question then becomes: Is there a commercially significant number of DeCSS users who do have authorized access to the work?[70]

> For a technology . . . to be prohibited under this subsection, one of three conditions must be met. [The technology] must:
> (1) be primarily designed or produced for the purpose of circumventing;
> (2) have only a limited commercially significant purpose or use other than to circumvent; or
> (3) be marketed . . . for use in circumventing a technological protection measure that effectively controls access to a work protected under Title 17.[71]

None of these conditions capture DeCSS. DeCSS is not primarily designed for circumventing an access-control measure,[72] but instead allows a user to circumvent other technological measures, such as copy-control measures, once access is lawfully gained. Furthermore, DeCSS is not marketed as a means to circumvent access-control measures.[73] The remaining question is whether or not there is a commercially significant use for DeCSS (such as making fair use of a lawfully acquired work) other than to circumvent access-control measures.[74] It is unclear if there has been any research to determine the number of DeCSS users who have licensed DVD drives. This data would be needed in order to authoritatively say that the access-control provisions of the DMCA do not bar the distribution of DeCSS. The remaining parts of this Note will assume that either ownership of a DVD itself is enough for authorized access or that a commercially significant number of DeCSS users also use licensed DVD drives.

Now that it is evident that the access-control provisions in § 1201(a)(1) of the DMCA were not intended to apply to situations where consumers had already purchased a copy of a movie,[75] it follows that the anti-trafficking provisions of § 1201(a)(2) are likewise inapplicable. If DeCSS does not allow unauthorized access to a copyrighted work then it does not fit within § 1201(a)(2) prohibiting the traffick-

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70 *See* 17 U.S.C. § 1201(a)(2)(B) (Supp. V 1999).

71 H.R. REP. No. 105-551, pt. 1, at 18.

72 *See* 17 U.S.C. § 1201(a)(2)(A).

73 *See id.* § 1201(a)(2)(C). One of the creators of DeCSS stated that the program was intended to allow a user to view a DVD using a Linux operating system. *See Reimerdes*, 111 F. Supp. 2d at 311. DeCSS can also be lawfully marketed as a tool to make fair use of DVDs.

74 *See* 17 U.S.C. § 1201(a)(2)(B).

75 *See supra* note 60 and accompanying text.

ing of devices designed for "circumventing a technological measure that effectively controls access to a work protected under [Title 17]."[76]

The real concern of the movie industry regarding DVDs is not the "unauthorized" access of material on DVDs using an unlicensed DVD drive but rather possibilities of copyright infringement, especially the unauthorized copying of DVDs,[77] using an unlicensed DVD drive. This concern is made evident by the fact that CSS was looked at as a "unified response to the piracy threat" posed by the reproduction capabilities of digital media.[78] Another fact demonstrating that infringement is the main concern of the movie industry is that "manufacturers may not, consistent with their licenses, make equipment that would supply digital output that could be used in copying protected DVDs."[79] Thus while CSS does technically restrict access to a work, the true purpose of CSS is to protect the rights of the copyright owner. As explained above, the consumer obtains authorized access when he or she purchases the DVD (or places a lawfully acquired DVD in a licensed DVD drive). Therefore, what CSS actually does, as is consistent with the purpose of the technology, is protect the traditional rights of the copyright owner. Because CSS is truly a copy-control measure, not an access-control measure, § 1201(b) should be applied to the distribution of DeCSS.[80]

II. THE IMPLICATIONS OF FAIR USE ON THE ANTI-TRAFFICKING PROVISION OF § 1201(b)

Section 1201(b) of the DMCA prohibits the trafficking of a technology that is primarily designed for, has limited commercially significant purposes other than, or is marketed for use in circumventing a technological control measure that effectively protects a right of a copyright holder.[81] Unlike § 1201(a), this section does not contain a provision prohibiting circumvention but merely prohibits the distribution of a technology for circumvention. As the Senate Judiciary Committee explained, "copyright law has long forbidden copyright infringements, so no new prohibition was necessary. The device limi-

76 17 U.S.C. § 1201(a)(2).

77 Unauthorized copying is a violation of the copyright owner's exclusive rights. 17 U.S.C. § 106(1) (1994).

78 *Reimerdes*, 111 F. Supp. 2d at 309.

79 *Id.* at 310.

80 The remainder of this Note will focus its arguments towards § 1201(b). However, arguments very similar to those made in this Note can be made regarding the anti-trafficking provision of § 1201(a)(2).

81 17 U.S.C. § 1201(b)(1).

tation in 1201(b) enforces the longstanding prohibitions on infringements."[82]

Assuming that CSS is a technology that effectively protects a work from copyright infringement,[83] the question then arises as to whether or not the anti-trafficking provisions are consistent with the doctrine of fair use.

The notion of "fair use" is codified in § 107 of the Copyright Act.[84] The fair use defense applies, "[n]otwithstanding the provisions of sections 106 and 106A,"[85] which grant the owner of a copyright certain exclusive rights.[86] Thus, a person can make "fair use" of a copyrighted work without the consent of the owner and not be liable for infringement. The statute states that "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" fall within the scope of the fair use defense.[87] The statute goes on to list four nonexclusive[88] factors to be considered in determining whether a particular use is fair. These factors include: (1) the purpose of the use, including whether it is commercial or educational; (2) the nature of the protected work; (3) the amount used in proportion to the copyrighted work as a whole; and (4) the effect of the use on the market value of the protected work.[89] Thus, the fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would

82 S. REP. No. 105-190, at 12 (1998).

83 An argument can be made that CSS does nothing to prevent illegal copying. The court in *Reimerdes* stated that as a condition of their license to use CSS, manufacturers of DVD players and drives are not allowed to make equipment that would allow digital output for the copying of DVDs. 111 F. Supp. 2d at 310. This assetion implies that CSS does not itself restrict copying, but manufacturers simply are not allowed to provide the digital output for copying. The *Reimerdes* defendant's post-trial brief also hints at this argument, saying that the "plaintiffs' authorized players deliberately do not" allow any copying even for fair use purposes. Defendant's Post-Trial Memorandum at 2, Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000), *available at* http://www.2600.com/dvd/docs/2000/0808-brief1.html (last visited Jan. 25, 2001). If CSS is not a technology that effectively protects the right of a copyright owner, namely unauthorized copying and distribution, then § 1201(b) does not apply, and because, as explained in Part I, *supra*, § 1201(a)(2) does not apply, the DMCA would not be applicable to persons who circumvent CSS.

84 *See* 17 U.S.C. § 107 (1994).

85 *Id.*

86 *See id.* §§ 106, 106A (1994).

87 *Id.* § 107.

88 *See* Harper & Row, Publ'g v. Nation Enters., 471 U.S. 539, 560 (1985).

89 17 U.S.C. § 107.

stifle the very creativity which that law is designed to foster."[90] The fair use doctrine, as codified in the 1976 Copyright Act, was intended to restate the common-law doctrine that had previously developed, not to expand, narrow, or change the preexisting doctrine.[91]

Congress was concerned with the implications the anti-circumvention and anti-trafficking provisions of the DMCA would have on fair use.[92] Congress ultimately included a provision in § 1201(a)(1) of the DMCA which requires the Librarian of Congress to determine, in a rulemaking proceeding, "whether persons who are users of a copyrighted work are, or are likely to be . . . adversely affected by the prohibition under [the anti-circumvention provision] in their ability to make noninfringing uses under this title of a particular class of copyrighted works."[93] While a lot of lip service was given to preserving fair use, as codified, the DMCA effectively eliminates the doctrine of fair use as applied to encrypted works.

A. Congress Has Prohibited the Means for a Person To Make Fair Use of an Encrypted Work

While § 1201(a)(1) apparently contains a provision intending to preserve fair use,[94] nothing in the anti-trafficking provisions of § 1201(a)(2) or § 1201(b) allows a person to provide another with the means to make fair use. Consistent with the argument above, the remainder of this Note will focus on § 1201(b), which prohibits the trafficking of a technology to circumvent a copy-control measure; however, a similar argument can be made regarding § 1201(a)(2), which prohibits the trafficking of a technology to circumvent an access-control measure.[95]

Along with the Librarian of Congress provision in § 1201(a)(1)(C) seemingly protecting fair use, there are also specific exceptions to § 1201(a)(1)(A) pertaining to fair use that will be dealt with in order. First, there is an exception for non-profit libraries and educational institutions, but this exception applies only to the act of circumvention and specifically states that libraries and educational in-

90 Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980)).

91 *See Harper & Row*, 471 U.S. at 549.

92 *See generally* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000) (discussing legislative history and debate on how to protect fair use while implementing the anti-circumvention provisions).

93 17 U.S.C. § 1201(a)(1)(C) (Supp. V 1999).

94 *See id.*

95 For an application of this idea to § 1201(a)(2), see Nimmer, *supra* note 92, at 727–37.

stitutions can still be liable for trafficking in a technology to circumvent.[96] Next, there is a law enforcement exception that allows trafficking but is strictly limited to law enforcement or government activities.[97] Then, there is a reverse engineering exception that allows civilians to traffic in a technology to circumvent but "solely for the purpose of enabling interoperability of an independently created computer program with other programs."[98] Fourth, there is an encryption research exception that allows a person to circumvent and traffic in a technology to circumvent access but does not allow a person to traffic in a technology to circumvent a copy-control measure.[99] Next, there is an exception that allows a person to circumvent an access-control measure if that measure has the capability of collecting personally identifiable information of the person accessing the work; this provision does not allow the trafficking of a technology to circumvent.[100] Finally, there is an exception for security testing that allows circumvention and trafficking of a technology to circumvent access-control measures in order to perform security testing; this exception

	Allows Circumvention	Allows Trafficking in a Technology to Circumvent Access-Control	Allows Trafficking in a Technology to Circumvent Copy-Control
§ 1201(a)(1)(C): Librarian of Congress Determination	Yes	No	No
§ 1201(d): Library/Educational Exception	Yes	No	No
§ 1201(e): Law Enforcement Exception	Yes	Yes	Yes
§ 1201(f): Reverse Engineering Exception	Yes	Yes	Yes
§ 1201(g): Encryption Research Exception	Yes	Yes	No
§ 1201(i): Personally Identifying Information Exception	Yes	No	No
§ 1201(j): Security Testing Exception	Yes	Yes	No

96 *See* 17 U.S.C. § 1201(d)(1), (4).

97 *See id.* § 1201(e).

98 *Id.* § 1201(f)(1), (3).

99 *See id.* § 1201(g)(2), (4).

100 *See id.* § 1201(i)(1). Section 1201(h) provides an exception intending to protect minors on the Internet. *See id.* § 1201(h).

does not apply to trafficking in a technology to circumvent a copy-control measure.[101] The following table summarizes the exceptions to the anti-circumvention and anti-trafficking provisions.

As the above table illustrates, the only two exceptions that allow trafficking in a technology to circumvent a copy-control measure are for law enforcement and reverse engineering purposes. The law enforcement exception is very restrictive and applies only to an officer, agent, or employee of the government acting in the line of duty.[102] The reverse engineering exception is also strictly limited to apply to a small subset of society with the ability to engage in reverse engineering of computer programs.[103] None of the exceptions allow an ordinary citizen, without the knowledge to develop his or her own circumvention technology, to make fair use, such as excerpting, of an encrypted DVD.

For a practical example, assume Ben is an aspiring movie director and film school student who would like to excerpt small scenes from several of his favorite movies in order to study the cinematography and direction.[104] Ben owns the DVDs and also has a licensed DVD drive in his computer. However, Ben does not have the technological savvy to develop a means to circumvent CSS in order to copy the excerpts to his hard drive. Ben's friend, Jack, is knowledgeable in computers so Ben asks him for help. Jack informs Ben that he can probably create a program to circumvent CSS but also tells Ben that there is already a program known as DeCSS that can accomplish the task. Under § 1201(b) of the DMCA, it is illegal for Jack to create a program, such as DeCSS, and distribute it to Ben so that Ben can make lawful fair use of his DVDs. In fact, it is illegal for *anyone* to make DeCSS available to Ben. While Ben has a legal right to make fair use of his DVDs,[105] it is impossible for him to do so because it is illegal for anyone to provide him with the means to do so.[106]

Like Ben, most individuals are not able to create their own circumvention programs in order to bypass copy-control measures. Furthermore, it would be illegal for anyone like Jack or anyone who possesses DeCSS to provide Ben with a means—the primary purpose of which is to circumvent the copy-control measures—to lawfully use

101 *See id.* § 1201(j)(2), (4).

102 *See id.* § 1201(e).

103 *See id.* § 1201(f).

104 For an analysis of why this would be considered fair use, see *supra* note 48.

105 *See* H.R. REP. No. 105-551, pt. 1, at 18 (1998) (stating that an individual can circumvent "to make fair use of a work which he or she has acquired lawfully").

106 For a similar example and argument regarding the prohibition on trafficking in a technology to circumvent access, see Nimmer, *supra* note 92, at 735–36.

his DVDs. This is simply bad policy. Congress stated that nothing in the DMCA was intended to "affect rights, remedies, limitations, or defenses to copyright infringement, including fair use."[107] While the defense of fair use is technically still available (i.e., a person with the requisite skill needed to circumvent a copy-control measure can do so once authorized access is achieved and make fair use of the protected work), the subset of society with such ability is small.

Under pre-DMCA law, as the Court held in *Sony Corp. of America v. Universal City Studios, Inc.*, it was legal to traffic in technology that facilitated infringement so long as there was a substantial noninfringing use of the technology.[108] The "primary purpose" test of § 1201(b)[109] is not equivalent to *Sony*'s "substantial noninfringing use" test.[110] The Court in *Sony* stated that a technology that facilitates infringement "need merely be capable of substantial noninfringing uses"[111] to survive an attack for contributory infringement, while § 1201(b)'s "primary purpose" test talks solely of circumvention, not infringement.[112] Therefore, a person is liable under § 1201(b) for trafficking in a device primarily designed to circumvent a copy-control measure even if there is a substantial noninfringing use of the circumvention. As explained below, *Sony*'s substantial noninfringing use test may be required by the Constitution, thus invalidating § 1201(b)'s primary purpose test.[113] Also, anyone attempting to help another circumvent a copy-control protection is liable under § 1201(b) regardless of whether or not there was an infringement.

Two members of the House Commerce Committee seemingly understood the terrible policy implications of the anti-circumvention and anti-trafficking provisions.[114] In expressing their additional views on the House Commerce Committee Report, they "remain[ed] troubled by the implications of this legislation."[115] Representatives Scott Klug and Rick Boucher understood that, as written, the DMCA "fundamentally alters the balance that has been carefully struck in 200 years of copyright case law, by making the private incentive of content

107 17 U.S.C. § 1201(c)(1).

108 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984). For a more detailed discussion of *Sony*, see *infra* notes 145–50 and accompanying text.

109 *See* 17 U.S.C. § 1201(b)(A).

110 *See Sony*, 464 U.S. at 442.

111 *Id.*

112 *See* 17 U.S.C. § 1201(b).

113 *See infra* notes 145–52 and accompanying text.

114 *See generally* H.R. REP 105-551, pt. 2, at 85–87 (1998) (Representatives Scott Klug and Rick Boucher expressing concern that the provisions in § 1201 do not adequately protect fair use).

115 *Id.* at 85.

owners [the economic incentive of copyright owners] the paramount consideration—at the expense of research, scholarship, education, [and] literary or political commentary."[116] The Representatives went on to say that they intended to restore some balance between the interests of copyright owners and the rights of the public to use the works by

> legislating an equivalent fair use defense for the new right to control access. For reasons not clear to us, and despite the WIPO Treaty language "recognizing the need to maintain a balance between the rights of authors and larger public interest, particularly education, research and access to information * * *," our proposal was met with strenuous objection . . . .[117]

The proposed amendment to create a separate fair use provision for the ban on circumvention and trafficking failed, as evidenced by its absence in the codified Act.[118]

While Representatives Klug and Boucher appeared to be champions for fair use in the DMCA, when the bill was presented to the full House for a vote, both representatives affirmatively supported the bill to which they had previously voiced objection. Before the full House of Representatives, Congressman Klug stated that the bill was balanced in a "manner that promotes product development and information usage, indeed the very 'progress of Science and the useful arts' set forth in the Constitution."[119] Representative Boucher also expressed his support for the bill stating, "The Committee on Commerce has, in the manner for which it is known, mastered the intricate details of this complex subject and has produced a balanced result."[120]

Nowhere else in the copyright law can a person be found liable absent a direct infringement on someone's part.[121] Thus, the anti-trafficking provisions not only obliterate the right to fair use, but also create a new form of liability for third parties. Unlike contributory

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116 *Id.*

117 *Id.* at 86.

118 *See generally* 17 U.S.C. § 1201 (Supp. V 1999). There is not a specific fair use provision pertaining to either the anti-circumvention or anti-trafficking provisions anywhere in the Act. *See id.*

119 144 CONG. REC. H10,621 (daily ed. Oct. 12, 1998) (statement of Rep. Klug). Unfortunately, contrary to Representative Klug's statement, user rights were not protected.

120 144 CONG. REC. H7096 (daily ed. Aug. 4, 1998) (statement of Rep. Boucher).

121 *See* Nimmer, *supra* note 92, at 734.

infringement[122] and vicarious liability,[123] which both require direct infringement in order to find a third party liable, the anti-trafficking provisions can place liability on a person for providing the means for another to make lawful use of a protected work.

B. Fair Use Is Constitutionally Compelled

The Constitution states that "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[124] While this clause grants authors an exclusive right to their works for a limited time, it does so in order to promote the arts and science. Thus, any legislation expanding the scope of copyright must do so in a way that still promotes the arts and science. As noted above, the anti-trafficking provisions of the DMCA effectively eliminate the right of fair use and thus do not comport with the purpose of the Constitution's Copyright Clause.

While fair use was not codified until the Copyright Act of 1976, the principle existed at common law for much longer. As far back as 1841,[125] courts recognized that "a fair and bona fide abridgment of an original work, is not piracy of the copyright of the author."[126] While § 107 of the Copyright Act basically codified the common-law doctrine of fair use,[127] it is important to understand *why* fair use developed at common law.

Fair use developed in order to effectuate the intent of the Copyright Clause:

> Although the Copyright Law makes no provision for "fair use" of another's work, the author's consent to a reasonable use of his copyrighted works has always been implied by the courts as a necessary incident of the *constitutional* policy of promoting the progress of science and useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works

122 *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (stating that both knowledge of the *infringing* activity and material contribution are required to find contributory infringement).

123 *See id.* at 262 (stating that the elements for vicarious liability are a right to control and direct financial benefit from the *infringing* activity).

124 U.S. CONST. art. I, § 8, cl. 8.

125 *See* Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968) ("The earliest discussion of the principle was in 1841 by Mr. Justice Story . . . .").

126 Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

127 *See* Harper & Row, Publ'g v. Nation Enters., 471 U.S. 539, 549 (1985).

> and thus destroy all incentive to engage in literary activity and frustrate the very ends sought to be attained.[128]

The Supreme Court favorably quoted this passage, giving it much credibility.[129] Several other cases interpreting the common-law fair use doctrine have recognized the constitutional foundations of fair use.

In *Time Inc. v. Bernard Geis Associates*, the court addressed the issue of whether it was fair use for an author to use copies of pictures owned by *Time*.[130] The pictures were frames from Abraham Zapruder's home video of the assassination of John F. Kennedy.[131] Zapruder had sold all the rights in his film to *Time*.[132] The defendants in the case wanted to use some frames of the film in a book discussing the assassination but were denied permission and decided to copy the frames anyway.[133] The court determined that it was fair use for the defendants to use the pictures, and thus, they were not liable for infringement.[134] The court went on to say, "if there is no action for statutory copyright infringement because the copying by defendants is found a fair use, then New York could not *constitutionally* make such copying an act of unfair competition."[135] This reasoning was based on an earlier Supreme Court decision, *Sears, Roebuck & Co. v. Stiffel Co.*, in which the Court held that a state could not enact unfair competition laws granting protection to a lamp that was not subject to patent protection.[136] The Court in *Sears* reasoned:

> To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public.[137]

Thus, in both *Sears* and *Time*, the Supreme Court and the district court reasoned that the Supremacy Clause prohibits states from granting protection to works that federal law says should be available to the public to promote the useful arts and science. While it could be argued that *Sears* and *Time* deal with preemption law and thus do not

128 HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944) (emphasis added).
129 *See Harper & Row*, 471 U.S. at 549.
130 293 F. Supp. at 144–46.
131 *See id.* at 131.
132 *See id.* at 133–34.
133 *See id.* at 138.
134 *See id.* at 146.
135 *Id.* (emphasis added).
136 376 U.S. 225, 231–32 (1964).
137 *Id.*

apply to the federal government, the Supreme Court's and district court's references to the Constitution and to fair use demonstrate that even in the absence of preemption law, the states would not be able to enact laws that do not comport with fair use. In *Time*, the court explicitly said that the Constitution prohibited a state from usurping fair use.[138] This reasoning implies the constitutional basis of the fair use doctrine, and it follows that the federal government should not be allowed to usurp fair use.

Another case interpreting the common-law doctrine of fair use again describes the constitutional basis of the fair use doctrine. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, the court determined that Random House's use of information from Rosemont's articles on Howard Hughes was fair use.[139] In discussing fair use, the court stated:

> The fundamental justification for the privilege lies in the *constitutional purpose* in granting copyright protection in the first instance, to wit, "To Promote the Progress of Science and the Useful Arts." To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."[140]

While information is not itself subject to copyright,[141] the above quotation makes it clear that the court was focusing on fair use rather than the non-copyrightable nature of factual information. The above statement again demonstrates that the Constitution requires fair use in order to promote the useful arts and science. Without fair use, subsequent authors and members of the public would not be able to further develop the ideas and learn from the techniques used in previous works. Applied to DVDs, without fair use, Ben from the example above would not be able to create the compilation of snippets to study the directorial techniques, and, thus, the constitutional purpose of promoting the useful arts and science is subverted.

Along with the cases that demonstrate the constitutional basis for the common-law fair use doctrine, cases decided after fair use was codified continue to recognize the constitutional roots of the doctrine. "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science

138 *Time*, 293 F. Supp. at 146.

139 366 F.2d 303, 306 (2d Cir. 1966).

140 *Id.* at 307 (citations omitted) (emphasis added).

141 *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

and useful Arts . . . .'"[142] Likewise, the Court also has stated that fair use allows courts leeway when a strict reading of the copyright law would hinder the creativity the copyright clause of the Constitution intends to promote.[143] "Fair use allows a court to resolve tensions between the ends of copyright law, public enjoyment of creative works, and the means chosen under copyright law, the conferral of economic benefits upon creators of original works."[144]

A situation similar to that of DeCSS was addressed by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*[145] In *Sony*, the Court was asked to determine if Sony's sale of video-copying equipment[146] violated any rights of copyright owners.[147] In determining whether a prohibition on VCRs would violate fair use principles, the Court stated that the "question is thus whether the Betamax is capable of commercially significant noninfringing uses," and went on to say that, "one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home."[148] The court thus determined that time-shifting was a commercially significant noninfringing (fair) use and therefore was constitutionally protected. In talking about the Constitution's Copyright Clause, the Court stated:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.[149]

The Court went on to say that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. *Indeed, it need merely be capable of substantial noninfringing uses.*"[150] Thus, the Court reasoned that the *constitutional* balance

142 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting U.S. CONST. art. I, § 8, cl. 8).

143 *See* Stewart v. Abend, 495 U.S. 207, 236 (1990).

144 Pac. & S. Co. v. Duncan, 744 F.2d 1490, 1495 (11th Cir. 1984).

145 464 U.S. 417 (1984).

146 In this case, the video-copying machine was known as the Betamax. *Id.* at 422. The Betamax is very similar to a VHS videocassette recorder.

147 *Id.* at 420.

148 *Id.* at 442.

149 *Id.* at 429.

150 *Id.* at 442 (emphasis added).

required between economic incentive to create works and public access to works to motivate creativity forbids a ban on a machine that is capable of allowing noninfringing fair use.

Like the Betamax in *Sony*, DeCSS is a technology that is capable of allowing users to make substantial noninfringing uses of protected works. The court in *Reimerdes* stated that "Sony involved a construction of the Copyright Act that has been overruled by the later enactment of the DMCA to the extent of any inconsistency between Sony and the new statute."[151] Since *Sony* relied on constitutional principles, Congress cannot simply overrule the *Sony* Court with the enactment of the DMCA. The enactment of the anti-trafficking provisions of the DMCA cannot change the underlying principle of *Sony* that the Constitution requires a balance between the economic interests of authors and the public's right to use the works in order to foster creativity. While fair use is an equitable doctrine and the Constitution does not say where the line must be drawn in balancing the economic interests of copyright owners and the public's desire to foster creativity, as explained above, the DMCA effectively eliminates the fair use required to foster creativity and must run afoul of the Constitution's requirements. The anti-trafficking provisions, which effectively eliminate the right to fair use, do not comport with the requirements of the Constitution made clear in *Sony*.

Many cases after the *Sony* decision have attempted to limit the Court's holding to staple articles of commerce. "Arguably, the Sony doctrine only applies to 'staple articles or commodities of commerce,' such as VCR's, photocopiers, and blank, standard-length cassette tapes."[152] Even if the limitation of the *Sony* doctrine to staple articles of commerce is valid, DeCSS fits within the limitation. DeCSS, like other computer programs, is a consumer good with legitimate legal functions and is thus a staple article of commerce. The Betamax in *Sony* and modern VCRs are machines capable of copying protected works in and of themselves. DeCSS is a software utility that allows another machine, a computer, to copy protected works. The fact that DeCSS, a computer program and consumer good, must be used in conjunction with another staple article of commerce should not preclude it from being an article of commerce itself. Likewise, the fact that DeCSS is distributed for free over the Internet should not distinguish it from other computer programs that are sold in stores. DeCSS is a staple article of commerce that is capable of substantial nonin-

151 Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000).

152 A & M Records, Inc. v. Abdallah, 948 F. Supp. 1449, 1456 (C.D. Cal. 1996).

fringing uses and therefore is constitutionally protected for the promotion of useful arts and science.

While the regulatory provisions of § 1201(a) of the DMCA may preserve fair use and insulate the anti-circumvention provision from a constitutional attack, a strict reading of the anti-trafficking provisions of the DMCA does not comport with the intent of copyright law as expressed in the Constitution. Rather than promote the useful arts and science, the anti-trafficking provisions radically shift the balance towards protecting the economic interests of copyright owners at the expense of society as future creativity is stifled. This shifting balance may so frustrate the purpose of the Constitution that courts will declare the DMCA unconstitutional. This constitutional problem can be avoided if a fair use defense is added to the anti-trafficking provisions.

III. Congress Does Not Have the Power To Enact the Anti-Trafficking Provisions Under Other Constitutional Grants

While the Copyright Clause does not grant Congress the power to enact the anti-trafficking provisions of the DMCA, one might argue that other clauses of the Constitution allow Congress to enact these provisions. The likely sources of Congressional power would be the Commerce Clause[153] and the Necessary and Proper Clause.[154] As described below, neither of these clauses grants Congress the power to enact the anti-trafficking provisions of § 1201(b).

The Commerce Clause does not give Congress the power to enact legislation that contradicts another provision of the Constitution.[155] In *Railway Labor Executives' Association*, the Court held that Congress could not use the Commerce Clause to enact non-uniform bankruptcy laws because the Bankruptcy Clause requires that bankruptcy laws be uniform.[156] Because fair use is constitutionally required in order to achieve the balance the Copyright Clause requires, and to promote the useful arts and science, *Railway Labor Executives' Association* dictates that Congress cannot use the Commerce Clause to destroy this balance. If Congress were allowed to use the Commerce Clause to eliminate fair use, a constitutional limitation required by the Copyright Clause would be bypassed. This bypassing of a constitutional limita-

153 U.S. Const. art. I, § 8, cl. 3.

154 *Id.* art. I, § 8, cl. 18.

155 *See* Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 468–69 (1982).

156 *See id.*

tion is precisely what the Court held to be impermissible in *Railway Labor Executives' Association.*[157]

While other cases have held that Congress can use its Commerce Clause power to enact legislation to give copyright-like protection to works not within the scope of the Copyright Clause,[158] these cases do not allow Congress to usurp a constitutional limitation. In *Moghadam,* the court upheld a statute[159] that granted copyright-like protection to live musical performances.[160] The court noted that the Copyright Clause does not prohibit Congress from extending protection, similar to copyright, to works outside the scope of the Copyright Clause.[161] However, unlike the anti-bootlegging statute at issue in *Moghadam,* the anti-trafficking provisions of § 1201(b) do directly conflict with the requirements of the Copyright Clause. As described above, the right of fair use is required by the Copyright Clause.[162] Allowing the anti-trafficking provisions of the DMCA to stand would not fill a gap in the Copyright Clause like *Moghadam* permits, but rather would eradicate a limitation on Congress's power imposed by the Copyright Clause.

In *Authors League of America,* the court held that Congress could use the Commerce Clause to deny copyright protection to some foreign-manufactured works.[163] However, denying copyright protection is not akin to usurping a constitutional limitation on congressional power. The Copyright Clause gives Congress the power to enact copyright legislation;[164] it does not mandate that the legislation be enacted or be uniform. Therefore, when Congress decided to deny copyright protection to certain works, it was not contradicting a constitutional limitation. However, the anti-trafficking provision of § 1201(b) is directly contrary to a constitutional limitation; therefore, the provision is invalid.

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157 *See id.* ("Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.").

158 *See, e.g.,* United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999) (holding that Congress could use the Commerce Clause to provide protection to live musical performances, even if the performances were not fixed in a tangible medium of expression as required by the Constitution); Authors League of Am., Inc. v. Oman, 790 F.2d 220, 224 (2d Cir. 1986) (stating that Congress can use the Commerce Clause to deny copyright protection to certain foreign-manufactured works).

159 18 U.S.C. § 2319A (1994).

160 175 F.3d at 1280.

161 *Id.*

162 *See supra* Part II.B.

163 790 F.2d at 224.

164 U.S. CONST. art. I, § 8, cl. 8.

Likewise, the Necessary and Proper Clause cannot be used as a basis for congressional power to enact the anti-trafficking provisions of the DMCA. The Necessary and Proper Clause does grant Congress wide latitude to implement laws to achieve the ends permitted by the Constitution.[165] However, the Necessary and Proper Clause does not allow Congress to transcend constitutional limits on its power.[166] The Court in *McCulloch* stated, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consistent with the letter and spirit of the constitution,* are constitutional."[167] Congress's intent to protect copyrighted works from piracy is legitimate and within the scope of the Constitution. However, the anti-trafficking provisions of the DMCA are not "consistent with the letter and spirit of the constitution," but rather abrogate the right of fair use. As explained above, the Copyright Clause requires a fair use right so that the arts and sciences can be promoted. The anti-trafficking provisions of the DMCA effectively eliminate the right of fair use and therefore cannot be justified under the Necessary and Proper Clause.

IV. As a Matter of Policy, a Fair Use Defense Should Be Added to § 1201(b)

The inability of a person to make fair use of a DVD is just the tip of the iceberg. As e-commerce develops and more Internet users gain access to high-speed connections such as cable modems and T1 lines, more and more information can be expected to be distributed in encrypted digital format. While Congress's intent of protecting digital information and prohibiting interception and unauthorized access to digital transmissions or private digital archives is noble, the DMCA goes too far. The digital environment does pose a threat to copyright owners because of the ability to easily, and at a very low cost, make perfect copies of protected works.[168] However, beyond prohibiting ac-

165 *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–14 (1819) ("To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.").

166 *See id.* at 421.

167 *Id.* (emphasis added).

168 *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 309 (S.D.N.Y. 2000).

cess to digital *transmissions*, similar to scrambled satellite signals,[169] the *Reimerdes* court's interpretation of the DMCA extends to all encrypted digital information whether it exists in cyberspace or is in physical form such as a DVD. Prohibiting circumvention of copy-control measures, particularly of digital information in a physical medium (such as a DVD), is a dangerous expansion of the rights of a copyright owner.

While the owner's economic interest is protected by this provision, society suffers because the lack of fair use will hinder the development of, rather than promote, the arts and science. The Constitution grants authors a limited monopoly, but at a cost. In exchange for the author's exclusive rights enumerated in § 106,[170] the public is entitled to make fair use of the work. The Framers of the Constitution ingeniously created this trade-off to provide economic incentive for original works while at the same time providing others with a means to develop ideas and expand our country's wealth of creative works. As Justice Story said:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.[171]

The anti-trafficking provisions of the DMCA prevent an average citizen, not able to circumvent a technological protection measure himself, from making fair use of a work, thereby prohibiting the borrowing that is necessary for future creation.

For example, while a person can still watch a movie on a DVD and possibly be stimulated to create his own work, a person like Ben from the above example is not able to study the movie in detail by making a compilation of excerpts. Surely, there are creative geniuses out there capable of being inspired to create great works with just the least bit of studying or education. However, for a great deal of others, fair use is required to foster creativity and aid the development of literary and artistic works. The DMCA denies these people the stimulation they need in order to promote the useful arts and sciences.

The desire to prohibit trafficking of circumvention technologies is understandable. The prohibition makes it much easier to protect

169 It is argued above that this is the type of material Congress intended to protect with the DMCA. *See supra* notes 56–67 and accompanying text; *see also* H.R. REP. No. 105-551, pt. 1, at 10 (1998) (analogy to satellite transmissions).

170 *See* 17 U.S.C. § 106 (1994).

171 Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

works from infringement, as potential infringers will not have access to the tools necessary to commit the crime. The court in *Reimerdes* analogized the prohibition on trafficking of circumvention technologies to the prohibition on the possession of burglar tools.[172] However, unlike circumvention technologies, which allow lawful fair use, burglar tools by definition are useful only in committing crimes. What the anti-trafficking provisions do is more analogous to banning the sale of alcohol to the entire population in order to reduce the amount of drunk driving and is therefore overbroad.

Most people would agree that, like copyright infringement, drunk driving is a problem. Most would further agree that banning the sale of alcohol would greatly reduce the incidence of drunk driving and promote the important government interest of keeping streets safe much more efficiently than arresting drunk drivers with officers on random patrol or at road blocks. However, most would disagree that a ban on the sale of alcohol is the answer to the problem. Like circumvention technologies, there are lawful uses of alcohol, and while the sale of alcohol may lead to an increase in crime, this is a cost of living in a free society. Likewise, the trafficking ban on circumvention technologies is a much more efficient way of protecting copyrights than going after infringers directly; however, it frustrates the constitutional purpose of promoting the useful arts and sciences by not allowing fair use. A fair use exception to the anti-trafficking provisions would solve this problem.

So what should be done? As noted above, the court in *Reimerdes* erroneously looked at DeCSS as a technology to circumvent access-control measures,[173] and chose to accept the fact that strict enforcement of the DMCA would deprive many people of their right to fair use:

> Many of the possible fair uses may be made without circumventing CSS while others, i.e., those requiring copying, may not. Hence, the question whether § 1201(a)(2) as applied here substantially affects rights, much less constitutionally protected rights, of members of the "fair use community" cannot be decided *in bloc*, without consideration of the circumstances of each member or similarly situated groups of members. Thus, the prudential concern with ensuring that constitutional questions be decided only when the facts before the Court so require counsels against permitting defendants to mount an overbreadth challenge here.[174]

172 *See* 111 F. Supp. 2d at 329.

173 *See supra* Part I.

174 *Reimerdes*, 111 F. Supp. 2d at 338.

Thus, the court in *Reimerdes* punted on the constitutional issue. Other courts are free to and should decide this important issue. As argued above, the fair use doctrine is derived from the Constitution's purpose of promoting the useful arts and sciences.[175] Courts thus have two options. They can either declare the anti-trafficking provisions unconstitutional, or they can develop a new common-law fair use exception to the anti-trafficking provisions. Of course, Congress can step in at any time and draft a fair use exception to the anti-trafficking provisions that withstands constitutional scrutiny.

Congressional action is preferable in order to publicly discuss the issue and to impose a uniform standard across the country. However, until Congress chooses to act, the latter option is preferable. Just as courts had done for all versions of the copyright act prior to the current Copyright Act of 1976, courts should now imply a fair use exception to the anti-trafficking provisions. By doing this, the DMCA's policy goals of protecting copyrighted works against the increased threats in the digital age will be preserved while the constitutional purpose of promoting the development of arts and sciences will also be protected. The standards for applying fair use to the anti-trafficking provisions must be carefully tailored in order to effectively protect copyrights.

The fair use exception to the anti-trafficking provisions should balance the desire to protect the effectiveness and integrity of copy-control technologies with the interests of those who would like to make fair use. Congress would be the best place to have this balance worked out. One possible example, not intended to be the only possibility, of a fair use exception may help illustrate what Congress may choose to do.[176]

Courts could simply say that people may traffic in technologies to circumvent copy-control measures in order to allow another to make a lawful use of the protected work. Courts could apply a negligence standard to the fair use exception such that if a person negligently provides an infringer with a circumvention technology, the supplier of the circumvention technology would be liable under the provisions of the DMCA.[177] While exact contours of the negligence standard would have to be refined by the courts, presumably a site such as 2600.com,

175 *See supra* Part II.B.

176 Finding a solution to this problem is a difficult task and the more ideas that are presented, the better the discussion will be, which will hopefully lead to the best possible solution.

177 *See* 17 U.S.C. §§ 1203–1204 (Supp. V 1999) (discussing civil and criminal penalties respectively).

which indiscriminately offers DeCSS for download,[178] would be acting negligently by not even attempting to verify if the *intended* use of the circumvention technology is lawful. This is similar to the exception for reverse engineering[179] but would allow trafficking solely for fair use purposes rather than for interoperability purposes. The amount of verification necessary to ensure that the recipient of the circumvention technology intends to make fair use would be no greater than the amount needed for the reverse engineering exception.[180] People intending to offer circumvention technologies would have to verify that the potential user intends to make a lawful use of the circumvention technology. This would place a fairly large burden on the distributor, but that is not necessarily a bad thing. It can be assumed that many people would think that the burden and accompanying risk of distributing circumvention technologies is too large, and they would not offer technologies. At the same time, however, other groups would most likely be willing to verify a user's intended purpose.[181] Also, a person such as Ben in the above example would be able to have his friend Jack develop a circumvention technology for him to use.

This scheme seems to strike a fairly good balance. Many people would be deterred from trafficking in circumvention technologies, which would protect the economic incentive to produce creative works. At the same time, those people who continue to offer circumvention technologies, whether it be a web site or a friend of the "fair user," would have to verify that the user intends to make a fair use. This possible solution fulfills the constitutional requirement of promoting the useful arts and sciences while still holding traffickers liable for negligently aiding the infringement of copyright.

CONCLUSION: WHAT'S NEXT?

In conclusion,[182] CSS should be treated as a copy-control measure, not an access-control measure. While the provision of the

178 *See Reimerdes*, 111 F. Supp. 2d at 309.

179 *See* 17 U.S.C. § 1201(f).

180 *See id.* § 1201(f)(3).

181 It is a fear that no one would be willing to distribute circumvention technologies for fear of liability. However, as courts begin to develop the contours of the negligence standard and things become more certain, more people would probably be willing to verify a user's intended purpose. If no one would be willing to provide circumvention technologies to users who wish to make fair use, courts would have to consider other alternatives.

182 Another issue, beyond the scope of this Note, may play an important role in the distribution of DeCSS. There are concerns that the prohibition on trafficking of DeCSS is a violation of the First Amendment. *See Reimerdes*, 111 F. Supp. 2d at 326–33.

DMCA that prohibits the trafficking of technologies to circumvent access-control measures is a more effective and efficient means of protecting the rights of a copyright holder than directly attacking infringers, it frustrates the Constitution's purpose and eliminates users' rights to make fair use of the protected works. Ideally, Congress will step in and legislate a fair use exception to the anti-trafficking provisions as it did in 1976, when it codified the common-law fair use doctrine. However, if Congress chooses not to act, courts should either rule that the DMCA is unconstitutional because it does not promote the useful arts and science, or courts should read in a fair use exception to comport with the Copyright Clause's purpose.

A couple of recent cases have held that certain computer code is protected speech. *See generally* Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) (holding that the First Amendment protects encryption source code); Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132, 1141 (9th Cir. 1999) ("[E]ncryption software, in its source code form and as employed by those in the field of cryptography, must be viewed as expressive for First Amendment purposes.") (citation omitted). An argument can be made that the DMCA's restriction on the dissemination of DeCSS is an impermissible restraint on freedom of expression. Whether this argument is persuasive or not is outside the scope of this Note. It is mentioned merely to illustrate that there are other possible arguments to justify the distribution of DeCSS. For a recent case analyzing the First Amendment implications of posting DeCSS, see *DVD Copy Control Ass'n v. Bunner*, No. CV786804, 2001 WL 1340619, at *11 (Cal. Ct. App. Nov. 1, 2001) (finding that the trial court's grant of a preliminary injunction, prohibiting the defendants from linking to sites that distribute DeCSS, was an unconstitutional prior restraint on the defendants' First Amendment rights).