



NO-COPY TECHNOLOGY AND THE COPYRIGHT ACT: HAS THE MUSIC
INDUSTRY BEEN ALLOWED TO GO TOO FAR IN DIMINISHING THE
CONSUMERS' PERSONAL USE RIGHTS IN THE DIGITAL WORLD?

KEVIN C. EARLE

ABSTRACT

Record companies have in recent years begun production of compact discs containing “no-copy” technology. These CDs appear to be classic CDs but are alleged to have poorer sound quality and often will not play in computers. The recording industry has used this and other methods to stem the increasing popularity of CD copying and unauthorized music file distribution online. While the right of copyright owners to protect their intellectual property is well established, it is arguable that the method described herein interferes with a consumer’s right to make personal use of legally purchased content. Such right is alleged to stem from the Audio Home Recording Act (AHRA) passed in 1992. The Digital Millennium Copyright Act (DMCA) passed in 1998, which bars the circumvention of digital copyright protection systems, makes the exercise of this personal use right difficult or impossible in the case of copy protected CDs. It is the author’s contention that the rights between copyright owners and consumers of copyrighted content need to be rebalanced. A proper rebalancing should include a recognition of fair use exceptions in relation to the DMCA and personal use rights under the AHRA.

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NO-COPY TECHNOLOGY AND THE COPYRIGHT ACT: HAS THE MUSIC INDUSTRY BEEN ALLOWED TO GO TOO FAR IN DIMINISHING THE CONSUMERS' PERSONAL USE RIGHTS IN THE DIGITAL WORLD?

KEVIN C. EARLE*

“To the extent protected technological measures are actually effective in controlling access to copyrighted works, they will, as a practical matter, preclude *all* uses of copyrighted works not authorized by copyright owners, including fair use and other expected uses that the law in legal theory permits.”¹

INTRODUCTION

Imagine young Chris Disk sitting at home one afternoon listening to the radio when he hears that his favorite band, The Screaming Monkey Bandits, released a new CD.² Upon hearing this, he runs up to his mom and asks her for money to go buy the new CD. She proceeds to explain to Chris the importance of money and that he needs to work for the money. Chris then spends the next two weeks working hard; cutting grass and doing odd jobs to come up with the money for the CD. Chris keeps hearing songs from the CD on the radio. He becomes more and more excited about buying the CD and listening to the song in digital clarity. Finally, Chris has made enough money to buy the CD and he rushes off and buys the new Screaming Monkey Bandits CD. He races home, pops the CD into his computer setup with speakers, hits play, and then KABLAM! The computer makes a loud noise, starts smoking and won't work. Chris begins to cry. After saving up more money to pay a computer repairman to extricate the CD from the computer drive and repair his

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¹ JAY DRATLER, JR., CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM § 2.04[3], at 2-21 (2000) (referring to H.R. Rep. No. 551 (Part 2), 105th Cong., 2d Sess. 25 (July 22, 1998), quoting “Fair Use,” Richmond Times-Dispatch, at A-6 (July 13, 1998)).

Copyrights traditionally have permitted public access while protecting intellectual property. The U.S. approach – known as ‘fair use’ – benefits consumer and creators. A computer revolution that has increased access to information also creates opportunities for the holders of copyrights to impose fees for, among other things, research and the use of excerpts from published works. And digital technology – whatever that means – could be exploited to erode fair use.

Id.

² See generally Marshall Brain, *How CDs Work*, at <http://www.howstuffworks.com/cd3.htm> (last visited October 14, 2002). CD stands for compact disc. *Id.* CDs have become a standard media for distributing large quantities of information, including music, data, and computer software. *Id.* Through the use of a computer and a CD-R drive, consumers have the ability to create their own CDs. *Id.*

computer, Chris returns to the store to get his money back. At this point the retailer explains that this CD has a new copyright protection “format” that cannot be played in a computer. Unfortunately for young Chris, the new Screaming Monkey Bandits CD was not marked to warn Chris that he could not play it in his computer, let alone transfer the songs on the CD to MP3 format so he could listen to the songs on his portable player.

The above scenario has left Chris with a damaged computer, the cost to repair the computer, a CD that is partially ‘useless’ to him, and the inability to listen to the new music from his favorite band on his computer or his MP3 player. His only recourse is to take legal action against the Record Company. This story is more than a hypothetical; it has occurred in California where a class action lawsuit has been brought against five major record labels for distributing defective and unstable audio discs containing no-copy technology.³ The lawsuit alleges that the record labels sold CDs that appear like regular CDs but are in essence defective.⁴ These CDs have poorer sound quality than CDs without no-copy technology and often won’t play in computers and regular CD players, sometimes causing the players to jam.⁵ The suit also alleges that the no-copy technology employed by the record labels interferes with consumer’s legal rights to make personal use of their legally purchased music. Such rights are alleged to stem from the Audio Home Recording Act of 1992.⁶ The suit demands that no-copy technology CDs be removed from the market or, in the alternative, that they be clearly labeled so a consumer can differentiate them from regular CDs.⁷

³ Mealey’s Litigation Report: Copyright (Vol. 1, Issue #6), No-Copy Discs Defective, California Class Action Complaint Asserts; Matthew Dickey, et al. v. Universal Music Group, EMI Publishing, BMG Entertainment, Sony Music Entertainment and Warner Music Group, et al., No. 275602, Calif. Super., Los Angeles Co. (noting that a class action lawsuit has been brought by Matthew Dickey and Elizabeth Koluncich against five music labels: Universal Music Group, EMI Music Group, BMG Entertainment, Sony Music Entertainment, and Warner Music Group; the plaintiffs are seeking to represent “all customers in California who purchased Defendants’ defective audio discs, that were rendered unrecordable or unstable for use in many personal computers, Macintosh computers, CD players, digital video disc players, car stereos and digital video game consoles” because of the Defendant’s use of audio discs featuring no-copy technology).

⁴ *Id.* (stating that the labels have engaged in illegal business practices that created discs that look like standard CDs but instead have no-copy technology).

⁵ *Id.* These no-copy technology CDs “have characteristics inferior to conventional CDs in that they have poorer sound quality . . . and interfere with the customers’ legal rights to backup, play or transfer their own music, for personal, non-commercial use to other playback mediums.” *Id.*

⁶ *Id.* (explaining that “[t]he shortcomings in the quality of these defective discs arise from Defendant’s manipulation of the format of these discs in an apparent effort to prevent customers from using their own music in an entirely legal manner.”); “[E]ven if the discs worked properly, they ‘deprive purchasers of the legal right to make multiple, non-commercial, copies of their own music, as implicitly recognized under the Audio Home Recording Act of 1992. . . .’” *Id.*

⁷ *Id.* (noting that the record labels do not clearly disclose any of the aforementioned shortcomings on the outside packaging of their audio discs with no-copy technology; the complaint seeks class action certification; an injunction prohibiting any further production and distribution of these copy protected discs, a full refund to purchasers of the defective discs, and a full disclosure from the record labels detailing the defective discs; costs and fees; damages and interest; and equitable monetary relief in the form of restitution and a constructive trust).

This Comment examines the recent developments in copyright protection technology and the legal rights that the music industry⁸ is trying to take away from consumers. This Comment argues that providing labels on copy protected CDs is insufficient to overcome the heavy handed tactics the music industry has used to prevent the exercise of the consumer's fair use right. A balance needs to be re-established between the copyright owner and the consumer to ensure that the true spirit of copyright law is carried out.⁹

This Comment provides the necessary background materials to fully understand the current digital technology and the relevant copyright laws applicable in the "Digital Millennium."¹⁰ This Comment proposes changes that may more clearly define the intent of Congress in addressing the interplay of fair use and digital technology. Part I outlines the relevant digital technologies and the applicable copyright laws, including "ripping"¹¹ songs from CDs and converting them to MP3 files, copyright protection and limitations created through the Fair Use Doctrine, the Audio Home Recording Act (hereinafter "AHRA"), and the Digital Millennium Copyright Act (hereinafter "DMCA"). Part II will analyze various issues seen with no-copy technology, including the judicial application and interpretation of the AHRA, the current options for the music industry to slow digital piracy under the AHRA and the DMCA, and the competing interests of consumers and copyright owners. Part III will detail proposed amendments to copyright laws affecting those competing interests. These proposals include a re-recognition of a personal use right as intended by Congress under the AHRA, a limit on the chilling effects of certain provisions under the DMCA, and that the Internet Service Provider (hereinafter "ISP") liability provisions found in the DMCA be used to target the serious copyright infringers. This section will also review current bills before the House of Representatives and their affect on copyright laws.

⁸ Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074 (9th Cir. 1999) (stating that the music industry is controlled by the Recording Industry Association of America, or RIAA, that represents the major record companies and their artists; the RIAA primarily includes BMG, EMI, Sony, Universal, and Warner Bros.; at that time this group controlled the vast majority of distribution and sales of recorded music in the United States).

⁹ Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 FORDHAM L. REV. 2445, 2447 (2000). "Further, the digital music revolution will more equally shift the copyright balance between creators and the public, as the future of digital music holds incentives for musical artists to create new works and the ability to disseminate highly desirable digital music to the public." *Id.* See also David L. Hitchcock, *Symposium: Exploring Emerging Issues: New Intellectual Property, Information Technology, and Security in Borderless Commerce: Current Status of Copyright Protection in the Digital Age and Related Topics*, 8 TEX. WESLEYAN L. REV. 539, 543 (2002) (stating that "because the internet allows access to much more than copyrighted digital works and because public policy favors competition and the free exchange of ideas, the DMCA attempts to balance the rights of copyright owners and the public in light of market realities").

¹⁰ Pollack, *supra* note 9, at 2445-46 (discussing the copyright concerns since the emergence of the Internet; the ability to digitize copyrighted materials and to use the Internet to deliver these copies to thousands of Internet users in relative anonymity has allowed for widespread dissemination of copyrighted materials).

¹¹ Marshall Brain, *How MP3 Files Work*, at <http://www.howstuffworks.com/mp3.htm> (last visited October 14, 2002). Ripping is a term used in the record industry for taking a song from a music CD and encoding it as an MP3 file. *Id.*

I. DIGITAL MUSIC AND DIGITAL COPYRIGHT LAWS

A. Ripping CDs to MP3s

To understand the issues with converting CDs to MP3s and the need to balance potential piracy and fair use, one must understand the underlying technology.¹² A CD is merely a circular piece of plastic imbedded with bumps comprising a single, continuous track of data.¹³ This data is in a format that allows the CD to store a huge number of bits for each second of music and play back a stored song in high quality.¹⁴ In CD format, a three-minute song consumes 32 million bytes of space and takes more than two hours to download over a conventional 56K phone modem connection.¹⁵

MP3 format is in an alternate format that reduces the bytes of data required per song.¹⁶ By converting a song from CD to MP3 format, it is possible to shrink down the original sound data by a factor of twelve.¹⁷ This reduction in size is accomplished by eliminating certain unnecessary parts of a song without noticeably diminishing the song's audio sound quality.¹⁸ This technology allows a person to download the same 3-minute song in minutes rather than hours over a standard 56K modem connection.¹⁹

¹² See Pollack, *supra* note 9, at 2447 (discussing the balance between consumer's fair rights and copyright holder's rights); see also Brain, *supra* note 11, at <http://www.howstuffworks.com/mp3.htm> (stating that MPEG is the acronym for Moving Picture Experts Group; the MPEG compression system includes a subsystem to compress sound, called MPEG audio Layer-3 that is commonly known by its abbreviation, MP3).

¹³ Brain, *supra* note 2, at <http://www.howstuffworks.com/cd3.htm> (stating that CDs are a simple piece of injection molded plastic; during manufacturing, the plastic is impressed with microscopic bumps arranged as a single, continuous track of data, circling from the inside of the disc to the outside; a thin, reflective aluminum layer covers the bumps and a thin acrylic layer is sprayed over the aluminum to protect it).

¹⁴ *Id.* CDs are capable of storing hundreds of millions of bits of information, allowing the music to be recorded in an uncompressed, high resolution format that enables the music to be played back in high quality. *Id.* Music is sampled at 44,100 samples per channel per second. *Id.*

¹⁵ Brain, *supra* note 11. 44,100 samples/second * 16 bits/sample * 2 channels = 1,411,200 bits per second. *Id.* 1.4 million bits per second equals 176,000 bytes per second. *Id.* A three minutes song would then consume about 32 million bytes of space on a CD and would take two hours to download over a 56K modem. *Id.*

¹⁶ *Id.* The MP3 format is a compression system for music. *Id.*

¹⁷ Fraunhofer IIS, *Audio & Multimedia MPEG Audio Layer III*, at <http://www.iis.fraunhofer.de/amm/techinf/layer3/index.html> (last visited October 20, 2002). By using MP3 format, one may achieve a typical data reduction of 10 to 12 times while still maintaining the original CD sound quality. *Id.* See also Brain, *supra* note 11, at <http://www.howstuffworks.com/mp3.htm>. Compressing a CD quality song by a factor of 10 to 14 would compress a 32-megabyte (MB) song on a CD down to about 3MB. *Id.*

¹⁸ Fraunhofer IIS, *supra* note 17, at <http://www.iis.fraunhofer.de/amm/techinf/layer3/index.html>. Perceptual coding techniques are used to remove or limit various sound waves that the ear cannot hear from what the format will save into the file. *Id.*

¹⁹ Brain, *supra* note 11, at <http://www.howstuffworks.com/mp3.htm>. MP3's allow people to download songs in minutes rather than hours and store hundreds on songs on a computer's hard disk without taking up that much space. *Id.*

The emergence of MP3 technology has done several things for the music industry. The MP3 format allows users to rip songs from music CDs to play songs directly, encode the songs as MP3 files, recombine songs from multiple CDs, or transfer the MP3 files to portable players for listening wherever the users go.²⁰ Free MP3 encoding software, readily available on the Internet, allows a user to rip songs from a CD and encode them in MP3 format, all on a home computer.²¹

MP3 files are available on the web when the author or copyright owner intentionally posts the MP3 for free distribution, consumers visit one of the few, limited pay sites, or MP3 files are ripped from copyrighted CDs and the files are made available for free download.²² Sharing of MP3 files is illegal when copyright owners have not granted permission to have the copyrighted work reproduced or distributed.²³ The illegal reproduction of copyrighted music is commonly known today as music piracy.²⁴

B. Copyright Protection and Fair Use Limitation

Most, if not all, of the music that is being placed on the Internet is subject to copyright protection under the United States' laws.²⁵ Copyright protection stems from provisions of the United States Constitution.²⁶ The ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare.²⁷ Not only does the Federally codified Copyright Act encourage creation and dissemination of intellectual works for the public welfare, but it also provides

²⁰ *Id.* The MP3 movement, consisting of format and web capabilities has done several things for music: it made it easy for anyone to distribute music at minimal cost; it made it easy for anyone to find music and access it instantly; it taught people a great deal about manipulating sound on a computer. *Id.* It is also now extremely easy for MP3 users to download MP3 files from a web site and play them; rip songs from a music CD and play it directly or encode it as an MP3 file; record personal songs and make them available to the world; convert MP3 files into CD files and create personal audio CDs from MP3 files on the web; rip songs off various music CDs and recombine them into your own custom CDs; store hundreds of MP3 files on data CDs; load MP3 files into tiny portable players and listen to them wherever you go. *Id.*

²¹ *Id.* An MP3 player software application can be downloaded from the Internet in about 10 minutes. *Id.*

²² Pollack, *supra* note 9, at 2448 (discussing the process of transferring information through downloading or uploading of material) (citing Kevin Davis, Comment, Fair Use on the Internet: A Fine Line Between Fair and Foul, 34 U.S.F. L. Rev. 129, 131 (1999)); see also Stephanie L. Brauner, Note, *High Tech Boxing Match: A Discussion of Copyright Theory Underlying the Heated Battle Between the RIAA and MP3ers*, 4 VA. J.L. & TECH. 5, § I.4. (1999) (noting that MP3 files available on the Web fall into two categories, files intentionally posted for free distribution by an artist and "illegal" MP3 files ripped from copyrighted compact discs).

²³ See 17 U.S.C. § 106 (2000).

²⁴ Aaron L. Melville, Note, *The Future of the Audio Home Recording Act of 1992: Has It Survived the Millennium Bug?*, 7 B.U. J. SCI. & TECH. L. 372, 376 (2001) (stating that music piracy is generally defined as the unauthorized copying and sale of copyright protected music).

²⁵ *Id.* at 374 (stating that music has been protected by copyright law since an 1831 revision to the Copyright Statute; those laws were revised in 1976).

²⁶ U.S. CONST. art. I, § 8, cl. 8. The Constitution empowers congress "[t]o promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

²⁷ See H.R. Rep. No. 2222, 60th Cong., 2d Sess. on the Copyright Act of 1909.

exclusive rights and rewards to the copyright owners.²⁸ Thus, the Copyright Act was drafted to balance certain public interests by granting access to protected copyright materials while simultaneously reserving certain proprietary rights to the authors of original works.²⁹

Copyright protection was granted to musical works under §102 of the Copyright Act of 1976.³⁰ Under this act, a musical work must meet three basic conditions before obtaining copyright protection: “a work must be (1) within the constitutional and statutory definitions of a work of authorship, (2) fixed in a tangible medium of expression and (3) original.”³¹ It is important to note that copyrights on musical works are commonly shared between joint authors, the musical artist and the record-producers.³² If qualified, a copyright holder’s exclusive rights include the rights to

²⁸ Margreth Barrett, *INTELLECTUAL PROPERTY: CASES AND MATERIALS* 396-397 (2d ed. 2001) (referring generally to the rights of authors and the public interest). *See also* 17 U.S.C. § 106 (2000). These rights include:

[T]he owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

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

Id.

²⁹ Jennifer E. Markiewicz, Comment, *Seeking Shelter From the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 *COMMLAW CONCEPTUS* 423, 425 (1999).

³⁰ 17 U.S.C. § 102(a) (2000).

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works. . . .

Id.

³¹ Donald D. Chisum & Michael A. Jacobs, *UNDERSTANDING INTELLECTUAL PROPERTY LAW*, § 4C (1999).

³² *See* Copyright 2002 by Practising Law Institute, Chapter 14, Section 2.1, Copyright in the Digital Age: What Rights Are Implicated By Activities in the Online World?: Activities that May Implicate Rights (explaining that it is common for different entities to own separate rights in the

reproduce copies of the original work, prepare derivative works, distribute copies, and, for musical works, to publicly perform and display the work.³³

However, these rights are subject to statutory limitations.³⁴ One of the most applied and compelling limitations is that of fair use.³⁵ Fair use was traditionally defined as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent”³⁶ and without compensation. The Fair Use Doctrine requires a determination of whether a particular use is fair on a case-by-case basis according to the following four statutory factors: the purpose and character of use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market or value of the copyrighted work.³⁷ Examples of acts that are often recognized as fair use of copyrighted material are: use of the material in criticism, comment, news reporting, teaching, scholarship, research, or parodies.³⁸

The United States Supreme Court set the fair use ball rolling with its landmark decision in *Sony Corp. of America v. Universal Studios, Inc.*³⁹ The Court ruled that

bundle of exclusive rights granted by the Copyright Act and to determine which rights are infringed is essential for determining who has standing to sue for infringing acts and to ultimately obtain remedies).

³³ See 17 U.S.C. § 106 (2000) (stating that the owner of a copyright has certain exclusive rights).

³⁴ See *id.* (stating that section 106 is subject to sections 107 through 120); see also 17 U.S.C. §§ 107–20 (2000); *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 432–33 (1984) (explaining that all reproductions of the work do not fall within the exclusive domain of the copyright owner, but that some fall within the public domain; the court recognizes that any individual may reproduce a copyrighted work for “fair use” and that the copyright owner does not possess the exclusive right to such a use).

³⁵ See 17 U.S.C. § 107 (2000) (stating that there are fair use limitations on the exclusive rights of copyright owners).

Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies and phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

³⁶ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (citing H. Ball, *Law of Copyright and Literary Property* 260 (1944)).

³⁷ See *id.* (explaining that section 107 requires a case-by-case determination of whether a particular use is fair using the four nonexclusive factors indicated in the statute); see also 17 U.S.C. § 107 (2000).

³⁸ See 17 U.S.C. § 107 (2000) (listing examples of fair use).

³⁹ See generally *Sony Corp. of Am.*, 464 U.S. at 432–33.

“time shifting”⁴⁰ using a VTR⁴¹ constituted fair use.⁴² This decision was primarily based on the finding of the district court that time shifting for private home use must be characterized as non-commercial, non-profit activity and that did not have a significant effect on the demonstrable market for the copyrighted works.⁴³

The Court in *Sony* expressly recognized that an individual may reproduce a copyrighted work for a “fair use.”⁴⁴ The *Sony* decision and the advent of new digital technology sparked much debate in and out of Congress. Congress’ attempt to resolve non-commercial home taping of digital works resulted in the AHRA.⁴⁵

C. Audio Home Recording Act

In 1992, Congress passed the AHRA to amend the Copyright Act of 1976.⁴⁶ The AHRA was enacted to provide restrictions on the anticipated rise in digital audio recording devices.⁴⁷ The AHRA supplemented the Copyright Act in three ways. First, the AHRA recognizes the idea of ‘fair use’ and works to ensure the right of consumers to make analog or digital copies of sound recordings for personal use.⁴⁸

⁴⁰ See *id.* at 423. (explaining the process of time shifting “Time-Shifting” is the process by which television viewers record broadcast programs that they cannot view as they are being televised and watch it at a later time more convenient for viewing. *Id.*

⁴¹ See *id.* at 420. A VTR is a Betamax video tape recorder that is commonly referred to as VCR. *Id.*

⁴² See *id.* at 420 (holding that the “time shifting” of television programs using a VTR constituted a fair use by the consumers). The court found that three of the four fair use factors weighed in favor of the VTR manufacturer. *Id.*

⁴³ See *id.* at 449, 456 (holding that the time shifting of television shows was for noncommercial and nonprofit purposes and therefore not copyright infringement, and that there was no evidence that time shifting would cause economic harm to the potential market, or value of the copyrighted works).

⁴⁴ See *id.* at 433 (stating that the copyright owner does not possess the exclusive right to a “fair use” of a copyrighted work).

⁴⁵ See 17 U.S.C. §§ 1001–1010 (2000).

⁴⁶ See 17 U.S.C. §§ 1001–1010 (2000). The 1992 Act added Chapter 10 to Title 17 of the U.S. Code.

⁴⁷ See 17 U.S.C. § 1001(3) (2000).

A “digital audio recording device” is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for--

- (A) professional model products, and
- (B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

Id.

⁴⁸ See 17 U.S.C. § 1008 (2000) (explaining the prohibition on certain infringement actions).

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital music recordings or analog music recordings.

Second, it establishes a system whereby copyright holders receive royalty payments from the sale of digital recording devices.⁴⁹ Third, it authorizes a “Serial Copy Management System” (hereinafter “SCMS”) to prevent copied digital audio recordings from being duplicated beyond one generation, imposing penalties on parties that circumvent SCMS.⁵⁰

In the past, a device that allowed for home recording of legally obtained original works was not an infringement. Congress did not eliminate this activity with the enactment of the AHRA.⁵¹ The main purpose of the AHRA was in fact the facilitation of personal use.⁵² The reasoning behind the AHRA was to “benefit American consumers, creators, and innovators . . . protecting the legitimate right[] of our songwriters, performers, and recording companies to be fairly rewarded for their tremendous talent, expertise, and capital investment.”⁵³ However, Congress did not stop with the AHRA.

Id.

⁴⁹ See 17 U.S.C. § 1003(a) (2000).

No person shall import into and distribute, or manufacture and distribute, any digital audio recording device or digital audio recording medium unless such person records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments for such device or medium specified in section 1004.

Id.

⁵⁰ See 17 U.S.C. § 1002(c) (2000) “No person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose of effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, a system described in subsection (a).”; see also 17 U.S.C. § 1002(a) (2000).

No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to--

- (1) the Serial Copy Management System;
- (2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system’s method of serial copy regulation and devices using the Serial Copy Management System; or
- (3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

Id.

⁵¹ See H.R. Rep. No. 102-873(I), at 24 (1992), reprinted in 1992 U.S.C.C.A.N. 3594 (“In the case of home taping, the exemption protects all noncommercial copying by consumers of digital and analog musical recordings”).

⁵² Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078 (9th Cir. 1999) (stating the RIO’s operation was consistent with the facilitation of personal use; this facilitation was in fact the AHRA’s main purpose).

⁵³ See S. Rep. 102-294 (1992), reprinted at 1992 WL 133198, at *86 (stating that “the purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use”).

D. Digital Millennium Copyright Act

In 1998, Congress enacted the DMCA, which consists of provisions tailored to control and regulate.⁵⁴ The DMCA consists of two main components. Title I consists of provisions making it illegal to circumvent digital copyright protection systems.⁵⁵ Title II consists of provisions creating safe harbors against money damages for ISP's who inadvertently commit or enable infringing activities.⁵⁶

Title I contains three important provisions aimed at circumvention of technological protection.⁵⁷ The DMCA prohibits a person from: (1) circumventing a technological measure;⁵⁸ or (2) trafficking a technology designed for the purpose of circumventing a technological measure that effectively controls access, where the technological measure protects the work⁵⁹ or the rights of a copyright owner.⁶⁰ When

⁵⁴ See 17 U.S.C. §§ 1201–1205 (2000). The 1998 Act added Chapter 12 to Title 17 of the U.S. Code.

⁵⁵ See *id.* at § 1201(a)(1)(A). “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”; see also *id.* at § 1201(a)(2).

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title

Id. at § 1201(a)(2); see also § 1201(a)(3).

As used in this subsection—

(A) to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure “effectively controls access to a work” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

Id.

⁵⁶ See 17 U.S.C. § 512(a)–(d) (2000) (stating that the limitations of liability are in four categories of conduct by an ISP: transitory digital network communications, system caching, storage of information on systems or networks at the direction of users, and information location tools).

⁵⁷ See 17 U.S.C. § 1201(a)(1)–(2), (b)(1) (2000).

⁵⁸ *Id.* at § 1201(a)(1)(A).

⁵⁹ *Id.* at § 1201(a)(2).

⁶⁰ *Id.* at § 1201(b)(1).

Additional violations.

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure

Congress enacted the DMCA, it provided certain exemptions to ensure that fair use still had standing.⁶¹ The technological measures referred to may include digital watermarking⁶², encrypting⁶³, and digital enveloping.⁶⁴

Title II of the DMCA established the procedure by which a copyright owner can obtain a subpoena from a U.S. District Court ordering an ISP to disclose the identity of a subscriber who is allegedly engaging in infringing activities.⁶⁵ Congress set up Title II to create incentives for ISPs to work with the copyright holder to deal with

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- that effectively protects a right of a copyright owner under this title in a work or portion thereof; or
 - (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or
 - (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

Id.

⁶¹ See *id.* at § 1201(c)(1) (stating that nothing in section 1201 shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use).

⁶² See Rosemarie F. Jones, comment, *Wet Footprints? Digital Watermarks: A Trail to the Copyright Infringer on the Internet*, 26 PEPP. L. REV. 559, 568 (1999) (explaining that digital watermarks are a type of steganography, which is the field of science that deals with encoding digitized information with attributes that cannot be disassociated from the file that contains the information; digital watermarking essentially serves as proof of authenticity; digital watermarks are unique identifiers and can contain invisible information including an author's name, e-mail address, or other copyright information); *Id.* at 569-70. This technology does not stop copying or prevent theft, but rather allows copyright owners the ability to deter copyright piracy by tracing the source of any illegal or unauthorized copies that may be posted anywhere on the Internet, thereby exposing the user to liability; additionally, attempts to remove digital watermarks result in a noticeable degradation in quality of the copyrighted material. *Id.* at 571. The basic theory behind digital watermarking is that "providing accurate copyright information is more important than controlling access, and that most users will respect online copyright if publishers make it easy for them to do so." *Id.*

⁶³ See Kevin Kelly, Comment, *The MP3 Challenge: Has Congress Effectively Shielded the Music Recording Industry from Internet Copyright Piracy?*, 18 TEMP. ENVTL. L. & TECH. 163 (2000). Encryption involves "the process of encoding or 'scrambling' the contents of any data or voice communication with an algorithm (a mathematical formula) and a randomly selected variable associated with the algorithm, known as a 'key.' Only the intended recipient of the communication, who holds the key, can decrypt and access the information. *Id.*; see also Jones, *supra* note 62, at 571. Encryption has long been the means for protecting confidential information; encryption was originally used by the government to protect confidential information and has been slowly adopted by private industry over the last 20 years. *Id.* at 572. Digital information is essentially rendered unintelligible by scrambling of data using mathematical principles; encryption is compared to securing a barn with a high tech combination lock, but once a person enters the lock's proper combination, the "animals are loose and forever beyond control"; this allows only authorized users to access such information; other types of encryption allows for files to be copied a limited number of times before scrambling them beyond recognition. *Id.*

⁶⁴ See Kelly, *supra* note 63 (referring to other types of technological measures available to protect copyright owners' rights).

⁶⁵ See 17 U.S.C. 512(h) (2000) (stating that the subpoena shall authorize and order the ISP expeditiously disclose to the copyright owner or other person authorized sufficient information to identify the alleged infringer).

infringement, which then limits their own liability.⁶⁶ This would allow copyright holders to notify ISPs of the infringers rather than chasing infringers on their own.⁶⁷ Once the ISP is notified of misconduct, the ISP must stop the illegal actions to maintain statutory immunity.⁶⁸

II. PROBLEMS WITH NO-COPY TECHNOLOGY

This section will analyze the various issues seen with no-copy technology. Part A analyzes the judicial application and interpretation of the AHRA. Part B reviews the music industry's current options to slow digital piracy under the AHRA and the DMCA. Part C analyzes the competing interests between the copyright owner and the consumer.

A. Judicial Application and Interpretation of the AHRA

The AHRA was cited by the Recording Industry Association of America (hereinafter "RIAA") to seek an injunction against Diamond Multimedia Systems (hereinafter "Diamond") to stop the manufacture and distribution of the Rio.⁶⁹ The Rio is a portable music player that allows a user to download MP3 audio files from a computer and listen to them elsewhere away from the computer.⁷⁰

The RIAA believed that the Rio and similar devices encouraged Internet piracy and discouraged the purchase of copyrighted recordings.⁷¹ The RIAA contended that

⁶⁶ Pollack, *supra* note 9, at 2465 (quoting H.R. Rep. No. 105-796, at 72, reprinted in U.S.C.C.A.N. 639, 649). "Title II 'preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment . . . [while] providing greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities'".

⁶⁷ See Robert T. Baker, *Finding a Winning Strategy Against the MP3 Invasion: Supplemental Measures the Recording Industry Must Take to Curb Online Piracy*, 8 UCLA ENT. L. REV. 1, 14 (2000) (stating that instead of chasing direct infringers around cyberspace, copyright holders may notify ISPs of user misconduct).

⁶⁸ *Id.* (noting that once the ISP is notified, they must act quickly to remove illegal matter or potentially face actions for contributory infringement); see also Pollack, *supra* note 9, at 2466 (stating that as long as the ISP's actions fall under one of the limitations in § 512 of the Copyright Act, then the ISP will not be liable for monetary relief for claims or for contributory infringement; however, just because an ISP doesn't qualify for any of the limitations, doesn't mean that it will be liable for infringement; the copyright owner must still prove infringement and the ISP can still attempt to make use of defenses such as fair use).

⁶⁹ See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1073 (9th Cir. 1999) (holding that an injunction should be granted because the Rio is a digital audio recording device subject to the restrictions of the AHRA).

⁷⁰ *Id.* The Rio is a portable music player approximately the size of an audio cassette, with headphones that allow a user to download MP3 audio files from a computer and listen to them elsewhere. *Id.* The Rio can store approximately one hour of music or sixteen hours of spoken material and with the addition of memory cards can store a total of two hours of music. *Id.* at 1075.

⁷¹ *Id.* at 1074 (stating that RIAA believes Internet distribution of digital copies of pirated copyrighted material will discourage consumers from purchasing legitimate recordings and predicting that the RIAA stands to lose significantly more than the \$300 million annually lost from other traditional forms of piracy).

the injunction was proper because the Rio was a digital audio recording device that did not employ SCMS technology and because Diamond was not paying any royalties to manufacture and distribute the Rio.⁷² In denying the RIAA's motion for a preliminary injunction, the district court found that the Rio may be a digital recording device, but it did not have the capabilities to copy music to other devices.⁷³

On appeal, the Ninth Circuit affirmed the district court's denial of the injunction, but held the Rio was not a digital audio recording device under the AHRA.⁷⁴ In making this ruling, the Ninth Circuit analyzed the language and the legislative history of the AHRA.⁷⁵

The court first looked to the language of the AHRA concerning a "digital audio recording device."⁷⁶ By analyzing the nested definitions found in the AHRA, the court determined that for a device to be a digital audio recording device, it must be able to reproduce, either directly or from transmission, a digital music recording.⁷⁷

This led the court to consider whether the Rio could reproduce a digital music recording and whether that recording was expressly excluded by the AHRA.⁷⁸ The

⁷² *Id.* at 1075; *see also* 17 U.S.C. § 1002(a)(1)(2) (2000) (providing that "[n]o person shall import, manufacture, or distribute any digital audio recording device . . . that does not conform to the Serial Copy Management System or a system that has the same functional characteristics"); *id.* at § 1003(a) (providing that "no person shall import into and distribute, or manufacture and distribute, any digital audio recording device . . . unless such person records the notice specified by this section and subsequently deposits the statements of account and applicable royalty payments").

⁷³ *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624, 632-633 (C.D. Cal. 1998) (stating that the district court denied the RIAA's preliminary injunction because RIAA's likelihood of success on the merits was mixed and the balance of hardships did not lean in the RIAA's direction).

⁷⁴ *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1081 (9th Cir. 1999) (stating that the Rio is not a digital audio recording device and therefore not subject to the restrictions of the AHRA, that the district court properly denied RIAA's motion for preliminary injunction against the manufacture and distribution of the Rio, and that there is no need to consider whether the balance of hardships or the possibility of irreparable harm supports injunctive relief).

⁷⁵ *See id.* at 1076-77 (stating that they see no need to review the legislative history because the statutory language is clear, but they will address it here "because it is consistent with the statute's plain meaning and because the parties have briefed it so extensively").

⁷⁶ *Id.* at 1076; *see also* 17 U.S.C. § 1001(3) (2000) (defining a "digital audio recording device" as "any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use. . . ."); *id.* at § 1001(1) (defining a "digital audio copied recording" as "a reproduction in a digital recording format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission"). Section 1001(5)(A) defines a "digital musical recording" as:

[A] material object--

- (i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and
- (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Id. at § 1001(5)(A).

⁷⁷ *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1076 (9th Cir. 1999). The Ninth Circuit begins with the definition of "digital audio recording device" which is defined as a device that can make a "digital audio copied recording," the definition of which is a copied "digital music recording."

⁷⁸ *See* 17 U.S.C. § 1001(5)(B)(ii) (2000).

AHRA expressly excludes a computer's hard drive, from which the Rio relies to supply it with MP3 files.⁷⁹ Within the plain meaning of the AHRA, computers are not digital audio recording devices since their primary purpose is to run programs and not to make digital audio-copied recordings.⁸⁰ The Ninth Circuit found that the legislative history expressly recognized that computers have recording capabilities and the "Act was rather expressly designed to create this loophole."⁸¹

The Ninth Circuit then looked to the legislative history of the AHRA in support of the statute's plain language meaning.⁸² The court found multiple instances where the legislative history was consistent with the statute's language, recognizing that computers have the capability of home taping but are intentionally excluded from the Act.⁸³ The Ninth Circuit then went on to state that the main purpose of the Act is "the facilitation of personal use."⁸⁴

Finally, the court compared the personal use found with the Rio's space shifting of copies of copyrighted musical recordings and the personal use of time shifting of copyrighted television shows using a VTR as in *Sony Corp. of America v. Universal City Studios*.⁸⁵ The court determined that both types of shifting are "paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."⁸⁶

The implication of this decision is that consumers are due a personal use right when dealing with copyrighted material. Consumers have a right to make "recordings of copyrighted music for their private, noncommercial use."⁸⁷ As it stands, the wordings of the AHRA and the DMCA do not clearly delineate the

[A] 'digital musical recording' does not include a material object in which one or more computer programs are fixed, except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.

Id.

⁷⁹ See Recording Indus. Ass'n of Am., 180 F.3d at 1076 (reasoning that a hard drive is a material object in which one or more programs are fixed and therefore a hard drive is excluded from the definition of digital musical recordings).

⁸⁰ *Id.* at 1078 (stating that the primary purpose of computers is to run various programs and to record any necessary data to perform associated tasks).

⁸¹ See *id.* (stating that while the district court concluded that the exemptions of the hard drives and computers generally would allow music pirates "to evade regulation simply by passing the music through a computer" that this loophole was the intended purpose of congress; their exclusion of computers from the Act's scope was part of a deal with the computer industry to avoid vigorous opposition to the passage of the Act).

⁸² *Id.* at 1076-77.

⁸³ *Id.* at 1077 (quoting S. Rep. 102-294 (1992), reprinted at 1992 WL 133198, at *118-19 "if the material object contains computer programs or data bases that are not incidental to the fixed sounds, then the material object would not qualify under the basic definition of a digital music recording"); see also *id.* at 1078 (quoting S. Rep. 102-294, at *122 "the typical personal computer would not fall within the definition of 'digital audio recording device'").

⁸⁴ *Id.* at 1079 (quoting S. Rep. 102-294 (1992), at *86 "the purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use") *Id.* (quoting H.R. Rep. 102-873(I), at *59, that the Act's Home Taping Exception "protects all noncommercial copying by consumers of digital and analog musical recordings"). *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

original intent of congress. The holding of the court in *Diamond* and the legislative history of the AHRA clearly indicate a personal use right was intended with the enactment of the current statutes.

B. Music Industry's Current Options to Slow Piracy

Both the AHRA and the DMCA seek to establish some sort of balance between the copyright owners of digital works and the consumer's personal use and attempt to provide some solution to piracy.

1. AHRA

The purpose of the AHRA was to give home recording a personal use,⁸⁸ create a royalty payment system for those affected by lost sales due to digital recordings,⁸⁹ and require a SCMS to be incorporated into any digital audio recording device to prevent the copying of copies.⁹⁰ SCMS is the main anti-piracy component to the AHRA. The SCMS allows unlimited copies to be made from lawfully purchased music recordings but prevents making copies from copies.⁹¹

Although Congress does not specifically give the reason for having SCMS as a part of the AHRA, it would seem that the SCMS is a balancing tool that addresses some of the piracy concerns while still allowing the consumer to make personal use of his or her own legally purchased music.⁹² Congress included several provisions to maintain the effectiveness of SCMS by prohibiting the manufacture or distribution of devices designed to circumvent the SCMS⁹³ and the encoding of false or inaccurate SCMS information on digital music recordings.⁹⁴ The royalty scheme and the noncommercial use provision complement the SCMS requirement because the SCMS alone still allows unauthorized private copying without adequate compensation.⁹⁵

⁸⁸ See S. Rep. 102-294 (1992), reprinted at 1992 WL 133198, at *30 (1992).

⁸⁹ See *id.* at 33 (stating that the AHRA creates a royalty payment system that provides modest compensation to the various elements of the music industry for the digital home recordings of copyrighted music).

⁹⁰ See *id.* at 37 (stating that the SCMS system places limitations on serial copying, or making copies of copies; one can make an unlimited number of copies from the original, but one cannot copy the copy).

⁹¹ *Id.*

⁹² See Melville, *supra* note 24, at 399 (stating that by inserting SCMS requirement into the AHRA, Congress implicitly acknowledged the RIAA's concern of piracy).

⁹³ See 17 U.S.C. § 1002(c) (2000) (stating that "[n]o person shall import, manufacture, or distribute any device, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implement, in whole or in part, a system described in subsection (a)").

⁹⁴ *Id.* § 1002(d)(1) (stating that "[n]o person shall encode a digital musical recording of a sound recording with inaccurate information relating to the category code, copyright status, or generation status of the source material for the recording").

⁹⁵ See S. Rep. 102-294 (1992), reprinted at 1992 WL 133198, at *36 (1992) (stating that the music industry felt that SCMS alone would be insufficient compensation for the unauthorized private copying).

2. DMCA

The DMCA took a new approach to recognizing copyrights enforcement in a digital age and provided for technological circumvention controls to protect copyright owner rights to control access to copyrighted works.⁹⁶ The DMCA and its anti-circumvention provisions for copy protection technology goes well beyond the AHRA; it prevents access and not just copying.⁹⁷ With the enactment of this legislation, fears arose that the anti-circumvention language went too far to protect copyright owners and would directly contradict the Constitution.⁹⁸

The DMCA effectively allows copyright owners to establish a monopoly power over their works by using “unduly restrictive copyright management systems that cannot be legally circumvented even for legitimate purposes.”⁹⁹ These provisions potentially threaten the ability of individuals to use copyrighted works in such a way as to “promote the progress of science and useful arts.”¹⁰⁰ This act would essentially give rights of unlimited duration to those copyrighted materials protected with these technological measures, especially encryption.¹⁰¹ The anti-circumvention rule has the potential to convert copyrights into permanent forms of protection and create a chilling affect on any personal use right of copyrighted works.¹⁰²

Title II of the DMCA gives the copyright owners an opportunity and means to target actual infringers; those who are actually illegally uploading songs to the Internet without the copyright holder’s consent.¹⁰³

C. Competing Interests

The competing interests between copyright owners and the consumers remain very important topics of debate in the digital world when dealing with copyrights. As

⁹⁶ See 17 U.S.C. § 1201 (2000).

⁹⁷ See Pollack, *supra* note 9, at 2480 (stating that there are definite differences between “hackers” who break codes and the abilities of consumers to implement those methods or break the codes themselves in the real world).

⁹⁸ See H.R. Rep. 105-551, pt. 2, 24 (1998) (noting that the concern was based on the fact that the “[anti-circumvention provisions] would not be an ordinary copyright provision; liability under the section would result from conduct separate and independent from any act of copyright infringement or any intent to promote infringement”).

⁹⁹ See Benton J. Gaffney, comment, *Copyright Statutes that Regulate Technology: A Comparative Analysis of the Audio Home Recording Act and the Digital Millennium Copyright Act*, 75 WASH. L. REV. 611, 631. The DMCA is allowing copyright owners to monopolize their copyrighted works at the expense of public interests beyond what was meant to be protected by copyright law. *Id.* at 633.

¹⁰⁰ See *id.* at 634-635 (stating that use of the anti-circumvention provisions of the DMCA undermine the constitution by giving too much control to the copyright owners to legally preserve their copyrighted works than they are entitled to under copyright law) see also U.S. Const. art. I, 8, cl. 8.

¹⁰¹ See Kelly, *supra* note 63, at 168.

¹⁰² See Dratler, *supra* note 1, at § 2.04[3] (stating that the anti-circumvention rule makes the circumvention of access controls independently wrong and therefore may make copyrights an absolute form of protection that will prevent any access not authorized by the copyright owner).

¹⁰³ See Pollack, *supra* note 9, at 2466 (stating that instead of giving the copyright owners a liability catch-all in the ISPs, Title II allows copyright owners to go after the actual infringers).

the initial quote of this paper states, there is an interest by copyright owners to use technological measures to control access to their copyrighted works.¹⁰⁴ But, how far can these technological measures go to prevent all uses of copyrighted works not authorized by the copyright owners?¹⁰⁵ How far can consumers go to make use of copyrighted works?

In this digitally advanced, computer savvy world, information is at our fingertips. Computers have increased the consumer's access to information and have given consumers the ability to reproduce and distribute copies of protected works at virtually no cost.¹⁰⁶ In implementing technological measures, the copyright owner normally wants to prevent unauthorized uses.¹⁰⁷ They want to protect their intellectual interests and economic investments in their copyrighted works.¹⁰⁸

On the other hand, consumers want access to information. They want the ability to do what they want with their stuff. Computers have given them this ability, but computers have also been used to abuse copyright laws meant to protect the copyright owners.

Copyright owners should be entitled to protect themselves, but not at the expense of the common consumers who actually stay within the realm of their personal use rights. It is the music pirates who the copyright owners should be able to go after to protect their copyrights.

Copyrights have traditionally permitted public access to copyrighted works while protecting intellectual property.¹⁰⁹ Technological measures are now being utilized by copyright owners to erode fair use and prevent personal use.¹¹⁰ Congress must advance the copyright laws to protect the personal use interests of the consumers and the copyright protection interests of the copyright owners in the digital millennium.¹¹¹

III. RE-RECOGNIZE PERSONAL USE RIGHT IN COPYRIGHT LAW

This section proposes that amendments be made to the copyright laws in order to re-establish a balance between the competing interests of copyright owners and consumers.¹¹² Part A proposes that a personal use right be re-recognized according to the AHRA as intended by Congress. Part B proposes a limit to the chilling effects of certain provisions under the DMCA. Part C suggests that the DMCA's ISP liability provisions be used to target the serious copyright infringers. Part D reviews current bills before the House of Representatives that may affect copyright laws.

¹⁰⁴ See Dratler, *supra* note 1, at 2-21.

¹⁰⁵ *Id.* at 2-21 (referring to H.R. Rep. No. 551 (Part 2, 105th Cong., 2d. Sess. 26 (July 22, 1998), quoting a letter of June 4, 1998, to Committee on Commerce from Consumer's Union and stating that technological measures "will dramatically diminish public access to information, reducing the ability of researchers, authors, critic, scholars, teachers, students, and consumers to find, to quote for publication and otherwise make fair use of them").

¹⁰⁶ *Id.* at 2-22.

¹⁰⁷ *Id.* at 2-21.

¹⁰⁸ *Id.* at 2-22.

¹⁰⁹ *Id.* at 2-21.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2-22.

¹¹² See Pollack, *supra* note 9, at 2447; see also Hitchcock, *supra* note 9, at 543.

The aforementioned balance of rights between the copyright holder and the public is often subject to the capability of the copyright law to keep pace with the development of technology.¹¹³ With all the technological innovations that have been achieved in the past, from the printing press to the Internet, it is tough to predict what the next technology will be and how it could be used to the benefit of the copyright holder or the consumer.¹¹⁴ It is also exceptionally tough to predict how copyright laws should be applied or whether or not they should be amended in order to best maintain some balance between the consumer and the copyright holder as was intended by Congress.¹¹⁵

A. Re-recognize a Personal Use Right Under the AHRA

The first step in re-establishing a balance between consumers and copyright holders is to re-recognize the personal use right that was first recognized by Congress when enacting the AHRA.¹¹⁶ One way to do this is to broaden the scope of the AHRA and recognize an actual personal use right for all works.¹¹⁷ The problem is that the language of the AHRA is not entirely clear. This requires courts to look to the legislative history of the statute to determine Congress's intent.

Fair use was really never an issue under AHRA. The legislative history, or the source of the amendment, shows that there was in fact a fair use guarantee.¹¹⁸ As stated by the court in *Diamond*, the main purpose of the AHRA was "the facilitation of personal use."¹¹⁹ The legislative history talked about ensuring the rights of consumers to make recordings of copyrighted music for their private, noncommercial

¹¹³ Hitchcock, *supra* note 9, at 541 (stating that the pace of the development of technology is evolving at an exponential rate and far exceeds the pace by which copyright law changes to account for technological innovations; the pace of copyright law is proceeding at a Darwinian pace).

¹¹⁴ Elizabeth R. Gosse, Comment, *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.: The RIAA Could Not Stop the Rio—MP3 Files and the Audio Home Recording Act*, 34 U.S.F. L. REV. 575, 599 (2000) (stating that Congress was unaware of the threat computers would pose to copyright owners, both through their popularity and through the ease by which computers make the online transmission of copyrighted materials possible).

¹¹⁵ David N. Weiskopf, Article, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F. L. REV. 1, 10 (1998).

Technological progress and development has prompted Congress and the courts to repeatedly modify and amend copyright laws in an effort to maintain this balance.

The new technology of the Internet will almost certainly prompt Congress and the courts to again amend and modify existing copyright laws to maintain the appropriate balance of interests between society and authors.

Id. "The Internet poses yet another technological leap stretching the applicability of existing copyright law. Congress' long history of amending copyright laws in reaction to technological innovation strongly suggests that Congress will eventually amend the statutory copyright laws to respond to new issues created by the Internet." *Id.* at 11.

¹¹⁶ See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1075 (9th Cir. 1999).

¹¹⁷ See Gaffney, *supra* note 99, at 631 (stating that the AHRA is limited in its scope and addresses copyright issues only within the narrow band of digital audio recording devices).

¹¹⁸ See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999).

¹¹⁹ See *id.*

use.¹²⁰ However, this wasn't representative of the text of the AHRA. If the AHRA is to have affect, it must state that a personal use right exists.

For the AHRA to keep step with constantly changing technologies, its scope must be modified or re-interpreted to cover new devices and methods for making digital copied recordings.¹²¹ It is time to make the AHRA explicit in its fair use guarantee and expand the scope of this guarantee into all different types of copyrightable works, not just audio recordings.¹²² Any home copying of audio or video recordings should be legal as long as the copying is by an authorized purchaser and is for non-commercial, private use.

B. Limiting the Chilling Effect of the DMCA

The AHRA represented a positive step in recognizing a personal use right.¹²³ However, this advance was ignored under the DMCA. A second step in establishing a proper balance between the copyright holder and the consumer is to limit the chilling effect that the DMCA has had on the consumer's personal use right.

The DMCA and its anti-circumvention provisions potentially threaten the ability of individuals to use copyrighted works in such a way as to "promote the progress of science and useful arts."¹²⁴ Congress specifically allowed for a fair use exception in the DMCA¹²⁵ and provided exemptions for libraries and educational institutions,¹²⁶ but the reality is that most individuals are incapable of circumventing copy protection technology without obtaining the technology elsewhere.¹²⁷

Legislators must realize that there are differences between the true pirates that are out there and common consumers,¹²⁸ like Chris Disk. Chris just wants to play his legally purchased music on a different media without being treated like a pirate and made to act like one. Copyright owners should not be allowed to utilize copy

¹²⁰ See S. Rep. 102-294 (1992), reprinted at 1992 WL 133198, at *30 (stating the purpose of Senate bill 1623 is to ensure the right of private consumers to make analog or digital audio recordings).

¹²¹ Gaffney, *supra* note 99, at 632 (stating that although the AHRA is applicable to some new technologies, it does not address many of the new technologies that combine digital music recordings with computers).

¹²² *Id.* at 633 (stating that visual works will be able to be copied and distributed just as easily as digital sound recordings); see also Melville, *supra* note 23, at 402 (stating that the motion picture industry spent years to design copyright protection controls for the Digital Versatile Disk (DVD) technology and hackers broke the controls within months; now DVDs are having the same copying debate as CDs).

¹²³ See Recording Indus. Ass'n of Am., 180 F.3d at 1081.

¹²⁴ See Gaffney, *supra* note 99, at 634-635 (stating that use of the anti-circumvention provisions of the DMCA undermine the constitution by giving too much control to the copyright owners to legally preserve their copyrighted works than they are entitled to under copyright law); see also U.S. Const. art. I, 8, cl. 8.

¹²⁵ See 17 U.S.C. § 1201(c)(1) (2000).

¹²⁶ *Id.* § 1201(d).

¹²⁷ See Gaffney, *supra* note 99, at 636 (stating that "most individuals lack the expertise necessary to circumvent" a protection system and "the effectiveness of the statutory exemption for non-infringing uses is substantially lessened by Congress's strict prohibitions against the manufacture and distribution of technologies designed to circumventing protective measures").

¹²⁸ See Pollack, *supra* note 9, at 2480.

protection technology when it effectively prevents consumers from making personal use of legally purchased copyrighted materials. In the alternative, consumers should be given the means to legally circumvent technological measures that prevent personal use of legally purchased copyright materials.

C. Institute ISP Liability

The DMCA does, however, provide other means for addressing piracy and for going after those serious infringers. Another way to re-establish the balance between the copyright owner and the consumer is to work with the ISP to find out who the serious infringers are in order to go after them rather than preventing the common consumer's personal use right.¹²⁹

The DMCA did help to curb the liability of ISPs, but it did so by creating an incentive for the ISPs to work with the copyright holders to remove infringing material.¹³⁰ However, the problem of finding the infringers and the infringing material is not easy.¹³¹ Through the use of ISP liability in conjunction with digital watermarking technology, any ambiguity of ownership is avoided and the ISP can quickly verify true ownership.¹³² Digital watermarking is an inexpensive tool that can provide adequate verification of copyright ownership and make the ISPs more willing to block or remove infringing works.¹³³

D. Proposed Legislation

New congressional legislation has been introduced into the House of Representative to make amendments to the DMCA in the form of the Digital Choice and Freedom Act (hereinafter "DCFA")¹³⁴ and the Digital Media Consumers' Rights Act (hereinafter "DMCRA")¹³⁵.

¹²⁹ A serious infringer would have to be subjectively determined by the ISP and the copyright owner.

¹³⁰ See Baker, *supra* note 67, at 14 (stating that the RIAA and other copyright holders should be able to notify ISPs of user misconduct instead of hopelessly chasing infringers around cyberspace; otherwise the ISP may be subject to a contributory infringement suit).

¹³¹ See *id.* (stating that the process of finding infringers is quite formidable and many infringers invent creative ways of keeping themselves anonymous and undetected, sometimes creating their own codes to communicate).

¹³² See Jones, *supra* note 62, at 586.

¹³³ See *id.* at 587.

¹³⁴ See H.R. Rep. No. 5522 107th Cong., 2d. Sess. (October 2, 2002) (requesting that this bill be known as the Digital Choice and Freedom Act of 2002 and amend Title 17 of the USC "to safeguard the rights and expectations of consumers who lawfully obtain digital entertainment").

¹³⁵ See H.R. Rep. No. 5544 107th Cong., 2d. Sess. (October 3, 2002) (requesting that this bill be known as the Digital Media Consumers' Rights Act of 2002 and "amend the Federal Trade Commission Act to provide that the advertising or sale of a mislabeled copy-protected music disc is an unfair method of competition and an unfair and deceptive act or practice").

1. *Digital Choice and Freedom Act*

The DCFA is being proposed based on new findings of Congress that the development of digital technology and the rise of the Internet have once again shifted the balance between copyright owners and consumers.¹³⁶ The DMCA, which was meant to safeguard the copyright balance, in reality has taken away the rights and expectations of legitimate consumers and failed to give them means to make fair use of copyrighted works.¹³⁷ The DCFA would therefore amend the Copyright Act by adding or amending sections to protect fair use and consumer expectation in the digital world,¹³⁸ to implement digital first sale,¹³⁹ and to make permissible

¹³⁶ *Id.* at Findings (5) (stating that technological measures allow copyright holders to threaten society's interests in the free flow of ideas, information, and commerce).

¹³⁷ *Id.* at Findings (6)-(7) (stating that as a result of the DMCA, a lawful consumer cannot legally circumvent technological restrictions, even to exercise a fair use or to utilize the work on a different media).

¹³⁸ *Id.* at Sec. 3 (amending §123(a)-(d)).

A. Use of Lawfully Obtained Digital Works – Notwithstanding the provisions of section 106, it is not an infringement of copyright for a person who lawfully obtains a copy or phonorecord of a digital work, or who lawfully receives a transmission of a digital work, to reproduce, store, adapt, or access the digital work--

i. for archival purposes, is all such archival copies are destroyed or rendered permanently inaccessible in the event that continued possession of the work should cease to be rightful; and

ii. in order to perform or display the work, or an adaptation of the work, on a digital media device, if such performance or display is not public.

B. Effect of Licenses – When a digital work is distributed to the public subject to nonnegotiable license terms, such terms shall not be enforceable under the common laws or statutes of any State to the extent that they restrict or limit any of the limitations on exclusive rights under this title.

C. Definitions

i. A 'digital work' is any literary work (except a computer program), sound recording or musical work, or a dramatic work, motion picture, or other audiovisual work, in whole or in part in a digital or other nonanalog format.

ii. A 'digital media device' is any hardware or software that converts copyrighted works in digital form into a form whereby the images and sounds are visible or audible, or retrieves or accesses copyrighted works in digital form and transfers or makes available for transfer such works to such hardware or software.

D. Construction – Nothing in this section shall enlarge or diminish any of the other limitations on exclusive rights contained in this title, including any limitations that relate to archival activities by a library or an archives under sections 107 and 108

i. Conforming Amendment – The table of sections for chapter 1 of title 17, United States Code, is amended by adding at the end the following new item: "123. Limitations on exclusive rights; Permissible uses of digital works."

Id.

¹³⁹ *Id.* at Sec. 4 (amending § 109).

circumvention to enable fair use and consumer expectations.¹⁴⁰ This amendment would expressly recognize a personal or fair use right in the copyright statute. The enactment of this legislation would solve a good portion of the problem with current copyright laws. However, it does not address the needs of copyright owners to find and deal with serious infringers. As mentioned above, there still exists a need to institute ISP liability.

2. Digital Media Consumers' Rights Act

The DMCRA is also taking the initiative to reduce the heavy handed tactics of recording companies by making them disclose when CDs they produce utilize copy protection technology.¹⁴¹ The DMCRA is being proposed based on findings of Congress that the limited introduction into commerce of copy protected CDs has caused great consumer confusion.¹⁴² Record companies should have the freedom to innovate, but they should also be responsible for giving notice to consumers about any restrictions on playability or recordability.¹⁴³ The DMCRA would revise the Federal Trade Commission Act by adding or amending sections to prevent inadequately labeled copy protected discs from entering commerce.¹⁴⁴ This legislation will not address the affect of no-copy technology on the consumer's personal use right, but consumers will be placed on notice that their use of this product may be limited. It will at the very least allow the consumer to make an educated decision about their purchase according to their needs.

III. CONCLUSION

There are copy protection methods and laws available to the music industry to protect a label's copyright without diminishing the consumer's fair use rights.¹⁴⁵ By asserting these rights, consumers will be able to make full, personal use of digital music technology without stealing from those who are entitled to the fruits of their copyright.¹⁴⁶

Although the AHRA and the DMCA seek to address various piracy concerns in new ways, neither is a fix all to the problems that have arisen or that will undoubtedly arise in the future. The new legislation definitely makes some headway

¹⁴⁰ See *id.* at Sec. 5 (amending § 1201 by redesignating subsections (c) through (k) as subsections (d) through (l) and by inserting the following after subsection (b)).

¹⁴¹ *Id.*

¹⁴² See *id.* at Findings (1) (stating that limited introduction of copy protected CDs has not only caused consumer confusion, but it has placed unwarranted burden on retailers, electronics manufacturers, and other manufacturers to respond to complaints).

¹⁴³ See *id.* at Findings (2).

¹⁴⁴ See *id.* at Sec. 3 (stating that the Federal Trade Commission Act (15 U.S.C. 41) would be amended by inserting § 24A).

¹⁴⁵ See Pollack, *supra* note 9, at 2446-47 (stating that there has been a significant amount of discussion concerning copyright laws and the Digital Millennium Copyright Act which seeks to redefine the copyright laws in response to the digital revolution)

¹⁴⁶ *Id.* at 2446 ("In keeping with copyright tradition, Congress has sought to sort out some of the potentially harmful effects of the Internet and digital distribution on copyright owners.").

back to achieving a proper copyright balance, but there is more that can be done to ensure that “copyright laws in the digital age prevent and punish digital pirates without treating every consumer as one.”¹⁴⁷

If the DMCA and the AHRA continue to be applied in their current form, every consumer using a computer to record or transfer music between media forms will eventually be in violation of the DMCA’s anti-circumvention provisions and subject to penalties.¹⁴⁸ The DMCA can be considered exclusive so that no fair use is allowed, whereas the AHRA was actually created to recognize a personal use right. This suggests the DMCA is in conflict with the AHRA. It is time to expressly recognize a personal use right under the AHRA, broaden its scope, and eliminate the chilling effect of the DMCA by putting fair use back into the Act.

If you still remember Chris Disk, a lot of his anguish could have been avoided by just having proper labels on the CD he bought. But, the present and future anguish of many consumers and retailers alike can be minimized by making sure that the balance between copyright holders and consumers remains as Congress intended.

¹⁴⁷ See H.R. Rep. No. 5544 107th Cong., 2d. Sess. (October 3, 2002) at Findings (9).

¹⁴⁸ See Dratler, *supra* note 1, at 2-21.