

Opening the Door to Fair Use In the Digital Millennium Copyright Act By Allowing Fair Circumvention and Dissemination of Circumvention Devices

By Stephanie L. Kimbro
April, 2002

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I. Introduction

In 1998, the Digital Millennium Copyright Act entered American Copyright Law in the midst of controversy that continues to dominate the field.¹ Proponents of the DMCA argue that the Act ensures the security of continued progress in electronic commerce and provides needed protection for copyright owners from digital piracy. Opposition to the DMCA, however, argues that the Act will stifle technological innovation by promoting a "pay-per-use" society and preventing the wide spread of ideas and information online. While the Supreme Court has yet to interpret digital fair use² under the DMCA, the Act currently provides more protection for the copyright owner than the user with a legitimate use of the copyrighted material. This upsets the balance of interests found in traditional copyright law and has the potential, in the long run, to hinder future research and development of technology.

This paper examines the ambiguous wording of section 1201(c)(1) of the DMCA as it relates to fair use in copyright law. First, this paper argues that the fair use provision in 1201(c)(1) has been incorrectly applied by the courts. The courts have interpreted "fair use" as preserving only traditional copyright infringement fair uses included in section 107 of the Copyright Act. This interpretation, however, overlooks possible legitimate circumvention or trafficking of circumvention devices that allow individuals to make fair

¹ 17 U.S.C.A. § 1201-1205 (2002).

² The term "fair use" in this article, unless mentioned in conjunction with the Copyright Act section 107, will refer to uses of copyrighted materials that do not violate copyright infringement laws and which would be considered legitimate uses of lawfully obtained, protected material. This paper will argue that "fair use" should also include fair circumvention of access controls and fair dissemination of circumvention devices.

use of copyrighted materials. Second, this paper concludes that section 1201(c)(1) should be amended to provide fair circumvention and dissemination of circumvention devices for legitimate fair uses of copyrighted works. Section 1201(c)(1) should be amended to include these uses for two reasons: 1. because of the ambiguity in the wording of the section 1201(c)(1) and 2. circumstances arise under 1201(a)(1) and (a)(2) in which the exceptions in (d)-(j) are not applicable, but in which there is a legitimate circumvention or trafficking of circumvention device for fair use of copyrighted works. Many of these legitimate uses would clearly be in the interest of promoting the arts and sciences. In concluding, this paper examines the potential ramifications of allowing the interests of copyright owners to exceed the interest of the individual users and suggests that amending section 1201(c)(1) to preserve fair use under the DMCA would help restore copyright law to its traditional balance.

II. Background

A. The Plain Meaning of Section 1201(c)(1)

Section 1201(a)(1)(A) of the digital millennium copyright act states that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."³ Exceptions to this are found in 1201(d)-(j) providing limited exemptions for academic institutions, nonprofit libraries, archives, law enforcement and other government activities.⁴ Reverse engineering and encryption

³ 17 U.S.C.A. § 1201(a)(1)(A).

⁴ For the purposes of this paper, the author has chosen to focus solely on a critique of 1201(c)(1) and fair use interpretations under the DMCA.

research exemptions provided under subsections (f) and (g) are limited to a narrow list of activities and requirements inviting controversy⁵ over their interpretation.

Similarly, section 1201(c)(1) has the potential to evoke debate over the application of fair use rights provided in the Copyright Act section 107 to the DMCA.⁶ Section 1201(c)(1) states: "*Nothing* in this section *shall* affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."⁷ (emphasis added) The text of the statute implies that the fair use provisions of the Copyright Act section 107 are subsumed into section 1201 of the DMCA. Section 107 of the Copyright Act states that the fair use of a copyrighted work includes reproduction of copies, phonorecords or copying of any other means "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research...."⁸ The statute provides a list of factors that a court is required to review before determining if fair use exists. These factors include: 1. the purpose of the use, 2. the nature of the copyrighted work, 3. the amount of the work used in relation to the work as a whole, and 4. the effect of the use on the potential market value of the work.⁹ One possible interpretation of Congress' wording of section 1201(c)(1) provides that fair use rights in Section 107 of the Copyright Act be applied to the digital medium by using the word "shall" rather than a permissive verb.

In contrast, another interpretation provides that the language of 1201(c)(1) does not intend to confer traditional fair use defenses to the DMCA. The "nothing" could be

⁵ See Pamela Samuelson, "Anticircumvention Rules: Threat to Science," 293 Science 2028 (2001); Brief of Openlaw Participants as Amicus Curiae In Support of Defendants Eric Corley, a/k/a "Emmanuel Goldstein" and 2600 Enterprises <<http://eon.law.harvard.edu/openlaw/DVD/filings/NY/openlaw-amicus/> (last updated May 30, 2000).

⁶ 17 U.S.C.A. § 107 (2002).

⁷ 17 U.S.C.A. § 1201(c)(1).

⁸ 17 U.S.C.A. § 107.

⁹ *Id.*

interpreted to mean only that the DMCA will not affect traditional fair uses rather than meaning that fair use should be applied to the provisions in the DMCA. These two possible interpretations of fair use illustrate the problems inherent in Congress' ambiguous wording of 1201(c)(1).

Aside from merely "including fair use," the text of section 1201(c)(1), if meant to confer fair use on the DMCA, fails to supply any supplemental guidelines for implementing fair use without violating section 1201(a)(1)(A) or (a)(2). The plain meaning of the text provides only a broad guideline; if interpreted from a textualist perspective, the statute allows for circumvention of access control to obtain a copyrighted work for fair use purposes as provided in the Copyright Act section 107.¹⁰ If the user, however, shared the method for circumvention of the access controls to the copyrighted work, the user would be in violation of section 1201(a)(2) which states that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is (A) primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this titled in a work or a portion thereof..."

When this is applied to section 1201(c)(1), it is not clear which exceptions were intended to be exempt from 1201(a)(1) and (a)(2). The meaning of 1201(c)(1) appears particularly ambiguous when applied to the narrowly worded exemptions in subsections (d)-(j). For example, subsection (d) provides exemptions for nonprofit libraries, archives and educational institutions. If the fair use rights of the copyright act are meant to remain

¹⁰ Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised," 14 Berkeley Tech. L. J. 519 (1999).

intact as implied in subsection (c)(1), then the provisions in (d) seem an unnecessary reiteration of the fair use rights in section 107 of the Copyright Act. Section (d) creates "shopping rights" for institutions that are considering purchasing copyrighted texts.¹¹ This seems, however, an unnecessary provision considering that any copyright owner seeking to sell his works would provide a copy for marketing purposes in the first place. Furthermore, if Congress meant for the text of subsection (c)(1) to include fair use from the Copyright Act there would not be a need for the exemptions provided under subsection (d) because copies for limited use would have been obtained from the copyright owner.

In conclusion, the broadly worded text of section 1201(c)(1) is ambiguous and could be interpreted in two different ways: 1. that 1201(c)(1) implies that the fair use rights provided in the Copyright Act section 107 apply to the DMCA provisions, or 2. that 1201(c)(1)'s fair use wording means that nothing under the DMCA should be taken as detracting from traditional copyright fair use defenses in section 107. Furthermore, taken in context with the rest of the Act, section 1201(c)(1) provides limited guidelines for implementation of fair uses not covered by the exemptions in subsections (d)-(j). This is particularly evident when section 1201(a)(2) threatens to prohibit fair use of copyrighted works by making illegal the dissemination of technology that circumvents access for fair use purposes.¹² Unfortunately, legislative history of the DMCA provides limited additional evidence of how section 1201(c)(1) was intended to relate to the rest of the statute.

¹¹ *Id.* at 540.

¹² *Id.* at 555. Samuelson suggests that while Congress intended section 1201(a)(2) to prevent the production "black boxes" used to pirate copyrighted works, they instead created overly-broad provisions that make circumvention for protected fair use illegal.

B. The Legislative History of Section 1201(c)(1)

Legislative history surrounding the creation of the DMCA suggests that the primary interest of Congress in adding this section to the Copyright Act was to encourage the growth of electronic commerce while maintaining the rights of copyright owners.¹³ Before passage of the bill, the Committee on the Judiciary extended consideration of the proposed statute to private and public parties who had voiced concern over the impact that the statute would have on their respective interests.¹⁴ Regardless of the complaints raised in opposition to the passage of the bill, the primary goal of the legislature in adopting the statute was the need to control the increase in piracy of copyrighted works. The legislative history establishes that Congress did not have the primary objective of regulating the spread of information and ideas.¹⁵ This remains the constitutional purpose of the Copyright Act.¹⁶

Rather, legislative history indicates that Congress intended to create a balance between the increasingly fast-paced technological growth of electronic commerce and the rights of copyright owners facing violations due to that technology.¹⁷ Scholars of copyright law responded to the proposal in a letter to Congress in 1997 stating their concerns that the proposed additions to the Copyright Act would be a form of "paracopyright" that would regulate fair usage of copyrighted works provided in the

¹³ H. Commerce Comm. Rpt., 105th Cong., 2nd Session, 105-551 (II), at § 38 (1976).

¹⁴ *Id.* at § 37.

¹⁵ *Id.* at § 39.

¹⁶ US Const. art. I, § 8, cl. 8. "The Congress shall have power: ... To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries..."

¹⁷ H. Commerce Comm. Rpt. 105-551 (II) at § 39.

primary copyright laws.¹⁸ Congress responded to the scholars by emphasizing the need to update the current copyright laws to protect copyright owners from technological changes that have increased the threat of copyright infringement.¹⁹

In the legislative history, Congress acknowledges that fair use faces significant problems concerning the increase of copyrighted works being published online.²⁰ On the one hand, new technology has provided an increase in the dissemination of ideas, which provides enhanced exposure to the public of the arts and sciences as encouraged by the Copyright Act. On the other hand, the same technology has allowed individuals and organizations to charge fees for any usage of their copyrighted works beyond what a consumer would have to pay when purchasing a physical copy of the work.²¹ One side promotes healthy consumerism while the other promotes education and academic scholarship.

Legislative history of section 1201(c)(1) indicates that Congress wrote the provision "to ensure that none of the provisions in section 1201 affect the existing legal regime established in the Copyright Act and case law interpreting that statute."²² The Senate Report on the DMCA specifically stated that the provisions of the DMCA were not intended to alter fair use in section 107 of the traditional Copyright Act.²³ The report concluded that no changes were necessary to section 107 because the fair use provision is "technologically neutral, and therefore, the fair use doctrine is fully applicable in the

¹⁸ *Id.* at § 40.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Opponents of the DMCA have termed this as the creation of a "pay-per-use" society that will erode the fair use provisions of the Copyright Act.

²² H. Rpt., 105th Congress, 2nd Session, 105-551 (I) at *19 (1998).

²³ S. Rpt., 105th Congress, 2nd Session, 105-190 (1998).

digital world as in the analog world."²⁴ Based on this report, one could make the assumption that the fair use defenses in section 107 of the original Copyright Act are also intended to provide fair use defenses to section 1201 of the DMCA. The Senate Report, however, stated that section 1201(c)(1) was intended to protect existing copyright law and case law that interprets the Copyright Act.²⁵ From this, one could assume that the wording in 1201(c)(1) was not written to convey any of the fair use defenses from the original copyright act on section 1201 of the DMCA. Rather, it was written to ensure that sections of the DMCA would not be applied to the traditional Copyright Act.

To further add to the ambiguity of section 1201(c)(1), Congress wrote subsections (d)-(j) as exceptions to liability in section 1201. If Congress had intended for section 1201(c)(1) to provide the DMCA with all the fair use defenses of the Copyright Act section 107, then these specific exceptions would be unnecessary because traditional fair use defenses in section 107 would already allow for them. As it has been interpreted by the courts, section 1201(c)(1) permits none of the fair uses provided for in traditional copyright law to apply to the DMCA.²⁶

C. Court Interpretation of Fair Use Under the DMCA

Two cases have encountered contrasting interpretations of fair use under the DMCA.²⁷ In *RealNetworks, Inc. v. Streambox, Inc.*, the district court held that the

²⁴ *Id.* at *23-24.

²⁵ *Id.* at *30.

²⁶ *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001).

²⁷ *Id.* While both of these cases contain discussions on fair use in the DMCA, the courts have not yet handled a DMCA case in which interpretation of section 1201(c)(1) was the specific focus of the decision.

defendant was not allowed to market a device that circumvented the plaintiff's access controls.²⁸ The court issued the injunction against the defendant, Streambox, on the grounds that the device violated the DMCA by circumventing access control devices and encouraged copyright infringement of the copyrighted works that RealNetwork's program distributed on a "pay-per-play" basis.²⁹ Streambox argued that they were entitled to fair use exemption for their product because the device provided for both fair and unfair uses of the copyrighted works.³⁰ RealNetworks, however, was able to establish irreparable economic harm from the distribution of Streambox's device.³¹ Therefore, the court held that any circumvention of access controls, regardless of its potential for non-infringing fair use, were in violation of the DMCA.³² This court's ruling was significant because it implied that if a circumvention device can in any way be used to infringe on a copyrighted work, regardless of its potential to permit a fair use, the device will be considered in violation of the DMCA.³³ Because section 1201(c)(1) does not expound on how the fair use defenses should be applied to the rest of the statute, courts will take the plain meaning of section 1201(a)(2) to include even those devices that might permit a fair use.

In a Second Circuit case, *Universal City Studios v. Corley*, the court examined fair use as it applies to section 1201(f) for reverse engineering.³⁴ The court held that the defendants were enjoined from publishing a circumvention software download, DeCSS,

²⁸ *RealNetworks*, 2000 U.S. Dist. LEXIS 1889 at *2-3.

²⁹ *Id.* at *34-35.

³⁰ *Id.* at *21-22.

³¹ *Id.* at *26-27.

³² *Id.* at *2-3.

³³ See also, John R. Therien, "Exorcising the Specter of a 'Pay-Per-Use' Society: Toward Preserving Fair Use and the Public Domain in the Digital Age," 16 Berkeley Tech. L.J. 979 at 1019-1021.

³⁴ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001). This case also addressed the First Amendment rights involved in allowing a website to publish code that may or may not be used to circumvent access controls. For the purposes of this paper, only the fair use argument will be discussed.

on their website as well as posting hyperlinks to the software.³⁵ The plaintiff, Universal City Studios, argued that the software was used to make copies of their copyrighted works in violation of the DMCA.³⁶ The defendant, Eric Corley, owner of the website that posted the software, argued that the software was originally created for computer users to play DVDs on their Linux operating systems.³⁷ Linux systems could not read the DVDs because they were encrypted with a security and authentication system called CSS.³⁸ DeCSS decrypted the access control device on the DVD and allowed the user to make fair use of the copy.³⁹ The court agreed with the plaintiff that DeCSS was also used to make pirated copies of the DVDs.⁴⁰ Therefore, the court held that the defendant was in violation of DMCA 1201(a)(2)(A) for trafficking in a circumvention device.⁴¹ The defendant's argument that the software also promoted fair use of a user's copy did not convince the court that the device was not in violation of the DMCA.⁴² The court concluded that "fair use" in section 1201(c)(1) did not allow for circumvention of encryption technology for fair uses.⁴³ Instead, the court held that section 1201(c)(1) "clarifies that the DMCA targets the *circumvention* of digital walls guarding copyrighted material...but does not concern itself with the *use* of those materials after circumvention has occurred."⁴⁴ This case is currently awaiting a rehearing en banc by the Second Circuit Court of Appeals, which is expected to occur sometime this spring.

³⁵ *Id.* at 459.

³⁶ *Id.* at 435-436.

³⁷ *Id.*

³⁸ *Id.* at 438-439.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 459.

⁴² *Id.* at 443.

⁴³ *Id.*

⁴⁴ *Id.* In coming to this conclusion, the court relied heavily on the legislative history surrounding the DMCA and interpreted that Congress intended the DMCA to serve as a "balanced approach" to piracy and

III. Argument

While it may serve as a short-term solution to digital piracy of copyrighted works, the DMCA causes more confusion than clarity in attempting to dictate how courts should address digital copyright infringement in an age of computer-savvy consumers. In trying to solve difficult digital copyright security problems, the writers of the DMCA left many provisions too broad, while leaving others too narrow. Legislative history suggests that Congress intended the DMCA to maintain the balance of copyright owners' rights with individual users' rights that exists in the Copyright Act. As fair use is interpreted by the courts, however, section 1201(c)(1) upsets the balance of copyright law and places more control in the hands of the copyright owner to the detriment of the individual user. The ambiguous wording of section 1201(c)(1) does not adequately provide for fair uses of copyrighted materials, including circumvention of access controls or dissemination of circumvention devices. The meaning of section 1201(c)(1) is further clouded by the exemptions from liability provided in sections 1201(d)-(j), which are not adequate to preserve all fair uses of copyrighted materials.

In this respect, the DMCA fails to provide protection to the user for circumvention of access controls when a legitimate use of the copyrighted material exists. If an individual or corporation has many copyrighted works stored in one online database protected by a single access device, then a user who circumvents that device to gain

fair use. The court concluded that allowing exemptions made by the Library of Congress was Congress' way of ensuring that fair uses were provided for in the DMCA. *Id.* at 444.

access for a legitimate fair use violates the DMCA for circumventing access controls that may contain copyrighted works to which the user does not have a fair use defense. Depending on how courts chose to interpret section 1201(c)(1), the consequences of the ambiguity in this section could significantly damage the access and distribution of copyrighted materials for fair uses.

This paper examines the ambiguous wording of section 1201(c)(1) and concludes that the meaning of fair use in this section has been incorrectly interpreted by the courts as preserving only traditional fair uses under section 107. Examining both textualist and intentionalist approaches to interpreting section 1201(c)(1), this paper concludes that the courts have overlooked possible legitimate fair circumvention of access controls or dissemination of circumvention devices that allow individuals to make fair use of copyrighted materials. This paper suggests that the words "fair use" in section 1201(c)(1) should be interpreted by the courts to include fair circumvention and fair dissemination of circumvention devices.

Finally, this paper will conclude that section 1201(c)(1) should be amended to include these uses for two reasons: 1. because of the ambiguity in the wording of the section 1201(c)(1) can render harsh results for copyright users and 2. circumstances arise under 1201(a)(1) and (a)(2) in which the exceptions in (d)-(j) are not applicable, which upsets the balance of interests provided for in traditional copyright law. Without protection for fair uses of copyrighted materials, the advancement of digital technology would not continue to develop and spread knowledge at the fast pace that it has in the past decade. Amending section 1201(c)(1) to include legitimate fair circumvention and dissemination in the DMCA would allow the statute to maintain the same balance of

interests found in traditional copyright law: protecting the rights of copyright owners while also encouraging the development of the arts and sciences.

A. Interpreting the Ambiguous Wording of Section 1201(c)(1)

1. A Textualist Interpretation of 1201(c)(1)

The text of section 1201(c)(1) states that *none* of the provisions in the DMCA *shall* prohibit legitimate uses of copyrighted material in the digital medium. Deceptively simplistic, section 1201(c)(1) seems even more ambiguous when applied to sections 1201(a)(1)(A) or (a)(2). Courts could interpret fair use in 1201(c)(1) in two different ways. First, the courts could assume that the same factors for evaluating the existence of a fair use defense in section 107 should be applied in copyright cases in the digital medium. This interpretation could define the words "fair use" as the fair use defenses in section 107 and nothing more. This would mean that the text of 1201(c)(1) was not meant to apply to DMCA violations in any circumstances. Such an interpretation, however, could render unfair results for the user who legitimately obtains a copyrighted work. For example, if fair use is not interpreted to include fair circumvention under the DMCA, then a user who has legally purchased a copyrighted CD would not be able to circumvent access controls on his computer software in order to play the lawfully obtained copy on different operating systems.⁴⁵

⁴⁵ For further explanation of DeCSS, see "The Openlaw DVD/DeCSS Forum FAQ List" <<http://eol.law.harvard.edu/openlaw/dvd/>> (last updated May 3, 2000). This example is similar to the circumstances under which the software, DeCSS, was used. Individuals who purchased DVDs were not able to view them on their Linux operating systems unless they used the software to circumvent the DVD access controls (CSS). Viewing the DVDs was a legitimate fair use of the copyrighted material. However, in the digital medium this use required the circumvention of a digital access control.

Furthermore, if a university professor wishes to obtain a translation of a copyrighted document that is contained on a DVD with a collection of other copyrighted materials does he have the right to circumvent the access controls to the entire collection to obtain the document that he has a fair use right to use in his classroom? Under section 1201(a)(1)(A), any circumvention of an access control that protects copyrighted works would be a violation regardless of whether a fair use right existed as to a document included in that collection. Moreover, if the same professor then wanted to share with his colleague the same code for circumventing the access controls, that professor would be in violation of section 1201(a)(2) for disseminating a circumvention device. Even if the professor's colleague also had a fair use defense of the copyrighted material, his actions in sharing the code would be a violation of the DMCA.

Second, if courts do not interpret the words "fair use" in section 1201(c)(1) to include fair circumvention and dissemination of access controls, traditionally permissible uses of copyrighted material will be made illegal in the digital medium. If "fair use" is only interpreted to refer to section 107 fair use defenses and not to apply to the DMCA, then courts must assume that Congress meant for sections 1201(d)-(j) to be the only narrow exceptions to liability under the DMCA regardless of the limitations this places on copyright users. For example, in the trial court's decision preceding the Second Circuit Court of Appeals' ruling in *Corley*, the court supplied a more in-depth textualist analysis of the DMCA's incorporation of the Copyright Act's fair use provision.⁴⁶ Beginning with the language of the DMCA, the court held that if Congress had meant for

⁴⁶ *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294 (SDNY 2000), *aff'd*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001); *see also*, Brian Paul Menard, "And the Shirt Off Your Back: Universal Studios, DeCSS, and the Digital Millennium Copyright Act," 27 Rutgers Computer & Tech. L.J. 371 (2001).

fair use to apply to section 1201(a)(1)(A), then they would have written this defense into that provision of the statute.⁴⁷ The court claimed that Congress recognized that the DMCA might cause conflict with traditional fair use, and therefore, attempted to strike a balance between the interests of the copyright owner and the user in writing the statute.⁴⁸ For example, once the user has obtained "authorized access" to the copyrighted material the fair use defense remains allowing them to use the copyrighted work for those purposes.⁴⁹ Section 1201(a)(1)(A), however, still prohibits any circumvention of access devices for fair use purposes when the user is not able to obtain authorized access.⁵⁰

Furthermore, in *Reimerdes*, the court also insisted that the DMCA's specific exceptions in sections 1201(d)-(j) are evidence that Congress wanted to protect certain fair uses.⁵¹ The court, however, failed to resolve one question: if Congress specifically wanted to ensure that the exceptions created in (d)-(j) were protected fair uses, then what was the purpose of the broad language in section 1201(c)(1)? In concluding their fair use analysis, the court held, in rather harsh language, that if the defendants wished to change the wording of the statute they needed to turn to Congress, not the courts.⁵² The result of this interpretation was that the DMCA prohibits the trafficking of devices for circumvention of fair use, regardless of whether or not this denies some people from obtaining access of the copyright materials that they have a fair use defense to access. In light of the harsh results this interpretation has on the traditional balance in copyright law

⁴⁷ *Id.* at 322.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 324. "The fact that Congress elected to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so is a matter for Congress unless Congress' decision contravenes the Constitution...."

between the interests of owners and the interests of users, courts should interpret the text of section 1201(c)(1) to include fair access and fair circumvention.

As it now stands, judicial interpretations of fair use in the DMCA have concluded that the fair use defenses in section 107 of the Copyright Act are not guaranteed in the DMCA as they apply to circumvention of access controls in a digital medium.⁵³ None of these cases, however, have dealt directly with the questions of fair circumvention or fair dissemination claims as they relate to section 1201(c)(1). Rather, these cases have been concerned more with the dissemination of software that has allowed for fair uses of copyrighted materials while also, and to a larger extent, provided for piracy of those works. Courts have not yet faced a DMCA claim that focuses on the interpretation of the text of section 1201(c)(1) as it relates to 1201 (a)(1)(A) or (a)(2) or the exceptions in section 1201(d)-(j). To ensure that users will be able to make use of lawfully obtained copyrighted materials and that traditional uses of these materials are preserved, it will be necessary for courts to interpret section 1201(c)(1) as providing fair use defenses under the DMCA that include methods of circumvention or dissemination that allow for that use. To avoid ambiguity, however, the wording of section 1201(c)(1) should be amended to include fair circumvention and fair dissemination of circumvention devices.

2. Deciphering Congressional Intent Regarding Section 1201(c)(1)

As with the textualist approach to interpreting section 1201(c)(1), interpreting congressional intent with this section renders two contrasting results. First, if the text of section 1201(c)(1) is meant to include fair circumvention and fair dissemination, then

⁵³ *RealNetworks*, 2000 WL 127311; *Universal City Studios, Inc. v. Corley*, 273 F.3d 429.

circumvention for fair use purposes would be allowed under sections 1201(a)(1)(A) and (a)(2). This would make both the anticircumvention and antitrafficking provisions less effective as means of preventing piracy of copyrighted works. Therefore, one interpretation provides that Congress could not intend for the fair use wording in section 1201(c)(1) to include all fair uses because it would be impossible for the copyright owner to track every circumvention of his access controls and discover if it was circumvented for a fair use purpose or not.

For example, a person who circumvents to obtain fair use of a copyrighted work might be in violation of the DMCA regardless because they do not have a fair use defense for the other copyrighted works contained in the same protected collection. In addition, if they share the access control code to another person who has a fair use, they would still be disseminating a device that could be used to circumvent the access controls to copyrighted works not covered by a fair use defense.⁵⁴ This scenario was played out in the Second Circuit's decision in *Corley*.⁵⁵

In *Corley*, the court constructed an intentionalist interpretation of fair use under section 1201(c)(1) in relation to possible restrictions on legitimate uses of copyrighted materials under the DMCA.⁵⁶ In *Corley*, the defendant sought relief of an injunction prohibiting him from publishing downloads or hyperlinks to downloads of software called DeCSS, which decrypts CSS, a 40-bit encryption access control device for copyrighted DVD works.⁵⁷ While the software allowed for fair use by the user who wanted to play legally obtained copies of DVDs on Linux machines, the software also

⁵⁴ This scenario is similar to *Universal City Studios, Inc. v. Corley* where DeCSS was used as a circumvention software for fair use purposes while also being used to facilitate digital piracy.

⁵⁵ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429.

⁵⁶ *Id.*

⁵⁷ *Id.* at 434-436.

allowed other users to make pirated copies of the protected DVDs. Because the software could be used for both fair uses and illegal infringement, the court held that providing access to the software violated section 1201(a)(2) for trafficking in circumvention devices.⁵⁸

The defendant's argument for fair use included the fact that the DeCSS software would allow for fair use of the DVD that would allow the copy of the contents to be viewed in as good a condition as the original.⁵⁹ The court disagreed stating that neither the Constitution nor the Copyright Act guaranteed that the fair use of a copyrighted material required that it be in as good a format as the original.⁶⁰ The court further asserted that because the defendant was able to use technological advances to improve the fair use copy did not mean that the law created the right for to them to use that technology.⁶¹ Furthermore, the court addressed whether the DMCA violated the Constitution based on its restrictions on fair use.⁶² The court took the position that fair use is not a constitutional requirement, and therefore, the DMCA cannot be unconstitutional based on its restrictions on fair use.⁶³ The court did acknowledge, however, the Supreme Court's holding in *Campbell v. Acuff-Rose*, that fair use facilitates the Constitution's objective of promoting the arts and sciences.⁶⁴ The court found, however, that this did not contribute to their analysis of the congressional intent for fair use in the DMCA.

⁵⁸ *Id.*

⁵⁹ *Id.* at 458-459.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Universal City Studios, Inc. v. Corley*, 273 F.3d 429. A Petition for rehearing en banc is expected sometime this spring. The court's analysis in *Corley* deals primarily with the defendant's claim of First Amendment Rights violations caused by the DMCA. This case, however, serves as one of the first examples of how future courts may interpret the fair use under the DMCA.

⁶³ *Id.* at 458.

⁶⁴ *Id.*; citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

Second, the narrowly defined exemptions that follow in subsections (d)-(j) also add to the ambiguity of section 1201(c)(1).⁶⁵ Nimmer, writing on the fair use application to the DMCA, stated that the exemptions are so narrowly and vaguely worded that they are practically inapplicable to the average person seeking a fair use defense under the DMCA.⁶⁶ If Congress intended for fair use to be unchanged and broadly interpreted, then why did they include the specific exemptions to follow section 1201(c)(1)? The following exemptions might be interpreted to make section 1201(c)(1) merely a general phrase intended to appease lobbyists during the creation of the bill who were concerned that the DMCA would override fair use defenses in the Copyright Act.

During the creation of the DMCA, the House Committee on Commerce questioned whether the wording of the DMCA might supercede the traditional fair use of the Copyright Act.⁶⁷ Congress included section 1201(a)(1)(C) as a protective measure to ensure that if the Librarian of Congress thought that a particular type of copyrighted material should be made available, the anticircumvention provisions would not apply.⁶⁸ Every three years, the Register of Copyrights must decide which copyrighted materials fall under this exempted category of works that will be made available for public consumption. Congress determined that only two classes of works would be exempted as determined by the Librarian of Congress: "1. Compilations consisting of lists of websites blocked by filtering software applications; and 2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit

⁶⁵ David Nimmer, "A Riff on Fair Use in the Digital Millennium Copyright Act," 148 U.Pa. L. Rev. 673, 740 (2000).

⁶⁶ *Id.*

⁶⁷ "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies," October 27, 2000, 65 FR 64556-01, 2000 WL 1624383.

⁶⁸ This raises another important question of how to define a "class of works" worthy of fair use waiver from the DMCA. Do these works include only those documents that a public library or archive would preserve, or can it be extended to include other works, such as comic books or other items of pop-culture?

access because of malfunction, damage or obsolescence."⁶⁹ This section, however, does not allow users to circumvent access controls for specific fair use purposes.

Furthermore, the user only has access under this provision if the Librarian has considered the particular material that they wish to view as having a valid fair use. The three-year waiting period further hinders research by requiring the user to wait for the Register of Copyright's waiver before acting on a fair use that they might already be entitled to under the Copyright Act. In addition, the provision does not prevent violations of fair use under 1201(a)(2). Even if circumvention for fair use purposes were allowed under 1201(a)(1)(A), only those users who possess the technological skills to circumvent the access controls would be able to view the secured documents. Under 1201(a)(2), dissemination of a circumvention device to allow for fair use access continues to be a violation. Therefore, the Committee on Commerce's attempt to ensure fair use was token at best.

Copyright Law Scholar Pamela Samuelson suggests that the DMCA be amended to include an "other legitimate purpose" circumvention exception to counter the limited and narrowly worded exceptions already provided.⁷⁰ She argues that when Congress wrote the exceptions they based them on problems that were already known to exist in the digital media without examining the potential for other fair use exceptions to arise in the future.⁷¹ If 1201(c)(1) was written to serve as a general fair use exception to the statute, the specific exemptions would be unnecessary. Samuelson suggests that the DMCA was created to respond primarily to the concerns of the copyright industry,

⁶⁹ 37 CFR 201.40.

⁷⁰ Pamela Samuelson, "Towards More Sensible Anti-Circumvention Regulations," at <<http://www.sims.berkeley.edu/~pam/papers/fincrypt2.doc>> (last accessed January 27, 2002).

⁷¹ *Id.*

particularly the music and film industry, without considering that digital access control to copyrighted works provides many other individuals and organizations with protection to their digitally stored information.⁷² Consideration of these other interested parties might have resulted in the inclusion of a generalized rule permitting other legitimate circumventions of access control and dissemination of circumvention devices for fair use purposes. For this reason, section 1201(c)(1) should be amended to include fair access and fair dissemination as "fair use" in order to resolve the ambiguity inherent in this provision.

B. Failure to Preserve Fair Use in the DMCA Will Stifle Copyright Law's Ability to Promote the Arts and Sciences.

1. Upsetting the Traditional Balance: The Rights of the Copyrights Owner Versus the Rights of the Individual User.

Copyright law Professor Jessica Litman poses the question of whether public access is necessary to uphold the constitutional objective of the Copyright Act to "promote the progress of science and useful arts."⁷³ Litman points out that during a majority of American history the dissemination of information was limited and not reliant on any form of copyright protection.⁷⁴ She states, "At no time, however, until the enactment of the access-control anti-circumvention provisions of the DMCA, did Congress or the courts cede to copyright owners control over looking at, listening to, learning from, or *using* copyrighted works."⁷⁵

⁷² *Id.*

⁷³ Jessica Litman, *Digital Copyright* at 175-176 (Prometheus Books 2001); US Const. art. I, § 8, cl. 8.

⁷⁴ Litman, *Digital Copyright* at 176.

⁷⁵ *Id.*

Similarly, copyright law Scholar David Nimmer has explored the ramifications of the DMCA on traditional copyright law and how the Act falls into a line of significant historical events that have created the current copyright law.⁷⁶ For Jewish scholars in the Eleventh Century, the copyright dilemma was whether the scholarly texts of a rabbi were more valuable because of their ability to be studied by many scholars or because of one man's ownership rights in the texts.⁷⁷ The writers of the DMCA assumed that because the dissemination of ideas is no longer as burdensome as it was in the Eleventh Century, the pendulum of copyright law must swing completely over to protect the copyright owners' rights more than the users. If section 1201(c)(1) is amended to include fair circumvention and fair dissemination, then the rights of copyright owners will continue to exceed those of individual users under the DMCA, upsetting the balance of traditional copyright law. In turn, this imbalance will have a significant impact on the development of the arts and sciences. Therefore, it is critical that section 1201(c)(1) be amended to include fair circumvention and fair dissemination in order to preserve the traditional copyright law balance between the rights of the copyright owners and the rights of the individual users. As short-sighted assumptions go, the DMCA's ambiguous wording of fair use in section 1201(c)(1) will have serious ramifications for future copyright users in several ways.

Nimmer writes that the DMCA furthers the development of a "pay-per-use" society in which anyone who wants access to a copyrighted work will have to pay a fee

⁷⁶ David Nimmer, "A Riff on Fair Use in the Digital Millennium Copyright Act," 148 U. Pa. L. Rev. at 676-677.

⁷⁷ *Id.* at 675-677. Nimmer explains that before copyright laws were formally written Judaic scholars addressed the need for property rights in scholarly texts because the works were often lent out to others in the community. Both a need for fair use of the content of the work was recognized as well as the need to preserve the property interests of the owner.

regardless of whether they might have a fair use right under the original Copyright Act to access the material.⁷⁸ Nimmer recognizes that the DMCA's lack of fair use rights will hinder scholars, students and teachers who might otherwise have a right to use copyrighted materials.⁷⁹ As judicially interpreted, the DMCA allows copyright owners to lock-up their works with anti-circumvention devices and makes it illegal for anyone, even those with fair uses, to gain access to the works.⁸⁰ Therefore, the ambiguous wording of section 1201(c)(1) will create significant access problems for people with fair uses for copyrighted works.⁸¹ To move a step beyond Nimmer's analysis, consider the long-term effects of the DMCA if section 1201(c)(1) is not interpreted to allow for circumvention and dissemination for legitimate uses.

There are paradigm struggles in every revolution; the technological revolution is no different. In the realm of copyright law, this struggle has materialized in the creation and implementation of the DMCA. As Scientist Thomas Kuhn wrote, "Paradigms gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognize as acute."⁸² No paradigm

⁷⁸ *Id.* at 714-715; *see also* F. Gregory Lastowka, "Symposium: E-Commerce in the Digital Millennium: Free Access and the Future of Copyright," 27 Rutgers Computer & Tech. L.J. 293 at 321-327.

⁷⁹ David Nimmer, "A Riff on Fair Use in the Digital Millennium Copyright Act," 148 U. Pa. L. Rev. at 718-719.

⁸⁰ *RealNetworks, Inc.*, 2000 U.S. Dist. LEXIS 1889; *Universal City Studios, Inc. v. Corley*, 273 F.3d 429.

⁸¹ For an in-depth analysis of accessibility in copyright law, *see* Robert A. Kreiss, "Accessibility and Commercialization in Copyright Theory," 43 UCLA L. Rev. 1 (October, 1995). Professor Kreiss makes the distinction between copyrighted works that are commercialized and those that are not and how that distinction affects fair use analysis under traditional copyright law. In discussing the importance of access for the promotion of arts and science, Kreiss states, "In order for the copyright system to promote the Progress of Science, the public must have access to copyrighted works. If the public is not given access to copyrighted works, the public cannot learn from those works; learning and knowledge would not advance." *Id.* at *10. One could argue that excluding fair circumvention and fair dissemination of circumvention devices from section 1201(c)(1) limits access for potential legitimate uses, and therefore, does not follow the goals of traditional copyright law.

⁸² Thomas S. Kuhn, *The Structure of Scientific Revolutions*, at 23 (U. of Chicago Press 1962). *See also*, Crane Brinton, *The Anatomy of Revolution* (Vintage Books 1965). Historian Brinton has described the paradigm struggle that causes or results within a revolution as a "disequilibrium" of the social system.

ever solves every problem, leaving the question of which issues are the most important for society to address.⁸³ Today the rights of copyright owners are largely represented by corporations who own the copyrights to individual artists' works, for example, the movie and music industries.⁸⁴ On the other hand, the rights of the users to access copyrighted works and share information across the technology highway have been represented by smaller and less funded public interest groups, including the Electronic Frontier Foundation (EFF) and individual legal scholars.⁸⁵ If the DMCA remains the chosen paradigm for the digital copyright age, then the interests of the copyright owners have prevailed over the interests of the individual users.

Analyzed in terms of two competing paradigms, there are three reasons why the interests of the copyright owners and the interests of the fair use proponents were not reconciled in the formation of the DMCA. First, the two interests cannot agree on the source of the problem that the statute is proposed to solve.⁸⁶ For example, the primary concern of the music industry was to end digital piracy of copyrighted works. The objective of the individual users, however, was to make sure that software and other technological innovations were able to circulate openly over the Internet to further intellectual development of their field. Within both paradigms, negative sides exist to which the opposing party protested and for which reason the two interests did not reconcile in the creation of the DMCA. For example, the music industry that seeks protection of copyrighted works for their artists in reality only gives the copyright

⁸³ Kuhn at 110.

⁸⁴ See the Recording Industry Association of America's website at <<http://www.riaa.org>> (last accessed Feb. 21, 2002).

⁸⁵ See <<http://www.eff.org>> (last accessed Feb. 21, 2002); see also "2600 Magazine 2nd Cir. En Banc Appeal in *MPAA v. Corley, et al.* (Jan 14, 2002) at <http://www.eff.org/IP/Video/MPAA_DVD_cases/20020114_ny_2600_appeal.html> (last accessed Feb. 22, 2002).

⁸⁶ Kuhn at 148.

"author" a minimal royalty compared to the amount that goes back to the profits of the corporation that owns the artist's copyright. Similarly, the open source software movement has members who will create circumvention programs that they claim are for the use of interoperability of programs but which are also used by the public as digital piracy devices.

Second, competing paradigms attempt to incorporate similar concepts of the original paradigm (in this case, the Copyright Act), but in fact, they do not use those "borrowed elements" in the same way.⁸⁷ In other words, both interests purport to follow the objectives of the Copyright Act, but because their interpretations of their respective rights in that original authority differ, there is no real consensus on what the new paradigm should encompass. This relates back to the discussion above regarding the contrasting interpretations of fair use under section 1201(c)(1). For example, opponents to the DMCA would desire to have section 1201(c)(1) interpreted to ensure that fair use defenses in the Copyright Act were transferred to the provisions of the DMCA. On the other hand, proponents of the DMCA would prefer to interpret the words "fair use" under 1201(c)(1) to mean that the DMCA will not affect fair use defenses in section 107. This interpretation would not apply traditional fair use to the DMCA. In both cases, the two competing interpretations struggle over the meaning of fair use language borrowed from the original Copyright Act.

Third, the proponents of the two paradigms originate from completely opposite domains with differing morals and principles in mind.⁸⁸ A corporation is an entity whose

⁸⁷ *Id.* at 149.

⁸⁸ *Id.* at 150. "...the proponents of competing paradigms practice their trades in different worlds."

sole purpose is to increase the economic holdings of its shareholders.⁸⁹ Open source programmers are individual intellectuals who desire to increase their personal knowledge by facilitating the spread of ideas on a global front.⁹⁰ This generalization of the two opposing interests in the DMCA illustrates the complications in creating a law while attempting to reconcile two very different backgrounds. It might be difficult to explain to a corporation that the interests of society as a whole might be furthered by the sharing of technological innovations when the corporation must first consider the economic impact that such innovation will have on its shareholders. Only a paradigm shift can cause the two interests to see the world in the same way and to accomplish this would require that one interest acknowledge that the chosen paradigm created more problems than it solved. For a paradigm to be accepted and followed, a significant portion of the community, in this case the legislature, has to accept it as the solution to the problem. This might give the competing paradigms a reason to reevaluate their interests on a common ground.

The result of this struggle of competing interests in the DMCA within a larger technological revolution will significantly change the spread of information in the future. In supporting the interests of the copyright owner above potential fair use defenses in the digital medium, the DMCA claims to solve the problem of piracy and "black boxes"

⁸⁹ For example, the Recording Industry Association of America (RIAA) claims to lose \$5 billion in sales internationally in one year from digitally pirated works. The RIAA considers profits as the primary objective of promoting the arts and sciences rather than the spread of culture knowledge. Shane Ham and Robert D. Atkinson, "Napster and Online Piracy: The Need to Revisit the Digital Millennium Copyright Act," May 1, 2000 at <http://www.ndol.org/ndol_ci.cfm?contentid=646&kaid=140&subid=289> (last accessed February 19, 2002). *See also*, Anna Claveria Brannan, "Fair Use Doctrine and the Digital Millennium Copyright Act: Does Fair Use Exist on the Internet Under the DMCA," 42 Santa Clara L. Rev. 247, 276 (2001)(concluding that the culture of the Internet needs to change and that it should "undergo a shift in its free-for-all based philosophy" so that the traditional fair use doctrine can be amended into the DMCA).

⁹⁰ *See* <<http://www.opensource.org>> (last accessed Feb. 23, 2002) for an explanation of the open source movement. The non-profit organization states, "The basic idea behind open source is very simple: When programmers can read, redistribute, and modify the source code for a piece of software, the software evolves. People improve it, people adapt it, people fix bugs. And this can happen at a speed that, if one is used to the slow pace of conventional software development, seems astonishing."

while covering up the fact that the paradigm fails to solve the problem of protecting most fair uses of copyrighted works in an age of digitally restrictive access. The DMCA is a significant battle in a larger technological revolution; with this legislation the interests of corporations are allowed to further dictate the development of the arts and sciences.⁹¹ Therefore, it is critical that section 1201(c)(1) be amended to include fair circumvention and fair dissemination of circumvention devices in order to maintain the balance of interests that exists in traditional copyright law.

2. Hindering the Development of the Arts and Sciences

In *Harper & Row v. Nation Enterprises*, the Supreme Court emphasized that the purpose of fair use rights provided in the Copyright Act was to protect the constitutional objectives of promoting the progress of arts and sciences.⁹² Based on a case-by-case evaluation of the use of a copyrighted work, the Supreme Court recognized that some uses of copyrighted materials were needed to encourage socially acceptable uses, such as for educational purposes. Based on the Supreme Court's holding in *Harper*, if the text of section 1201(c)(1) is interpreted to prohibit legitimate fair uses not covered in the exceptions provisions of sections 1201(d)-(j), then it would prevent the constitutional

⁹¹ Kuhn expresses the "invisibility" of revolutions and how both the average person and the politician tend to accept the authority that comes into law as the correct solution to the problems that the authority purports to answer. He writes, "Both scientists and laymen take much of their image of creative scientific activity from an authoritative source that systematically disguises – partly for important functional reasons – the existence and significance of scientific revolutions." Kuhn at 136.

⁹² *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); US Const. art. I § 8, cl. 8 reads: "The Congress shall have Power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

goal of promoting the arts and sciences.⁹³ The courts have interpreted section 1201(c)(1) to mean that Congress did not intend for the term "fair use" to include fair circumvention and fair dissemination under the DMCA. The result of this interpretation has the potential to stifle the promotion of the arts and sciences.

In an interview, Copyright Law Professor Laurence Lessig commented on the impact that the dissemination of ideas through the Internet can have on society. He stated, "Creative action and the distribution of these arts could be achieved in a much more diversified way than before."⁹⁴ Lessig argued that continued digital sharing of technological innovation will allow for a "production of culture that doesn't depend on a narrow set of images of what culture should be."⁹⁵ Allowing one interest to dictate which information should or should not be shared globally with the public, however, limits the overall projection of ideas and social norms to the world. If, for example, the music industry is allowed to lock up all their copyrighted materials under a "pay-per-use" system, then the arts and sciences will be affected because individual users with fair uses of the material will not have the opportunity to be influenced by those works.⁹⁶ What would be allowed into the public domain would depend on what view of the world the music industry or Hollywood wants to provide the public. Under one access controlling

⁹³ See also, Robin D. Gross, "Testimony of Electronic Frontier Foundation (EFF) Before Copyright Office Public Hearings on the Digital Millennium Copyright Act (DMCA)," <<http://www.virtualrecordings.com/EFFtestimony.htm>> (last updated May 19, 2000).

⁹⁴ Karlin Lillington, "Sentries at the gate: Copyright is the Internet's new battleground," *The Guardian*, Dec. 20, 2001. (accessible through Westlaw at 2001 WL 31913512).

⁹⁵ *Id.*; See also, Diane Zimmerman, "Adrift in the Digital Millennium Copyright Act: The Sequel," 26 U. Dayton L. Rev. 279, 280 (2001). Zimmerman states, "Depending on how they [technological protection devices] are designed, they can also give copyright owners a very fine-grained level of control over how works are accessed, by whom, how often, at what price, and indeed how they are used once access is obtained. In short, they can be used to prevent virtually any unconsented interaction with a work."

⁹⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (Justice Story stated, "in truth, in literature, in science and in art, there are and can be few, if any, things, which in the abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before.")

device, both copyrighted works and public domain works could be locked away. This causes a major skewing of history that threatens to provide the future with only a one-sided view of the past.⁹⁷ The information provided in those documents might someday be significant as a valuable source of cultural information.

Take a less extreme example of the potential consequences on education if section 1201(c)(1) is interpreted to exclude fair circumvention or fair dissemination. Suppose an independent scholar of the Chinese language and culture wants to circumvent region encoding on a DVD that he has purchased while on a trip overseas. To practice his proficiency in the language he wants to watch the foreign film in its original version without subtitles. He is not associated with a university as a teacher or graduate student, and therefore, does not fall under any exemptions provided in sections 1201(d)-(j). Under the DMCA, the independent scholar's use of the software that decodes the region coding would be a violation of section 1201(1)(a). If he shares this code with friends, who also want to listen to their copies of films in foreign languages without the subtitles, he will be in violation of section 1201(a)(2). In this respect, the courts' interpretation of section 1201(c)(1) as not providing for fair dissemination or fair circumvention seems to stifle academic research and cut against the objectives that the Copyright Act was created to encourage. Amending section 1201(c)(1) to include those fair uses would help restore the balance of interests to copyright law.

Researchers have always experienced degrees of difficulty in accessing materials for academic research, either in the form of costly travel to reach archives or in the form

⁹⁷ While typically considered a study of the humanities, history, as practiced by disciplined historians, is a science. "History's credentials as a science derive from three of its objectives: first, it aims to record the truth about what happened in the past; second, it aims to build a body of knowledge about the past; third, it aims to study the past through a disciplined methodology, using techniques and sources that are accessible to others in the field." Keith Windschuttle. *The Killing of History*, 185 (New York: The Free Press, 1997).

of waiting in long lines for access to limited archives in foreign countries. Many historical research documents are no longer governed by copyright law, if they ever were. Within the past ten years, however, there has been a surge of digital preservation and conservation of both copyrighted and public domain works, including everything from daily business records to historical manuscripts and artwork.⁹⁸ This means that materials that were not covered by copyright law are now stored in databases that are protected by copyright law or are included in databases that contain protected copyrighted works. For a researcher, access to these digital databases may be more economically feasible than former means of research. In some cases, the digital version of the work will be all that remains or is allowed to be handled by researchers.⁹⁹ Furthermore, as more university research departments become corporate-run or funded, the opportunity increases for the storage of both copyrighted and public domain materials under the same access control devices with permission to access determined by the corporate interests at stake.¹⁰⁰

⁹⁸ The author is taking the liberty of assuming that based on current archival trends, in the future, the majority of documents will only be accessible to researchers in digital format, either on CDs or secured online databases. The author of this note spent two years digitally photographing an archive of rare herbologies for the Lloyd Library in Cincinnati, Ohio. A digital compilation of the contents of these books might one day be copyrighted and placed online. If the CD contains copyrighted essays about the public domain works, then circumventing the access controls would be in violation of section 1201(a)(1)(A) because it would be circumvention of an access control that protect copyrighted works as well as public domain works. The *only* public access to these works would be through a "pay-per-use" system designed by the library or by illegal circumvention of the online access controls. The original "authors" of the materials would not be benefiting from paid access. Yet, circumvention of the access controls would be in violation of the DMCA, even though the researcher might have a fair use to that material, if courts continue to interpret section 1201(c)(1) to exclude fair circumvention and fair dissemination. *See supra* n. 109 (Professor Ginsburg suggests that the control of copyright in the digital medium might be more a result of greed than a method of rewarding the authors of the copyrighted works for their innovation.)

⁹⁹ For example, one reason why archivists are no longer allowing physical copies of materials to circulate is because the acidity in the human hands causes an increase in the deterioration of physical documents. Furthermore, documents printed on "war-time paper" dating from the start of the second World War through the 1970s are highly acidic, and therefore, the originals are not practical for physical use because the documents themselves will deteriorate even faster than those printed on paper from the 1500s.

¹⁰⁰ One could argue that Congress included section 1201(a)(C) to allow the Library of Congress to approve noninfringing uses of certain classes of works. However, see text of paper *infra* p. 21 for a discussion on how this method is not acceptable to preserve fair use. *See also*, The National Initiative for a Networked Cultural Heritage (NINCH)'s website at <<http://www.ninch.org/about/mission.html>> April 10, 2002. This

To illustrate further the dangers that might arise from section 1201(c)(1)'s ambiguous fair use provision, take for example the fair use issues surrounding the Dead Sea Scrolls and place it in the context of a digital medium. In 1992, Elisha Qimron, a professor at Ben Gurion University in Israel brought a copyright infringement suit in Israel against the editors of a book that contained copies of the Dead Sea scrolls.¹⁰¹ The book contained reconstructions of the scroll fragments that Qimron had researched and interpreted himself.¹⁰² One critical issue in the case was whether a scholar has copyright rights in a reconstructed manuscript of an ancient text.¹⁰³ Qimron's copyright control over the ancient texts allowed him to skew the materials by not making clear which portions of the work were his own interpretations and which were actually from the physical scroll fragments.¹⁰⁴ Qimron claimed that he planned on publishing his own book about his interpretations of the scrolls.¹⁰⁵ Around fifty years passed since the scrolls were discovered and in that time the scholarly community was deprived of at least half of the actual fragments because of Qimron's refusal to share the historical materials

recently formed organization is concerned with the "chilling" effect of digital access controls on the arts and sciences and includes an impressive number of influential organizations within the humanities and social sciences. Of particular interest, NINCH's copyright statement emphasizes the importance of maintaining a balance in copyright law." We believe in fairness and balance in the provision of access to digital works on the network; a balance between the rights of copyright owners and the public interest in broad access to cultural resources; a balance between our rights and responsibilities both as users of digital material and as creators or owners of such material. Furthermore, we believe that an essential part of the system of access to cultural material is payment to the owners of copyright material in the form of profit or cost recovery. However, the "fair use" of copyrighted material for educational and other permitted activity, as well as other limitations and exemptions to the rights of copyright owners, is in the public interest and should be guaranteed in the digital environment."

¹⁰¹ David L. Cohen, "Copyrighting the Dead Sea Scrolls: *Qimron v. Shanks*," 52 Me.L. Rev. 379 (2000) at 381. The Israeli Supreme Court decided to rely on Israeli copyright law even though the defendants in the case were an American publisher and editor. See C.A. 2790/93, 2811/93, *Qimron v. Shanks*, (August 30, 2000).

¹⁰² *Id.*

¹⁰³ *Id.* For the purposes of this article, a conflict of laws analysis will not be addressed.

¹⁰⁴ *Id.* at 392.

¹⁰⁵ *Id.* at 395-396.

with the world.¹⁰⁶ To scholars of ancient history, the value of the information in the Dead Sea Scrolls was immeasurable. Keeping the historical materials from the academic community for fifty years meant depriving the public of part of its history for the sake of one individual's claim to his "droit de divulgation."¹⁰⁷

While *Qimron v. Shanks* did not address copyright within the digital medium, it raised significant fair use issues that can be applied to this analysis of the section 1201(c)(1)'s role in providing fair circumvention and fair dissemination under the DMCA.¹⁰⁸ As Nimmer commented, the deprivation to the academic community for fifty years of the knowledge contained in the scrolls was a serious loss to historical research.¹⁰⁹ Under the DMCA, however, the deprivation of cultural materials stored digitally for preservation or storage purposes could be increased and permanent. Imagine if an American corporation had purchased the Dead Sea Scrolls from an antiques dealer before falling into Qimron's hands. For preservation purposes, the scrolls are digitally photographed and placed on a protected website owned and controlled by the corporation with access by permission only. Copyright law protects this database. The corporation wants to permit research only to certain researchers around the globe and then later make a profit off their work by selling the exclusive translations of the ancient texts. Under the DMCA, any scholar not authorized by the corporation who attempts to circumvent the access controls protecting the digital copies of the scrolls violates section 1201(a)(1)(A). Furthermore, interpretation of one historical text by only a handful of scholars increases

¹⁰⁶ *Id.* The Israeli District Court sided with Qimron and implied that he had been denied the right to release his "life's work" to the academic community because of the infringing book's release.

¹⁰⁷ David Nimmer and Eaton S. Drone, "Copyright in the Dead Sea Scrolls: Authorship and Originality," 38 Hous. L. Rev. 1 at 153-154.

¹⁰⁸ *Id.* at 84. "...any just resolution of its [DMCA] legal issues requires a court to recognize a profound need to reconcile the claim of copyright protection with the public's inextinguishable right of access to materials of great public and scholarly value."

¹⁰⁹ *Id.*

the risk that the interpretation of the document that finally reaches the public may not be as objective as if the text had been open to the views of multiple scholars globally and without the potentially subjective influence of the corporate owner of the copyright. As currently interpreted by the courts, under section 1201(c)(1), a scholar would not have a fair use defense to circumvent access controls for research purposes.

Therefore, the ambiguous wording of "fair use" in section 1201(c)(1), fails to adequately define the public's right to gain access to copyrighted works or copyrighted databases protected by access control. The courts' refusal to include fair circumvention and fair dissemination as "fair use" under section 1201(c)(1) could have serious implications on society's ability to research and share knowledge through the digital medium. As more works of science and art become digitally preserved and corporate-controlled, the risk of losing significant portions of society's cultural history increases.¹¹⁰ Therefore, section 1201(c)(1) should be amended to include fair circumvention and fair dissemination as "fair use" in order to preserve the goal of traditional copyright law of promoting the development of the arts and sciences.

IV. Conclusion

The DMCA's limitations on the public's fair circumvention of access controls to copyrighted materials and fair dissemination of circumvention devices will affect education and the development of the arts and sciences. As more copyright owners rely

¹¹⁰ Fair use problems in the DMCA may soon become an international crisis. The European Union Copyright Directive (EUCD) was passed in May of last year and may be placed into UK law by the end of this year. This will be the European equivalent of the DMCA. For more information on the influence of the DMCA on a global scale, see <<http://uk.eurorights.org/issues/eucd>> (last accessed Feb. 27, 2002).

on digital access controls to protect their copyrighted works, the balance of traditional copyright law between the rights of the owners and the rights of the users will continue to be manipulated. If courts interpret 1201(c)(1) to exclude fair circumvention and dissemination, the DMCA will provide copyright owners complete control over the public dissemination of their work regardless of potential legitimate uses by individual users. As long as a copyright owner stores public domain works under the same access control devices as copyrighted materials, those works will be protected from circumvention by the DMCA. Therefore, the ambiguous wording of section 1201(c)(1), to the detriment of copyright law, permits the courts to interpret "fair use" in a manner that allows copyright owners to effectively "silence" copyrighted materials that they do not wish to share with society. This upsets the balance of rights in traditional copyright law and will hinder the development of technology in the long run.

Senator Rick Boucher, a proponent of fair use reaffirmed this concern: "For over 150 years, the fair-use doctrine has helped stimulate broad advances in scientific inquiry and education, and has advanced broad societal goals in countless other ways. In this emerging digital era, we need to return to first principles....We need to rewrite the law for the benefit of society as a whole before all access to information is irreversibly controlled. In short, we need to reaffirm fair use."¹¹¹ In interpreting fair use under the DMCA, courts need to recognize that in the technological revolution, the party with the most powerful lobbyists is not always the side that promotes the traditional and constitutional objectives of the Copyright Act.¹¹² Amending section 1201(c)(1) to

¹¹¹ Rick Boucher, "Time to rewrite the DMCA," January 29, 2002 at <<http://news.com.com/2010-1078-825335.html>> (last accessed March 1, 2002).

¹¹² *See also*, Jane C. Ginsburg, "Copyright and Control Over New Technologies of Dissemination," 101 Colum. L. Rev. 1613, 1645-1647 (November, 2001). Professor Ginsburg questions whether the "authors"

include fair circumvention and fair dissemination of circumvention devices would provide the critical first step toward preserving fair use in the DMCA.

of copyrighted works are really the individuals controlling the dissemination of those materials. She states, "Perhaps, then, just as eighteenth-century publishers advanced their claims through appeals to the moral justice of remunerating authors whom they promptly despoiled, today's copyright rhetoric of control is merely a pretext for corporate greed." *Id.* at 1646.