

**Does the Digital Millennium Copyright Act (DMCA) erode the “Fair Use” doctrine
of copyrighted works?**

030-68-9283
Massachusetts School of Law
Intellectual Property
Spring Semester
Law Review Paper
Due 27-April-2007

TABLE OF AUTHORITIES

TABLE OF CASES

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994) 3,4,5

Dellar v. Samuel Goldwyn, Inc.,
104 F.2d 661, 662 (2d Cir. 1939) 3

Junger v. Daley,
209 F.3d 481 (6th Ct. 2000) 11

Meeropol v. Nizer,
560 F.2d 1061 (2d Cir. 1977) 3

Sony Corp. of America v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 4

Static Control Components, Inc. v. Lexmark Intern., Inc.,
Slip Copy, 2007 WL 926985 (2007) 8

United States of America v. Elcom Ltd.,
203 F.Supp.2d 1111, 1119 (District Ct. 2002) 6,7,8,9,11,12

Universal City Studios, Inc. v. Corley,
273 F.3d 429 (2d Cir. 2001) 7,11,12

Universal City Studios, Inc. v. Reimerdes,
82 F.Supp.2d 211 (District Ct. 2000) 7,12

Wainwright Sec., Inc. v. Wall St. Transcript Corp.,
558 F.2d 91, 94 (2d Cir. 1977) 3

TABLE OF STATUTES

17 U.S.C. § 107 (1976) 3

17 U.S.C. § 107(1) 3

17 U.S.C. § 107(2) 4

17 U.S.C. § 107(3) 5

17 U.S.C. § 107(4) 5

17 U.S.C § 1201 (1998) 6

17 U.S.C § 1201 (a)(1)(A) 8

17 U.S.C § 1201 (a)(2) 9

17 U.S.C § 1201 (b) 9

17 U.S.C § 1201(c)(1) 11

TABLE OF CONSTITUTIONAL PROVISIONS

U.S.C. Const. Amend. I-Full Text..... 10

U.S.C. Const. Art. I § 8, cl. 8..... 10

The fair use doctrine is an affirmative defense used in copyright infringement cases that originally developed under common law.¹ Before the fair use doctrine was codified in §107 of the 1976 Copyright Act, many courts found themselves divided in how to apply the fair use doctrine in copyright infringement cases. In Meeropol, the court evaluated how other courts have interpreted and applied the fair use doctrine and concluded, “The application of the fair use doctrine to the facts of this case confronts us with difficult and complex issues.”² In Dellar, the court declared, “The issue of fair use ... is the most troublesome in the whole law of copyright.”³ The difficulty of applying the fair use doctrine lies in balancing competing interests of the copyright creator and those who use the copyrighted material.⁴ In Wainwright Securities, Inc., the court spoke to the balance of the fair use doctrine as taking into consideration the “exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry.”⁵ The court goes on to state more coarsely that “the doctrine distinguishes between ‘a true scholar and a chiseler who infringes a work for personal profit.’”⁶

The fair use doctrine is typically only used when it is been established via fact finding that the defendant's work is in fact substantially similar to the plaintiff's.⁷ To clear up ambiguities, Congress codified the four factors of the fair use doctrine in section §107 of the 1976 Copyright Act.⁸ The Supreme Court concluded in Campbell v. Acuff-Rose Music, Inc., “All [four statutory factors] are to be explored, and the results weighed together, in light of purposes of copyright.”⁹ The first factor of the fair use doctrine is “The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁰

This includes whether the purpose of use was for commentary, criticism, news reporting or parody.¹¹ This factor also looks into whether the use adds something new to the original, creating something of a different character.¹² The more “transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹³

The Supreme Court of the United States specifies that commercial use is only one factor that may weigh against fair use as noted in Sony Corp. of America v. Universal City Studios, Inc.¹⁴ The Court distinguishes between the commercial and noncommercial uses of the copyrighted work, stating that every commercial use of a copyrighted work is to have the presumption that it is an “unfair exploitation of the monopoly privilege” therefore requiring a burden to demonstrate a fair use defense.¹⁵ The Court goes on to state that for noncommercial uses of a copyrighted work, there must be proof that either “the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work” for the fair use doctrine to not apply.¹⁶ The burden is to demonstrate a preponderance of the evidence that there is some meaningful likelihood of future harm that exists with the copyright infringement.¹⁷ The Court in Sony stated that if the use is for commercial use, the likelihood is presumed, but if for noncommercial use, the likelihood must be demonstrated.¹⁸ Commercial use is not conclusive of infringement, but merely weighs against the finding of fair use.¹⁹

The second factor is “the nature of the copyrighted work.”²⁰ This tends to look at the original’s creative expression and see if it was for public dissemination.²¹ If it original

work was for public dissemination, than this would fall within the copyright's protective purposes.²²

The third factor is “[t]he amount and substantiality of the portion used in relation to the copyrighted work as a whole.”²³ This factor asks the relevant question of whether a substantial portion of the infringing work was copied verbatim from the copyrighted work.²⁴ The Court in Campbell, states that this factor looks strictly at how excessive the actual copying was, with the likelihood that the “infringing” content would serve as a substitute in the market for the original.²⁵ The Court made clear that this factor looks at how excessive the copying was, and not whether the content itself was the most distinctive or memorable features of the original.²⁶

The fourth factor of Fair Use under §107 is “[t]he effect of the use upon the potential market for or value of the copyrighted work.”²⁷ A parody is typically not considered to harm the original's market because “parody and the original usually serve different market functions.”²⁸ The Court reasoned in Campbell that the authors of original works would “license critical reviews or lampoons of their own productions” which remove them from the potential licensing market.²⁹ Evidence of substantial harm would weigh against fair use because “the licensing of derivatives is an important economic incentive to the creation of originals.”³⁰

Since these decisions, technological advancements in computer software and computer hardware have created new challenges in balancing the competing interests in copyright law. In 1999, Congress enacted the Digital Millennium Copyright Act (“DMCA”) as an expansion of copyright law because in the digital information age, copyright authors must employ protective technologies in order to prevent their works

from being unlawfully copied.³¹ Before the DMCA, the burden would be on the plaintiff to demonstrate the copyright infringement and the defendant would still be able to use the fair use doctrine as a defense. For the copyright owner, fair use is a reactive doctrine because a defendant invokes it as a defense to copyright infringement.³² The pendulum has swung in the other direction with the DMCA, where the copyright user needs to demonstrate that they *did not* infringe on the copyrighted content by circumventing the protections of the content. The protective measures of the copyrighted content are proactive measures where the copyright owner maintains the ability to sanction the use even before it commences.³³

Congress wanted to prohibit certain efforts to “unlawfully circumvent protective technologies, while at the same time preserving users’ rights of fair use.”³⁴ In Elcom, the court construed 17 U.S.C. §1201(b) to mean that Congress only banned the trafficking in and marketing of devices primarily designed to circumvent the use restriction protective technologies, not the *act* of circumventing the use restrictions themselves, since Congress want to preserve the fair use rights of persons who had lawfully acquired a work.³⁵ In reality, a typical user of a DVD, CD, or eBook does not have the computer science background or the mathematical theory to sit down at a computer and program a software application that not only cracks the encryption of the content, but also allows making backup copies, or extract sample copies for presentations. Any exchange of information of any medium that demonstrates how to break a particular encryption in order to have “fair use” rights to the content is considered a circumvention device under the DMCA.³⁶ The narrow interpretation of the statute under Elcom sets a dangerous precedent in that as technology improves, most if not all copyrighted content will have some form of Digital

Rights Management (“DRM”), therefore severely limiting the fair use rights prescribed under §107.³⁷ In a recent decision in Corley, the Court found that the defendant, by just having the source code that decrypted the DVD on his web page, was sufficient to warrant a violation of the DMCA because “offering to the public and providing technology primarily designed to circumvent technological measures” is prohibited.³⁸ The Court upheld the District courts conclusion there was no first amendment conflict with the DMCA in limiting free speech construing the DMCA to be more of a “prophylactic measure”, and that the “DMCA appears to be a legitimate exercise of Congress' power.”³⁹

Other examples of where the DMCA was used for its “prophylactic measures” include a research group at Princeton, run by Edward Felten, who accepted a public challenge to break a new secure encryption standard on CDs, but was threatened with litigation under the DMCA if they published their findings.⁴⁰ Felten later sued the Recording Industry Association of America (“RIAA”) and agreed not to appeal the case under an agreement that “Felten should publish his findings, because everyone benefits from research into the vulnerabilities of security mechanisms.”⁴¹ Sony BMG added copy protection software to their music CDs that installed a hidden “root kit” onto the users computer without their consent. This allowed viruses to exploit this vulnerability by accessing the user’s computer from the internet. J. Alex Halderman, a graduate student at Princeton University, discovered the Sony “root kit” vulnerabilities, but did not publish these findings for one month until consultation with lawyers under fear of the DMCA.⁴² This left millions of users exposed to malicious intrusion of viruses and other malware far longer then necessary. A Russian programmer, Dmitry Sklyarov, was arrested and

prosecuted for circumvention offenses under the DMCA, facing up to 25 years in prison, and over \$2.5 million in civil penalties. Dmitry at the time was a 27-year-old Russian citizen, Ph.D. student, and professional cryptographer. He developed a technique for taking Adobe's secure eBook-formatted documents, and converting them to Adobe PDF formatted documents.⁴³ He was at a conference in Las Vegas, NV when F.B.I agents stormed the room, arrested Dmitry and detained him without representation for one month.

These individuals reverse-engineered the programs in order to find out the weaknesses and therefore publish the findings to protect others from the vulnerabilities. Individuals will try to “reverse-engineer” a program’s executable in order to determine the instructions needed to create it. This practice of reverse engineering has been commonplace in the software and hardware industry since their infancy promoting not only competition in a free market, but also innovation for fair use of the copyrighted material. Individuals may wonder why ink cartridges are so expensive. The reason is that there is no free market with generic versions of these ink cartridges because the ink cartridge vendors encrypt access to the cartridge “firmware” in the device itself. If any company tried to reverse-engineer these cartridges, they would have to circumvent this encryption, therefore breaking the law under the DMCA.⁴⁴ Even though reverse engineering is a legitimate use of circumventing the encryption, it is criminalized by this legislation.

The first part of the provision is §1201 (a)(1) which prohibits the circumvention of the copyrighted works.⁴⁵ This provision is subtle in its simplicity, but overly draconian in its application. The original reason for this provision was to protect the copyright

holder from someone decrypting, i.e., breaking their protected works in order to gain illegal access to the content. At its essence, the purpose of this statement is to criminalize the action. This also assumes that the intention of breaking the encryption is for illicit purposes while there are myriad reasons why it would be legitimate. The legitimate purposes of the copyrighted work, such as fair use, are therefore unilaterally abolished. Proponents of these provisions claim that they are necessary to prohibit and limit piracy of the digital content. What they fail to mention is that if someone can see or hear the content, it can be recorded. These provisions do not impede the piracy business. Instead, the DMCA has been used as a weapon against competitors in the technology field, not on pirates themselves.

The second part of the provision is that §1201 (a)(2) which prohibits the tool that circumvents the copyrighted work as well.⁴⁶ Instead of focusing on the intention of the action, this provision actually bans the tools themselves. There are numerous lawful uses for the tools themselves, and the law states that if there is one illegal use, then ergo the entire product is illegal. Elcom stated that the purpose of the circumvention device not material, that strictly construed from the statute that “all tools that enable circumvention of use restrictions are banned, nor merely those use restrictions that prohibit infringement.”⁴⁷ In other words, even if the circumvention device was designed to *bypass use restrictions for fair use*, the device violates §1201(b) since this provision imposes a blanket ban on all device that circumvents use restrictions.⁴⁸ This is analogous to banning all knives because one possible use is for murder, even though there are many legitimate uses for knives. This also severely censors free speech in regards to published works that describe these techniques for circumventing the copyrighted content. By limiting speech

and making software illegal, these provisions have a chilling effect on the innovation of the marketplace significantly hindering free market competition.

The founding fathers understood that corrupt governments would try to limit this speech because of the power free expression gave to the citizens. The founding fathers guaranteed that “Congress shall make no law ... prohibiting the free exercise thereof; or abridging the freedom of speech” to prevent this abuse.⁴⁹ The Founding Fathers also understood the value of copyright but emphasized that this was “limited” and was only applicable to “artists and scientists”.⁵⁰ Written words are expressions of thought conveyed to another. In the past, paper was the primary vehicle of the expression of the written word. Through technological advances, the written word can now be expressed in electronic form via computers. Every typed letter that is represented on the computer screen is a result of a computational instruction. This instruction begins when your finger touches the keyboard, sending the signal to instruct the computer to display, and finally displaying the letter.

Computer software is an expression of some intangible idea represented by instructions that tell the computer what action to take. These instructions take the form of software code and a program executable analogous to cooking food in a recipe book. The software code is similar to a recipe for cooking a meal giving the cook the necessary ingredients and instructions to create the meal. The executable generated from the software code is similar to the finished cooked meal based upon the recipe. Like the recipe books, software code is protected by copyright. The written word is the most powerful tool that we have at our disposal to guarantee a free society. The Sixth Circuit Court of Appeals in Junger v. Daley ruled “Because computer source code is an

expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.”⁵¹

Based on court interpretations of the DMCA, precedent would state that all tools that circumvent use restrictions, regardless of purpose such as fair use, are banned.⁵² Disseminating security vulnerabilities, or decryption software code, even if just posted on a web page, is also in violation of the DMCA.⁵³ There is a provision in the DMCA that specifically addresses the fair use doctrine, in that §1201(c)(1) states that “[n]othing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title.”⁵⁴ It would appear that fair use would trump the other provisions based on face value, but this would be an incorrect inference. In Universal City Studios, Inc. v. Corley, the Court found that fair use does not apply when the defendants were found liable for violating §1201(a)(2) of the DMCA by trafficking a software program that was designed to circumvent the measures protecting the copyrighted work.⁵⁵ The Court goes on to state that “[f]air use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.”⁵⁶ In regards to the question whether the fair use provision of the DMCA bars the application of the fair use doctrine when defendants are found liable for violating the DMCA, Corley assumes that “access circumvention is a separate violation from copyright infringement.”⁵⁷ The fair use defense should be preserved and used even in anti-circumvention cases because the fair use doctrine was created to be applied to all rights within the area of copyright.⁵⁸

In conclusion, it appears that the DMCA provisions for anti-circumvention of DRM technologies reign supreme to the fair use doctrine codified in §107. All tools that

circumvent use restrictions, regardless of purpose such as fair use, are banned, and even the act of disseminating security vulnerabilities, decryption software code, web postings or even hyperlinks are also in violation of the DMCA.⁵⁹ A defendant cannot use the fair use doctrine as a defense if they are liable for circumventing the DRM protection first in order to access the content.⁶⁰ The Appeal courts have had conflicting decisions on the constitutionality of the DMCA including the applicability of the fair use doctrine. The prevailing opinion appears to be that there is no first amendment conflict with the DMCA because the DMCA itself is just a prophylactic measure.⁶¹ The first amendment protection of software code will also not stand if the software code itself is used to circumvent the copyright content and therefore violate the DMCA.⁶² The question which arises is how can a consumer who purchases a copyrighted item with this encryption built in, use samples of said copyrighted item for “fair use” purposes unless they circumvent the encryption, thus violating 17 U.S.C.A. § 1201 (1)(a)? It appears that they cannot, and therefore appears to make the provision §1201(c)(1) moot. If the consumer does not circumvent the encryption, than there is no way for him to use the copyrighted item in a way that would be protected by the “fair use” defense. As technology becomes more pervasive in our culture, and more copyrighted content becomes encrypted with DRM measures, the fair use doctrine will become less applicable in the digital age unless certain exceptions are placed with the DMCA provisions securing fair use.

¹ Dreyfuss, Rochelle, and Kwall, Roberta, Intellectual Property: Trademark, Copyright And Patent Law. New York: Foundation Press, 2004 at 412

² Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977).

³ Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939)

⁴ Dreyfuss, *supra* at 411

⁵ Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977)

⁶ *Id.*

⁷ Dreyfuss, *supra* at 411

⁸ 17 U.S.C. § 107 (1976).

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

¹⁰ 17 U.S.C. § 107(1)

¹¹ *Id.* at 578

¹² *Id.*

¹³ *Id.*

¹⁴ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

¹⁵ *Id.* at 451

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 17 U.S.C. § 107(2)

²¹ Campbell, 510 U.S. at 586

²² *Id.*

²³ 17 U.S.C. § 107(3)

²⁴ *Id.* at 587

²⁵ *Id.*

²⁶ *Id.*

²⁷ 17 U.S.C. § 107(4)

²⁸ *Id.* at 591

²⁹ *Id.* at 592

³⁰ *Id.* at 593

³¹ 17 U.S.C. § 1201 (1998)

³² Dreyfuss, *supra* at 480

³³ Dreyfuss, *supra* at 480

³⁴ United States of America v. Elcom Ltd., 203 F.Supp.2d 1111, 1119 (District Ct. 2002).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

³⁹ Universal City Studios, Inc. v. Reimerdes, 82 F.Supp.2d 211 (District Ct. 2000).

⁴⁰ Felten et al. v RIAA et al., (Declaratory Judgment) See http://www.eff.org/IP/DMCA/Felten_v_RIAA/

⁴¹ *Id.*

⁴² See <http://www.cs.princeton.edu/~jhalderm/papers/drm2002.pdf>

⁴³ Elcom Ltd., 203 F.Supp.2d at 1119

⁴⁴ Static Control Components, Inc. v. Lexmark Intern., Inc., Slip Copy, 2007 WL 926985 (2007).

⁴⁵ 17 U.S.C. § 1201 (a)(1)(A)

⁴⁶ 17 U.S.C. § 1201 (a)(2)

⁴⁷ Elcom Ltd., 203 F.Supp.2d at 1119

⁴⁸ 17 U.S.C. § 1201 (b)

⁴⁹ U.S.C. Const. Amend. I-Full Text

⁵⁰ U.S.C. Const. Art. I § 8, cl. 8

⁵¹ Junger v. Daley, 209 F.3d 481 (6th Ct. 2000).

⁵² Elcom Ltd., 203 F.Supp.2d at 1119

⁵³ Corley, 273 F.3d at 429

⁵⁴ 17 U.S.C. § 1201(c)(1)

⁵⁵ Corley, 273 F.3d at 429

⁵⁶ Id. at 459

⁵⁷ Id.

⁵⁸ Dreyfuss, *supra* at 480

⁵⁹ Corley, 273 F.3d at 459, Elcom Ltd., 203 F.Supp.2d at 1119

⁶⁰ Corley, 273 F.3d at 459

⁶¹ Reimerdes, 82 F.Supp.2d at 221

⁶² Id.