

GETTING “RIPPED” OFF BY COPY-PROTECTED CDs

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Without much fanfare, copy-protected compact discs (“CDs”) found their way next to regular music CDs in record stores last year. On May 15, 2001, Charley Pride released the first commercial CD to use technology developed by SunnComm called MediaCloq.¹ The technology prevents consumers from burning² the CD or ripping³ tracks and compressing music into digital audio formats such as MP3.⁴ Record companies hope that copy-protected CDs can suppress the insidious effects of digital music piracy spurred by Napster and CD burners. Copy-protected CDs utilize technology aimed at protecting copyrights by disabling the burning and ripping of CDs. Copy-protected CDs prevent copying and strive to limit the means of sharing digital music files over the Internet.

In September 2001, a consumer filed a suit against an independent record label and program manufacturer for embedding technology that blocked the listening of the CDs on a computer.⁵ The disc’s packaging carried a disclaimer warning that the CD could not be played with a DVD player⁶ and by extension, a computer with a DVD-ROM drive. Also, when a

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1. Jeffrey H. Albright, *The Next Step in Stopping Swapping: Copyproof CDs*, NAT’L LAW JOURNAL, Oct. 22, 2001, at C3.

2. Burning refers to the act of recording music to a CD.

3. Ripping is the process of extracting data from a compact disc into a manipulatable file. After a CD is ripped, it is typically compressed and encoded into a space-saving format such as MP3 or burned onto another CD.

4. MP3 stands for Moving Pictures Expert Group, audio layer 3. MPEG created an algorithm for file compression. MP3 refers to both the resulting audio compression file and the method for compressing audio data. For more information, visit <http://www.mpeg.org>.

5. Complaint at 1, *DeLise v. Fahrenheit Entertainment, Inc.*, No. CV 014297, (Marin County Ct., Cal. Super. Ct. filed Sept. 6, 2001), at www.techfirm.com; see also Jim Hu, *Lawsuit Targets Copy-Protected CDs*, CNET, http://dailynews.yahoo.com/h/cn/20010907/tc/lawsuit_targets_copy-protected_cds_1.html, (Sept. 7, 2001) (on file with the Journal of Legislation).

6. The CD label stated:

This audio CD is protected by SunnComm MediaCloQ Ver 1.0. It is designed to play in standard audio CD players only and is not intended for use in DVD players. Licensed copies of all music on this CD are available for downloading. Simply insert CD into your computer to begin.

DeLise, at 30; Tom Spring, *Music Labels Target CD Ripping*, <http://webcenter.pcworld.aol.com/computing/aolcom/article/0,aid,69504,00.asp> (last visited Nov. 11, 2002).

user attempted to rip a song, the user was sent to a site to download the MP3, which asked for personal information.⁷ Finally, the warning label made no disclosure that the downloaded songs would not work on a non-Windows computer and could not be moved to a portable device or burned to another CD.⁸ The complaint alleged that the label and distributor engaged in unfair business practices by failing to adequately inform the consumer.⁹ The case settled when the label and distributor agreed to provide a more detailed disclosure on the CD's package.¹⁰ Unfortunately, the settlement sets no precedent and will not apply to other copy-protected CDs.¹¹

The future of music will no longer require standard audio players, but rather computers and other digital devices. To contrast, a laptop holding over 100 CDs worth of music in MP3 format is far more easily organized and less cumbersome than carrying over 100 CDs coupled with the inconvenience of switching CDs.¹² Presently, the CD is the dominant format of tangible media, but the shift towards intangible digital media is not far behind. In an attempt to capitalize remaining CD sales, record companies have not abandoned the old-school approach of selling CDs despite record low profits.¹³ Record companies have made numerous attempts to limit consumer options by waging war against the digital medium through legal action.¹⁴ Additionally, recent legislation encroaches upon the rights of listeners in controlling their music collections. Digital music allows the creation of custom mixes on computers, the transfer of music to portable players, the sharing of playlists with friends, and the ability to burn music onto CDs for space- and format-shifting purposes. In contrast, the ever-increasing sales of CD writers, blank CDs, computers with large hard drives¹⁵ compared to lagging sales of music CDs over the past year¹⁶ should serve as an indicator for the industry to reevaluate its business model and adopt the MP3 format.

7. *DeLise*, at 33-39.

8. Jon Healey, *A Lock and Load Battle Over Music*, L.A. TIMES, Nov. 22, 2001, at T1.

9. *DeLise*, at 40-43.

10. Andrew Herrmann, *3.6 Billion Illegal Downloads a Month*, CHI. SUN-TIMES, Mar. 3, 2002, at 6.

11. Jon Healey, *Label to Disclose CD Protections*, L.A. TIMES, Feb. 23, 2002, at C3.

12. Apple Computer introduced the iPod, which can carry over 1,000 MP3s. Brad King & Farhad Manjoo, *Apple's 'Breakthrough' iPod*, WIRED NEWS, <http://www.wired.com/news/gizmos/0,1452,47805,00.html> (Oct. 23, 2001). For more information, visit Apple's website: <http://www.apple.com/ipod>.

13. Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2454-55 (2001).

14. See, e.g., *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (granting a preliminary injunction on the peer-to-peer file sharing system that enabled the transmission of copyrighted music and sound recordings); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072 (9th Cir. 1999) (holding that the Diamond Rio was not a digital audio recording device and therefore, not in violation of the Audio Home Recording Act).

15. Healey, *Lock and Load*, *supra* note 8, at T1.

16. Randy McMullen, *Labels Get Some Protection, But It'll Just Hurt Consumers*, CONTRA COSTA TIMES, Mar. 8, 2002, available at 2002 WL 4541065.

The Recording Industry Association of America¹⁷ ("RIAA") has had varied success in quelling the reproduction of MP3s.¹⁸ RIAA played a significant role in the public campaign against unauthorized trading of copyrighted songs on Napster. After a lengthy legal and technological struggle, the court of appeals in *A&M Records, Inc. v. Napster*,¹⁹ found that uploading and downloading of digital audio files containing copyrighted music, through an Internet service provider that facilitated transmission and retention of such files by its users, was not fair use of copyrighted works.²⁰ The use by individuals was not "transformative," but rather commercial because it saved users the expense of purchasing authorized copies.²¹ Despite this win, the music industry has not been able to stop the proliferation of unauthorized copyrighted material on Napster-like platforms that support peer-to-peer file exchanges.²²

The legislative action and judicial decision-making responding to the advent of technology threatens the delicate balance of copyright policy. Copyright is a limited monopoly granted to exclude certain uses of another's expression. Under certain circumstances, persons other than the author are allowed to use the protected work for limited purposes. Though consumers have been protected by fair use, recent legislation has left the judge-made doctrine in a tenuous position. For example, the Digital Millennium Copyright Act ("DMCA") has an anti-circumvention provision²³ that prevents a user from getting around technical protection systems ("TPS").²⁴ In addition, an anti-piracy bill recently proposed by Senator Ernest "Fritz" Hollings would restrict computers and electronic devices from playing unauthorized material by using a copy protection measure to be agreed upon by technol-

17. Established in 1952, the RIAA is a trade group that represents the recording industry of the United States. Members of the trade group control about ninety percent of all sound recordings produced and sold in the United States. See generally RIAA: Who We Are, <http://www.riaa.com/About-Who.cfm> (last visited Apr. 5, 2002).

18. See, e.g., *Diamond*, 180 F.3d at 1081.

19. 239 F.3d 1004.

20. *Id.* at 1014-15.

21. *Id.* at 1015.

22. Many peer-to-peer file exchange services have supplanted Napster: AudioGalaxy (<http://www.audiogalaxy.com>), Gnutella (<http://www.gnutella.com>); FastTrack (<http://www.kazaa.com>); Music City Networks (<http://www.musiccity.com>); and Bearshare (<http://www.bearshare.com>).

23. 17 U.S.C. §§ 1201(a), 1201(b) (2000).

24. See John R. Therien, Comment, *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, 982 (2001) (stating that a TPS can be used to guard media that need not be copyrightable). Other terms like "copyright management systems" and "automated rights management systems" assume that works are protected by copyright and are narrower than the scope of TPSs. See, e.g., Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L. J. 161 (1997); Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

ogy and entertainment industries.²⁵ These laws fundamentally challenge copyright law in a way that is certain to suffocate innovation. While the copyright balance is not absolute, each encroachment of technology supported by chilling legislative action shifts the equilibrium in favor of copyright holders.

Track I of this Note will outline the history of sound recordings, its relation with the artist, and the rise of the music industry in the United States. Track II will discuss the current state of sound recordings and illustrate the different types of copy-protection technology embedded in CDs. Track III will provide information on the constitutional roots of copyright law and statutory protections that govern musical works. It will analyze copyright trends in legislation and judicial decisions within the scope and limitations of a copyright owner's exclusive rights to reproduce and distribute works. Track IV will first argue that copy protection and technical protection systems adversely affect expression and, as a result, violate the First Amendment. Additionally, recent legislation and judicial decisions do not comport with the Constitution and further complicate the application of safety valves to copyright law. Second, it will argue that copy protection and technical protection systems coupled with current legislation and practices are poor public policy because they thwart competition and hinder innovation in an otherwise expanding technological marketplace. Copyright owners will probably not deter business and consumer interest in digital audio technology by aggressively pursuing uncompromising changes in copyright law. Lastly, this Note will provide a legal and economic framework to deal with digital piracy and sound recordings in the digital age.

TRACK I: THE MUSIC

Sound recordings are a part of our every day lives, whether or not we want them to be: riding in an elevator, browsing in a store, dining at a restaurant, sitting in a dentist's chair, waiting on hold, driving to work, or enjoying an evening at home. Sound recordings enable the preservation of musical works, progression of music and creation of new sounds. Music is no longer a novelty or commodity of fleeting existence, but instead a part of history. The listener has the option of playing sound recordings at any time, into perpetuity, and at any place. A sound recording that persists for eternity allows

25. Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. § 3 (2002) ("CBDTPA"). See generally Congressional Press Release, Ernest F. Hollings, *Hollings Introduces Bill to Protect Copyrighted Digital Content Bill Requires Private Sector to Develop Standards, Technologies and Encoding Rules to Safeguard Content*, (Mar. 21, 2002), <http://hollings.senate.gov/~hollings/press/2002613820.html>.

a musician to create works and build on the musical foundations. Today, a complex web exists among the artists, the music industry, and sound recordings.

The history of sound recordings began in 1877 when Thomas Alva Edison invented the phonograph.²⁶ This marked the beginning of the acoustic age. Edison's phonograph consisted of a cylinder wrapped in tin foil and a metal stylus. Originally, access to music was for the affluent. Edison's goal was to provide affordable music for the masses through a sound recording.²⁷ At about the same time, Emile Berliner improved upon the phonograph and developed the gramophone which could record on discs rather than cylinders.²⁸ His technique of recording on wax discs remained the standard for over forty years.

The intense adaptation of the electrical sound recording began in 1925. The 78-rpm shellac disc and the vacuum tube phonograph dominated the electrical period from 1925 to 1950.²⁹ Columbia Records introduced the long-playing ("LP") microgroove vinyl disc with a capacity of twenty-five minutes of playing time in 1948.³⁰ This far exceeded the length of the 78-rpm shellac discs, which had a playing time of about four minutes. The longer playing time was attributed to narrower grooves and reducing the running speed from 78-rpm to 33-rpm.³¹ At the same time, the fidelity of sound recordings continued to improve. In contrast, the new vinyl discs were lighter, flexible, unbreakable, and had much less background noise. The boost in sales of LPs encouraged record companies to re-record all existing music.

The introduction of the magnetic tape enabled artists to edit their performances and splice the best material from each of several takes into the final product. The tape allowed artists to perform over existing tracks, known as "dubbing." This increased the flexibility and freedom of artists, musicians, and recording producers. Philips introduced the compact audio-cassette tape in 1963.³² It slowly overtook the revolving disc as the main form of recorded sound. By 1983, Sony solidified the dominance of the cassette by introducing portability with the Sony Walkman and enhancing the quality of sound by adding Dolby B Noise Reduction.³³ A combination of Vinyl LPs for play at home and cassettes for the commute in the car became

26. ANDRE MILLARD, *AMERICA ON RECORD* 1 (1995).

27. *Id.* at 2.

28. MAX MORATH, *THE NPR CURIOUS LISTENER'S GUIDE TO POPULAR STANDARDS* 29 (2002).

29. MILLARD, *supra* note 26, at 6.

30. *Id.* at 207-08.

31. *Id.* at 209.

32. *Id.* at 316.

33. *Id.* at 325.

the model. A nascent problem facing the music industry was piracy.³⁴ For the first time, people copied records onto blank tapes and circulated “bootlegged” copies of concerts.³⁵ However, piracy was limited because of the near impossibility of producing a high-quality or perfect copy.

The digital era began in 1982 with the commercial introduction of the compact disc (“CD”).³⁶ Standardization of the Philips-Sony CD system was a major victory for the companies and an important event in the digital era of sound recording.³⁷ The adoption of the CD as the primary format of recorded music took inducement because of high costs incurred with the manufacture of CDs coupled with the continued improvement of cassette audio quality.³⁸ For the first time in 1988, CD sales surpassed vinyl LPs in the United States. Finally, in 1992, CD sales trumped audiocassettes.³⁹

The CD represented the epitome of recorded-sound technology. Recording on vinyl and cassette tapes accentuated the loud voices of singers and quieted instrumentals. Each time a user played a tape, a slight amount of damage was done to the recording.⁴⁰ Music became more precise and artists had the option of recording tracks longer than four and a half minutes.⁴¹ Up to seventy-five minutes of sound could be stored on the CD, far exceeding the length of any other system.⁴² At last, a sound recording with no extraneous noise, no surface noise of scratches and pops, no tape hiss, and no background drone was possible.⁴³ Digital recordings suffer no degradation over time and last forever.

Digital technology reached the pinnacle of user friendliness. In addition, technological improvements of the CD player gave the user the ability to choose selections at random and with the introduction of remote control devices, it made it possible to operate the device without leaving the comforts of the couch. Today, the music industry faces a battle with piracy because of the dissemination of the widely popular MP3 format via peer-to-

34. Piracy is the unauthorized duplication of the actual sound recording—the record, tape or CD. Today, a “record 950 million units would make illegal music an industry worth \$4.3 billion, almost three times the size of the market for portable CD players themselves.” Bob Keefe, *Music Piracy Exploding, Trade Group Reports*, COX NEWS SERVICE, June 11, 2002.

35. MILLARD, *supra* note 26, at 327. The RIAA saw bootlegging as a threat to sales and “[b]y the 1980s the RIAA and its members claimed that piracy of its products was costing them billions of dollars of revenue each year.” *Id.*

36. *Id.* at 7.

37. *Optical, Laser Pickup is Due to Become Main Format*, JAPAN ECONOMIC JOURNAL, Aug. 4, 1981, at 8.

38. Debbie Galante Block, *With Choice of Audio Formats, Consumers Still Stick with Tape*, BILLBOARD, Mar. 12, 1994, at 73.

39. Steve Traiman, *Coalition Helps Slow Drop in Tape Sales*, BILLBOARD, Feb. 7, 1998.

40. MILLARD, *supra* note 26, at 353.

41. See Kevin Kelly, *Where Music Will Be Coming From*, N.Y. TIMES, Mar. 17, 2002, at 29.

42. MILLARD, *supra* note 26, at 353.

43. *Id.*

peer file-sharing software. In order to deal with it, the music industry employs various techniques such as instituting technical protection measures like copy protection to lobbying Congress for additional copyright protection.

TRACK 2: TECHNOLOGY OF COPY PROTECTION

Copy protection mechanisms take advantage of the different technical specifications engineered into CD production. For the purposes of this Note, two different standards are relevant: Red Book and Yellow Book. Since 1980, Philips and Sony developed and licensed the Red Book standard for Compact Disc Digital Audio ("CD-DA").⁴⁴ It was necessary to create a universal CD standard so that any CD could read by a CD player made by any manufacturer. In 1983, Sony and Philips announced the Yellow Book standard for Compact Disc Read Only Memory ("CD-ROM").⁴⁵ A CD-ROM drive can play a music CD via software, but playing a CD-ROM disc on an audio player will ruin the speakers.⁴⁶

All CDs have errors, but that does not prevent them from being played accurately because CD players use error detection code ("EDC") and error correction code ("ECC") to fix the errors.⁴⁷ Audio CD players are not as sensitive readers as CD-ROM drives because the designers were cognizant of possible spoiled CDs caused by scratches or dirt. CD-DA players that follow the Red Book standard in stereo systems have built-in ECC named Cross Interleaved Reed Solomon Code ("CIRC") to reconstruct the audio file if errors exist.⁴⁸ If a CD-DA player cannot fix an error, it merely skips 1/75th of a second of audio.⁴⁹

On the other hand, CD-ROM drives and MP3 players that follow the Yellow Book standard must read every bit of encoded information. A single bit of errant information in a computer program can crash your program and even your computer's operating system. To compensate, CD-ROMs use CIRC and an additional EDC/ECC.⁵⁰ If the CD-ROM has too many errors caused by scratches, dirt, air bubbles, or superfluous data, the CD-ROM

44. *CD Terminology and Background: Coloring Books*, at <http://www.music.swt.edu/tech/CDINFO.HTML> (last visited Nov. 11, 2002).

45. *Compact Disc Creation Services*, at <http://www.gi.alaska.edu/crc/cdrom/cdrom.html#1> (last visited Nov. 11, 2002).

46. Brad Thompson, *What's in a CD-ROM Drive?*, CD-ROM PROFESSIONAL, VOL. 8, NO. 12, Dec. 1995, at 90.

47. Bob Starett, *Compact Disc Errors*, ROXIO CD-R NEWSLETTER, Apr. 21, 2000, available at <http://www.roxio.com/en/support/cdr/cderrors.html>.

48. *Id.*

49. *Id.*

50. *Id.*

player will be unable to read and make accurate copies. While CD-DA devices skip over the errors, CD-ROMs must read data bit by bit, so they are more sensitive to errors. Consequently, when the user attempts to copy the music encoded with errors to convert it into MP3 format, the CD-ROM device either fails to copy the CD onto the hard drive or the copy is riddled with defects.

The five major record labels⁵¹ enlisted the support of encryption companies to copy-protect CDs with the intent to curtail digital piracy.⁵² Encryption companies exploit the difference between Red Book and Yellow Book standards by scrambling or distortion. Distorting the music entails insertion of extra data, which are undetectable “pops” and “clicks” in analog form, but readily audible when a consumer attempts to make a copy onto their computer.⁵³ The imperfect music is meant to discourage the user from copying and disseminating digital music.

Copy-protected CDs entered the stream of commerce with relatively little publicity.⁵⁴ The first CD released in the United States with such protections was the Charley Pride CD in May 2001. Since then, numerous CDs contain copy protection mechanisms.⁵⁵ Each record label enlisted different companies to secure CDs. Consumers will be faced with the prospect that not all CDs can be copied onto their PCs and later space- or format-shifted for personal use. Even if one can gain access to copy a music CD, there is no guarantee of perfect music. For that reason, consumers might have to undergo the tedious process of obtaining the MP3 online through the record label that may have additional technical protection systems placed upon them. The chart below analyzes the different copy protection mechanisms available and whether or not the digital music can be copied to a PC.

51. BMG Records, EMI Group, Sony Music Entertainment, Universal Music Group, Warner Music Group.

52. Adam Pasick, *Record Labels Plan Copy-Proof CDs*, YAHOO DAILY NEWS, at http://dailynews.yahoo.com/h/nm/20010807/re/tech_cd_copyprotection_dc_1.html (Aug. 7, 2001).

53. John Borland, *Snaps, Crackles and Pops Aim to Stop CD Piracy*, ZDNET UK NEWS, at <http://news.zdnet.co.uk/story/0,,t269-s2091619,00.html> (July 19, 2001).

54. Ron Harris, *Copy-Proof CDs Shrouded in Secrecy*, ASSOC. PRESS ONLINE, at 2001 WL 26776226 (Aug. 23, 2001).

55. To see a list of CDs containing copy protection mechanisms, visit <http://www.fatchucks.com/z3.cd.html>.

Company	Digital Audio Disc Corporation ⁵⁶	Macrovision ⁵⁷ and TTR Technologies ⁵⁸	Midbar ⁵⁹	SunnComm ⁶⁰
Copy Protection Scheme	Key2Audio	SafeAudio	Cactus Data Shield ("CDS")	MediaCloq
Mechanism	Uses a hidden signature applied to the disc during glass master manufacturing that prevents playback on PC/MAC and thereby prevents copying or track ripping. ⁶¹	Adds digital errors to music CD and deliberately upsets error correction codes. ⁶²	CDS replaces parts of music with false data. CD recorder copies incorrectly labeled false data as music and playback sounds bad. ⁶³	Disguises the CD's table of contents so that CD-ROM drive and accompanying software cannot find the tracks to extract. ⁶⁴
Copied onto Computers?	No, unrecognizable to CD-ROMs. CD cannot be played or copied onto PCs. ⁶⁵	Yes, but distortion is amplified into pops and clicks in unauthorized digital copies. ⁶⁶	Yes, but cannot be moved to another PC or shared online. ⁶⁷	No. Directs consumer to website where an MP3 can be downloaded. ⁶⁸

TRACK 3: COPYRIGHT LAW

The Constitution grants Congress the power "[t]o 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."⁶⁹ The four basic ideas of copyright are manifested in the clause:⁷⁰ 1) promotion of learning, 2) government grant of protection for the author, 3) monopoly for a limited time, and 4) author's right to protect their works. The Framers viewed expression as a public good to stimulate creativity in soci-

56. *Circumvention Claimed for Copy-Proof CD*, CONSUMER ELECTRONICS, Aug. 20, 2001, available at 2001 WL 7872353.

57. Ulrich Boser, *That CD Pop May Not Be a Scratch*, U.S. NEWS & WORLD REPORT, Aug. 6, 2001, available at 2001 WL 6320842.

58. Macrovision and TTR Technologies announced a strategic alliance in November 1999 to market music copy protection at www.ttr.co.il (last visited Apr. 7, 2002).

59. *Another CD Anticopy System Readied*, CONSUMER ELECTRONICS, July 30, 2001, available at 2001 WL 7872286.

60. Harris, *supra* note 54.

61. Sony DADC Key2audio.com – *Frequently Asked Questions*, at http://www.key2audio.com/download/faq_p25.pdf (last visited Nov. 12, 2002).

62. Boser, *supra* note 57.

63. *Another CD Anticopy System Readied*, *supra* note 59.

64. Harris, *supra* note 54.

65. Key2audio, *supra* note 61.

66. *Another CD Anticopy System Readied*, *supra* note 59.

67. Harris, *supra* note 54.

68. Shelly Emiling, *New Software Aims to Squelch CD Sharing*, CHI. TRIB., May 9, 2001, available at 2001 WL 4070988.

69. U.S. CONST. art. I, § 8, cl. 8.

70. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 193 (1968).

ety. Numerous court decisions support the notion of the copyright system to foster learning for public welfare:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings . . . but upon the grounds that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.⁷¹

The Framers drafted the Constitution on the firm conviction that concentrations of power were contrary to the establishment of a democratic government.⁷² The Framers saw the detrimental effects of a monopolistic regime caused by granting exclusive licenses to the publisher's guild in Britain.⁷³ Accordingly, the Framers proceeded to grant exclusive, but limited rights to authors under the Copyright Clause.⁷⁴ The Framers envisioned copyright for the promotion of intellectual pursuits by granting a temporary monopoly, but above all, for the benefit of the public. Justice John Paul Stevens echoed this sentiment in *Sony Corp. of America v. Universal City Studios*:⁷⁵

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special 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.⁷⁶

A. Copyright Act

The First Congress passed the first copyright statute in 1790 "[f]or the encouragement of learning by securing the copies of maps, charts, and

71. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, 429 (1984) (citing H.R. REP. NO. 2222, 60th Cong., 2d Sess., 7 (1909)) [hereinafter *Sony*]; *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 580 (1985) [hereinafter *Harper Row*].

72. "With regard to Monopolies, they are justly classed among the greatest nuisances in Government." GAILLARD HUNT, *THE WRITINGS OF JAMES MADISON*, New York (10th ed. 1900) (quoting a letter from James Madison to Thomas Jefferson).

73. The King of England licensed publishers to produce books in order to restrain the publication of heretical and seditious works. The guild of publishers known as the Company of Stationers obtained an exclusive and perpetual right of publication when the Church or King approved of a work. When the Stationers' Company requested more control over expressive works, Parliament responded by passing the Statute of Anne in 1710, and in effect, shifted copyright to authors to restrict the Stationers' monopoly. See generally PATTERSON, *supra* note 70; L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. REV. 719, 785 n.219 (1989).

74. PATTERSON, *supra* note 70, at 193-96.

75. 464 U.S. 417 (1984).

76. *Id.* at 429.

books to the authors and proprietors of such copies, during the times therein mentioned.”⁷⁷ Copyrights had a term of fourteen years from the recording of title and the privilege of renewing it for another fourteen years.⁷⁸ The 1790 Act contained strict requirements for receiving legal protection and were particularly difficult to satisfy.⁷⁹ A plaintiff asserting a valid copyright had to show fulfillment of all requirements of the statute. Frequently, it was the first matter of controversy in early copyright cases.⁸⁰ Early copyright law was for the benefit of copyright holders who claimed their rights in earnest.⁸¹ The Copyright Act of 1976 eliminated the formalities of copyright law and afforded protection as soon as the author fixed the work in a tangible medium of expression.⁸²

Since 1790, copyright law has undergone numerous revisions expanding the scope of protection. To contrast, the 1790 Act confined grants of copyright to “maps, charts, and books,”⁸³ but in 1909, Congress expanded the subject matter to protect “all the writings of an author” to include sound recordings, photography, motion pictures, and choreography.⁸⁴ Music is unique in that it is an expression with two copyrightable aspects—the musical work⁸⁵ and the sound recording.⁸⁶ Today, the government grants copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated.”⁸⁷ Congress tipped the scales in favor of the copyright holders by granting more expansive rights and privileges.⁸⁸

77. Copyright Act, ch. 15, §§ 1-7, 1 Stat. 124-26 (1790) (repealed 1909) [hereinafter “1790 Act”].

78. 1790 Act, § 2, 1 Stat. 124.

79. 1790 Act, §§ 3, 4, 1 Stat. 125 (requiring a person to deposit a printed copy of the title with the clerk’s office of the district court where author or proprietor resided, to insert the record on the first or second page within two months, to publish record of deposit in one or more newspapers printed in the United States for a period of four weeks, and within six months after publication, a copy must be deposited with the Secretary of State).

80. See, e.g., *Wheaton v. Peters*, 33 U.S. 591, 662-63 (1834) (holding a copyright holder must comply with statutory requirements in order for copyright to vest).

81. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 513-14 (1999).

82. 17 U.S.C. § 102(a).

83. 1790 Act, § 1, 1 Stat. 124.

84. Copyright Act of 1909, ch. 320, § 4, 35 Stat. 1076 (1909) (current version at 17 U.S.C. § 102) [hereinafter “1909 Act”].

85. 17 U.S.C. § 102(a)(2).

86. 17 U.S.C. §§ 102(a)(7), 115.

87. 17 U.S.C. § 102(a). See generally House Comm. on the Judiciary, *Copyright Law Revision*, H.R. REP. NO. 94-1476, at 51 (1976) (stating that the purpose of changing statutory language from “all the writings of an author” to “original works of authorship” was to prevent courts from holding copyrightable something that Congress did not intend to protect).

88. See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 34-35 (1996). Nearly any entity that wished to use a copyrighted work in any manner needed a compulsory license. However, Litman noted that Congress failed to enact specific exemptions for the public:

Copyright law has also expanded the scope of ownership. The 1790 Act granted rights to authors and proprietors that were renewable.⁸⁹ The 1909 Act defined the word “author” to include “an employer in the case of works made for hire”⁹⁰ based on the theory that employers should be able to claim rights for work, which they created in interest and expense.⁹¹ The 1976 Act expanded it to include “work-made-for-hire,”⁹² which included both those prepared by an employee and those prepared by an independent contractor by special order or commission.

Music has two distinct attributes that are copyrightable and, as a result, numerous parties have interests in copyright protection. To illustrate, a songwriter and publisher may split the proceeds from a musical composition. In turn, the artist/performer typically assigns the sound recording copyright to the record company, which may or may not owe a percentage to the recording artist/performer. The decline of the author followed by the rise of “work-made-for-hire” promotes the interest of copyright owners in their works more than it promotes the interest of individual authors. Recently, the RIAA lobbied to have recordings legally described as “works-made-for-hire,” but the Recording Artists Coalition disputed the effort.⁹³ Copyright trends indicate the decline of utilitarian and learning purposes of the copyright in order to maximize profits.

Another expansion of copyright involves Congress extending the copyright term. Initially, the term lasted fourteen years from the date of recording title in the clerk’s office, with the option to renew the term for another fourteen years.⁹⁴ The 1976 Act extended the term of protection for

Jukebox operators, for example, enjoyed an exemption from liability for public performance for more than fifty years, and were the beneficiaries of a compulsory license for another decade after that. Other compulsory licenses went to record companies, cable television systems, satellite carriers and noncommercial television. Broadcasters received exemptions permitting them to make “ephemeral recordings” of material to facilitate its broadcast; manufacturers of useful articles embodying copyrighted works received a flat exemption from the reproduction and distribution rights to permit them to advertise their wares. Libraries received the benefit of extensive privileges to duplicate copyrighted works in particular situations. Schools got an express privilege to perform copyrighted works publicly in class; music stores got an express privilege to perform music publicly in their stores; and small restaurants got an express privilege to perform broadcasts publicly in their restaurants.

Id.

89. 1790 Act, § 2, 1 Stat. 124.

90. 1909 Act, § 23, 35 Stat. 1080 (current version 17 U.S.C. § 201(b)).

91. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (holding that an employment relationship determination for copyright purposes should follow the general common law of agency) [hereinafter CCNV].

92. 17 U.S.C. § 201.

93. Phil Hardy, *RIAA Calls For Government Support to Combat Increased Copying of Music*, MUSIC & COPYRIGHT, Mar. 27, 2002.

94. 1790 Act, § 2, 1 Stat. 124.

works created on or after this date consisted of the life of the author and fifty years after the author's death.⁹⁵ In 1998, Congress passed the Sonny Bono Copyright Term Extension Act ("CTEA"), extending the duration of the copyright to life plus seventy years.⁹⁶ Additionally, the term of protection for works made for hire is now 95 years from publication or 120 years from creation, whichever is earlier.⁹⁷

Consumers, artists, and the entertainment industry are closely watching the development of copyright law and music in the dawn of the 21st Century. So far, the entertainment industry has successfully persuaded Congress to construe and revise copyright law to permit stakeholders to retain their ownership in the information market. The current atmosphere exposes the far-reaching grant of copyright that has no limits in protecting works so long as it can be created, expressed, and fixed in a tangible medium. Few copyright laws are struck down even though copyright has evolved to promote the interests of rights holders in their works more so than to promote learning, creation, interests of individual authors, and the public domain. Stakeholders have been more vigilant in pursuing those who have infringed copyrights. This leads one to think, what rights are there left for the public?⁹⁸

The copyright holder has exclusive rights to use and to authorize six distinctive uses of the copyrighted work.⁹⁹ The courts have articulated limitations on copyrights: doctrine of fair use, first sale,¹⁰⁰ and copyright misuse

95. Copyright Act, ch. 3, § 101, 90 Stat. 2572-73 (1976) (current version at 17 U.S.C. § 302) ("1976 Act").

96. Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 112 Stat. 2827 (1998); 17 U.S.C. §§ 301-304; *but see* Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted sub nom.* Eldred v. Ashcroft, 70 U.S.L.W. 3514 (U.S. Feb. 19, 2002) (No. 01-618) (challenging the constitutionality of copyright extension and Congress's ability to enact a statute to increase the incentive to create new work retroactively).

97. 17 U.S.C. § 302.

98. *See supra* note 88 and accompanying text.

99. 17 U.S.C. § 106. The text reads:

Exclusive rights in copyrighted works

Subject to sections 107 through 121, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

100. The doctrine of first sale will not be discussed in this paper. The first sale doctrine is a defense to

that purportedly forges a compromise between copyright owners and the public domain. Fair use is the most prominent safety valve of copyright law. Other safety valves include the idea-expression dichotomy and the limited term. Noticeably absent is the failure to implicate First Amendment scrutiny within the context of copyright analysis.¹⁰¹ The following analyzes the limitations exercised on the exclusive rights granted by copyright and provides reasons for the courts to lift the First Amendment immunity.

B. Doctrine of Fair Use

The doctrine of fair use is judge-made law and first recognized by Justice Story.¹⁰² Fair use has functioned as a safety valve in copyright law, preserving free speech interests against the monopoly granted to copyright owners.¹⁰³ Fair use permits unauthorized use of copyrighted material when the secondary use is transformative and does not harm the potential market for the original.¹⁰⁴ It allows subsequent authors to borrow and expand on earlier works without having to wait until the copyright expired. Now codified, it considers four factors:¹⁰⁵ 1) the purpose and character of use, including whether such 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 use on the potential market for or value of the copyrighted work. Essentially, fair use limits an author's exclusive right to reproduce the work by permitting others to reproduce the protected work for limited purposes in certain circumstances.¹⁰⁶

copyright infringement. It states that when a copyright owner relinquishes title to a copy of work, the owner's right to control distribution with respect to that copy no longer exists. 17 U.S.C. § 109(a). This doctrine precludes the copyright owner from restricting subsequent sales or transfers of copyrighted work. *See* *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1344 (9th Cir. 1988) (holding that the first sale doctrine permits the purchaser of the book to resell the book, but not cut images from the book and later mount on ceramic tiles, which the court considered to be a derivative work).

101. *See* discussion *infra* Track 4.

102. *See Harper Row*, 471 U.S. 539 ("As early as 1841, Justice Story gave judicial recognition to the [fair use] doctrine").

103. Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 12 (2001) [hereinafter Netanel, *First Amendment Skein*]

104. 17 U.S.C. § 107.

105. *Id.*

106. *Folsom v. Marsh*, 9 F. Cas. 342, 344-345 (C.C.D. Mass. 1841) (No. 4091).

[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

Id.

The first factor explicates the conditions in which a fair use finding is most likely. The reproduction and fair use of a copyrighted work is not infringement “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.”¹⁰⁷ The Court in *Campbell v. Acuff-Rose Music, Inc.*,¹⁰⁸ articulated the standard that must be made to determine “whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks . . . whether and to what extent the new work is ‘transformative.’”¹⁰⁹ Transformation is at the heart of the fair use doctrine. However, if a work is nontransformative, that does not preclude a finding of fair use, but the plaintiff must not be able to show economic harm caused by the use.¹¹⁰

The second factor is the nature of the copyrighted work. This factor is rarely dispositive and is often of little help in the determination of fair use. The third factor weighs the amount and substantiality of the portion used in relation to the whole.¹¹¹ Generally, if the entire work is copied, the defendant’s use is not fair use.¹¹² The fourth factor considers the economic effect of the work on the potential market. *Harper Row* characterized this prong as the “the single most important element of fair use.”¹¹³ A likely finding of fair use will be a work that has little or no effect upon the potential market value.¹¹⁴ Today, fair use has been dramatically limited when a market still exists for the original.¹¹⁵ Although fair use is not an empty affirmative defense, it is difficult to predict whether there will be a finding of fair use because courts have inconsistently applied the four factors.

The landmark fair use case, *Sony Corp. of America v. Universal City Studios, Inc.*,¹¹⁶ explored the issue of whether the sale of the copying equipment to the general public violated the exclusive rights of the copyright

107. 17 U.S.C. § 107.

108. 510 U.S. 569 (1994).

109. *Id.* at 579.

110. *Sony*, 417 U.S. at 456.

111. *Harper Row*, 471 U.S. at 539 (no finding of fair use when engaged in verbatim copying of a former president’s soon-to-be-published memoirs).

112. *But see, Sony*, 464 U.S. at 451 (allowing users to reproduce an entire work in cases involving time-shifting).

113. *Harper Row*, 471 U.S. at 566 (holding that intent to “scoop” story and impending market harm precluded finding of fair use).

114. *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (2001) (vacating the district court’s injunction because “lack of irreparable injury to Suntrust, together with the First Amendment concerns regarding comment and criticism and the likelihood that a fair use defense will prevail”).

115. *See Dr. Seuss Enter. v. Penguin Books USA, Inc.* 109 F.3d 1394, 1403 (1997) (holding that because use was of copyrighted work was not transformative, “unrestricted and widespread dissemination would hurt the potential market for the original and derivatives”).

116. 464 U.S. 417.

owners.¹¹⁷ Sony manufactured and sold home videotape recorders ("VTRs"). Universal owned copyrights to television programs broadcast on public airwaves. Universal alleged that users recording television programming broadcasts infringed on owner's copyrights and Sony asserted the fair use doctrine as an affirmative defense. The Supreme Court determined that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.¹¹⁸ Furthermore, the Court found that when viewers were invited to watch a free broadcast of a work, "the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use."¹¹⁹

In 1998, Congress passed the DMCA in order to implement the WIPO Copyright Treaty¹²⁰ and to encourage copyright owners to make digital works available over the networks.¹²¹ The DMCA states that "no person shall circumvent a technological measure that effectively controls access to a work protected" by copyright law.¹²² Exceptions created for circumvention are narrow and inconsistent. Section 1201(a)(1) intended to preserve fair use, but the anti-trafficking provisions of sections 1201(a)(2) and 1201(b)(1) do not permit a person to provide another with the means to make fair use.¹²³ Classes exempt from anti-circumvention are "nonprofit libraries, archives, and educational institutions,"¹²⁴ "law enforcement, intelligence and other governmental activities,"¹²⁵ a person who has lawfully obtained the right to reverse engineer,¹²⁶ and those engaging in "encryption research".¹²⁷

C. Copyright Misuse Doctrine

The courts recently acknowledged the copyright misuse doctrine,¹²⁸ but the Supreme Court still has not validated such a defense. In *Lasercomb America, Inc. v. Reynolds*,¹²⁹ the Fourth Circuit held that standard licensing agreements, which barred licensees from developing competing software for

117. *Id.* at 420.

118. *Id.* at 449.

119. *Id.* at 450.

120. *But see* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 531-35 (1999) (asserting that the DMCA was not integral in implementing the WIPO treaty).

121. Report of the Senate Comm. on the Judiciary, S. REP. NO. 105-190, at 2 (1998); *see also* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 680 (2000).

122. Digital Millennium Copyright Act, § 103, 17 U.S.C. § 1201(a)(1)(A) (2000).

123. 17 U.S.C. §§ 1201(a)(2), 1201(b)(1).

124. 17 U.S.C. § 1201(d).

125. 17 U.S.C. § 1201(e).

126. 17 U.S.C. § 1201(f).

127. 17 U.S.C. § 1201(g).

128. *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990).

129. *Id.*

ninety-nine years extended the duration of copyright protection beyond the statutory monopoly and prevented the expression of the program's underlying idea or function.¹³⁰ The copyright misuse doctrine renders a copyright unenforceable when the owner attempts to expand the statutory monopoly beyond its lawful scope or engages in conduct contrary to the public policy inherent in the copyright statute.¹³¹ Copyright misuse is a common law defense to infringement and borrows its legal precedent from patent misuse¹³² and the equitable doctrine of "unclean hands."¹³³ Three circuits have recognized the doctrine relying on public policy,¹³⁴ drawing inferences from the patent misuse doctrine, but not antitrust principles.¹³⁵

D. Audio Home Recording Act

Congress passed the Audio Home Recording Act of 1992 ("AHRA")¹³⁶ in the wake of the landmark Sony decision. The recording industry considered and still considers home copying an infringement because of "massive sales displacement and loss of revenues."¹³⁷ Furthermore, it asserted that legislation for additional enforcement was needed to make copyright protection "more than an empty right."¹³⁸ Lawmakers accepted the argument that "private uses"¹³⁹ were a threat to copyright holders despite the primary purpose of "space-shifting."¹⁴⁰ The recording industry alleged a

130. *Id.* at 979.

131. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.09, at 13-142.1 to 13-148.

132. See *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 494 (1992) (formally recognizing the patent misuse doctrine).

133. See *United States Gypsum Co. v. Nat'l Gypsum Co.*, 352 U.S. 457, 465 (1957) (applying the doctrine of unclean hands to patent law).

134. *Lasercomb Am, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990); *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772 (5th Cir. 1999); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997).

135. See *Morton Salt*, 314 U.S. at 494 (relying on equitable principles to state that misuse consists of practices that are "contrary to public policy" or that have an "adverse effect upon the public interest"). But see *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 512 (7th Cir. 1982). Judge Posner asserting that antitrust analysis should be carried over from patent misuse to copyright misuse cases:

If misuse claims are not tested by conventional antitrust principles, by what principles shall they be tested? Our law is not rich in alternative concepts of monopolistic abuse; and it is rather late in the day to try to develop one without in the process subjecting the rights of patent holders to debilitating uncertainty.

Id.

136. 17 U.S.C. §§ 1001-1010.

137. U.S. Congress, Office of Tech. Assessment, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW, 6 (1989) (citing letter from Hilary Rosen, RIAA to J. Winston, OTA, May 2, 1989) [hereinafter COPYRIGHT AND HOME COPYING].

138. *Id.*

139. "Private use" is also referred to as "personal use," "private copying," or "home use." See COPYRIGHT AND HOME COPYING, *supra* note 137, at 5-6.

140. An example of "space-shifting" is to copy music from records or compact discs to audiocassettes to be played in a car or in a portable cassette player.

revenue loss of \$550-\$600 million in the United States in 1980.¹⁴¹ In 1988, the Office of Technology Assessment (“OTA”) conducted a survey that found four in ten of a nationally representative sample of American over the age of ten had taped recorded music.¹⁴²

The AHRA was a direct response to concerns of private uses of pre-recorded music. The stated purpose of the AHRA was to “ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.”¹⁴³ Congress passed the AHRA with two main provisions. First, it required manufacturers to pay a three percent royalty to the recording industry on every digital recording media, such as a blank tape, and two percent royalty on digital audio recording equipment.¹⁴⁴ Second, it mandated the incorporation of copy controls into digital audio recording devices to prevent serial copying.¹⁴⁵ Congress agreed that the Serial Copy Management System (“SCMS”) would be the copy protection mechanism in all digital audio recording equipment produced.¹⁴⁶ Therefore, the statute permits unlimited first generation copies of prerecorded material but prohibits subsequent copying from the first generation copy. The AHRA did not acknowledge that private use was fair use, but it reflected a concession by copyright holders to accept royalties in exchange for home copying.

TRACK 4: COPY PROTECTION IMPLICATIONS

Technical protection systems will have a threefold effect on future persons who wish to engage in fair use. First, the content owners’ use of technical protection systems can affect censorship of speech. Second, content owners have a free ticket to prevent objectionable uses of legally unprotected works by preventing fair use. Lastly, technical protection systems limit creation by enclosing the public domain.

141. Richard Harrington, *The Recording Industry Goes to War on Home Taping*, WASH. POST, Jun. 15, 1980, at G1. Record companies considered piracy such a great threat that it went as far as to offer a cash award to the inventor of a ‘spoiler signal’ to preclude off-air taping. *Id.*

142. COPYRIGHT AND HOME COPYING, *supra* note 137, at 3.

143. S. REP. NO. 102-294, at 30 (1992).

144. 17 U.S.C. §§ 1003-1007; *see also* Sarah Bryan Miller, *Consumers Also Have a Right in “Copyright Protection*, ST. LOUIS DISPATCH, Mar. 31, 2002, at F3; B.J. Richards, Note, *The Times They Are A-Changin’*: A Legal Perspective on How the Internet is Changing the Way We Buy, Sell, and Steal Music, 7 J. INTELL. PROP. L. 421, 441 (2000).

145. Serial Copying is the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital music recording. 17 U.S.C. § 1001(11).

A. Constitutional Implications

1. First Amendment

In *Harper Row*, the Court stated that the Framers intended for copyright "to be the engine of free expression."¹⁴⁷ Copyright protects the original expression of information by granting the author exclusive rights. Subsequently, an author may enjoin others from expression, thereby restricting speech. Under the Copyright Clause, Congress has the power to grant authors "the exclusive right to their respective writings and discoveries,"¹⁴⁸ but under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹⁴⁹ This structure is meant to promote progress in society, but Congress's recent expansion of copyright protection limits the entry of works into the public domain and chills speech. The First Amendment expressly states that Congress does not have the power to abridge freedom of speech. These two provisions depict the constitutional tension between prohibiting the use of another's expression and safeguarding expression.

Free speech analysis is nonexistent in the context of copyright. The main reason behind this discord stems from the "Nimmer exoneration."¹⁵⁰ The Nimmer exoneration assumes the adequacy of safety valves¹⁵¹ that limit copyright's burden on free speech, thus mitigating the need to subject copyright to First Amendment scrutiny.¹⁵² Increasingly, Congress's trend in expanding the scope of copyright and the consequent erosion of the copyright safety valves mandates a serious consideration of First Amendment scrutiny.

Some argue that technical protection systems will stimulate greater dissemination of information.¹⁵³ The promise of new and abundant digital content has yet to make its way to the marketplace.¹⁵⁴ Instead, the DMCA

146. 17 U.S.C. § 1002(a).

147. *Harper Row*, 471 U.S. at 558. It is unclear how the Court made this assertion.

148. U.S. CONST. art. 1, § 8, cl. 8.

149. U.S. CONST. amend. 1.

150. Netanel, *First Amendment Skein*, *supra* note 103, at 26 (using *Harper Row*, 471 U.S. at 558 to demonstrate this point).

151. Safety valves include: Doctrine of Fair Use, Idea-Expression Dichotomy, and copyright's limited term.

152. Netanel, *First Amendment Skein*, *supra* note 103, at 26.

153. See e.g. H.R. REP. NO. 105-551, pt. 2, at 23 (1998); Oscar S. Cisneros, *Fear of a Pay-Per-Use World*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,39330,00.html> (Oct. 9, 2000) (A representative of the MPAA argued that "the use of technological measures in general, and of access-control technologies in particular, has already greatly increased the availability of a wide range of copyrighted materials to members of the public.").

154. See Peter Chernin, *Beyond Napster: Protecting Content in the Broadband Age*, Presentation before the Center for National Policy, Washington D.C., at <http://www.mpaa.org/copyright/PChernin.htm> (July 25, 2000).

has instigated some of the most acute lawsuits restricting academic freedom and free speech. Princeton University Professor Edward Felten and his colleagues participated in an open challenge by the Secure Digital Music Initiative ("SDMI")¹⁵⁵ to defeat the watermarking technologies proposed for protecting digital audio content.¹⁵⁶ The Felten team wanted to publish and present the results of their scientific research, but did not because Felten received a threatening letter from the SDMI warning that doing so would subject him to liability under the DMCA.¹⁵⁷ Felten filed a lawsuit to challenge the DMCA and to assert his First Amendment right to publish his research results.¹⁵⁸ The case was dismissed, but the First Amendment issue has not been resolved.¹⁵⁹

Similarly, Eric Corley of 2600 Magazine, appealed the injunction for posting an article regarding the circumvention of CSS and linking to a website that contained the DeCSS code.¹⁶⁰ DeCSS defeats the standard DVD copy protection system. The Second Circuit failed to uphold the First Amendment rights of these speakers.¹⁶¹ The protection afforded by the DMCA unjustly excludes free speech because the decreased availability of public domain materials will yield a harmful effect on the production of new works.¹⁶² The decrease of materials made available to the public domain will make it much more difficult for criticism, parody, and research. Analogously, copy protections bolstered by the DMCA will enclose the public domain and chill free speech.

Napster marks the very first time that we have seen just how powerfully digital technology can undermine the intellectual property protections that have been part of our laws for over two centuries. The consequences of all this could be severe. Most simply, companies won't make content available in digital form because there won't be an economic incentive to do so.

Id.

155. The Secure Digital Music Initiative consists of over 160 companies working in conjunction to develop open standards for digital music distribution over the Internet. *SDMI: Overview*, at <http://riaa.org/Music-SDMI-1.cfm> (last visited Apr. 30, 2002).

156. Declan McCullagh, *SDMI Code-Breaker Speaks Freely*, WIRED NEWS, at <http://www.wired.com/news/politics/0,1283,46097,00.html> (Aug. 16, 2001).

157. Letter from Matthew Oppenheim, Secretary of the SDMI Foundation to Professor Edward Felten, at <http://www.cs.princeton.edu/sip/sdmi/riaaletter.html> (Apr. 9, 2001) (stating "any disclosure of information gained from participating in the Public Challenge would be outside of the scope of the activities permitted by the Agreement and could subject you and your research team to actions under the Digital Millennium Copyright Act"). See also Steven Levy, *Busted by the Copyright Cops*, NEWSWEEK, Aug. 20, 2001, at 54.

158. *Felten v. Recording Indus. Ass'n of Am.*, (D. N.J. filed June 6, 2001), available at http://www.eff.org/Legal/Cases/Felten_v_RIAA/20010606_eff_complaint.html.

159. Rick Boucher, *Time to Rewrite the DMCA*, CNET NEWS, at <http://news.com.com/2010-1078-825335.html> (Jan. 29, 2002).

160. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 453-58 (2d Cir. 2001) (raising a First Amendment challenge to the injunction proscribed by the DMCA).

161. *Id.* at 458 (concluding that the district court's injunction is consistent with the limitations of the First Amendment).

162. For example, Disney's most storied animated films, such as *Snow White and the Seven Dwarfs*, are based on 19th century public domain works.

2. Fair Use

The fair use doctrine provides a defense when accused of infringing a copyrighted work. Even though fair use is codified in the Copyright Act of 1976,¹⁶³ the interpretation and application of this doctrine have been inconsistent.¹⁶⁴ In addition, “the Supreme Court has never held that fair use is constitutionally required.”¹⁶⁵ Consequently, technologies that protect copyrighted material need not permit fair use because it is not constitutionally mandated.

Traditionally, the public has benefited from the ability to make convenient and minor copies of copyrighted works without having to pay a fee or obtaining prior consent from copyright owners. These traditional fair use rights are at the heart of promoting progress—representing the receipt and use of information by the people. The DMCA ultimately granted full fortification to creative works protected by technical protection systems, thus putting an end to information availability. While the DMCA aims to protect digital material, it effectively protects much more broadly than copyright law itself. Section 1201 of the DMCA bans devices that enable circumvention of technical protection systems, and also prohibits circumvention of technical protection or access control measures.¹⁶⁶ Once a protection measure is placed on a digital work, such as a music CD, users cannot circumvent access controls on the technology unless the user has permission to access the work and has the technical expertise to circumvent the protection measure.¹⁶⁷ If a user lacks the technical expertise to circumvent the protection measure, it is impossible for the user to gain access because the trafficking of a circumvention device is illegal. Ultimately, the user has no access, thereby shutting the door on fair use.

The emerging threat to traditionally accepted fair uses will soon create a world where content is no longer freely available at a library. Instead, users will be forced to pay for any use. Even a student who wants to gain access to a small portion of a book to write a term paper would have to pay to avoid committing a crime. Since 1841, the fair use doctrine has stimulated scientific advancement, education and furthered societal goals. The digital era has propelled the Information Revolution, making accessible large amounts of content to more people and to all corners of the world. If the In-

163. 17 U.S.C. § 107 (“fair use of a copyrighted work, including such use by reproduction in copies or phonorecords”).

164. See *infra* Track 3.

165. *Corley*, 273 F.3d at 458.

166. 17 U.S.C. §§ 1201(a), 1201(b).

167. See 17 U.S.C. § 1201(a).

dustrial Revolution brought about devices like the television, stereo, and computer, imagine the limitless possibilities the Information Revolution could produce. It is imperative that Congress solidifies the doctrine of fair use for the benefit of society before all access to information is irreversibly proscribed.

3. Limited Times

The Framers intended the Copyright Clause to balance the interests of authors against the public. Congress's passage of the CTEA lengthened the period copyright owners could profit from their creative works. The statute extended the copyright for works that would have fallen into the public domain on December 21, 1998, for another twenty years.¹⁶⁸ The copyright monopoly grant could extend over seven generations and preclude the work from entering the public domain in a timely manner.

The largest supporters and beneficiaries of this provision were the Walt Disney Company, the Gershwin Family Trust, and AOL Time Warner.¹⁶⁹ It follows from this observation that entities with vast holdings of copyrights would strive to maximize profits from existing holdings rather than allow works to enter the public domain for the common good of society. The two additional decades enable the entities to monopolize the market, charge higher prices, and reduce the dissemination of a valuable copyrighted work. This is contrary to the original purpose of copyright to provide a minor incentive for authors to recoup their efforts and then allow their works to enter the public domain to promote creation and learning.¹⁷⁰

Eric Eldred filed suit challenging the 1998 CTEA on constitutional grounds.¹⁷¹ The suit alleged that the term extension was unconstitutional because it applied retroactively to works already created and as a result would preclude works from entering into the public domain.¹⁷² The suit further contended that the extension goes beyond the scope of "limited times" and does not increase the incentive to create new works.¹⁷³ The court held that the copyright term extension was a proper exercise of congressional power.¹⁷⁴ Judge Sentelle dissented on the grounds that the copyright term extension was unconstitutional because it exceeded the scope of Congress's enumer-

168. 17 U.S.C. §§ 301-304.

169. Garon, *supra* note 81, at 523-24.

170. PATTERSON, *supra* note 70, at 200.

171. *Eldred*, 239 F.3d at 374.

172. *Id.*

173. *Id.* at 375.

174. *Id.* at 380.

ated powers.¹⁷⁵ Judge Sentelle articulated that the retrospective extension of copyright term did not further the goal of promoting the progress of science and art.¹⁷⁶

Similarly, the uses of technical protection systems do not further the progress of learning. Technical protection systems not only expand the scope of copyright because the DMCA bans the trafficking of any device that can enable circumvention of TPS, but also grants a perpetual monopoly.¹⁷⁷ The anti-circumvention provisions enable the removal of material from the public domain because the DMCA unconstitutionally extends protection to TPS without regard to whether the work is copyrightable. Technical protection systems may also prohibit creative uses of work, parody, criticism, news reporting, and reverse engineering. The DMCA fails to take into account originality, duration of copyright, or infringement of copyright in the underlying, technologically protected work. In essence, the purpose is no longer to create new works, but to protect existing works, and the DMCA anti-circumvention provisions should be invalidated because they are not related to promoting progress in the arts and sciences.

Another potential problem arises if the copyright term expired for a work with copy protection, it would be conceivable to think that it would enter into the public domain. If the work only existed on a copy-protected CD, then one would need to circumvent the access controls in order to gain access. It might be impossible to gain access to the work because the DMCA bans the trafficking of circumvention devices. In addition, the knowledge to circumvent the access controls may be lost because of lack of expertise in circumventing access controls and technology falling into obscurity due to the duration of copyright lasting in excess of 100 years. The DMCA has no specific regime for allowing access to works whose copyright has expired. As a result, copy protection effectively renders the monopoly indefinite by preventing it from entering the public domain. Moreover, the DMCA shifts the balance in favor of stakeholders with large shares of copyrighted works.

B. Public Policy Implications

1. Space- and Format-Shifting

Recent laws are aimed at protecting the exploitation and dissemination of digital music. Some laws go too far in thwarting competition and in-

175. *Id.* at 380-81 (Sentelle, J., dissenting) (stating that "[e]xtending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.").

176. *Id.*

177. 17 U.S.C. § 1201(b).

novation. Prior to the arrival of the photocopier, copyright holders controlled the production and distribution of works of authorship. The public could not obtain the work without purchasing a copy, or borrowing one from a library or friend. Before the proliferation of audio and video recording equipment, copyright owners also controlled access to works made publicly available through performances and transmissions, because the public could not see or hear the work without attending a licensed live performance, or viewing or listening to it through licensed media. Digital representations of music, video, and other types of information and entertainment for home use cause copyright owners the most concern.¹⁷⁸ Copyright owners perceive growing technology to undermine their economic viability because of the ability to easily and cheaply make perfect copies. The arrival of these technologies shifted the balance from copyright holders to users, but with the growing concern over digital piracy, Congress' recent response seems to be shifting the balance back to the copyright holders.¹⁷⁹

Much has changed since the advent of audiocassettes. A digital copy, readily obtainable from a CD or MP3, enables the reproduction of a perfect copy without sound degradation. The AHRA was a concession to allow owners of a copyrighted work the right to make first generation copies¹⁸⁰ but copy protections built into CDs prevent space-shifting to different locations and format-shifting to other formats such as MP3. This prohibition of space- and format-shifting should, either necessitate a repeal of the AHRA because it makes little sense for consumers to be paying royalties to the record companies when the copy protection prevents them from making copies or Congress should reiterate the public's right to non-infringing uses.

2. Enclosure of the Public Domain

A tangential effect arising from TPS placed on copyrighted works and works already in the public domain is the enclosure of the public domain. Copy protection can be used to protect a copyrightable work and generate just rewards for the creator. Once that copyright runs out, the user may not be able to safely circumvent protection measures to expand upon the work. So long as the DMCA is still in place, the prohibition on trafficking may preclude the majority of computer users from decrypting the protection measure.

178. See, e.g., *Sony*, 464 U.S. 417; *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

179. Jane C. Ginsburg, *Copyright and Control Over Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1614 (2001).

180. 17 U.S.C. §§ 1001-1002.

Another more problematic issue occurs when copy protection is placed on a work already in the public domain. This scenario is detrimental to the advancement and promotion of progress because it encloses the public domain. It is important to realize that both cultural giants and corporate giants borrow from the public domain. For example, *West Side Story*¹⁸¹ is an adaptation of Shakespeare's *Romeo and Juliet*.¹⁸² Other examples include Disney's animated films, such as *Snow White and the Seven Dwarfs*,¹⁸³ which is based on nineteenth century public domain works. Borrowing is ubiquitous, inevitable, and beneficial to society. A user should not be required to bypass security prior to entering public property.

3. Anti-Monopoly Principles

The term consisting of life of the author plus 70 years could easily extend over 150 years before entering the public domain. Despite the prolonged copyright monopoly term, TPS have the ability to increase the monopoly indefinitely. Copy protection and other TPS further monopolize the creative work by granting near perfect control, even private censorship. Copyright owners may even exploit the monopoly and charge "rents for access."¹⁸⁴ Although it is not a rampant problem, copyright monopolies are unduly burdensome through collective licensing and discriminatory pricing.¹⁸⁵ The extensive copyright monopoly permitted through the control over derivative works and extended times produces an atmosphere that chills cultural and creative development. Users will have fewer avenues of fair use and the passage of the DMCA criminalizing circumvention of protection measures will further inhibit new creations.

The copyright industry has been very successful in promoting their agenda through their aggressive lobbying. The rise of the copyright industry – Reed Elsevier (Lexis-Nexis), Time Warner, Disney, and Thomson (West) – is parallel to the dominance of London booksellers in the Stationer's company and their influence on content-based rights and policies. The modern copyright industry's propensity to shape copyright laws takes the country down a similar path. The CTEA and CBDTPA expose the decline of utilitarian and learning purposes of copyright and the rise of profit-making. The desire to profit indefinitely from copyrighted works fails to provide just

181. *WEST SIDE STORY* (United Artist 1961).

182. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*. See also Netanel, *First Amendment Skein*, *supra* note 103, at 18.

183. *SNOW WHITE AND THE SEVEN DWARFS* (Disney 1937).

184. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996).

185. See *infra* Track 3.

enough protection to stimulate creative activity, let alone promote learning or innovation, but enough protection to last beyond your lifetime.¹⁸⁶

4. Barriers to Innovation

The CBDTPA was formerly known as the Security Systems Standards and Certification Act ("SSSCA") and its original purpose was "[t]o provide for private sector development of workable security system standards and a certification protocol that could be implemented and enforced by Federal regulations"¹⁸⁷ Like the DMCA, CBDTPA makes it a crime to remove any TPS, even if you are exercising legal rights.¹⁸⁸ Arguably, the CBDTPA is more stringent because it does not grant any affirmative defenses to circumventing TPS. The CBDTPA mandates that all digital devices that will handle creative content conform to security standards.¹⁸⁹ The definition of "digital media device"¹⁹⁰ is overly broad and encompasses much more than just computers, but conceivably includes cell phones, pagers, and watches.

The effect of the CBDTPA will further erode fair use rights by increasing the control content owners have. It will stifle technology and innovation because electronic companies will be constrained by security system standards and encoding rules. In addition, it will cost billions of dollars to implement the security standards in all the different industries that will be affected by this government mandate.¹⁹¹ The Act further hinders technology because modification of the security standard can only be done after "representatives of digital media device manufacturers, consumer groups and copyright owners . . . determine that a change in technology is necessary because"¹⁹² the technology has been compromised or technological advancement warrant upgrading the technology. The need to consult increases the

186. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor.").

187. Security Systems Standards and Certification Act, at <http://cryptome.org/sssc.htm> (last visited Sep. 19, 2002).

188. CBDTPA, § 6.

189. *Id.* at § 5.

190. *Id.* at § 9(3):

[A]ny hardware or software that (A) reproduces copyrighted works in digital form; (B) converts copyrighted works in digital form into a form whereby the images and sounds are visible or audible; or (C) retrieves or accesses copyrighted works in digital form and transfers or makes available for transfer such works to hardware or software described in subparagraph (B).

Id.

191. *The Anti-Mammal Dinosaur Protection Act*, DVD REPORT, Apr. 1, 2002.

192. CBDTPA, § 3(h).

bureaucracy of creation and dramatically diminishes the incentive to create new devices.

TRACK 5: DIGITAL FRAMEWORK

A. Free Speech/Fair Use Analysis

A free speech analysis is necessary because the role of fair use as a mediator between copyright law and the First Amendment is uncertain. To relieve the tension, the courts have employed the assistance of the idea-expression dichotomy and fair use to reconcile the two competing interests. Recently, the defense provided by the fair use doctrine has been whittled away. The *Corley* court refused to resolve the issue of a constitutionally required fair use. The court justified its action by declaring that Corley “[did] not claim to be making fair use of any copyrighted materials, and nothing in the injunction prohibits them from making such fair use.”¹⁹³ The court further rejected the doctrine of fair use by stating that “no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guaranties copying by the optimum method or in the identical format of the original.”¹⁹⁴ With these remarks, the court declined to make a determination on the constitutional element of fair use.

The future litigant or defendant of fair use rights under the DMCA should be cognizant of the following. First, an inadequate evidentiary record caused the court to reject the claim of fair use of copyrighted materials by calling it an “extravagant claim.”¹⁹⁵ Therefore, in order to bring a fair use claim, future cases will need a better evidentiary record. The *Corley* case asserted that a user’s right to a perfect copy does not provide a basis for claiming an unconstitutional limitation of fair use.¹⁹⁶ The *Corley* case does provide hope that once the Supreme Court decides that fair use is a constitutional requirement that “some isolated statements in its opinions might arguably be enlisted for such a requirement.”¹⁹⁷ Within this framework, users would have an argument for space- and format-shifting of copy protected works.

193. *Corley*, 273 F.3d at 459.

194. *Id.*

195. *Id.* at 458.

196. *Id.* at 459.

197. *Id.* at 458.

B. Judicial Discretion for finding Fair Use

Despite stating that nothing in section 1201 would “affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title,”¹⁹⁸ Congress does not recognize circumvention of TPS for purposes of fair use or other non-infringing acts. Noticeably absent is a provision that enables courts to exempt acts of circumvention engaged in for legitimate purposes. Furthermore, a violation under section 1201 does not require an underlying copyright infringement claim. Therefore, the defense of fair use, copyright misuse, or any other defense to copyright infringement probably does not apply to a section 1201 claim. Therefore, the DMCA extinguishes the delicate balance between copyright, fair use, and the First Amendment. The circumvention of TPS is necessary in order to make fair use, to conduct scientific research, and to engage in legal uses, such as playing DVDs on Linux machines. In the *Corley* case, the appellate court further constrained traditional fair use rights by declaring that these rights did not apply to the most convenient, highest-quality formats available to consumers.¹⁹⁹ The DMCA expands the scope of copyright, but fails to balance Congress’s directive to promote the progress of arts and science.²⁰⁰

The copyright statute does not provide guidance as to how the judiciary should balance creative control over new markets and maintaining the copyright incentive without stifling the dissemination of new technologies. Congress should amend the DMCA to provide for judicial discretion in finding fair use. This would protect the interests of the user and provide opportunities for the judiciary to find fair use.

C. Copyright Misuse Doctrine

Copyright was developed for the promotion of intellectual pursuits and public knowledge, primarily for the benefit of the public at large. The grant of a copyright creates risks inherent in monopolies. Those risks are the impediment of competition and creation. Congress and the courts have strived to maintain the delicate balance between “incentives for innovators

198. 17 U.S.C. § 1201(c)(1).

199. *Corley*, 273 F.3d at 459. See also *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 341 (S.D.N.Y. 2000) (enjoining *2600 Magazine* from publishing or linking to DeCSS, a computer program that circumvents the encryption of DVDs, called CSS. DeCSS enabled DVDs to be played on computers running the Linux system.).

200. See also Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L. J. 161, 172 (1997); Jason Sheets, *Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & Innovative Markets*, 23 HASTINGS COMM. & ENT. L. J. 1, 20 (2000).

and access for the public.”²⁰¹ The copyright misuse doctrine has been used when the copyright holder has illegally used his copyright or extended the monopoly beyond the scope of the copyright²⁰² or has violated the public policies underlying the copyright laws.²⁰³ Most of these cases involve competition stemming from technological advancements and a company’s desire to stifle innovation.

Although the copyright misuse doctrine has not been applied to TPS, it can assist courts in curbing anti-competitive and anti-innovative practices by copyright owners.²⁰⁴ The doctrine is a useful defense against charges of copyright infringement in the context of TPS because it directly implicates questions about the scope of the intellectual property. This will force the court to examine the constitutional balance of copyright and fair use. While it is not a panacea, it can prevent the depletion of the public domain.

D. Business Model

Copy protection is a temporary solution as seen in the case of content scrambling system (“CSS”) for DVDs.²⁰⁵ Technologies that circumvent copy protections have the potential to proliferate effortlessly as seen with DeCSS. It merely takes one person to post a copy over the Internet. The music industry faces an uphill battle enticing consumers to switch from CDs to Mini-Discs, DVD-audio, and Super Audio CDs. One reason stems from consumer reluctance. Another reason comes from consumers looking for more value-based incentives to buy. Consumers have felt price gouged by the high cost of CDs for one good song.²⁰⁶ In addition, the freedom to space- or format-shift music would be proscribed by technological protections.

Record labels hesitate to move to a more secure format for digital music because of backlash from the public. The music industry realizes that copy protecting CDs may compel them to make added concessions like personalized liner notes, provide the ability for users to space- and format-shift, or offer discounts to specialized artist events, such as concerts or autograph

201. Sheets, *supra* note 200, at 2.

202. *Lasercomb*, 911 F.2d at 979.

203. *Alcatel*, 166 F.3d at 793-94.

204. Therien, *supra* note 24, at 1040.

205. More recently, simply using CD-ripping software available on the Internet can circumvent copy protection for secure CDs released in Japan. The expertise required to access circumvention measures requires moderate PC knowledge. Jake Adelstein, *CD Protection Easily Defeated*, THE DAILY YOMIURI (TOKYO), Apr. 2, 2002, at 10.

206. Statement by Matthew Zinn, Vice President and General Counsel of TiVo, Inc.: “I think what we’re seeing with the Napster phenomenon is visceral reaction to years of abuse by the music industry, because consumers feel like they’ve been taken to the woodshed for paying \$19.95 for a CD that costs 30 cents to make.” *Look Who’s Talking*, E-COMMERCE LAW REPORT, April 2001, at 25.

sessions. For the first time, consumers have become a powerful force because of digital proliferation of music on the Internet. The music industry views the millions of music lovers as threats as the once omnipresent CD is slowly being replaced by MP3s without the oversight of the music industry.²⁰⁷ Instead, the music industry should concentrate its efforts in improving its relationship with consumers.²⁰⁸

The music industry must understand that technology should not be seen as the death knell for music, but rather a start of something new. Since the establishment of the Internet, many industries have changed the way they do business. The music industry faces competition from nascent file-sharing and subscription services. They not only bring challenges, "but might also trigger new capabilities and even a new competitive regime, including new business models and new organizational forms."²⁰⁹

CONCLUSION

Copy protection and technical protection systems are not entirely detrimental. For example, every VCR has copy protection developed by Macrovision, but users are still allowed to record programs or time-shift. In retrospect, if the Court did not find Sony Betamax to have substantial non-infringing uses, would the entertainment industry have enjoyed the rewards of selling movies on videocassettes? While that is debatable, it is important to realize that the VCR platform provided an alternate means of generating revenue for the entertainment industry. The same can be said of DVDs. Owners of movies on videocassettes are updating their movie collections and purchasing DVDs.

Recently, Michael Greene, formerly the President of the National Academy of Recording Arts & Sciences, remarked "No question the most insidious virus in our midst is the illegal downloading of music on the Net . . . Ripping is stealing [the artist's] livelihood one digital file at a time, leaving their musical dreams haplessly snared in this World Wide Web of theft and indifference."²¹⁰ The future of digital music is not as grim as he paints it. Like the VHS, music in MP3 format will rise to the challenge and help the music industry reap a myriad of benefits. If MP3s are reasonably priced,

207. *But see* Keefe, *supra* note 34 ("There's a genuine concern about piracy in the industry . . . but the bottom line is that there are a lot of people that are still making a ton of money.").

208. *Id.* ("[M]any musicians claim the recording industry itself—with its stringent royalty fees, high-priced CDs and mediocre marketing for marginal acts—is a bigger problem than pirates.").

209. Charles Baden-Fuller, Frans A.J. Van Den Bosch, Henk W. Volberda & Marc Huygens, *Co-evolution of Firm Capabilities and Industry Competition: Investigating the Music Industry, 1877-1977*, ORGANIZATION STUDIES, Nov. 1, 2001, LEXIS, Nexis Library, News File.

210. Michael Greene, *The Insidious Virus of Illegal Music Downloading*, Address at the 44th Annual

Edison's vision of music for the masses will continue to proliferate. Undoubtedly, modern trends have upset the balance of copyright policy.²¹¹

The RIAA, Congress, the Judiciary, and consumers should look for a solution which will benefit all players. The first compromise is to grant the public constitutionally protected fair use rights. Intertwined with this is to grant fair use to listeners and users of digital music when circumventing technical protection measures under the DMCA. This will prevent the enclosure of the public domain and permit users to space- and format-shift.

Grammy Awards at <http://grammy.aol.com/features/speech.html> (Feb. 27, 2002).

211. Sheets, *supra* note 200, at 5 ("Intellectual property law, private contract, and technological innovation have mitigated, if not extinguished, the threat of market failure by way of free-riding.").

