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The Fallacy that Fair Use and Information Should be Provided for Free: An Analysis of the Responses to the DMCA's Section 1201

Cover Page Footnote

Mauricio España, J.D. 2003, Fordham University School of Law; Associate, Mayer, Brown, Rowe & Maw (as of September 2003). I would like to thank everyone who supported and encouraged me as I strived to carry on my endeavors. I would like to express special gratitude to my mother, father, family, and friends for their unending support, tolerance, and understanding.

THE FALLACY THAT FAIR USE AND INFORMATION SHOULD BE PROVIDED FOR FREE: AN ANALYSIS OF THE RESPONSES TO THE DMCA'S SECTION 1201

*Mauricio España**

INTRODUCTION

The Framers of the Constitution believed that the advancement of the arts and technology were very important to the growth of society.¹ Thus, in 1787, they adopted the Copyright Clause to the Constitution to give Congress the power to enact copyright regulations in order “[to] Promote the Progress of Science and useful Arts.”² Both the copyright and the scientific world in which framers lived, however, has changed dramatically. Likewise, the Copyright Act has evolved and adapted to changes in technology and society.³

It should surprise no one that at the end of the twentieth century Congress has once more revised the Copyright Act.⁴ During the latter end of the twentieth century, the world encountered the most drastic change in our way of life since the industrial revolution. This change was brought about by the emergence of the digital revolution, more specifically, digital information, computer networks, and the Web.⁵ This novel and innovative technology now permeates every aspect of peoples’ lives including copyrighted works, and has provided enormous benefits in terms of convenience, productivity, and quality. Moreover, because digital technology is fast evolving and revolutionary, the potential benefits to every aspect of peoples’ lives are immeasurable.

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1. CRAIG JOYCE ET AL., COPYRIGHT LAW 19 (2001).

2. U.S. CONST. art. I, § 8, cl. 8.

3. *Infra* Part I.C.1.

4. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as scattered sections of 17 U.S.C).

5. *Infra* Part I.C.2.a-c (discussing digital information, computer networks, and the Web).

The same characteristics that make digital technology and digital copyrighted works beneficial, however, also contribute to their susceptibility to piracy and unauthorized exploitation.⁶ This danger to copyrighted works has the potential of regressing the advancement and progress of science and the arts, and adversely affecting the affluent copyright and e-commerce industries that have developed.⁷ The potential for this calamity was recognized by the one hundred and sixty nations, including the United States, that participated in the World Intellectual Property Organization ("WIPO"),⁸ which convened to amend the Berne Convention,⁹ the international copyright treaty that the United States adheres to, in order to recognize copyrights in digital works.¹⁰

These nations were well aware of the effect that piracy and unauthorized exploitation would have on copyrighted works if they did not protect them.¹¹ Accordingly, they signed and ratified two treaties aimed at protecting copyrighted works by prohibiting the circumvention and creation of tools made for the purpose of circumventing Technological Protective Measures implemented by copyright owners to protect their works.¹²

In 1998, the United States, a signing member of the WIPO treaties enacted the Digital Millennium Copyright Act ("DMCA")¹³ in order to bring "copyright law squarely into the digital age."¹⁴ Its relevant and most controversial section is Title One, "WIPO Treaties Implementation," which contains 17 U.S.C. § 1201.¹⁵ Section 1201 implements the WIPO treaties by prohibiting the circumvention and creation of tools to circumvent copyright owners' Technological Protective Measures.¹⁶

Legal commentators did not welcome the implementation of the WIPO treaties through § 1201.¹⁷ These commentators claim that

6. *Infra* Part I.C.2.d.

7. S. REP. NO. 105-190, at 8-9 (1998).

8. *Infra* notes 212-16 and accompanying text.

9. JOYCE ET AL., *supra* note 1, at 35-40.

10. *Id.* at 47-49.

11. S. REP. NO. 105-190, at 4-5.

12. JOYCE ET AL., *supra* note 1, at 48.

13. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as scattered sections of 17 U.S.C.).

14. S. REP. NO. 105-190, at 2.

15. Pub. L. No. 105-304, 101, 112 Stat. 2860, 2861 (codified as scattered sections of 17 U.S.C.).

16. 17 U.S.C. § 1201(a)(1)(A) (2001).

17. *See, e.g.,* Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 742-46 (2001) [hereinafter Bell, *Escape from Copyright*] (arguing that Copyright law provides copy-

§ 1201 will have the adverse effect of hindering or abolishing both fair use,¹⁸ and the copyright balance, by creating a “pay-per-use” world where the public will have to pay for all uses of copyrighted works, including fair use.¹⁹

This Note argues that § 1201 is not only necessary to ensure that copyright law is able to progress and advance in the digital revolution, but more importantly, that the protection of copyrighted works will benefit the public in ways the analog²⁰ world cannot. It also argues that legal commentators’ fears about § 1201 are misplaced.

The real danger to fair use and the copyright balance stems from the National Conference of Commissioners on Uniform State Laws’ (“NCCUSL”) adoption of the Uniform Computer Information Transactions Act (“UCITA”).²¹ UCITA’s danger emanates from its two main effects.²² First, its provisions provide copyright owners with the ability to condition the licensing of all copyrighted works on any terms, including the forfeiture of fair use and other

right owners with too much protection); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 359-60 (1999) [hereinafter Benkler, *Common Use*] (arguing that the DMCA may be too restrictive); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562-63 (2000) [hereinafter Benkler, *Consumers to User*] (arguing that the DMCA may be detrimental to users and creators of copyrighted works); Julie Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH L.J. 161, 163 (1997) (arguing that the enactment of the DMCA would foreclose uses that copyright law expressly permits); Neil Weinstock Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J. 283, 289-90 (1996) (discussing copyright’s importance in maintaining and furthering a democratic civil society); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 712-15 (2000) (arguing that the DMCA may bring forth a “pay-per-use” society); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 522-24 (1999) (arguing that the DMCA’s anti-circumvention provisions are too broad and achieved an imbalance in copyright law).

18. § 107; *infra* Part II.A.1, 3.

19. Nimmer, *supra* note 17, at 710-28; Samuelson, *supra* note 17, at 542-43; *see also* Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137, 148-49 (1997) (discussing paying for the use of works in a library setting).

20. By “analog” I refer to all traditional copyrighted works that have not been digitized, including, but not limited to books, magazines, newspapers, and audio tapes.

21. Unif. Computer Info. Transaction Act (Final Act Aug. 2002), *available at* http://www.law.upenn.edu/bl/ulc/ulc_frame.htm (last visited May 6, 2003); *infra* notes 169-174 and accompanying text.

22. *Infra* Part II.B.2.

privileges and rights.²³ Second, they validate and enforce *ProCD, Inc. v. Zeidenberg's*²⁴ “shrink-wrap” contracts.²⁵

Part I of this Note discusses copyright's background, including the genesis of copyright law, the evolution of copyright law including the DMCA,²⁶ and *ProCD, Inc.*²⁷ and its progeny.

Part II explores the controversy and debate within the legal community regarding the implications of the DMCA's § 1201.²⁸ First, Section A explores the arguments in opposition to § 1201, including the unbalanced pay-per-use world argument, the First Amendment/democratic paradigm argument, and the market failure theory argument. Section B then elucidates the main argument from commentators supporting § 1201. Section C discusses the argument that UCITA stands to adversely affect fair use and the copyright balance.

Finally, Part III argues that § 1201 is not only necessary and beneficial, but also does not adversely affect fair use and the copyright balance.

I. BACKGROUND

A. Genesis of Copyright Law

The genesis of Anglo-American copyright law was motivated by a desire to censor divergent views, but in effect, the English Crown provided an exclusive publishing monopoly.²⁹ Its impetus, however, eventually became the protection of authors' works.³⁰ The first copyright regulation, the Statute of Anne, enacted in England in 1710, provided authors with limited protection for their works.³¹

23. Unif. Computer Info. Transaction Act § 208.

24. 908 F. Supp. 640, 644 (W.D. Wis.), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

25. Unif. Computer Info. Transaction Act §§ 112, 208, 211.

26. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as scattered sections of 17 U.S.C.).

27. 908 F. Supp. at 644.

28. 17 U.S.C. § 1201 (2001).

29. JOYCE ET AL., *supra* note 1, at 16. In 1534, England imposed the first Anglo regulation of copyrights after the introduction of the printing press by William Caxton threatened the Crown's power and religious views. *Id.* at 15-16. The English Crown “prohibited anyone from publishing without a license and approval by official censors.” *Id.* at 16. In 1557, they went further and gave a publishing group, Stationer's Company, an exclusive publishing monopoly. *Id.*

30. Netanel, *supra* note 17, at 354-57 (discussing copyright's importance in maintaining and furthering a democratic civil society). Professor Netanel claims that this conversion of motivation was promulgated by the Framers' belief that protection of author's works would provide them with an incentive to create and disseminate, which were vital and essential to democratic governance. *Id.* at 356-59.

31. JOYCE ET AL., *supra* note 1, at 16.

Parliament enacted this Act to further the “encouragement of learning,”³² and to encourage “Learned Men to Compose and Write useful Books.”³³

In 1787, after the majority of the American states had enacted copyright laws, the Framers of the Constitution adopted the Copyright Clause, providing the federal government with the right to pass laws on copyright in order to create a uniform regulation.³⁴ As evident from the clause’s language, the Framers, like Parliament before them, intended to further science and learning by providing authors and inventors with an economic incentive.³⁵ Three years later, Congress used its constitutional empowerment to enact the Copyright Act of 1790 protecting maps, charts, and books for a period of twenty-eight years.³⁶ As America encountered changes in technology and market forces, however, Congress repeatedly exercised its power to amend and revise the Copyright Act.³⁷

B. The Creation of Fair Use and the Copyright Balance

Although copyright law provides copyright holders with broad and powerful monopoly rights as an incentive to create, allowing these rights to be absolute and unhindered would destroy the balance between the private and public interests of copyright law.³⁸ Accordingly, to maintain this balance, Congress included many limitations to copyright owners’ exclusive rights.³⁹ Although Congress enacted many such limitations by statute, most are categorical and limit a judge’s role to that of determining whether an action fits within any of the enumerated exceptions.⁴⁰ These limitations alone, however, are insufficient to balance copyright law’s public

32. *Id.*

33. *Id.* at 18 (quoting the language of the Statute of Anne).

34. U.S. CONST. art. I, § 8, cl. 8. (stating that “Congress shall have the 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.”). At the time of its adoption, twelve out of the thirteen states had their own different copyright regulations. JOYCE ET AL., *supra* note 1, at 19.

35. JOYCE ET AL., *supra* note 1, at 19.

36. *Id.* at 20.

37. *Infra* Part I.C.1.

38. *See supra* notes 29-37 and accompanying text (discussing the creation of copyright laws that would both provide an economic incentive for authors to create while also allowing other creators to use these works to further create).

39. 17 U.S.C. §§ 107-21 (2001). These sections describe in intricate detail the limitations to copyright owner’s exclusive rights enumerated in 17 U.S.C. § 106.

40. *Id.*

and private interests⁴¹ because there has and will be many instances not specifically enumerated by Congress where reason and fairness shall dictate that a specific use of a copyrighted work cannot be considered a copyright infringement, while simultaneously being consistent with the Copyright Clause's purpose and mandate.⁴² Accordingly, courts have developed the doctrine of "fair use" a judge made equitable rule of reason that attempts to fill the gap between copyright's public interest in providing authors with an incentive and the Constitution's private interest in promoting "the Progress of Science and useful Arts."⁴³ The ultimate test of fair use is whether "the Copyright Act's goals of encouraging creative and original work would be better served by allowing the use than by preventing it."⁴⁴ Due to its flexible nature and dual function as bridge and safety valve—which allows courts to use it when they deem fairness requires—fair use's major problem and benefit has been its inconsistency and indeterminacy.⁴⁵

In 1976, Congress acknowledged fair use's significance and codified it as section 107 in the 1976 Copyright Act.⁴⁶ Congress' intention was merely to restate the common law doctrine, by neither changing, narrowing, or enlarging it, so as to leave courts "free to

41. SHELDON W. HALPERN ET AL., FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENT, AND TRADEMARK 112 (1999).

42. Fair use has been used as a judicial equitable doctrine as far back as 1841 to the present date. *See, e.g.*, *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 594 (1994) (holding that parody of Roy Orbison's song by 2 Live Crew may be fair use if it satisfies all factors); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 569 (1985) (holding that under the pertinent factors the unauthorized publication of plaintiffs work before its publication did not constitute fair use); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984) (finding that home time-shifting through the use of VTRs is permissible is fair use); *Holdredge v. Knight Publishing Corp.* 214 F.Supp. 921, 924 (S.D. Cal 1963) (stating that the use of an author's work as a source for the creation of a new work is considered fair use); *Folsom v. Marsh*, 9 F.Cas. 342, 347-48 (C.C.D. Mass 1841) (discussing whether the copying of plaintiff's letters belonging to George Washington was a fair use); *N.Y. Tribune Inc. v. Otis & Co.*, 39 F.Supp. 67, 68 (S.D.N.Y. 1941) (discussing whether defendants duplication and publication of plaintiff's editorial in order to respond to its content was a copyright infringement or fair use).

43. *See Campbell*, 510 U.S. at 575 (stating that fair use is necessary to promote progress of the arts and sciences because there are very few things that are original).

44. *Arica Inst. Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992).

45. *See Campbell*, 510 U.S. at 594 (holding that a parody made by rap group 2 Live Crew of Roy Orbison and William Dees's ballad "Oh Pretty Woman" may constitute fair use, but must be determined on the basis of the facts on remand); *see also* H.R. REP. NO. 94-1476, pt.1, at 76 (1976) (stating that "since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts").

46. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as 17 U.S.C. § 107).

adapt the doctrine to particular situations on a case-by-case basis."⁴⁷ As a result, although 17 U.S.C. § 107 contains four enumerated factors to determine whether an action constitutes fair use,⁴⁸ courts have continued to apply fair use inconsistently on a case-by-case basis, justifying this practice on varying grounds of equity and fairness.⁴⁹ Although there are no determinative categories of fair use, several significant ones have nonetheless developed.⁵⁰ Of these categories, fair use of utilitarian works and uses made for research and academic purposes are most relevant to this Note.⁵¹

47. *Sony Corp. of America*, 464 U.S. at 450; see also *Campbell*, 510 U.S. at 577; *Harper & Row*, 471 U.S. at 549.

48. Section 107 lists the four categories that courts are to consider in no order of importance in deciding whether a particular action is considered fair use:

- (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.

17 U.S.C. § 107 (2001).

49. See *Harper & Row*, 471 U.S. at 549-50 (discussing the issue of fair use as a reasonable copyright owner test, basing the determination on whether "a reasonable copyright owner [would] have consented to the use"); *supra* note 42 (listing various fair use cases decided on equitable grounds). Professor Nimmer presents the fair use issue as one regarding the golden rule breaking down the determination to the simple axiom "[t]ake not from others to such an extent and in such a manner that you would be resentful if they took so from you." David Nimmer, 66 *LAW & CONTEMP. PROBS.* 263, 287 (2003).

50. In addition to the purposes listed in § 107's preamble, "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" courts have recognized a fair use interest in parodies, satires, and burlesques and utilitarian works, most specifically the reverse engineering of computer programs. *Campbell*, 510 U.S. at 579-81; *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 110 (2d Cir. 1998); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520-21 (9th Cir. 1996) (finding that reverse engineering of computer programs under certain circumstances is fair use); *Atari Games Corp. v. Nintendo of America Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (holding "reverse engineering object code to discern the unprotectable ideas in a computer program is a fair use"); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986).

51. *E.g.*, *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1383 (6th Cir. 1996) (holding that defendant's copying and selling copyrighted works to students did not constitute fair use); *Atari Games Corp.*, 975 F.2d at 843 (discussing reverse engineering of computer programs).

C. The Evolution of Copyright Law

1. *Evolution Caused by Market Failure and Technological Innovation*

From its onset, copyright law was motivated and driven by new and emerging technologies and modern conditions. As previously mentioned, Britain and the United States were initially stimulated to enact copyright regulations to protect authors' works from unrestricted copying, and to provide them with an economic incentive to continue creating and disseminating.⁵² The "Market Failure" theory best explains this original stimulus; it asserts, "[c]opyright law arose as a response to the market's failure to protect expressive works."⁵³ In keeping with its original impetus, at the beginning of the twentieth century, President Theodore Roosevelt summoned a complete revision of copyright law, the Copyright Act of 1909, in order to "meet modern conditions."⁵⁴ Similarly, the piecemeal amendments that followed these major revisions were stimulated by "changing times and technology."⁵⁵

In 1976, driven by the computer industry's technical revolution, Congress once again revised copyright law through the Copyright Act of 1976, which, except for some minor amendments, mirrors the present copyright scheme.⁵⁶ The quickly evolving computer revolution, however, brought forth significant amendments to directly address technology's affect on copyright law.⁵⁷

52. *Supra* notes 29-37 and accompanying text.

53. Bell, *Escape from Copyright*, *supra* note 17, at 747.

54. JOYCE ET AL., *supra* note 1, at 20. The 1909 Copyright Act had three major revisions including: the expansion of subject matter to include, all writing of an author; the extension of period of copyright protection to a total of fifty six years; and the commencement of copyright protection was changed from time of registration to publication. *Id.*

55. *Id.* at 21. The two major amendments brought forth by new technologies were adding the motion picture to the list of subject matter and providing copyright owners with a right to authorize performance for profit. *Id.*

56. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as scattered section of 17 U.S.C.). "[T]he 1976 Act was drafted so as to accommodate new media and new technologies for communicating creative expression;" however it was far from perfect because it failed to see the affect that new technologies would have on the creation of new industries and uses. JAY DRATLER, JR., *CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM* 1-10 (2003).

57. In 1980, § 117 was completely amended to codify the explicit protection and scope of rights for computer programs. Pub. L. No. 96-517, §10(b), 94 Stat. 3028 (1980) (codified as 17 U.S.C. §117). The Semiconductor Chip Protection Act of 1984, a sui generis form of copyright legislation, was enacted to protect computer chips. Pub. L. No. 98-620, Title III, § 302, 98 Stat. 3347 (1984) (codified as 17 U.S.C. 901-14). In 1984, Congress added section b to § 109 to prohibit the direct or indirect commercial renting of phonorecords, sound recordings, and computer programs. Pub. L. No.

a. *Digital Millennium Copyright Act*

The most important and controversial amendment to copyright law, and the main issue of this Note, is the enactment of the Digital Millennium Copyright Act of 1998.⁵⁸ This amendment clearly illustrates how technological changes and innovations require congressional action. As the Senate report presented by Senator Orrin G. Hatch states, the DMCA's purpose is to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education."⁵⁹ Before a thorough explanation of the DMCA's provisions is provided,⁶⁰ it is important to first understand and appreciate the digital technology, including its advantages and disadvantages, that encouraged the enactment of this legislation.

2. *The Advent of the Digital World and Its Affect on Copyright Law*

Although digital technology is prevalent in almost every aspect of society,⁶¹ in intellectual property law it is predominant in the sphere known as the National Information Infrastructure ("NII") or the information superhighway.⁶² The NII is composed of many

98-450, § 2, 98 Stat. 1727 (1984) (codified as 17 U.S.C. §109(b)). In 1988, § 119 was added to provide a compulsory license for home satellite viewing. Pub. L. No. 100-667, Title II, § 202(2), 102 Stat. 3949 (1988) (codified as 17 U.S.C. §119). Although there are many more amendments to illustrate technology's affect on copyright law, the most relevant to this issue is, first, the Digital Performance Right in Sound Recordings Act of 1995, which created a sixth exclusive right for copyright owners, the right to perform publicly a sound recording by means of a "digital" transmission. Pub. L. No. 104-39, § 2, 109 Stat. 336 (1995) (codified as 17 U.S.C. §106(6)). Secondly, the No Electronic Theft Act ("NET"), passed in 1997, significantly revised the copyright infringement provisions by providing criminal liabilities for the *free distribution* of copyrighted works. Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified at amended in 17 U.S.C. §506).

58. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as scattered sections of 17 U.S.C.).

59. S. REP. 105-190, at 1 (1998).

60. *Infra* Part I.C.4.

61. *Hologic Receives Final FDA Approval for Its Lorad(R) Full Field Digital Mammography System*, PR NEWSWIRE, Mar. 19, 2002, at Financial Section (discussing the benefits that digital technology can have on improvements on mammography testing); Karen Lowry Miller & Anna Kuchment, *The Shock of Recovery*, NEWSWEEK, Feb. 4, 2002, at 38 (discussing within the context of the World Economic Forum how digital technology will improve and benefit the economy).

62. HENRY H. PERRIT, JR., LAW AND THE INFORMATION SUPERHIGHWAY 13 (2001); COMM. ON INTELLECTUAL PROP. RIGHTS AND THE EMERGING INFO. STRUCTURE & COMPUTER SCI. AND TELECOMM. BD.: COMM'N ON PHYSICAL SCI., MATHEMATICS, AND APPLICATIONS NAT'L RESEARCH COUNCIL, THE DIGITAL DILEMMA:

elements,⁶³ but the three major ones are digital information, computer networks, and the World Wide Web.⁶⁴

a. Digital Information

Digital information is all encompassing, covering everything from audio, text, video, computer software, and shape.⁶⁵ In addition, the way digital computers and users utilize this information creates vital implications for copyright law.⁶⁶ Unlike analog information, using digital information in most instances requires copying of the information.⁶⁷ This implicates copyright law by triggering copyright owners' exclusive reproduction right.⁶⁸

INTELLECTUAL PROPERTY IN THE INFORMATION AGE 2 (2000) [hereinafter THE DIGITAL DILEMMA].

63. The National Information Infrastructure is composed of many structures, such as wireless technologies, cellular phones, personal communication systems, satellite systems, and all forms of electronic publishing. PERRIT, *supra* note 62, at 13-14.

64. THE DIGITAL DILEMMA, *supra* note 62, at 2. The Internet and World Wide Web are not to be confused as the same entity. *Id.* at 39. The Internet is a massive networking hub. *See id.* (describing the World Wide Web as a giant bulleting board). It is an open architecture that is non-proprietary, that is, it is not owned or controlled by anyone. *See id.* at 263-65 (discussing the way the Web works). Thus, anyone who conforms to its standards of TCP/IP protocols may connect to this network. *Id.* The World Wide Web, on the other hand, is the most popular use of the Internet. The World Wide Web is one way of organizing information so that it can be distributed across the Internet by creating html documents that can be viewed and accessed by browsers, such as Netscape and Internet Explorer. *Id.* at 39.

65. *Id.* at 28.

66. *Id.* at 28-45.

67. Unlike reading a book, a magazine, or going through a directory, accessing digital information using a computer requires that the computer make one or more copies of the information. *Id.* at 28, 31. These copies are made either from a website, server, or computer program into the computer's temporary Random Access Memory ("RAM"), so that when the user desires to use or see certain things the computer directs the information from RAM to the computer screen. *See id.* (discussing how information is copied into a computer's memory in order to perform any functions). Since RAM is temporary, it is often deleted when the computer shuts down, but absent any protection, it can be saved before shutting down. *See id.*

68. 17 U.S.C. § 117 (2001). The right to reproduce is the most basic and broadly defined right. HALPERN ET AL., *supra* note 41, at 104-11. It is infringed by merely making any copy or phonorecord of a copyrighted work. *Id.* The Copyright Act, when defining "copy" and "phonorecords" makes it clear that the machine, process, or medium used to make a reproduction is irrelevant. *See, e.g.,* § 117; MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 517-18 (9th Cir. 1993) (holding that copying an operating system into a computer Random Access Memory, constitutes a "copy" of the program for purpose of copyright infringement). Although Congress intended to make this right broad and exclusive, it did not intend it to be absolute, because there are various statutory limitations and exceptions that are the focal point of this discussion. § 106. This raises the issue of whether rights to control distribution may restrict rights to access. THE DIGITAL DILEMMA, *supra* note 62, at 31.

Digital information's physical and economic characteristics have the most significant impact on copyright law.⁶⁹ Digitally encoded information can be fixed in a compact form: this information is easily transferable or distributable since it is not restricted to any medium.⁷⁰ Most importantly, users can copy the information quickly and inexpensively.⁷¹ "Consequently, the traditional physical and economic impediments to copyright infringement have been considerably undermined."⁷² For instance, the ability to reproduce unlimited numbers of original-quality copies of digital information removes the most vital traditional hindrance to copyright infringement, the imperfection of reproductions.⁷³

Finally, since digital information is very flexible and dynamic, it can be easily manipulated and incorporated into other works.⁷⁴ This characteristic supports the creation of indexes and search features within works, which provide an extremely beneficial and efficient tool for research and study.⁷⁵ This flexibility, however, also lends to the easy creation of derivative works, either new copyrighted works or infringements of pre-existing works.⁷⁶

69. THE DIGITAL DILEMMA, *supra* note 62, at 32-33.

70. *Id.* at 32.

71. *Id.* at 31-32; *see also* Real Networks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *4, *13 (W.D. Wash. Jan. 18, 2000) (contrasting streaming with downloading by referring to the latter's ability to provide the user with a copy that can be distributed to others). Unlike analog information, digital information can be stored in pocket size floppy disks, zip disks, or CDs that are capable of storing hundreds of thousands of text and can be purchased relatively cheaply. THE DIGITAL DILEMMA, *supra* note 62, at 31-32.

72. THE DIGITAL DILEMMA, *supra* note 62, at 32; Netanel, *supra* note 17, at 285; *see also* Real Networks, Inc., 2000 U.S. Dist. LEXIS 1889, at *13 (finding that digital content poses greater dangers from unauthorized exploitation because of its physical characteristics).

73. THE DIGITAL DILEMMA, *supra* note 62, at 32; Michael J. Madison, *Legal Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1036-38 (1998) (discussing the effect digital technology has on copyright owner's fight to prevent piracy and how UCC-2B may adversely affect fair use and other user rights).

74. THE DIGITAL DILEMMA, *supra* note 62, at 33-34.

75. *Id.*

76. *Id.* A derivative work is the creation of an "independently copyrightable" work made by recasting, transforming, or adapting a pre-existing copyrighted work. 17 U.S.C. §103(b) (2001); Woods v. Bourne Co., 60 F.3d 978, 990 (2d Cir. 1995). Derivative works serve a twofold function they either can be a new copyrighted expression or infringement of a pre-existing copyright. In serving the former function derivative works must satisfy both the fixation and originality requirements to be copyrighted. Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 964 F.2d 965, 968 (9th Cir. 1992). In its latter function, the creation of a derivative work may constitute infringement without being fixed to a tangible medium. *See id.* (carrying out the fair use analysis to determine if the Game Genie infringed plaintiff's copyright even though they determined that it was not fixed to constitute a derivative worked). It is

b. Computer Networks

A computer network is a group of interconnected computers either closely situated, or located as far away as across the world.⁷⁷ These computers can share the same software and hardware, but most importantly, they have the ability to quickly transfer files between each other.⁷⁸ This ability to distribute digital information almost instantly around the world is beneficial to many businesses and industries,⁷⁹ but also presents copyright implications by the unauthorized widespread distribution of copyrighted works.⁸⁰ Moreover, it prevents the enforcement of legal restraining or injunctive orders and similar tools, which become useless once the information is disseminated.⁸¹

c. World Wide Web

The World Wide Web ("Web") is a relatively free global medium of publication that allows its users to publish works through standard protocols and allows access to these works through special programs.⁸² The Web is not limited to any medium, allowing video, text, graphics, or audio to be uploaded, published, and accessed.⁸³ It also allows hyperlinking, through which users can connect their

important to keep in mind that copyright does not give the creator of a derivative work monopoly power over any pre-existing works. 17 U.S.C. § 103(b). Copyright's monopoly power extends only to the extent of the originality and creativity applied. *Id.*

77. PERRIT, *supra* note 62, at 5.

78. See THE DIGITAL DILEMMA, *supra* note 62, at 38-39 (discussing the technicalities and workings of computer networks). "Networked storage of digital information has vastly reduced the cost of locating, retrieving, and accessing large quantities of information." Madison, *supra* note 73, at 1061.

79. *Supra* note 61.

80. THE DIGITAL DILEMMA, *supra* note 62, at 38-39; see also *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004, 1021 (2d Cir. 2001) (upholding a temporary injunction based on a finding that Napster would likely be held liable for contributory infringement because it allowed the transfer and copies of copyrighted MP3 music files). Copyright law provides copyright holders with the right to distribute their work in any manner, either through sale or otherwise. § 106(3). This right is analogous to the common law right of first publication, which gave copyright holders the right to determine when their work would first be exposed to the public. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 553 (1985). Although all exclusive rights granted by copyright law are mutually exclusive, exclusivity is of most importance with regards to the right to distribute. HALPERN ET AL., *supra* note 41, at 78. For instance, authorization to reproduce a work or perform it publicly does not give an individual the right to distribute it.

81. THE DIGITAL DILEMMA, *supra* note 62, at 38-39

82. *Supra* note 64.

83. THE DIGITAL DILEMMA, *supra* note 62, at 39-42.

publication to other publications through the Web.⁸⁴ This “World-wide Publishing Medium” provides many benefits to users, such as free access to an enormous amount of information, which can be easily searched and identified with search engines.⁸⁵ The Web also makes it easier for individuals to publish their works without the use of publishers.⁸⁶ Finally, it provides users and businesses with an extra medium of advertising and commerce, which in the last decade has provided the economy with a tremendous source of income, and has driven legislators to provide protections and incentives to individuals desiring to post their material on the Web.⁸⁷

The Web’s magnitude and the ease with which one can publish on it, however, yields some negative consequences.⁸⁸ For instance, since publication on the Web is easy and inexpensive, unauthorized distribution and reproduction of posted material becomes almost impossible to control or prevent.⁸⁹ This is a major problem for publishers who use the Web as an alternative or even their sole medium of publication, and for copyright owners whose works are published without permission or compensation.⁹⁰

84. *Id.* at 39.

85. *Id.* at 39-40; PERRIT, *supra* note 62, at 12-13. A search engine is a “computer software used to search data (as text or a database) for specified information.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY, available at <http://www.m-w.com/cgi-bin/dictionary> (last visited Mar 21, 2003).

86. THE DIGITAL DILEMMA, *supra* note 62, at 40-41. The most successful example of this factor is Stephen King’s publishing of his book, “Riding the Bullet”, on the Web instead of with publishers. Oscar Musibay, *E-books: A Real LCD Turner*, *HISP.*, Oct 2001, at 58, available at <http://www.hispaniconline.com/magazine/2001/oct/Technology/> (May 6, 2003). On its first day, it sold over 500,000 copies, and paid him disproportionately higher than a traditional publisher. *Id.* Even everyday people, however, who have been unable to convince traditional publishers to publish their works can now, for the small price of \$399 through companies such as 1st Books Library, publish their own works and receive a percent royalty for each copy sold. David Mehegan, *You’ve Got the Book with a Growing New Technology, Anyone Who Writes a Manuscript Can Become a Published Author*, *BOSTON GLOBE*, Jul. 4, 2001, at C1 (discussing the growing trend of authors self-publishing on the Web).

87. THE DIGITAL DILEMMA, *supra* note 62, at 40-42. Politicians and legal commentators alike have recognized the importance of the Web and E-Commerce to the United States economy. U.S. DEP’T OF COMMERCE, SECRETARIAT ON ELECTRONIC COMMERCE, THE EMERGING DIGITAL ECONOMY 1 (1998) (recognizing the impact that the Information Technology and E-Commerce sector has and will have on the U.S. economy and desires to make sure that the U.S.’s laws and regulations ensure that it is a positive impact); Samuelson, *supra* note 17, at 525-26 (discussing the problems with the DMCA’s anti-circumvention regulations, but recognizing the importance of e-commerce).

88. THE DIGITAL DILEMMA, *supra* note 62, at 40-42.

89. *Id.*

90. *Id.*

d. Copyright Owners' Options to Protect Their Works

Although digital technology provides users with benefits and services not available through traditional media, it also makes copyrighted works more susceptible to unauthorized exploitation and mutilation. Accordingly, copyright owners must use Technical Protection Measures ("TPMs")⁹¹ to protect any work published and distributed via the Web or in a digital medium.⁹² Although the TPMs industry is fast evolving and dynamic, four systems consistently play a major role.

i. Encryption

Cryptography, the science of encryption,⁹³ is the most popular and basic form of TPM.⁹⁴ The cryptographic method of protection uses encryption of a work's content so that it cannot be reasonably discernable until decrypted.⁹⁵ Presently, there are two major forms of encryption: symmetric-key encryption and public-key encryption.⁹⁶ Symmetric-key encryption uses a single key, for instance Key A, to both encrypt and decrypt information.⁹⁷ Thus, a copyright owner encrypts his work with Key A and publishes his work on the Web, discernable only to those who are authorized to view the work by purchasing, licensing, or otherwise obtaining Key A from the copyright owner.⁹⁸ A major problem, however, with symmetric-key encryption is that Key A must be sent to authorized users so that they may decrypt it, which leaves open the possibility of interception of the keys.⁹⁹

91. This term refers to any technology that is used to protect copyrighted. I have chosen this term because a measure is a step taken or plan as a means to an end, which is a copyright owner's intention. This technology, however, has been referred throughout academia in many different ways, including Technical Protection Measure, Technical Protection Systems, Copyright Management Systems, and Automated Rights Management. Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management On Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 562 (1998) (using the term Automated Rights Management); Cohen, *supra* note 17, at 161 (using the term Copyright Management Systems); Nimmer, *supra* note 17, at 686 (using the term Technical Protection Measures); Samuelson, *supra* note 17, at 524 (using the term Technical Protection Systems).

92. *Real Networks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *6 (W.D. Wash. Jan. 18, 2000).

93. Encrypt means to scramble and decrypt refers to descrambling. THE DIGITAL DILEMMA, *supra* note 62, at 156.

94. *Id.* at 155.

95. *Id.*

96. *Id.* at 156-58.

97. *Id.* at 156.

98. *Id.*

99. *Id.* at 156-57.

Public-key cryptography uses two separate keys; a public-key and a private-key that together create a unique combination.¹⁰⁰ The public key is used to encrypt the work, but unlike symmetric-key encryption, it cannot decrypt it.¹⁰¹ Its counterpart, the private-key is used solely to decrypt the content.¹⁰² Individuals usually implement this measure by keeping the private-key and publishing the public-key so that anyone can use the public key to encrypt a communication between them, but enabling only the holder of the private key to discern it by decrypting it.¹⁰³ Many intellectual property owners encrypt their information content by combining both forms of cryptography.¹⁰⁴ For instance, a copyrighted work is encrypted using a symmetric-key, and the public-key is then used to send the same symmetric-key encryption to authorized users who already have the private-key.¹⁰⁵

Cryptography, however, is not perfect and requires careful planning and structuring to implement it successfully.¹⁰⁶ Among the different risks are circumvention, interception during distribution, or inadequate planning.¹⁰⁷

ii. Digital Rights Language

Since the inception of computer programs copyright owners have used another basic form of TPM, controlling access.¹⁰⁸ Industries, however, have recently been developing Digital Rights Languages (“DRLs”),¹⁰⁹ which are computer programs coded with all

100. *Id.* at 157.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 157-58.

107. *Id.* at 157-58. Circumvention is the most relevant to this Note. It would entail breaking the encryption keys by using mathematical computations to discern the correct key to decrypt the copyrighted work. *Id.* at 157-58. Interception entails obtaining unauthorized access to the decrypting key either through technological means such as wire tapping or through social engineering, convincing someone that has the key to provide it to them. *Id.* Inadequate planning mainly refers to ensuring that no trace of the copyrighted content or encryption keys are left in a location that is not protected, for instance in a computers RAM or temporary files. *Id.*

108. Controlling access has always been a task of any digital copyright owner through the simple tasks of requiring passwords and making sure that everyone using the works is identified. *Id.* at 158. The Web, however, raised the dichotomy of access/use because, unlike in small environments such as libraries and universities, once published on the Web there is no way to control the use of the work. *Id.*

109. DRLs are also commonly referred to as “rights management languages” (RML) and have been developed and are in the process of further development by

the conditions and rights that are attributable to a specific copyrighted work.¹¹⁰ Depending on the type of work DRLs require different conditions for different uses.¹¹¹ Therefore, a work is published on the Web with the DRL, and a consumer has to inform the program what work it desires and for what use.¹¹² The program then matches the work and use with its specific conditions.¹¹³ Once the consumer satisfies the conditions, it provides a DRL formatted work that allows the consumer to use the work only for the specified and allowed purposes.¹¹⁴

Like all TPMs, however, DRLs are not impenetrable because they require distribution to each individual's computer and output devices.¹¹⁵ Hence, DRLs must also rely on cryptography to protect them from being intercepted and circumvented.¹¹⁶

industries such as Folio, NetRights, Xerox, Wave Systems, Intertrust, IBM, AT&T, and Liquid Audio. *Id.* at 164; Stefik, *supra* note 19, at 140-41 (discussing copyright owner's various options and claims that the protective technological measures will benefit all). Mark Stefik has actually led the development of a computer program that may become the standard in DRLs, called ContentGuard, available at <http://www.parc.xerox.com/istl/members/stefik/> (last visited Mar 21, 2003).

110. All the conditions and rights would include the right to display, print, copy, share, download, and even reuse the work. Stefik, *supra* note 19, at 149-54. The right to reuse the work would, for instance, be when an individual desired to use a certain work, or parts of the work, for a compilation, database, or derivative work; he would notify the program explicitly what he desired to use it for and the program would then provide the portion needed for that specific use. *Id.* Since all the rights are based on specific conditions it would be possible to have a certain price for each specific use. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. THE DIGITAL DILEMMA, *supra* note 62, at 161-64. In most instances, the DRL formatted work must be distributed to a user's computer so that he may use it, which provides other individuals with the ability to exploit it. *Id.* Accordingly, these same industries have been experimenting with different levels of protection that would try to plant the digital work into that particular computer for the use defined. *Id.* These uses include creating programs that would destroy the work upon the attempt to circumvent it or decrypt it without the proper key, or further conditioning it on a particular permanent aspect of a user's computer such as their hard drive's serial number. *Id.* Regardless, however, of what protections are implemented, the works would eventually have to go through an output, either a monitor or audio device, by which individuals could copy the work by either a screen capture utility or an analog to digital converter. *Id.* Although possible, this process is very tedious, burdensome and time consuming, which copyright owners hope will deter potential infringers. *Id.*

116. *Supra* notes 93-107 and accompanying text.

iii. Marking and Monitoring

In many instances, usually involving small closed communities, such as an office or small institution, encryption is not available or is impracticable; therefore, the only way to protect copyrighted works is to deter infringement by providing content of inferior quality and making detection easy.¹¹⁷ One simple TPM used to accomplish this goal is publishing a work that yields an inferior copy when reproduced, while providing the superior copy for a fee.¹¹⁸ Once an individual obtains the superior version, however, without encryption, it becomes very easy for her to reproduce it.¹¹⁹

Accordingly, another marking TPM that copyright owners use is overtly “labeling” a digital work with their copyright management information¹²⁰ and listing what uses are allowed.¹²¹ Although this TPM furthers cooperative transactions between individuals because users are notified of what they are entitled to and whom to contact for further rights, it only works for honest individuals because the label can be easily removed.¹²²

Finally, the last marking TPM is “watermarking,” a digital signal that is used “as a social warning, to carry information, and to leave digital fingerprints for detecting and tracing unauthorized copying.”¹²³ It differs from labeling in that although it can be implemented at different levels, it is not easily visible.¹²⁴ Watermarking

117. THE DIGITAL DILEMMA, *supra* note 62, at 164-65.

118. *Id.*

119. See *supra* notes 65-76 and accompanying text (discussing digital information’s susceptibility to piracy and exploitation).

120. Copyright management information refers to information regarding the copyrighted works including the title, the owner, the author, and any other pertinent information. 17 U.S.C § 1202(c) (2001).

121. THE DIGITAL DILEMMA, *supra* note 62, at 165.

122. This notion assumes that individuals that intend to use raw materials they obtain from the web or otherwise desire to provide credit and payment where it is due. Since, however, the label can easily be removed by editing programs such as paintbrush or adobe photoshop most individuals will remove the label and make use of it. *Id.*

123. Stefik, *supra* note 19, at 142-44. Water marking is a tool that has been used for centuries in a primitive form. THE DIGITAL DILEMMA, *supra* note 62, at 165 n.16. For instance, mapmakers would insert fictitious streets and roads in order to detect unauthorized copying. *Id.* Another example is the insertion of fictitious numbers in phone directories. Feist Publ’ns., Inc. V. Rural Tel. Serv. Co., 499 U.S. 340, 344 (1991).

124. THE DIGITAL DILEMMA, *supra* note 62, at 166-67, 296-97. Water marking can be done in various ways either throughout the work or only on certain portions. *Id.* It can be “fragile” easily distorted by alterations or “robust,” which survives distortions and major revisions. *Id.* The process can be done by either inserting extra text or small dots that alone mean nothing, but together provide a discernable mark. *Id.*

is predominantly used to detect works that authors have published or others altered without authorization.¹²⁵

Industries that implement watermarking as a TPM must also monitor the Web and other media for their works.¹²⁶ The most effective tool for this task is a "web crawler," a program that scours throughout the entire Web looking for watermarks.¹²⁷ These programs are very thorough because they are able to search through a website's entire content.¹²⁸ Web crawlers, however, have certain limitations; most significantly, they cannot penetrate firewalls,¹²⁹ emails and their attachments, or other media besides the Web.¹³⁰

iv. Trusted Systems

One ambitious, but not yet prevalent TPM is Trusted Systems.¹³¹ These TPMs are computer systems designed from beginning-to-end for the sole purpose of information protection.¹³² Trusted systems require the implementation of all the TPMs previously discussed, as well as several others.¹³³ One ambitious view of the use of Trusted Systems is that of Professor Mark Stefik.¹³⁴ Stefik envi-

125. *Id.*; Stefik, *supra* note 19, at 142-44.

126. Digital technology has already and may further change the norms of usage of copyrighted material because of the use of software and hardware that can effectively monitor and control use. Madison, *supra* note 73, at 1073.

127. The most developed versions of these programs are Digimarc, a commercial water marking and tracking system, found at <http://www.digimarc.com>. THE DIGITAL DILEMMA, *supra* note 62, at 167 n.18. Stanford University's Digital Library Project, which can be found at <http://www.diglib.stanford.edu/diglib/pub> also has developed a system that searches for excerpts of their text and audio files. *Id.*

128. THE DIGITAL DILEMMA, *supra* note 62, at 166-67, 296-97.

129. A firewall is a "computer or computer software that prevents unauthorized access to private data (as on a company's local area network or intranet) by outside computer users (as of the Internet)." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, available at <http://www.m-w.com/cgi-bin/dictionary> (last visited Mar. 21, 2003).

130. John R. Therien, *Comment: Exorcising the Specter of a "Pay-Per-Use" Society: Toward Preserving Fair Use and the Public Domain in the Digital Age*, 16 BERKELEY TECH. L.J. 979, 987-88, 988 n.39 (2001) (asserting that the DMCA's anti-circumvention provisions are unconstitutional because they violate the First Amendment).

131. THE DIGITAL DILEMMA, *supra* note 62, at 167.

132. *Id.* Trusted systems are information infrastructures whose entire structure, including the computer processor, bios, hardware, and software, are designed to implement information protection. *Id.*

133. *Supra* notes 93-130 and accompanying text. In addition to TPMs, trusted systems would require trusted programs that can implement the same rationale as DRLs for things such as printing, billing, and transferring. Stefik, *supra* note 19, at 141-54.

134. See Stefik, *supra* note 19, at 139-44. (describing in detail a trusted system in practice). Mark Stefik is a research fellow at the Xerox Palo Alto Research Center, manager of the Human-Document Interaction Area in the Information Sciences and Technology Laboratory, and an adjunct member of the Secure Document Systems Area in the Computer Science Laboratory. *Id.* at 137 n.2.

sions an entirely digital Trusted World, where information is distributed via these systems.¹³⁵ Under this vision, each computer would have a personal private-key and all public-keys would be published so that anything sent to that computer would be encrypted.¹³⁶ This World would also rely heavily on DRLs to ensure that individuals receive what they want while content owners are compensated for the use of their copyrighted works.¹³⁷ Stefik's World encompasses all aspects of the traditional analog world into a trusted system, including transfer, lending, printing, and copying rights.¹³⁸ Although Stefik's Trusted World is ideal because it provides extremely adequate efficiency, access, and convenience to users, while simultaneously ensuring that copyright owners are compensated, it fails to explain how, in practice, such a world could be implemented.¹³⁹

Although copyright owners have a variety of TPMs at their disposal to help them protect their works, none are fool proof, but rather, temporary fixes.¹⁴⁰ Hackers will eventually circumvent any technology that is implemented.¹⁴¹ This creates a tremendous problem for all industries within the NII, because circumvention of their TPMs usually correlates with loss of money.¹⁴² Consequently,

135. *Id.* at 139-41.

136. *Id.* at 139.

137. *Id.* at 140-41, 144-53.

138. *Id.* According to Stefik's vision, individuals would be able to make use of digital works in the same way that we have been accustomed to using books and other tangible intellectual property. *Id.* at 145-46. For instance, the purchase of an e-book would have programmed into its DRL the ability to be lent out a certain amount of times. *Id.* at 147-49. Therefore, if user A desires to lend it out he would do so by simply sending it to user B via B's public-key. *Id.*; see also THE DIGITAL DILEMMA, *supra* note 62, at 167-78. As soon as it is loaned out, however, A would not be able to use the e-book until it had been returned. Stefik, *supra* note 19, at 147-49; see also THE DIGITAL DILEMMA, *supra* note 62, at 167-78. In addition, if A wants the e-book back he would just choose that option and he would be able to use it, while B could no longer. Stefik, *supra* note 19, at 147-49; see also THE DIGITAL DILEMMA, *supra* note 62, at 167-78.

139. THE DIGITAL DILEMMA, *supra* note 62, at 167-71.

140. *Id.* at 157-58, 161-64; Therien, *supra* note 130, at 987-88.

141. See, e.g., Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435-36 (2001) (holding that the publishing of sites where DeCSS the circumvention program to decrypt encrypted DVD's was not fair use).

142. See Indrajit Basu, *448-bit Encryption: Key Walls Of Security*, COMPUTERS TODAY, Feb. 15, 2000, at 78; Kate Henry, *Technology Rules at Truliant Federal Credit Union*, ACCESS CONTROL & SECURITY SYS. INTEGRATION, Apr. 2000; James Mackintosh, *National News: Barclays' gremlins raise big questions about online trust: Teething troubles at internet banks could have wider repercussions*, writes James Mackintosh, FIN. TIMES (LONDON), Aug. 2, 2000, at 2; Phil Hunter, *Passwords to Protection*, COMPUTER WKLY., Jun. 11, 1998, at 36; Malcolm Rosario, *E-security a Must to Prevent*

although copyright owners may have the technology to prevent the exploitation and unauthorized use of their works, unless hackers are deterred and discouraged from circumventing TPMs, copyright law will be weak and futile.

3. ProCD, Inc. v. Zeidenberg and Its Progeny

a. ProCD v. Zeidenberg

In conducting an analysis of the DMCA and its protection of TPMs it is also important to consider contractual licensing. Contractual licensing is a non-technological protective measure that copyright owners used before TPMs and the DMCA and continue to use either alone or in combination with TPMs.¹⁴³ The importance of contractual licensing to this Note is primarily directed towards the emergence of “shrink-wrap” contracts, its effect on fair use and the copyright balance, and its scope outside the boundaries of copyright law.

Although digitalization affects all forms of information and intellectual property, it had an extremely significant affect on computer programs. Prior to the Copyright Act of 1976, copyright law did not explicitly protect computer programs,¹⁴⁴ leaving copyright owners uncertain and fearful of distribution.¹⁴⁵ The emergence of digitalization characterized by greater ease of reproduction, access, and free riding exacerbated copyright owners’ fears.¹⁴⁶ Accordingly, copyright owners turned to contracts to enforce their access and use restrictions.¹⁴⁷ Even though the Copyright Act of 1976 currently protects computer programs, copyright owners continue to use these measures extensively, no longer limiting it to computer programs.¹⁴⁸

Copyright owners initially used *shrink wrap* contracts, the same type of standard form contract used in *ProCD, Inc. v. Zeidenberg*.¹⁴⁹ These contracts received their peculiar name be-

Undetected Cyber Attacks, NEW STRAITS TIMES PRESS & BERHAD BUS. TIMES, JUN. 22, 2001, at 5.

143. Madison, *supra* note 73, at 1036-44.

144. Apple Computer Inc. v. Franklin Computer Corp. 714 F.2d 1240, 1249 (3d Cir. 1984) (holding computer programs that satisfied the originality/creativity requirement copyrightable).

145. Madison, *supra* note 73, at 1036-44. Copyright owner’s main fears revolved around the “first sale doctrine” because they were not sure how it would be applied with their programs. *Id.*

146. *Id.* at 1036-37.

147. *Id.* at 1038-39.

148. *Id.* at 1043-45.

149. 908 F. Supp. 640, 644-45 (W.D. Wis.), *rev’d*, 86 F.3d 1447 (7th Cir. 1996).

cause they were usually found inside shrinkwrap sealed software boxes, which if torn, constituted acceptance of its contractual terms.¹⁵⁰ In *ProCD, Inc.*, ProCD created an uncopyrighted telephone number database, and placed it on a CD-ROM with its copyrighted computer program, Selectphone that allowed users to search and retrieve the factual data.¹⁵¹ ProCD sold its program and the database in a typical shrink-wrapped box that contained a notice on the outside that the use of the program was subject to a license that could be found inside the box.¹⁵² Inside the box was a printed "license agreement" that explicitly listed several restrictions and limitations.¹⁵³ In addition, Selectphone contained a pop-up screen with a "clickwrap agreement," notifying the user that use of the program was conditioned on acceptance of the terms of the license agreement, which must be accepted by clicking on the "I Agree" button.¹⁵⁴ Defendant Zeidenberg purchased the program, downloaded the database to a network server, and made it commercially available to the public via the Web.¹⁵⁵ ProCD sued for copyright infringement, breach of the license agreement, and unfair competition.¹⁵⁶

The district court granted summary judgment to Zeidenberg on the copyright infringement claim, because his use was governed by Section 117 of the Copyright Act.¹⁵⁷ The court, however, held that although ProCD's CD-ROMS were uncopyrightable because they lacked originality and creativity, they still fell within the "subject matter of copyright."¹⁵⁸

150. *Id.* at 650.

151. *Id.* at 644.

152. *Id.* at 651.

153. *Id.* at 644-45. The restrictions and limitations included a limited use of the database and program to "individual or personal use," and a prohibition against copying the database listings to another computer or a networked computer giving the user the option of using the product and accepting the license or returning the program for a refund. *Id.*

154. *Id.* at 644-45; Madison, *supra* note 73, at 1050.

155. *ProCD, Inc.*, 908 F. Supp. at 645.

156. *Id.* at 644.

157. *Id.* at 649-50. The district court granted summary judgment in Zeidenberg's favor because 17 U.S.C. § 117 allows the copying of computer programs without liability if they are for archival purpose and are then destroyed or if it is necessary "as an essential step in utilization of the computer program in conjunction with a machine" states, which it held Zeidenberg satisfied. *Id.* at 648 (citing 17 U.S.C. § 117 (2003)).

158. *Id.* at 656-57. Copyright subject matter under the Federal Copyright Act is broad. Section 102(a) lists eight categories as the "works of authorship" within subject matter of copyright. § 102(a). These categories, however, are intended to be illustrative only, and flexible as to what can be copyrighted. See *Apple Computer Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1247 (3d Cir. 1984) (finding computer

On appeal to the Seventh Circuit, Judge Easterbrook reversed and remanded the district court's ruling and instructed the court to enter judgment for ProCD.¹⁵⁹ Judge Easterbrook based his holding on the fact that Zeidenberg was given notice of the "license agreement" before he bought it, when he opened the box and read the "license agreement," and before he used the program during the pop up screen.¹⁶⁰ Hence, in accordance with Uniform Commercial Code ("UCC") section 2-204(1),¹⁶¹ because Zeidenberg used the program instead of returning it for a refund, he accepted the license agreement through his conduct.¹⁶² Judge Easterbrook also dismissed the district court's preemption analysis and held that, in accordance with Section 301 of the Copyright Act,¹⁶³ there is a clear distinction between contract and copyright law because a contractual agreement is enforceable independent of any copyright issues as long as there is a valid agreement.¹⁶⁴

Judge Easterbrook's decision holding ProCD's "shrinkwrap" contract enforceable provided copyright owners with a strong tool

programs copyrightable as literary works). Therefore, many copyrighted works usually overlap one or more of these categories. Conversely, besides intangible works the Copyright Act has two additional major exclusions. The first is "any work of the United States Government," but it has the right to protect any works assigned to it. § 105. The second and most important exclusion revolves around the Idea/Expression Dichotomy. *Baker v. Selden*, 101 U.S. 99, 102-05 (1879) (distinguishing between idea and expression in determining copyrightability). Copyright protection is provided to expressions of ideas only and not to the ideas themselves. *See id.* (distinguishing between the idea of accounting tables and the actual expression in a form). Thus, the Copyright Act excludes anything that is not an expression. § 102(b).

159. *ProCD, Inc v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

160. *Id.* at 1452-53.

161. UCC Section 2-204(1), states that a vendor may invite acceptance in any way they desire and the buyer will then accept in the manner prescribed by the seller. UCC § 2-204 (1) (2000).

162. *ProCD Inc.*, 86 F.3d. at 1452.

163. 17 U.S.C. § 301(a) (2003) states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

§ 301.

164. *ProCD, Inc.*, 86 F.3d at 1453-54. The main justification for this analysis is that a contractual agreement between two individuals is not equivalent to a right provided under copyright law, because in the former there is an added element, assent and agreement. *See id.* at 1454 (distinguishing between a stranger who finds Selectophone and uses it with someone who agrees to use it).

to protect and regulate the use of their works. Accordingly, “shrinkwrap” contracts evolved into “clickwrap”¹⁶⁵ and “browser-wrap”¹⁶⁶ contracts, which are presently part of all computer software, hardware, and the Web. These contracts are usually in the form of “End User Agreements” that list the specific uses that are allowed, and other legal matters, such as forum selection and choice of law clauses.¹⁶⁷ In addition, they breathe life and strength into certain TPMs such as trusted systems.¹⁶⁸

b. *UCC-2B/UCITA*

The debate regarding enforceability of these electronic contracts and the implications they have on copyright is demonstrated by the courts’ inconsistent decisions regarding their validity.¹⁶⁹ Even though their validity is questionable, licensing agreements embodied in “shrink-wrap,” “click-wrap,” or “browser-wrap” contracts were becoming widespread and significant to both copyright industries and users.¹⁷⁰ Accordingly, the National Conference of Commissioners on Uniform State Laws and the American Law Institute (“ALI”) initiated a project to draft Article 2B of the Uniform Commercial Code to create a uniform set of laws covering software contracts and licenses of information.¹⁷¹ Although it initially began

165. “Clickwrap” agreements derive from the notion that a user acknowledges assent to the terms of the “user end agreement” by clicking with the mouse on a link usually labeled, “I agree.” Megan E. Gray & Brian A. Ross, *Contracts Drafting Stronger Clickwrap Agreements*, THE INTERNET NEWSL. INCLUDING LEGAL ONLINE, Sept. 2001, at 1.

166. “Browserwrap” agreements are usually found on the Web and state that the “site’s users implicitly consent to the terms of the agreement when they use the site;” thus, assent is accomplished by browsing through the site. *Id.* Some commentators refer to these as “web-wrap” or “net-wrap” notices and contracts. Madison, *supra* note 73, at 1061.

167. Madison, *supra* note 73, at 1058.

168. *Supra* note 131-39 and accompanying text.

169. *E.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150-51 (7th Cir. 1997) (holding that an arbitration clause that was included with various instructions and manuals provided when purchasing a computer was valid and enforceable when the consumer used the computer); *ProCD, Inc.*, 86 F.3d at 1453-55; *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 570-75 (Sup. Ct. 1998) (holding that a seller’s arbitration clause is valid and enforceable because the consumer kept the product past the given period allotted to return it); *but see* Step-Saver Data Sys. Inc. v. Wyse Technology and Software Link Inc., 939 F.2d 91, 105-06 (3d Cir. 1991) (holding that a license agreement disclaiming all warranties was not valid because the use of the product was not conditioned on acceptance and because the license was provided after the purchase).

170. *See* Madison, *supra* note 73, at 1059-76 (describing the expansion of shrink-wrap contracts).

171. The NCCUSL and ALI initiated this project after a recommendation from an American Bar Association Subcommittee “concluded that there was a compelling

as a project to amend Article 2, in 1995, after intense controversy and debate, the focus of project was changed to the creation of a new independent UCC article.¹⁷² In 1998, however, the NCCUSL decided to remove the new article from the UCC and to draft an independent uniform act.¹⁷³ On July 29, 1999, the NCCUSL adopted the Uniform Computer Information Transactions Act ("UCITA") as a uniform set of laws to govern software contract and licensing of information.¹⁷⁴

UCITA is primarily based upon two principles. First, it postulates that a transaction involving digital information does not involve a sale of goods, but rather "a license of computer information;" and second, that a "commercial law should support [contractual] freedom and interpretation of the [terms] in light of the practical commercial context."¹⁷⁵ UCITA's scope is specific; it covers computer information transactions, defined as "an agreement . . . to create, modify, transfer, or license computer information or informational rights in computer information."¹⁷⁶ Moreover, they define computer information as "information in electronic form which is obtained from or through the use of a computer, or which is in a form capable of being processed by a computer."¹⁷⁷

When considering that the NCCUSL drafted UCITA because of their desire to validate "shrinkwrap" contracts, it is not surprising that the determination of how it would regulate these contracts sparked much controversy and debate within the Drafting Committee.¹⁷⁸ Eventually, the committee decided on a "heightened un-

need for clarity and certainty in licensing transactions of computer information," and because they believed that these transactions did not qualify as goods to be governed by Article 2 of the UCC. Mary Jo Howard Dively & Carlyle C. Ring, Jr, OVERVIEW OF UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT, NAT'L CONF. OF COMMISSIONERS ON UNIFORM ST. L. §I(E) (1999), available at <http://www.ucitaonline.com/docs/ring.pdf> (last visited May 12, 2003).

172. *Id.*

173. *Id.*

174. *Id.* at § I(A).

175. *Id.* at § II.

176. Unif. Computer Info. Transaction Act § 102(11) (Final Act Aug. 2002). This covers support agreements, but does not apply merely because the contract is in digital form. *Id.*

177. *Id.* at § 102(10). UCITA applies to contracts made to license or buy software, create computer programs, for on-line access to databases, and contracts to distribute information over the internet. *Id.* at § 103(a) (providing the scope of the Act as computer information transactions).

178. Dively & Ring, *supra* note 171, at § IV(B)(2).

Some participants in the process urged that they be banned outright, others felt that UCITA should contain a list of terms which would impermissible

conscionability standard”¹⁷⁹ as a public policy standard.¹⁸⁰ It provides that if a contract term “violates a fundamental public policy [courts] may” exercise other options besides enforcing the contract.¹⁸¹ These options include, refusing to enforce the contract entirely, enforcing only the permissible terms, or “[limiting] the application of the impermissible term so as to avoid a result contrary to public policy.”¹⁸² In addition, the NCCUSL provides several guidelines to help courts determine when the public policy standard is triggered.¹⁸³ Foremost, it asserts that courts should adhere to public policies enumerated by their legislatures and be reluctant to override contractual terms when there is no legislative pronouncement, or where the parties have negotiated terms.¹⁸⁴ Furthermore, when considering a public policy claim, UCITA explicitly lists a variety of factors that courts should consider.¹⁸⁵ Finally, it asserts that the “offsetting public policies most likely to apply to transactions within this Act are those relating to innovation,¹⁸⁶ competition,¹⁸⁷ fair comment,¹⁸⁸ and fair use.”¹⁸⁹

(such as, for example, terms prohibiting reverse engineering, terms prohibiting certain kinds of comment about the software, etc.). Still others favored complete freedom of contract and asked that the enforceability of shrink-wrap contracts be subject to no greater restrictions than currently exist for other negotiated contracts.

Id.

179. *Id.*

180. Unif. Computer Info. Transaction Act § 105(b) (Final Act Aug. 2002).

181. *Id.*

182. *Id.*

183. *Id.* at cmt. § 3.

184. *Id.*

185. NCCUSL recommends that courts consider the following factors in entertaining public policy claims:

- [1.] The] extent to which enforcement or invalidation of the term will adversely affect the interests of each party to the transaction or the public,
- [2.] the interest in protecting expectations arising from the contract,”
- [3.] the purpose of the challenged term,
- [4.] the extent to which enforcement or invalidation will adversely affect other fundamental public interests,
- [5.] the strength and consistency of judicial decisions applying similar policies in similar contexts,
- [6.] the nature of any express legislative or regulatory policies, and
- [7.] the values of certainty of enforcement and uniformity in interpreting contractual provisions.

Id.

186. *Id.* “Innovation policy recognizes the need for a balance between protecting property interests in information to encourage its creation and the importance of a rich public domain upon which most innovation ultimately depends.” *Id.*

187. “Competition policy prevents unreasonable restraints on publicly available information in order to protect competition.” *Id.*

Under UCITA, a contract is formed using similar guidelines as those considered by Judge Easterbrook in *ProCD, Inc. v. Zeidenberg*.¹⁹⁰ Assent is satisfied either by intentional manifestation of acceptance or implied by the user's conduct, including use of the information.¹⁹¹ UCITA requires that all copyright owners provide users with an opportunity to review the entire license terms before they can be deemed to have assented by conduct.¹⁹² Additionally, if the copyright owner provides all the license terms only after payment, UCITA will not consider the payment and use assent by conduct.¹⁹³ Rather, under those circumstances UCITA will acknowledge assent by conduct only if the copyright owner provides the user with a right to refund if the user disagrees with the terms.¹⁹⁴ UCITA also includes a special disclosure provision for transactions made on the Web or "similar electronic site."¹⁹⁵ This provision requires disclosure of the entire license terms before payment or delivery by conspicuously displaying their location, by providing a copy of the terms, and by providing users with the ability to print or save these terms.¹⁹⁶

Under UCITA, the general rule related to contract terms is that if the parties assented to the contract, the "terms of a record including a standard form" prevail.¹⁹⁷ It also provides that a contract's terms are interpreted "without regard to the party's knowledge or understanding of individual terms in the record."¹⁹⁸ UCITA, however, provides additional provisions for mass-market

188. "Rights of free expression may include the right of persons to comment, whether positively or negatively, on the character or quality of information in the marketplace." *Id.*

189: *Id.*

Free expression and the public interest in supporting public domain use of published information also underlie fair use as a restraint on information property rights. Fair use doctrine is established by Congress in the Copyright Act. Its application and the policy of fair use is one for consideration and determination there. However, to the extent that Congress has established policies on fair use, those can taken into consideration under this section.

Id.

190. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449-55 (7th Cir. 1996).

191. Unif. Computer Info. Transaction Act § 112(a)(1)-(2) (Final Act Aug. 2002).

192. *Id.* § 112(a)-(b).

193. *Id.* § 112(c); cmt. 2(c).

194. *Id.*

195. *Id.* § 114.

196. *Id.*

197. *Id.* § 208(1).

198. *Id.* § 208(3).

licenses.¹⁹⁹ Its main provisions are that it will not enforce any unconscionable terms or those violating public policy.²⁰⁰ It also provides users with a refund of the price paid, reimbursement, and compensation for certain damages if a copyright owner does not provide full disclosure of the terms before demanding payment or tendering delivery.²⁰¹ Finally, UCITA provides special provisions for contracts formed by implied assent: it provides courts with a list of factors to help determine the contract terms.²⁰²

UCITA provides copyright owners with the right of self-help in retrieving possession of their copyrighted works and preventing their unauthorized use on the condition that it is exercised without a “breach of the peace”²⁰³ and subject to certain limitations if taken without judicial process.²⁰⁴ The only real limitation is that electronic self-help is prohibited.²⁰⁵ Consequently, although copyright owners may use many protective measures to protect their content, these measures are limited. Due to the fact that unauthorized exploitation of copyrighted works is detrimental to copyright owners, the economy, and the public, in 1998, Congress enacted the DMCA to address this problem.

4. *Enactment of the DMCA*

At the beginning of the Clinton Administration,²⁰⁶ former President William Jefferson Clinton announced an initiative promoting a National Information Infrastructure, and established the National Information Infrastructure Task Force’s Working Group on

199. *Id.* § 209.

200. *Id.* § 209(a)(1).

201. *Id.* § 209(b).

202. *Id.* § 210(a).

The terms of the contract are determined by consideration of the terms and conditions to which the parties expressly agreed, course of performance, course of dealing, usage of trade, the nature of the parties’ conduct, the records exchanged, the information or informational rights involved, and all other relevant circumstances. If a court cannot determine the terms of the contract from the foregoing factors, the supplementary principles of this [Act] apply.

Id.

203. *Id.* § 815(a)-(b).

204. *Id.* § 815(b).

205. *Id.* § 816. This is a change from the August 2001 draft where there were various substantive limitations, such as that it will not be exercised in mass-market transactions, it will be assented to, and it will not result in “substantial injury or harm to the public health or safety or *grave* harm to the public interest substantially affecting third persons not involved in the dispute.” *Id.* § 816(b), (c), (f) (emphasis added) (August 2001 Draft).

206. Former President William Jefferson Clinton was president from 1992 to 2000.

Intellectual Property.²⁰⁷ In September 1995, this task force released its report, "Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights" ("The White Papers").²⁰⁸ The White Papers recognized that digitalization and its new technology significantly impacted copyrighted works, including the economic consequences to authors and the industry in general.²⁰⁹ In addition, it proposed several recommendations, including adding section 1201 to the Copyright Act, which were later introduced in Congress as the National Information Infrastructure Copyright Protection Act ("NIICPA").²¹⁰ Due to prolonged controversy and debate, however, Congress never passed the bill.²¹¹

In December 1996, one hundred and sixty countries participated in the World Intellectual Property Organization summit convened to amend the Berne Convention so that it would recognize copyrights in digital works.²¹² The United States actively participated in WIPO by proposing its NIICPA's resolutions.²¹³ WIPO participants eventually signed and ratified two treaties, the WIPO Copy-

207. PERRIT, *supra* note 62, § 103[F].

208. See generally INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter THE WHITE PAPERS].

209. *Id.* at 7-11.

210. Cohen, *supra* note 17, at 164. The proposed § 1201 titled, "Circumvention of copyright protection systems;" contained the following provision,

No person shall import, manufacture, or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism, or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under section 106.

THE WHITE PAPERS, *supra* note 208, Appendix 1, at 6.

In addition, The White Papers also proposed to amend Section 106 of the Copyright Act to recognize digital transmission as a form of public distribution. JOYCE ET AL., *supra* note 1, at 496.

211. Cohen, *supra* note 17, at 164.

212. PERRIT, *supra* note 62, at 653-54.

213. Cohen, *supra* note 17, at 166-67 n.17. Jukka Liedes, Chairman of the Committees of Experts, proposed the following provisions:

Article 13: Obligations Concerning Technological Measures

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

right Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”), which partially adopted the NICPA’s resolutions.²¹⁴ The WCT recognizes “the right of communicating a work to the public by wire or wireless means” and “the right of protection against ‘infringing devices’ that have the purposes of decoding copyrighted information on computer networks.”²¹⁵ Many individuals have recognized this treaty as the cornerstone of the advancement of digital technology and e-commerce industries.²¹⁶

In 1998, Congress enacted the DMCA, the most significant revision to the copyright law since the Copyright Act of 1976.²¹⁷ The DMCA is composed of five titles,²¹⁸ the most significant is Title I, entitled WIPO Treaties Implementation.²¹⁹ This discussion mainly

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, “protection-defeating device” means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

Id.

214. PERRIT, *supra* note 62, at 653. Although, the one hundred and sixty countries participating initialed the final draft, the treaties are not binding until they are actually ratified by each country. *Id.* The United States has ratified both treaties. *Id.*

215. *Id.* at 653-54. The general norms that the WCT established in regards to applying copyright law to digital works are as follows:

- 1) [Copyright] owners should have an exclusive right to control the making of copies of their works in digital form;
- 2) [Copyright] owners should have an exclusive right to control the communication of their works to the public;
- 3) [Countries] can continue to apply existing exceptions and limitations, such as fair use, as appropriate in the digital environment, and can even create new exceptions and limitations appropriate to the digital environment;
- 4) [Merely] providing facilities for the communication of works should not be a basis for infringement liability;
- 5) [It] should be illegal to tamper with copyright management information insofar as this would facilitate or conceal infringement in the digital environment; and
- 6) [Countries] should have “adequate legal protection and effective legal remedies against the circumvention of effective technological measures” used by copyright owners to protect their works from infringing uses.

Samuelson, *supra* note 17, at 528-29.

216. Samuelson, *supra* note 17, at 528-34.

217. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

218. The five titles are: Title I—Wipo Treaties Implementation, Title II—Online Copyright Infringement Liability Limitation, Title III—Computer Maintenance or Repair Copyright Exemption, Title IV—Miscellaneous Provisions, Title V—Protection of Certain Original Designs. *Id.*

219. *Id.* §§ 2, 2860.

emphasizes § 1201, “Circumvention of copyright protection systems.”²²⁰ Before discussing the controversy and debate surrounding § 1201, it is important to first understand its three main provisions, the “basic provision”, the “ban on trafficking” provision, and “additional violations” provisions.²²¹

a. Basic Provision

The “basic provision” is § 1201’s core element.²²² Generally, § 1201 subjects an individual to civil and criminal penalties for the circumvention of a copyright owners’ TPM.²²³ It provides that, subject to certain enumerated exceptions, “[no] person shall circumvent a technological measure that effectively controls access to a work protected under this title.”²²⁴ A technological measure as stated is any of the many TPMs that copyright owners can implement to protect their works, such as encryption, passwords, or trusted systems.²²⁵ Therefore, it defines circumventing a technological measure as, “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.”²²⁶

At first glance the words, “effectively controls access to a work”, lead to a circular argument and, if taken literally, render the basic provision futile.²²⁷ If § 1201 were taken literally, then an individual’s act of circumvention would relieve him of liability because his ability to circumvent the TPM would indicate its ineffectiveness. Congress, however, avoided this problem by delineating a measure as effective if, “in the ordinary course of its operation, [it] requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to

220. *Id.* §§ 103, 2863-873.

221. 17 U.S.C. § 1201 (2001).

222. *Id.* § 1201(a)(1)(A).

223. *Id.*

224. *Id.*

225. *Supra* note 93-141 and accompanying text. *But see* Real Networks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 Dist. Lexis 1889, at *27-30 (W.D. Wash. Jan. 18, 2000) (rejecting for preliminary injunction purposes that RealNetworks proprietary media format in of itself constituted an effective technological measure, thus a format converter was not considered an anti-trafficking tool). The court refused to find that proprietary formats were a TPM because finding them as indistinguishable would thwart the purposes of the Copyright Act and DMCA by discouraging the creation of format converters and the dissemination of information. DRATLER, JR., *supra* note 56, at 2-16 to 17.

226. § 1201(a)(3)(A).

227. *Id.* § 1201(a)(1)(A)

the work.”²²⁸ In other words, a TPM is considered “effective” when the copyright owner places a barrier that prevents access, which, unless authorized by her, would require some action to gain access.²²⁹ This is consistent with Congress’ intention to “establish a general prohibition against granting unauthorized access” since Congress described circumventing a TPM as “the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”²³⁰ Therefore, contrary to a copyright infringement claim where the copyright owner’s exclusive rights are violated,²³¹ a violation under § 1201 merely requires obtaining unauthorized access, whether or not the individual intends to infringe the copyright owner’s exclusive rights or her use is authorized.²³²

b. Ban on Trafficking

Section 1201’s second provision, the “ban on trafficking,” was enacted by Congress to supplement the basic provision.²³³ Congress deemed it necessary to prevent circumvention by analogy to other circumvention prohibitions they had previously enacted.²³⁴ This section provides that, “[no] person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that [is] primarily designed or produced for the purpose of circumventing a

228. *Id.* § 1201(a)(3)(B).

229. DRATLER, JR., *supra* note 56, at 2-17 to 18; *see also Real Networks, Inc.*, 2000 U.S. Dist. LEXIS 1889, at *23-24 (denouncing defendant’s claim that Real Networks TPM was not effective because they were able to circumvent it). Congress, however, did not intend this prohibition to extend to circumvention in order to correct a distorted or substandard quality product caused by the TPM. H.R. REP. NO. 105-551, pt.2, at 40 (1998).

230. H.R. REP. NO. 105-551, pt.1, at 17.

231. Section 106 of the Copyright Act specifically enumerates a copyright owner’s exclusive rights, which is complete, exhaustive, and prohibits any other rights from being inferred. § 106. For purposes of this discussion, only the first three of these rights, the right to reproduction, prepare derivative works, and distribute are relevant. *Id.*

232. DRATLER, JR., *supra* note 56, at 2-21. A § 1201(a)(1)(A) violation is independent of any other violations including copyright infringement and the anti-trafficking prohibition. *Id.*

233. § 1201(a)(2).

234. Congress believed that in order for the “basic provision” to be effective it was necessary to develop a prohibition on the development of technologies primarily intended to circumvent TPMs. H.R. REP. NO. 105-551, pt.2, at 38 n.2 (1998) (analogizing circumvention of TPMs to cable and satellite decoders); H.R. REP. NO. 105-551, pt.1, at 18 (targeting black box technology); S. REP. NO. 105-190, at 11, 28 (1998). Congress analogized this provision to 17 U.S.C. § 605(e)(4), which prohibits the creation of “black boxes” that allow individuals to receive unauthorized cable service. H.R. REP. NO. 105-551, pt.1, at 18.

technological measure that effectively controls access to a work protected under this title.”²³⁵ Although this provision may appear broad and all encompassing, Congress intended to specifically target “black boxes” that are “expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work.”²³⁶

Black boxes are technological devices *intentionally* created to illegally gain access or use to restricted materials.²³⁷ Black box technology was common as far back as the seventies when the infamous John Draper, also known as Captain Crunch, pioneered the art of “phone freaking.”²³⁸ Draper circumvented telephone companies’ computer systems by emitting a 2600-Hertz frequency whistle with a plastic whistle he found in a Captain Crunch cereal box.²³⁹ Subsequent phone freakers created a technological device that could emit several frequencies into a phone line marking the emergence of black box technology. Black box technology, however, is more common in the cable and satellite industries where decoders and H-Card programmers enable individuals to access all channels without having to pay.²⁴⁰

Congress repeatedly emphasized that the ban on trafficking be directed towards black boxes because they wanted to “ensure that legitimate multipurpose devices [would] continue to be made and sold . . . [and that while protecting copyright owner’s rights it would] simultaneously allow the development of technology.”²⁴¹ For that reason, Congress provided three conditions to distinguish

235. § 1201(a)(2)A [emphasis added].

236. H.R. REP. NO. 105-551, pt.2, at 38. Congressman Bliley from the Committee on Commerce stated that “it is very important to emphasize that Section [1201(a)(2)] is aimed fundamentally at outlawing so-called ‘black boxes.’” *Id.*; see also H.R. REP. NO. 105-551, pt.1, at 18 (discussing the DMCA’s purpose and Congress’ intention).

237. *Real Networks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *11-12 (W.D. Wash. Jan. 18, 2000) (asserting that the “Streambox VCR acts like a ‘black box’ which descrambles cable or satellite broadcasts so that viewers can watch pay programming for free.”)

238. Phone Freaking means hacking into computerized phone lines in order to make unlimited free phone calls.

239. Jim Krane, *Plugged In; Who’s Using Your Cell Phone?; It could become vulnerable to hackers*, NEWSDAY, Mar. 19, 2002, at D09.

240. *Real Networks, Inc.*, U.S. Dist LEXIS, at *11-12; Armond D. Budish, *Cable Decoders are not Legal*, COLUMBUS DISPATCH, July 24, 1999, at 2D; Patricia Hurtadozz, *Cable-TV Decoder Boxes Seized; A ‘major seller’ arrested in bust*, NEWSDAY, Dec. 10, 1988, at 3. These devices can easily be obtained over the internet; *supra* note 234. See, e.g., <http://www.cabledescramblerquality.com/>; <http://www.descramblerman.com/>; <http://www.testcardworld.com/>; <http://www.huworld.com/> (last visited Mar. 21, 2003).

241. H.R. REP. NO. 105-551, pt.1, at 18.

black box technology from other technologies.²⁴² To satisfy these conditions, the black box technology has to be “primarily designed or produced”²⁴³ for circumventing TPMs, it must be a tool that “has only limited commercially significant purpose or use other than”²⁴⁴ circumventing a TPM, or be “marketed by that person or another acting in concert with that person with that person’s knowledge for use” in circumventing a TPM.²⁴⁵ Since Congress, however, was concerned with enabling the further development of technology, they intended these conditions to be flexible.²⁴⁶

c. Additional Violations

The “additional violations” prohibition is worded almost exactly as the ban on trafficking provision, except for two elements.²⁴⁷ First, instead of being directed at the circumvention of a TPM that controls access, it is directed at a TPM that “protects a right of a copyright owner in a work or a portion thereof.”²⁴⁸ Second, unlike the basic provision which is violated only when there is a circumvention of a TPM placed or authorized by the copyright owner, the additional violations provision applies to any TPM placed on the copyrighted work regardless of who placed it.²⁴⁹ Section 1201, however, does not prohibit the circumvention of a TPM protecting or regulating how the work is used, but only bans—the trafficking in tools—that will circumvent the TPMs protecting the use controls.²⁵⁰ In other words, a person who has access, lawful or unlawful, to a copyrighted work and circumvents its use controls is not violating the additional violations prohibition; rather, the individual who provided her with the tools to circumvent the use controls is liable.²⁵¹ The individual who actually circumvented the use con-

242. 17 U.S.C. § 1201(a)(2)(A)-(C) (2001).

243. *Id.* § 1201(a)(2)(A).

244. *Id.* § 1201(a)(2)(B). This language was added to make sure that this Section was applied to black boxes only so far as to protect copyright owners, while also allowing the development of further non-black box technology. Nimmer, *supra* note 17, at 687-88. For instance, this would not apply to computers, tape recorder, VCRs, or Servers. *Id.*

245. § 1201(a)(2)(C).

246. H.R. REP. NO. 105-551, pt.1, at 10; H.R. REP. NO. 105-551, pt.2, at 39-40; DRATLER JR., *supra* note 56, at 2-34.1.

247. § 1201(b)(1)(A).

248. *Id.*

249. *Id.* The additional violation’s provisions omits any reference to circumvention of encryption and other TPMs, but rather states its purpose broadly. DRATLER, *supra* note 56, at 2-31- 32.

250. Nimmer, *supra* note 17, at 689-90.

251. *Id.*

trols, however, is not free from liability because she is subject to an infringement suit under traditional copyright law.²⁵² Furthermore, the “additional violations” provision provides a broader definition of circumvention than the trafficking provision, as merely “avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure” without any illustrations of TPMs.²⁵³ Therefore, under the “additional violations” provision, any use-control device, whether or not placed by the copyright owner, is considered a TPM.²⁵⁴

d. Statutory Exceptions

In addition to providing additional prohibitions to protect copyright owners, the DMCA also provides several limitations on § 1201.²⁵⁵ Its main limitation is the exemptive authority that Congress provided to the Library of Congress.²⁵⁶ The Library of Congress has the power to promulgate exemptions in an informal rulemaking proceeding every three years.²⁵⁷ This power, however, is subject to four limitations.²⁵⁸ First, any such exemption promulgated applies only to the basic provision and cannot be used as a defense or exception to any other statutory rule, including the ban on trafficking and additional violations.²⁵⁹

252. *Id.* at 690.

253. § 1201(b).

254. DRATLER, JR., *supra* note 56, at 2-31 to -33.

255. § 1201(a)(1)(B)-(E).

256. *Id.* § 1201(a)(1)(C).

257. *Id.* § 1201(a)(1)(C)(i)-(v).

In conducting such rulemaking, the Librarian shall examine—

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.

Id.

The first and fourth factors are directed at keeping the balance between the copyright owner's private interests and the public's interest in copyright law, while the second and third factors reiterate similar principles as those for fair use. DRATLER, JR., *supra* note 56, at 2-28.4 to -28.5. Finally, the last factor provides the Library with some leeway for judgment in their decisions. *Id.*

258. § 1201(a)(1)(B)-(E).

259. *Id.* § 1201(a)(1)(E). If the Library determines that a certain class of works deserves exemption, individuals would be able to circumvent the TPMs that control access; but if someone provides them with the tool to do so the individuals would still

The second limitation is that the exemption must cover only “a particular class of works” protected under Title seventeen.²⁶⁰ This becomes an issue, if § 1201’s words “[no] person shall circumvent a technological measure that effectively controls access to a work protected under this title” are taken literal then it applies § 1201 to all works covered under Title Seventeen.²⁶¹ Title Seventeen, however, in addition to protecting copyrighted works also covers digital audio recordings²⁶² and unfixed live musical performances.²⁶³ Therefore, although § 1201 applies to all works covered by Title Seventeen, this exemption only applies to works protected by copyright.²⁶⁴

Third, the Library of Congress requires that individuals show a need for the exemption by providing evidence that they are or will be “adversely affected by” the basic provision “in their ability to make noninfringing uses of that particular class of works.”²⁶⁵ Finally, the library exemption lasts for only three years until the next rulemaking proceeding, the Library of Congress must then determine *de novo* whether the class of works is still being substantially adversely affected.²⁶⁶

In addition to the rulemaking proceeding, Congress provided a strong substantive limitation on § 1201 by asserting that a TPM is not deemed “effective” if it unreasonably degrades or distorts the quality of authorized copies, performances, or displays of copyrighted works.²⁶⁷ Moreover, it explicitly enumerated seven statutory exceptions to the DMCA’s provisions.²⁶⁸ These enumerated exceptions cover: bona fide encryption research,²⁶⁹ law enforcement intelligence,²⁷⁰ security testing of computers, systems, and

be liable under the “ban on trafficking” prohibition. DRATLER, JR., *supra* note 56, at 2-35 to -36.

260. § 1201(a)(1)(B).

261. *Id.* § 1201(a)(1)(A)

262. *Id.* §§ 1002(a), 1006(a), 1009(a), 1101(a).

263. *Id.* § 1101(a)(2).

264. DRATLER, JR., *supra* note 56, at 2-19 n.34, 2-27.

265. § 1201(a)(1)(B). The legislative history makes it clear that this is a rigid requirement, necessitating a showing of substantial adverse effect. 65 Fed. Reg. 64558-59 (Oct. 27, 2000).

266. § 1201(a)(1)(B)-(C); DRATLER, JR., *supra* note 56, at 2-2.4.

267. Congress stated that “it is important to stress . . . that those measures that cause noticeable and recurring adverse effects on the authorized display or performance of works should not be deemed to be effective.” H.R. REP. NO. 105-551, pt.2, at 40 (1998); *see also* DRATLER, JR., *supra* note 56, at 2-56 to -57; *supra* note 229.

268. § 1201(e)-(j).

269. *Id.* § 1201(g).

270. *Id.* § 1201(e).

networks;²⁷¹ circumventing and disabling TPMs that have the effect of collecting and disseminating the user's personal information;²⁷² limiting minor's access to certain material on the internet;²⁷³ reverse engineering to enable interoperability of computer programs;²⁷⁴ and libraries, archives, and non-profit educational institutions' ability to circumvent a TPM to decide whether to buy the work.²⁷⁵

II. RESPONSES TO SECTION 1201

Digital technology and the NII are very important for both copyright owners and the public.²⁷⁶ As Congress and the White Papers asserted however, if copyrighted works are not protected from circumvention and piracy the public will not benefit from technology.²⁷⁷ Accordingly, the DMCA's § 1201 was intended to upgrade copyright law so that it could properly protect digital copyrighted works.²⁷⁸ This unprecedented legislation has caused much uproar and unrest from commentators opposing its enactment. Those opposed to § 1201 claim that because it is too broad, restrictive, and indiscriminative, it will have the effect of hindering or diminishing "fair use" and that it will disturb the delicate copyright balance by unfairly providing too much power and control to copyright owners.²⁷⁹

Proponents of § 1201 disagree. They assert that § 1201 is necessary to further the growth and stimulation of the copyright and e-commerce industries.²⁸⁰ Moreover, they claim that § 1201 will

271. *Id.* § 1201(j).

272. *Id.* § 1201(i).

273. *Id.* § 1201(h).

274. *Id.* § 1201(f).

275. *Id.* § 1201(d). In addition, libraries are insured that they will never be exposed to either civil or criminal liability as long as they act in good faith. For instance, they will not be exposed to monetary fines if they were not aware that they were committing a violation and they will never be exposed to criminal penalties. S. REP. NO. 105-190, at 65 (1998); *see also* MELVILLE B. NIMMER & DAVID NIMMER, CR1 NIMMER ON COPYRIGHT: CONGRESSIONAL COMMITTEE REPORTS ON THE DIGITAL MILLENIUM COPYRIGHT ACT AND CONCURRENT AMENDMENTS CR 1:4 -78 (2000).

276. *See supra* notes 62-142 and accompanying text (discussing digital technology and TPMs that copyright owners can use).

277. *Supra* notes 208-221 and accompanying text; *see also* Real Networks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *12 (W.D. Wash. Jan. 18, 2000).

278. *See* S. REP. NO. 105-190, at 2.

279. *Infra* Part II.A.

280. *Infra* Part II.B.1. The copyright industries refer to the publishing, music, or other industry dealing with copyrighted works.

neither hinder “fair use” nor disturb the copyright balance, but that these too will have to adapt to the new technology.²⁸¹

Finally, there are commentators who claim that the real danger to “fair use” and the copyright balance does not stem from the DMCA’s § 1201, but rather from the enactment of UCITA.²⁸² These commentators claim that UCITA disturbs “fair use” and the copyright balance because it will validate “shrink-wrap” contracts allowing copyright owners to condition access to their copyright works on contractual licensing terms that may require consumers to abandon all rights and privileges.²⁸³

A. Arguments Against the DMCA

Legal commentators did not welcome warmly the enactment of Title 1, more specifically § 1201, of the DMCA. Due to its unprecedented approach in dealing with copyright issues in the digital age, the section has been criticized on several fronts. Those who criticize § 1201 for its alleged creation of a pay-per-use world with unbalanced interests claim that § 1201 unfairly sways the balance between the public and copyright owner’s private interests almost completely towards the latter.²⁸⁴

Some commentators assert that § 1201 is unconstitutional because the First Amendment and the democratic process require that all citizens have access to a broad and expansive public domain and the “widest possible dissemination of information from diverse and antagonistic sources,”²⁸⁵ which they allege § 1201 will curtail.²⁸⁶ This is commonly known as the Democratic Paradigm/First Amendment argument.²⁸⁷

Finally, the “Market Failure Theory” claims that the framers of the Constitution created copyright law as a response to the market’s failure to protect authors’ and creators’ works.²⁸⁸ TPMs and contractual licensing, however, currently provide copyright owners with adequate protection.²⁸⁹ Hence, this theory contends that cop-

281. *Infra* Part II.B.1.

282. *Infra* Part II.B.2.

283. *Infra* Part II.B.2.

284. *Infra* Part II.A.1.

285. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); Benkler, *Common Use*, *supra* note 17, at 358.

286. *Infra* Part II.A.2.

287. Benkler, *Common Use*, *supra* note 17, at 357-58; Netanel, *supra* note 17, at 288.

288. *Infra* Part II.A.3.

289. *See supra* notes 91-205 and accompanying text (discussing TPMs and ProCd).

yright owners should be able to opt out of copyright law protection because these safeguards in conjunction with § 1201 provide copyright owners with a disproportionate balance of power and rights.²⁹⁰

1. *An Unbalanced "Pay-Per-Use World"*

Commentators who espouse the view of a pay-per-use world with unbalanced interests acknowledge and fear digital technology and TPMs' strengths and potential benefits.²⁹¹ They acknowledge that digital technology and the Web provides a "plethora of information . . . to individuals, often for free, that just a few years ago could have been located and acquired only through the expenditure of considerable time, resources, and money."²⁹² They also, however, fear that these technologies may hinder access and distribution of copyrighted works.²⁹³ For instance, they recognize that TPMs allow copyright owners to effectively restrict and protect their works before publication, a traditional right.²⁹⁴ Yet, TPMs also potentially give copyright owners the ability to go further and control access and use of their works, including traditional and lawful uses such as reselling, reviewing, and quoting after their first publication.²⁹⁵

In addition, these commentators claim that TPMs have the ability to lock up and restrict public domain works that have traditionally been free to the public, as well as information content not subject to copyright protection.²⁹⁶ They allege that copyright owners' restraint of information content would be detrimental to prospective authors because it would preclude the beneficial aspects of information spill-overs.²⁹⁷ Their main fear is that users will have to

290. *Infra* Part II.A.3.

291. Cohen, *supra* note 17, at 179-87; Nimmer, *supra* note 17, 683-84, 711-15.

292. Nimmer, *supra* note 17, at 693.

293. *Id.* at 711.

294. *Id.* at 710-11. This traditional right is the common law right of first publication, which is now provided for under the exclusive right to distribute, § 106(3).

295. Nimmer, *supra* note 17, at 711-12.

296. *Id.* at 712-13; *see also* Cohen, *supra* note 17, at 176; *infra* note 298.

297. *See generally* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999) (explaining Silicon Valley's success and Massachusetts' Route 128's failure on the notion that the unenforceability of post-employment covenants not to compete in California facilitated information spillovers and the growth of the industry and technology, whereas their enforcement in Massachusetts had the contrary effect). Information spillovers are very beneficial to prospective copyright owners because it may provide them with a greater amount of raw materials from which they may create new copyright works. This effect is illustrated by Professor

pay to access and use these works, which would be in a new digital format.²⁹⁸ Professor Cohen, a proponent of this view, has gone as far as to propose that § 1201 require, as a prerequisite to protection, copyright owners to “[design TPMs that would] allow any uses of the underlying works that would be lawful.”²⁹⁹ Consequently, because of TPM’s potential and strength, these commentators believe that TPMs’ ability to prevent access to works “could well prove to be the legal foundation for a society in which information becomes available only on a ‘pay-per-use basis’.”³⁰⁰ It is the advent of this world and the manner in which § 1201 would interact and affect access to information content that these commentators most fear.³⁰¹

Their main contention is that in a pay-per-use world § 1201 would convert the limited monopoly power provided by the Constitution into a perpetual right.³⁰² This conversion would, thereby, fundamentally alter the copyright balance by making the copyright owners’ interest “the paramount consideration - at the expense of research, scholarship, education, literary or political commentary, [and] the future viability of information in the public domain.”³⁰³

Gilson’s analysis and explanation of Silicon Valley’s success and Massachusetts’ Route 128’s demise based primarily on non-compete covenants, which had the effect in Route 128 of restraining employees from taking ideas and inventions and using them in other companies or their own start up companies. *Id.* at 592. Whereas in Silicon Valley where these covenants are not enforced there is tremendous mobility and sharing of ideas and inventions by employees who leave companies unrestrained by these covenants. *Id.* at 588-92.

298. Nimmer, *supra* note 17, at 712-13. Professor Nimmer illustrates this point through two illustrations. *Id.* at 712-14. The first is a late nineteenth century Louisiana Cookbook that is not found in many places, which, although a public domain work, a publisher will digitize by scanning and add editorial comments thereby making his digital version copyrightable. *Id.* at 712. The second example is an early 1920s jazz recording that, as a public domain material, is not found in digital format, so the publisher digitalizes the recording and sells it at the same price of a copyrighted recording. *Id.* at 713-14.

299. Cohen, *supra* note 17, at 176. She acknowledges, however, that this requirement would not work for two reasons. *Id.* First, TPMs are too valuable to digital content providers and copyright owners; second, it would be a “near-impossible task” for TPMs to carry out the factual equitable inquiry required for fair use and other privileges. *Id.* at 176-77.

300. 144 CONG. REC. H 7094 (daily ed. Aug. 4 1998); Nimmer, *supra* note 17, at 710-15; Samuelson, *supra* note 17, at 542. A pay-per-use world is one where individuals would have to pay for not only access to every type of work, but also for every type of use of such works. See Stefik, *supra* note 19, at 149 (discussing digital reuse of copyrighted works and paying for the use of public domain materials).

301. Cohen, *supra* note 17, at 176-77; Nimmer, *supra* note 17, at 710-28; Samuelson, *supra* note 17, at 541-42.

302. Nimmer, *supra* note 17, at 721.

303. *Id.*

They claim that § 1201 provides copyright owners with this asymmetric right because its anti-circumvention provision is too broad, rigid, and all-encompassing.³⁰⁴ It does not discriminate between circumvention for unlawful purposes and circumvention for lawful purposes—such as fair use.³⁰⁵

Proponents of this view, including Professor Nimmer, argue that the basic provision's³⁰⁶ inability to consider the circumventer's *intended* use of the work poses the greatest danger to copyright's public interest.³⁰⁷ They claim that analogous to other provisions in the DMCA, Congress should have specifically designed § 1201 to apply only to specific situations, such as, when the circumventer's intent is infringement or other illegal purpose.³⁰⁸ Under this proposal, liability for circumvention would be determined in hindsight after the circumvention and actual use had occurred.³⁰⁹

Alternatively, it could have required that copyright owners who use TPMs "provide the means to overcome that measure for parties acting within the scope of their rights."³¹⁰ Professor Cohen's proposition, referred to as the "Cohen Theorem," best illustrates this contention by stating:

Copyright owners cannot be prohibited from making access to their works more difficult, but they should not be allowed to prevent others from hacking around their technological barriers. Otherwise, the mere act of encoding a work within a [TPM] would magically confer upon vendors greater rights against the general public than copyright allows.³¹¹

304. Nimmer, *supra* note 17, at 727-31; Samuelson, *supra* note 17, at 531-33.

305. Nimmer, *supra* note 17, at 727-31; Samuelson, *supra* note 17, at 531-33.

306. *Supra* notes 222-32 and accompanying text.

307. Nimmer, *supra* note 17, at 727-31.

308. *Id.* at 707. Professor Nimmer specifically looks at the DMCA exceptions to the Ephemeral Recording Exemption, 17 U.S.C. § 112(a)(2) that provide for instances where a copyright owner places a TPM that prevents a broadcaster from using its right to record a performance or display to facilitate transmission. *Id.* at 705-07 n.185-86. The DMCA provides that, if the copyright owner places a TPM, they "must make available to the transmitting organization the necessary means for permitting the making of such copy." *Id.* at 705-06, 706-07 n.186 (citing 17 U.S.C. § 112(a)(2) (1995)). In addition, if the owner fails to provide this tool it gives broadcasters the right to self-help by circumventing the TPM. *Id.* at 705.

309. *See id.* 705-07 (discussing ephemeral recording exceptions).

310. *Id.* at 707. This second example is derived from the Vessel Hull Design Protection Act, enacted to protect boat hull designers who were left powerless by a Supreme Court decision in *Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). Accordingly, this provision holds a seller or distributor of a protected hull design liable only if he "induced or acted in collusion with a manufacturer to make, or an importer to import, such article." *Id.* at 709 (quoting 17 U.S.C. 1309(b)(1)).

311. Cohen, *supra* note 17, at 178, 178 n.74.

In addition, these proponents assert that § 1201's blanket prohibition more commonly known as the "ban on trafficking" is too broad.³¹² They claim that this provision should have provided exemptions for fair use and other privileges, because "technologies that might be used for indisputably unlawful purposes are the same technologies that are useful for achieving many lawful and socially valuable ones."³¹³ Their main argument against this provision is that it determines what technologies fall into this category through an effects test; whether the effect of the technology is illegal, rather than whether it was "intentionally designed or produced to enable copyright infringement."³¹⁴ The practical consequence of this test is that technology that may have been created for another purpose, but has the *effect* of being primarily used for the circumvention of TPMs, will fall into this category unless its original or other purpose constitutes a "commercially significant purpose or use."³¹⁵ Since many technologies that were not "primarily designed or produced" to circumvent TPMs may be prohibited, this "[effects-rooted provision] threatens lawful and socially valuable conduct."³¹⁶

These commentators also claim that Congress' inclusion of § 1201(c), which provides that "[n]othing in this section shall affect rights, remedies, limitations,³¹⁷ or defenses to copyright infringement, including fair use,"³¹⁸ makes clear that it intended for users to continue to enjoy non-infringing uses of copyrighted works even if they were protected by TPMs.³¹⁹ Congress' statement of intention also mandates that the ban on trafficking provision be narrowed, be interpreted narrowly by courts, and that it should

312. 17 U.S.C. § 1201(a)(2) (2001); *see also supra* notes 233-44 and accompanying text.

313. Cohen, *supra* note 17, at 172.

314. Samuelson, *supra* note 17, at 532-33; *see also* Cohen, *supra* note 17, at 172 (finding the anticircumvention provisions as too broad); Nimmer, *supra* note 17, at 736-38 (describing the anticircumvention prohibitions as too broad).

315. § 1201(b)(1)(A)-(C).

316. Cohen, *supra* note 17, at 172. Professor Cohen goes even further and claims that TPMs that prevent "all copying or all free copying, will almost certainly frustrate some actions that the Copyright Act would permit." *Id.* at 175.

317. In addition to fair use the limitations that this provision refers to are the exceptions for library and archive use provided under 17 U.S.C. § 108; the exception for home audio taping provided by the Audio Home Recording Act of 1992; and the exception under the first sale doctrine provided under 17 U.S.C. § 109(a).

318. § 1201(c)

319. Samuelson, *supra* note 17, at 539.

recognize limited purpose tools intended solely to carry out fair use.³²⁰

Nevertheless, these commentators credit Congress with acknowledging the potential risks and dangers that are inherent in § 1201's legislation, thereby motivating them to include many exceptions to § 1201.³²¹ They claim, however, that the exceptions that were intended to resolve the potential inhibition of fair use and lack of access, the rulemaking procedure³²² and the exception for "non-profit [libraries], archives, or educational institutions,"³²³ are inadequate and insufficient to balance copyright's private and public interests.³²⁴

The main problem with both of these exceptions is that they apply only to the DMCA's basic provision, leaving users liable for the ban on trafficking and additional violations provisions.³²⁵ Thus, if an individual proves to the Library of Congress that he "[is] likely to be . . . adversely affected by virtue of such prohibition in [his] ability to make non-infringing uses of that particular class of works" and also satisfies the enumerated factors that they must consider, they will grant an exemption from liability for the basic provision for *all* users.³²⁶ The rulemaking procedure, however, will not provide an exemption to the ban on trafficking and additional violations prohibition.³²⁷ Therefore, although users may obtain the privilege to circumvent TPMs to gain access to the copyrighted work, they claim that in practice this privilege is a sham,³²⁸ because unless an individual is technically savvy enough to circumvent the TPM, she will be in the same position as before the exemption.³²⁹

Similarly, these commentators claim that the exemption for "[non-profit] libraries, archives, and educational institutions" also suffers from this deception because libraries are given only the

320. *Id.*

321. Nimmer, *supra* note 17, at 693-94, 717-21; Samuelson, *supra* note 17, at 559-60; *supra* notes 256-75 and accompanying text.

322. § 1201(a)(1)(B)-(E). *See also supra* notes 256-66 and accompanying text.

323. § 1201(d).

324. Nimmer, *supra* note 17, at 735-37; Samuelson, *supra* note 17, at 560.

325. Nimmer, *supra* note 17, at 735-37; Samuelson, *supra* note 17, at 559-60; *see also supra* notes 256-66, 323 and accompanying text. Professor Nimmer also finds that the rule making procedure exception provides too much power to the Library of Congress, a fact-finding equitable power that should belong to the courts. Nimmer, *supra* note 17, at 698. Accordingly, the only alternative users would have is to appeal pursuant to the Administrative Procedure Act. *Id.*

326. § 1201(a)(1)(B)-(E); *see also supra* notes 256-66 and accompanying text.

327. § 1201(a)(1)(B)-(E); *see also supra* notes 256-66 and accompanying text.

328. Nimmer, *supra* note 17, at 735-37; Samuelson, *supra* note 17, at 559-60.

329. Nimmer, *supra* note 17, at 735-37; Samuelson, *supra* note 17, at 559-60.

privilege to circumvent TPMs.³³⁰ Thus, since the “ban on trafficking” still applies, these organizations are unable to exercise their privilege unless they can circumvent the TPMs themselves.³³¹ Since the effect of these statutory exceptions is too narrow, commentators claim that “[Congress] should have adopted a provision enabling courts to exempt acts of intervention engaged in for other legitimate purposes.”³³²

The commentators who maintain that § 1201 is too broad and overly protective of copyright owners’ interest assert that Congress should have taken action to remedy this problem.³³³ They maintain that Congress can and should “intervene to remedy the lack of availability of a class of works [because] the law can value the right of public access to available works more heavily than the property rights of the owners of those works.”³³⁴ Therefore, since § 1201 hinders the public’s access to and use of copyrighted works, Congress was under a duty to create narrow exceptions to ensure that access and use by the public is maintained.³³⁵ Finally, if the public has traditionally been allowed to quote, review, criticize, and parody copyrighted works as part of a constitutional right intended to safeguard First Amendment interests of free speech and the advancement of knowledge, “then Congress was under an obligation to frame § 1201 in a manner that preserves that right.”³³⁶

2. First Amendment/Democratic Paradigm Argument

a. Copyright’s Production Function

Proponents of this argument,³³⁷ specifically Professors Benkler and Netanel, claim that the DMCA’s § 1201 is unconstitutional because it hinders the First Amendment’s freedom of speech,

330. Nimmer, *supra* note 17, at 700.

331. See Nimmer, *supra* note 17, at 735-37 (describing the ban on trafficking’s effect through an illustration); Samuelson, *supra* note 17, at 559-60 (discussing the exception to the DMCA through the librarian of Congress).

332. Samuelson, *supra* note 17, at 538. Professor Samuelson provides as an illustration as to the legitimate purposes that should be allowed.

333. See *supra* notes 292-332 and accompanying text (discussing the advent of a pay-per-use world).

334. Nimmer, *supra* note 17, at 678-79.

335. See *id.*

336. *Id.*

337. This theory is also referred to as the Democratic Paradigm theory. See generally Netanel, *supra* note 17, at 288. Its main principle is that copyrighted works and all other expressions of speech are vital to principles of democracy because they maintain and encourage public discourse, which furthers openness, diversity, and freedom. JOYCE ET AL., *supra* note 1, at 69-70. Accordingly, copyright law has two major functions in supporting democracy. *Id.* First, it must encourage and reinforce copyrighted

thereby, threatening our democratic civil society.³³⁸ These commentators claim that § 1201 harms the public domain, a vital and indispensable source of speech that has the effect of compelling the "widest possible dissemination of information from diverse and antagonistic sources."³³⁹ Professor Netanel refers to this phenomenon as "copyright's production function," a function whose main role in furthering democracy is to foster association and education.³⁴⁰

This function is significant because the public domain's existence is vital to our democratic process and the public's welfare.³⁴¹ The Supreme Court has acknowledged that a diversity of views is important to democratic governance and the First Amendment in its dual role; first, in maintaining an "uninhibited marketplace of ideas in which truth will ultimately prevail"³⁴² and second, maintaining the public's right to, "receive suitable access to social, political, esthetic, moral, and other ideas and experiences."³⁴³ Hence, a diverse public domain is central to both democracy and the public welfare because its depletion will have dire consequences for the public's democratic civil society by affecting public communication and discourse.³⁴⁴ A diminished democratic civil society will adversely affect the public's democratic governance,³⁴⁵ their "assertion of popular sovereignty over the . . . representative democratic

works. Second, it must provide economic incentives for authors so that further works are created. *Id.*

338. Professor Netanel defines a democratic civil society as the "sphere of voluntary, nongovernmental association in which individuals determine their shared purposes and norms." Netanel, *supra* note 17, at 342.

339. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see also* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

340. Netanel, *supra* note 17, at 347-51. More specifically this function is to foster the production and dissemination of original expression of a "broad range of political, social, cultural, and aesthetic matters" by providing an economic incentive. *Id.* at 348.

341. Benkler, *Common Use*, *supra* note 17, at 358, 366; *see also* Benkler, *Consumers to User*, *supra* note 17, at 565.

342. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

343. Benkler, *Common Use*, *supra* note 17, at 368-69.

344. Netanel, *supra* note 17, at 342-45.

345. Professor Netanel claims that in order to maintain a democratic governance there must exist a "robust, pluralist civil society" in the form of a "'democratic culture,' a belief in and understanding of the democratic process that becomes embedded in the minds, habits, and character of a people." Netanel, *supra* note 17, at 342-43.

state,”³⁴⁶ and their ability to collectively “self-rule outside formal institutions of government.”³⁴⁷

The public domain is also significant because it balances the inherent conflict between the Constitutional mandates of the First Amendment that “Congress shall make no law abridging the freedom of speech”³⁴⁸ and that of the Copyright Clause, which provides Congress with the power to provide authors and creators with a monopoly for a limited time.³⁴⁹ The public domain balances these conflicting mandates by being the “legal space within which Congress has ‘made no law’.”³⁵⁰

b. Copyright’s Structural Function

These commentators also assert that the DMCA’s § 1201 will adversely affect what Professor Netanel calls “copyright’s structural function.”³⁵¹ Copyright’s structural function is the promotion of public discourse by ensuring that creation and dissemination is free from state and elite patronage and by limiting the private control of creative expression.³⁵² Professor Netanel first asserts that copyright must adapt to digital technology because copyright owners will be dependent on state and elite patronage if their economic incentives are not protected.³⁵³ Copyright owners’ dependency on these individuals will cause censorship of information and deter the creation of diverse views.³⁵⁴ Professors Netanel and Benkler, however, conclude that too much protection is detrimental to the structural function because it may lead to the commercial concentration of information content.³⁵⁵ The overall effect of this centralization

346. *Id.* at 343. Professor Netanel also asserts that the public’s assertion of popular sovereignty will be affected because this requires certain citizenship skills and opportunities that a democratic civil society fosters. *Id.* at 343-44.

347. *Id.* at 344. Professor Netanel believes that the public’s ability to self-rule will be affected because a democratic civil society provides the sites for public association and the forum for discussion and debate where the public’s norms, beliefs, and standards are created, which are a vital element to self-governance. *Id.*

348. U.S. CONST. amend. I.

349. U.S. CONST. art. I, § 8, cl. 8.

350. Benkler, *Common Use*, *supra* note 17, at 393.

351. Netanel, *supra* note 17, at 352-63.

352. *Id.* at 352.

353. *Id.* at 352-62 (discussing how copyright law historically freed authors from patronage by allowing them to make a living from their works and how the failure to protect digital content can revert to pre-copyright eras of patronage).

354. *Id.* at 352-58.

355. Benkler, *Common Use*, *supra* note 17, at 400-01; Netanel, *supra* note 17, at 358-61. Professor Benkler believes that large corporations buying the rights to information and placing TPMs and contractual restrictions on their use will centralize information content. Benkler, *Common Use*, *supra* note 17, at 400-01; Netanel, *supra*

will be a shift from the process of creating a status quo through a democratic process to a system where those who control information will unilaterally determine the status quo.³⁵⁶

Commercial centralization of information content will alter the creation of the status quo by having two adverse effects on access and diversity.³⁵⁷ First, commercial concentration of information content by a small number of individuals will negatively affect the democratic public discourse by diminishing or eliminating many views that would motivate discussion, debate, and challenge the status quo.³⁵⁸ Commentators claim this effect is inevitable because in the event of commercial concentration of information content, information producers would only produce and publish either their own views, or the views that they deem the majority of the public would most likely accept.³⁵⁹ Under the first scenario, only the views of a small number of powerful individuals, either the elite or the state, would pervade the market place of ideas.³⁶⁰ Under the second scenario, which they believe is more likely, only a few mainstream views with which the majority of the public agrees will be available, thereby, eliminating many other important views.³⁶¹

The main point of this argument is that the minority producers of information content will prevent many "diverse and antagonistic" views, an essential element to the welfare of the public,³⁶² from pervading the public domain and society.³⁶³ If citizens do not have the ability to experience and understand society's different political and social views, then society will not determine its status quo through a democratic process where individuals discuss and debate

note 17, at 362-63. Accordingly, since these corporations will have a monopoly over these rights, preventing others from using them, citizens and smaller information producers will only have a small amount of information to work with and create future works. Benkler, *Common Use*, *supra* note 17, at 405-07; Netanel, *supra* note 17, at 360-61.

356. Benkler, *Common Use*, *supra* note 17, at 379; *see also* Netanel, *supra* note 17, at 358 (stating that "copyright constitutes an integral part of a system of collective self-rule in which the norms that permeate our social relations and undergird state policy are determined in the space of broadbased citizen debate, rather than by government of private fiat").

357. Benkler, *Common Use*, *supra* note 17, at 377-83 (discussing commercialization's affects on public discourse and self-governance).

358. *Id.* at 378-79.

359. *Id.* at 378; *see also* Netanel, *supra* note 17, at 358 (stating that under commercial concentration of information producers would only cater to the wealthy who would buy their works).

360. Benkler, *Common Use*, *supra* note 17, at 378; Netanel, *supra* note 17, at 358.

361. Benkler, *Common Use*, *supra* note 17, at 378; Netanel, *supra* note 17, at 360.

362. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

363. Benkler, *Common Use*, *supra* note 17, at 409.

all their options and agree on those they deem best.³⁶⁴ Conversely, they claim that the status quo would merely be the, “expression of entrenched powers preventing discussion of change.”³⁶⁵

The second adverse effect of commercial concentration of information content is that in conjunction with society’s distribution of wealth they will significantly impact the vital democratic element of public discourse.³⁶⁶ They assert that since commercial products are distributed to individuals primarily based on wealth, this will cause an “unequal distribution of private power over information flows.”³⁶⁷ This unequal distribution of information content will provide the individuals who are already in power and command with control over information, while the poor and the middle class obtain only inferior information.³⁶⁸ Henceforth, the majority of society lack the “diverse and antagonistic views”³⁶⁹ that are necessary to encourage and summon public discourse and debate.³⁷⁰ This is detrimental because citizens’ inability to engage in public discourse and debate will prevent them from challenging the social, economic, and political powers, as well as, the status quo.³⁷¹ Moreover, Professor Netanel claims that private control of the public domain, which inhibits the public discourse by limiting prospective authors and creators’ resources should be remedied by creating a new form of derivative right.³⁷² He asserts that this and other limitations, “are an affirmative manifestation . . . that, where necessary to further [copyright’s democracy enhancing principles], ideas and expressions should be *free* for all to use.”³⁷³ This new derivative right “would limit copyright owner[s]’ control over transformative uses,” thus, allowing the public to challenge mainstream information content.³⁷⁴

364. *Id.*; Netanel, *supra* note 17, at 354, 358.

365. Benkler, *Common Use*, *supra* note 17, at 379.

366. *Id.* at 379-81.

367. *Id.* at 380.

368. *See id.* (asserting that “power over information flows mirrors economic power”). Professor Benkler assumes that many works such as research, study, and scholarship will not be published and disseminated because they do not have a strong commercial value. *Id.* at 405-07 (referring to the scholarly lawyer and Joe Einstein strategies as being the least successful).

369. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

370. Benkler, *Common Use*, *supra* note 17, at 380.

371. *Id.* at 379-80.

372. Netanel, *supra* note 17, at 362-63, 378-81; *see also supra* note 76.

373. Netanel, *supra* note 17, at 363 (emphasis added).

374. *Id.* at 362-63. Professor Netanel, however, also recognizes that without a strong derivative right the original copyright owners and prospective authors or creators might not be encouraged to create and disseminate because of the “multiple

c. *First Amendment Argument*

Additionally, these commentators claim that the combination of these two factors may also have a censorial effect on the distribution of ideas and information.³⁷⁵ According to this argument, if the wealthy elite and corporations have control of information and information production, they will prohibit the dissemination of any information that is detrimental to their interests.³⁷⁶ Unlike the public discourse argument, this is an explicit and outright prohibition on speech.³⁷⁷ Thus, these proponents claim that once the enclosure of the public domain and reduction of diverse and antagonistic views are recognized as a regulation of information production and exchange, then, it becomes evident that § 1201's restrictions require heightened constitutional scrutiny.³⁷⁸ They claim that although § 1201 is content and viewpoint neutral, its effects on speech are not incidental because its entire purpose is to prohibit the use and communication of information.³⁷⁹ Therefore, § 1201 must satisfy the constitutional standard of intermediate scrutiny to be Constitutionally legitimate.³⁸⁰

One of this argument's major premises is the assumption that information is "free as the air to common use," and as such cannot be restricted unless necessary.³⁸¹ Relying on this premise, it asserts that the First Amendment's freedom of speech provision requires a

taker" dilemma. *Id.* at 379. The dilemma is that authors may not go through hard work of creating if someone else can create a derivate of the work that will replace it using their hard work. *Id.*

375. Benkler, *Common Use*, *supra* note 17, at 380-81; *see also* Netanel, *supra* note 17, at 362 (discussing how a media conglomerate may create censure by preventing the use of information that may be adverse to them).

376. Benkler, *Common Use*, *supra* note 17, at 380; Netanel, *supra* note 17, at 362. This argument assumes that the information content producers will obtain as much public domain materials that they can find and enclose them using TPMs. Benkler, *supra* note 17, at 402-05 (describing the four different strategies of information production initially using public domain material); Netanel, *supra* note 17, at 314-16 (describing neoclassicists view regarding the use of public domain to gain the most economic benefit).

377. *See* Benkler, *Common Use*, *supra* note 17, at 380-81 (stating that individuals are censored because the information owners prohibit them from speaking).

378. Benkler, *Common Use*, *supra* note 17, at 372 (discussing the *Turner Broad System v. FCC* litigation); *see also* *Turner Broad. Sys., v. FCC*, 512 U.S. 622, 640-41(1994).

379. Benkler, *Common Use*, *supra* note 17, at 413.

380. *See id.* (stating that these laws must show that they "serve an important governmental interest, and to do so without restricting substantially more speech than necessary").

381. Benkler, *Common Use*, *supra* note 17, at 357-58, 413; *see also* *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

flourishing and strong public domain.³⁸² A robust public domain is necessary because free speech is the antithesis of property rights, it belongs to no one and is privileged to all.³⁸³ Therefore, if a society lacked a public domain, its citizens' freedom of speech would merely be a negative liberty, a right to speak only as far as they used their own words and did not violate others' property rights.³⁸⁴ Hence, they claim that any legislative action that dwindles and encloses the public domain, "conflicts with the First Amendment injunction that government not prevent people from using information or communicating it,"³⁸⁵ which would also hurt the public's democratic civil society.³⁸⁶

Although these commentators recognize Congress' justifications and interests in enacting § 1201 they reject them as equivocal as to whether they justify the outcomes it produces.³⁸⁷ Accordingly, like Professor Nimmer, they claim that § 1201 is too broad because it fails to discriminate between infringing and permissible uses.³⁸⁸

382. Benkler, *Common Use*, *supra* note 17, at 357-58; Benkler, *Consumers to User*, *supra* note 17, at 577.

383. Benkler, *Common Use*, *supra* note 17, at 357-58, 390-94.

384. *Id.* at 358, 390-92. The connotation of freedom of speech as a negative liberty derives from the doctrine of the Constitution as a charter of negative liberties. *Id.* In other words, this doctrine asserts that the Constitution merely states what the government cannot do to citizens; however, it does not provide an affirmative obligation to provide these elements to citizens. *Id.* As applied to this scenario, it would mean that, although the government cannot take action to prohibit speech, it does not have any obligation to foster or nourish this right. *Id.* Therefore, without a public domain, although citizens have a theoretical freedom of speech, in practice the right is very limited because they can speak only about what facts and ideas belong to them. *Id.*; see also *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195-96 (1989) (finding that the due process clause does not "impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means).

385. Benkler, *Common Use*, *supra* note 17, at 358.

386. Netanel, *supra* note 17, at 350-51.

387. They recognize three justifications that Congress had for enacting section 1201:

First, in the absence of adequate protection, producers will not make content available in a digital form capable of networked distribution. Second, the copyright industries are an important economic sector of the U.S. economy, particularly in terms of exports. They need this protection to sustain all the jobs and revenue that they generate because contemporary technology makes the production and dissemination of unauthorized copies too easy. Finally, the legislation must prohibit circumvention per se, not only circumvention for the purposes of infringement, because relying on legal enforcement of copyright is more cumbersome and porous than self-help.

Benkler, *Common Use*, *supra* note 17, at 423; see also Netanel, *supra* note 17, at 289-90 (providing suggestions for the manner in which copyright should respond to these concerns).

388. *Supra* notes 306-16 and accompanying text.

They assert that § 1201's basic provision prosecutes circumvention of TPMs on a per se basis, regardless of the use.³⁸⁹ Therefore, if an individual desired to access a TPM-protected work to exercise his privilege of fair use or his right to free speech, he would automatically be liable.³⁹⁰ In addition, they argue that the ban on trafficking and additional violations provisions are lawful only because § 1201 legalizes the basic provision.³⁹¹ Although they recognize that the majority of § 1201's exceptions are valid, they claim that in general these exceptions are inadequate.³⁹² They, like many other commentators, believe that the exceptions' fundamental oversight is their failure to include a broad exception for circumvention when the intended use is privileged.³⁹³

Hence, proponents of the First Amendment/Democratic Paradigm argument conclude that it is not clear that Congress' justifications in enacting § 1201 are important government interests.³⁹⁴ Even if they were, due to its per se application and the inadequacy of its exemptions § 1201 potentially creates too many First Amendment constraints and costs.

3. Market Failure Theory

Proponents of the Market Failure Theory claim that the commercial market, TPMs, and contractual licensing are presently able to adequately protect copyright owners' works to a sufficient degree, enabling them to derive enough economic gain to serve as an incentive to further create and disseminate.³⁹⁵ Hence, instead of providing copyright owners with more protection via § 1201, they should be given the opportunity to opt-out of copyright law entirely.³⁹⁶

The underlying assumption on which this argument depends is that both the market and common law's failure to protect copy-

389. Benkler, *Common Use*, *supra* note 17, at 415-16.

390. *See id.* (stating that its "civil and criminal sanctions apply to circumvention per se, whether or not the underlying use is privileged").

391. *Id.* at 416-17.

392. *Id.* at 418-19. Professor Benkler claims that the library exception in 17 U.S.C. § 108 is meaningless because it would not be financially reasonable for any commercial publisher to deny libraries the ability to read the content before purchasing it. *Id.* at 418. Although he validates all the other exemptions, he fails to mention anything at all about the rule making procedure exception codified in 17 U.S.C. § 1201(a)(1)(B)-(E). *Id.* at 418-19.

393. *Id.* at 419.

394. *Id.* at 412.

395. Bell, *Escape from Copyright*, *supra* note 17, at 745-50, 786-87.

396. *Id.* at 745, 788-803.

right owners' interests in their work originally stimulated the development of copyright law.³⁹⁷ Since copyright owners were unable to reap sufficient gains from their work, the Framers of the Constitution believed that there was insufficient incentive "to Promote the Progress of Science and Useful Arts."³⁹⁸ Thus, under the justification of a public benefit, copyright law provided a significant statutory exception to the default rule "that a free people, respecting common law rights and engaging in market transactions, can copy expressive works at will."³⁹⁹

Over time, however, amendments and revisions to the Copyright Act have provided copyright owners with broader and greater powers.⁴⁰⁰ For instance, the term of a copyright has been generously expanded;⁴⁰¹ Congress has interpreted the language of the Copyright Clause to cover a larger selection of subject matter;⁴⁰² and, most importantly, copyright owners' exclusive rights have been multiplied.⁴⁰³ These commentators proclaim that the availability and effectiveness of TPMs and common law rights, including contractual licensing, provide copyright owners with, "unprecedented control over their works."⁴⁰⁴ Through the use of TPMs and the common law, copyright owners are able to regulate access, use, reuse, payment, and ownership information of their copyrighted works.⁴⁰⁵ Thus, they are no longer susceptible to the market and common law's failure to protect them.⁴⁰⁶

Since common law, TPMs, and copyright law together provide copyright owners with an overabundant source of exclusive rights and protection, these proponents claim that the balance between

397. *Id.* at 747.

398. *Id.* at 747; see also U.S. CONST. art. I, § 8, cl. 8.

399. Bell, *Escape from Copyright*, *supra* note 17, at 759; see also Ray Patterson, *Copyright and the "Exclusive Right" of Authors*, 1 J. INTELL. PROP. L. 1, 22 (1993) (arguing that "[copyright] is an intrusion upon the common-law public domain").

400. Bell, *Escape from Copyright*, *supra* note 17, at 781-84.

401. *Id.* at 781.

402. *Id.* at 781-83; *supra* note 158.

403. Bell, *Escape from Copyright*, *supra* note 17, at 783-84; *supra* note 231.

404. *Id.* at 747. Professor Hardy claims that the increasing effectiveness of digital technology exacerbates free-rider and piracy concerns, which will drive many copyright owners to favor opting-out of copyright and rely solely on TPMs and contract law. Trotter Hardy, *Contract, Copyright, and Preemption in a Digital World*, 1 RICH. J. L. & TECH. 2, 47-48 (1995).

405. Professor Bell provides a sufficient summary of the many commentators who believe that the use of TPMs will provide copyright owners with too much control over their works. Bell, *Escape from Copyright*, *supra* note 17, at 747. He acknowledged, however, that TPMs existence and standardization into the market is inevitable because of the financial incentives they stand to provide. *Id.*

406. *Id.* at 747-50.

copyright owners and public's interest has been destroyed.⁴⁰⁷ Accordingly, they propose giving copyright owners the choice of opting-out of copyright law when the combination of any of these measures is too strong,⁴⁰⁸ too broad and excessive,⁴⁰⁹ or when an inconsistency between copyright law and either common law claims or TPMs create an invalid restriction.⁴¹⁰ Before discussing the methods of opting-out of copyright law it is worthwhile to examine the counter-arguments posed against this view and their responses.

a. Lockean Natural Rights Counter-Argument

The first counter-argument, the Lockean Natural Rights argument, removes the market failure theory's major axiom that the right to opt-out is derived from copyright's origin as a response to the market failure, by considering copyright a natural right⁴¹¹ rather than a function of the market.⁴¹² In response to this counter-argument these commentators argue that the Framers of the Constitution never intended copyright law to be a natural right, but, even had it been, that it is irrelevant to the choice of opting-out of copyright law.⁴¹³

407. *Id.* at 780. It is also very important to take into consideration that present copyright owners are united into large, influential lobbying blocks, whereas users are divided and have less influential lobbying power. *Id.* at 786.

408. This would occur when common law rights, either contract or torts, in conjunction with copyright are too strong and detrimental to the public. *Id.* at 744-45.

409. *Id.* This scenario would take place when copyright law and TPMs combined are too excessive and restrictive. Thus, the law should give these individuals the right to choose between either: "1) limiting the effect of those non-statutory protections and exploiting the Copyright Act; or 2) abandoning copyright and relying on technological tools and the common law rights affiliated with them." *Id.* at 745.

410. *Id.* This would occur when a contractual license is deemed invalid because it attempts to secure rights not allowed under copyright law, such as restricting fair use or the first sale right. *Id.* Since the contractual license would give the copyright owner rights prohibited under copyright law, he should have the right to choose between "1) abandoning suspect terms of the license and falling back on copyright protection; or 2) abandoning copyright and relying on contract law to secure the interests in question." *Id.* at 788-93.

411. The Natural Rights/Lockean labor theory has been influential in the realm of copyright throughout history. JOYCE ET AL., *supra* note 1, at 64. Its major principle is that authors should be entitled to "reap the fruits of their creations, to obtain rewards for their contributions to society, and to protect the integrity of their creations as extensions of their personalities." *Id.* at 63. Accordingly, under this principle copyright law's primary purpose is to protect authors; Natural Rights. *Id.* Nonetheless, Lockean claim that the public's interest in copyrighted works would be advanced by two limitations imposed upon individuals: that they leave enough quality resources for others and that they not commit waste. *Id.* at 65.

412. Bell, *Escape from Copyright*, *supra* note 17, at 760.

413. *Id.* at 760-76.

They generally assert that the supposition that Locke's labor theory⁴¹⁴ was the theoretical foundation for copyright law is mistaken for two reasons.⁴¹⁵ First, they claim that Locke's labor theory dealt only with tangible physical property in which an individual creates a new embodiment through the *sweat of their brow*.⁴¹⁶ Hence, since Locke's principles did not apply to intangible intellectual property and the "noumenal realm of ideas;"⁴¹⁷ the Framers of the Constitution could not have imposed such interpretation upon it.⁴¹⁸ Second, they claim that copyright law is inconsistent with Locke's justification of property rights⁴¹⁹ because he believed that any restraint or monopolization of property constituted a "'manifest . . . invasion of the trade, liberty, and property of subject.'"⁴²⁰

Moreover, they claim that the incorrectness of this supposition is illustrated by three facts. First, the original state copyright laws referred to natural rights only as a matter of rhetoric and façade, but not in substance.⁴²¹ At the time of the enactment of these laws, state legislators were enacting copyright laws to appease a small, but influential population of authors and creators.⁴²² These legislators were aware that the enactment of copyright laws contradicted the pervasive view that, "statutory monopolies favored special interests over common liberties."⁴²³ Accordingly, they cloaked copyright restrictions within the rhetoric of natural rights only to prevent criticism and unrest.⁴²⁴

Second, none of the state copyright laws on their face provided restrictions framed as natural rights.⁴²⁵ Contrary to natural rights, which would be perpetual, all-encompassing, and unconditioned,⁴²⁶

414. *Supra* note 411.

415. Bell, *Escape from Copyright*, *supra* note 17, at 763-64.

416. *Id.* "Sweat of the brow" is commonly used to refer to Locke's labor theory. See also *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360-61 (1991) (discussing the use of the "sweat of the brow" principle as a legal standard).

417. Bell, *Escape from Copyright*, *supra* note 17, at 763.

418. *Id.* at 763-65.

419. *Id.* at 763-64.

420. *Id.* at 763.

421. *Id.* at 765-70.

422. *Id.* at 766.

423. *Id.*

424. *Id.* at 766-67. State legislators were specifically worried that their constituents would criticize them for creating the same sort of monopolies that had stimulated the revolution. *Id.* at 767.

425. *Id.* at 767-70.

426. *Id.* at 767.

state copyright laws provided a copyright for a limited time,⁴²⁷ for only a limited subject matter,⁴²⁸ and conditioned protection on certain requirements.⁴²⁹ Furthermore, similar to the Copyright Clause, which lacks any vestige of natural rights, the wording of both the state statute and the Copyright Clause seem to invoke a Utilitarian⁴³⁰ vision theory.⁴³¹

Finally, they refute the argument that copyright, as a natural right, prohibits copyright owners from opting out by illustrating the Framers' original intentions, through the words of James Madison.⁴³² In response to Thomas Jefferson's critique of the Framers for not including a Bill of Rights that explicitly prohibited

427. *Id.*; see also Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC'Y 11, 21-3 (1975) (discussing the state copyright terms as varying from fourteen to twenty-eight years).

428. Bell, *Escape from Copyright*, *supra* note 17, at 767; see also Crawford, *supra* note 427, at 18-21. None of the original thirteen states' copyright statutes covered paintings, prints, sheet music, or sculpture. *Id.* Massachusetts, New Hampshire, and Rhode Island had the broadest statutes covering only literary works. Bell, *Escape from Copyright*, *supra* note 17, at 767 n.123.

429. Bell, *Escape from Copyright*, *supra* note 17, at 768-69. Most states condition copyright protection on some requirement including identification, forfeiture of a copy to registrar, donation of copies to public libraries, and providing works in reasonable numbers and rates. *Id.* at 768 n.133.

430. The Utilitarian/Incentive theory is the most widely accepted by courts and commentators. See JOYCE ET AL., *supra* note 1, at 61; Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985) (holding Nation's publishing of an article using unauthorized excerpts from President Ford's unpublished manuscript not fair use); Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984) (holding that the manufacture of video cassette recorders were not liable for contributory infringement); Mazer v. Stein, 347 U.S. 201, 219 (1954) (stating, the "economic philosophy behind the clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors"). This theory is based upon the notion that society must provide economic incentives to encourage authors to continue creating and disseminating their works because copyrighted works provide a vital benefit to the public. JOYCE ET AL., *supra* note 1, at 61-63. Utilitarianism derives its premise by assuming several axioms. *Id.* First, it assumes that copyrighted works are not perishable or exhaustible because the simultaneous use by many does not extinguish a work's essence. *Id.* Second, that if these works are not protected authors will not be able to reap the economic benefits of their work, which will deter them from creating and disseminating future works. *Id.* at 63. Finally, that giving author's absolute protection is also detrimental because it would subject their works to market forces, which may enable authors to charge excessive prices, making works unavailable to the general public. *Id.* Accordingly, copyright law's purpose is to regulate the market and legal system in order to create an intermediate point where the scope and period of protection will provide authors with sufficient economic gains to encourage them to create and disseminate, while simultaneously providing the general public with sufficient access and use to these works. *Id.*

431. Bell, *Escape from Copyright*, *supra* note 17, at 769-70.

432. *Id.* at 770-74.

monopolies, Madison justified the Copyright and Patent clauses by using Utilitarian rhetoric.⁴³³ If the Framers had intended to apply natural rights concepts in the copyright context, it is most likely that they would have defended the Copyright and Patent Clauses by using natural rights rhetoric, especially since Jefferson was one of the “foremost advocate of natural rights,”⁴³⁴ yet, there is no mention of natural rights.⁴³⁵

b. *Public Discourse Counter-Argument*

Market failure champions also respond to the counter-argument that there is still a market failure because copyright law was primarily enacted to promote public discourse.⁴³⁶ The counter-argument states that there is still a market failure since TPMs, common law rights, and copyright law do not provide sufficient protection to works vital to public discourse, research, scholarship, and education.⁴³⁷ Market failure theorists respond by asserting that although the Copyright Clause was enacted to promote the greater good and the public’s interest in access to works, “it by no means follows that the public has any *affirmative right* to access copyrighted works.”⁴³⁸ Similarly, although they recognize that the promotion of public discourse is an important copyright foundation, they claim that, “it is not clear that it means that the copyright owner should be under a greater obligation to facilitate copying or even to avoid steps to make copying harder just because some user may be a fair user.”⁴³⁹

433. *Id.*

Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.

Id. at 772.

434. *Id.* at 773.

435. *Id.*

436. *Id.* at 774; Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 33 (1997) (discussing the market failure argument in the context of fair use).

437. Bell, *Escape from Copyright*, *supra* note 17, at 774-75; Loren, *supra* note 436, at 33.

438. Bell, *Escape from Copyright*, *supra* note 17, at 775 (emphasis added).

439. *Id.* (quoting Kenneth W. Dam, *Self-Help in the Digital Jungle*, 28 J. LEGAL STUD. 393, 409 (1993) (supporting digital self-enforcement because it reduces transaction costs and increases diversity of content)).

c. Methods of Opting-Out of Copyright

Since neither the natural rights nor the public discourse argument appear to prohibit providing copyright owners with the right to opt-out of copyright law, they propose three ways to accomplish this.⁴⁴⁰ First, is the doctrine of “election of remedies,” which allows copyright owners to choose between inconsistent copyright law and common law protections.⁴⁴¹ This doctrine provides an individual who has been injured or incurred damages with the right to choose one out of many legal ways to compensate them for their injury or damages, however, if the individual has coexistent, but inconsistent remedies and chooses one then they are prohibited from exercising the remainder of their options.⁴⁴² Although there may be some problems in getting a court to recognize this doctrine’s application to copyright law, its proponents claim it can be easily managed.⁴⁴³

The second option is to abandon the Copyright Act’s protections entirely.⁴⁴⁴ Under this option, the expressive works would fall into the public domain and copyright owners would then protect them solely through TPMs and common law rights.⁴⁴⁵ The main issue that this alternative presents, however, is whether a court would recognize a former copyright owner’s common law rights.⁴⁴⁶ These commentators claim that this alternative, like the first one, can be easily accomplished.⁴⁴⁷

The last option is to suspend a copyright owner’s statutory rights through the doctrine of “copyright misuse.”⁴⁴⁸ According to Professor Bell, this doctrine, “requires a copyright owner who has vio-

440. Bell, *Escape from Copyright*, *supra* note 17, at 788-801.

441. *Id.* at 788-93. This doctrine is based plaintiff’s right provided by the Federal Rules of Civil Procedure to plead alternatively and inconsistently to several causes of action. FED. R. CIV. P. 8. It appears, however, that although plaintiffs are allowed to plead several causes of actions they are entitled to one remedy. *Costello Publ’g Co. v. Rotelle*, 670 F.2d 1035, 1045 (D.C. Cir. 1981); *Twentieth Century-Fox Film Corp. v. Peoples Theatres Inc.*, 24 F. Supp. 66, 74 (D. Mass. 1933); *Bieg v. Hovnanian Enters., Inc.*, Civ. No. 98-5528, 1999 U.S. Dist. LEXIS 17387, at *18-19 (E.D. Pa. Nov. 9, 1999).

442. Bell, *Escape from Copyright*, *supra* note 17, at 788 (quoting, BLACK’S LAW DICTIONARY 518 (6th ed. 1990)).

443. *Id.* at 790-93. Although 17 U.S.C. § 301, copyright preemption, may prevent a copyright owner from alleging some common law claims, Professor Bell claims that this problem can be remedied easily by pleading an extra element or right that copyright does not provide, such as privity or assent. *Id.* at 790.

444. *Id.* at 793-98.

445. *Id.*

446. *Id.* at 795.

447. *Id.* Similar to the election of remedies doctrine, a plaintiff would need to craft his pleadings carefully in order to avoid preemption by 17 U.S.C. § 301. *Id.*

448. *Id.* at 798-801.

lated public policy by combining statutory rights and common law right to either forsake the former and rely on the latter, or reform any associated practices so as to end the misuse."⁴⁴⁹ Accordingly, an individual could decide not to reform her unauthorized practice and rely solely on her common law rights.⁴⁵⁰ Consequently, these commentators claim that because § 1201, in conjunction with copyright owners' ability to use TPMs and common law rights, will disproportionately provide copyright owners with unbalanced power, courts should allow them to opt-out of copyright law and rely solely on TPMs and common law.⁴⁵¹

B. Arguments Supporting the DMCA

1. *Section 1201 is not Adverse to Fair Use and the Copyright Balance*

Congress and Commentators who support § 1201 justify its enactment mainly because of the impact and significance it will have on the economy—specifically the copyright and e-commerce industries.⁴⁵² As the Judiciary's Committee Report to the Senate makes clear, the "[copyright industries] are one of America's largest and fastest growing economic assets."⁴⁵³ The industry has not only grown exponentially faster than any other industry,⁴⁵⁴ but it currently accounts for a significant percent of our Gross Domestic Product ("GDP").⁴⁵⁵ The copyright industry also plays a very important role in maintaining a stable workforce in the United States, since its employment rate usually increases in much larger exponents than the economy as a whole.⁴⁵⁶ Moreover, besides being a

449. *Id.* at 800.

450. *Id.*

451. *Id.* at 744-45.

452. S. REP. NO. 105-190, at 8-9 (1998).

453. *Id.* at 10.

454. *Id.* The Senate Report indicates that in twenty years the copyright industries have grown twice as fast as the rest of the economy. *Id.* While the remainder of the economy grew at a rate of 2.6 percent the copyright industry grew at 5.5 percent. *Id.*

455. The Senate Report also indicates that in 1996, the last full statistics available at the time of the enactment of the DMCA, these industries accounted for 3.65 percent of the United States' Gross Domestic Product, which was \$278.4 billion. *Id.*

456. "Between 1977 and 1996, employment in the U.S. copyright industries more than doubled to 3.5 million workers," which was 2.8 percent of the total U.S. employment. *Id.* In addition, between "1977 and 1996 U.S. copyright industry employment grew nearly three times as fast as the annual rate of the economy as a whole", 4.6 versus 1.6 percent. *Id.*

vital element to our domestic economic well-being, it leads all other industries in foreign exports and sales.⁴⁵⁷

Supporters of § 1201 claim that the copyright and e-commerce industry's successful accomplishments are mainly a result of their involvement in the digital world.⁴⁵⁸ Although digitalization allows for the creation of broader markets and products, it also provides a larger potential for piracy and unauthorized uses.⁴⁵⁹ Due to the grave effect piracy can have on the digital world, copyright owners and the WIPO⁴⁶⁰ have acknowledged that TPMs are very important, not only to the continued economic successes of these industries, but also to their further development.⁴⁶¹

Although TPMs are very advanced and effective in protecting copyrighted works, they are not impenetrable; inevitably, other technologies will be created to defeat them.⁴⁶² Congress shared the same view and believed that it should enact the WIPO treaties because, along “[with] this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.”⁴⁶³ Furthermore, both Congress and former President Clinton's National Information Infrastructure Task Force believed that if no action was taken, the “growth of the [Internet would] be stifled, and public accessibility [would] be retarded” because copyright owners would be unwilling to put their materials online.⁴⁶⁴

Therefore, by signing the WIPO treaties Congress intended to provide these industries with the tools to protect their copyrighted works from unauthorized exploitation within not only the United States, but also within the countries that would ratify the treaties.⁴⁶⁵ Congress was further motivated to sign and ratify the WIPO treaties because they believed that, “the [treaties] largely incorporate[d] intellectual property norms that [were] already part

457. At the time, it had accomplished \$60.18 billion in foreign sales and exports. *Id.*

458. *See supra* note 65-90 and accompanying text.

459. *See supra* Part.II.c.

460. *See supra* note 212-14 and accompanying text.

461. *See supra* Part.II.c.

462. Dam, *supra* at note 439, at 401; *supra* note 91-142 and accompanying text.

463. H.R. REP. NO. 105-551, pt.1., at 9 (1998).

464. S. REP. NO. 105-190, at 65 (1998); *see also* Real Networks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *7 (W.D. Wash. Jan. 18, 2000) (stating that “[m]any of these copyright owners further state if users could circumvent the security measures and make unauthorized copies of the content, they likely would not put their content up on the Internet for end-users”).

465. S. REP. NO. 105-190, at 65.

of U.S. law.”⁴⁶⁶ The only major change needed was the enactment of legislation that would protect TPMs from circumvention and maintain the integrity of rights management systems.⁴⁶⁷

In response to intense criticism that § 1201's ban on trafficking and additional violations provisions were too broad, Congress responded that the provisions were intended to apply only to “Black Box” technology that were “primarily designed” to circumvent TPMs placed by copyright owners to effectively protect their copyrighted works.⁴⁶⁸ Hence, they claim that § 1201 was not directed towards and does not apply to or deter other technological innovations.⁴⁶⁹ Merely because a technological innovation has the effect of circumventing TPMs alone does not constitute a violation of these prohibitions.⁴⁷⁰ In addition, Congress asserted that these laws are not novel or unprecedented.⁴⁷¹ Similar laws had already been enacted in the music, cable, and satellite industries as a response to technology that posed a significant threat to these industries' development and existence.⁴⁷² Congress also acknowledged that prohibiting the circumvention of copyrighted works may possibly threaten, “the diminution of otherwise lawful access to works and information, [thereby, requiring] a ‘fail safe’ mechanism.”⁴⁷³ The fail safe mechanism that Congress provided was the rule making procedure.⁴⁷⁴

Accordingly, commentators who support Congress' passage of § 1201 argue that it will not detrimentally affect fair use and the

466. *Id.* (quoting Secretary Daly of the Department of Commerce). Clinton's NII Task Force Report was well aware of the potential affect that anti-circumvention prohibitions would have on fair use, and responded by asserting that the fair use “doctrine does not require a copyright owner to allow or to facilitate unauthorized access or use of a work.” *THE WHITE PAPERS*, *supra* note 208, at 231; *see also* Bell, *supra* note 91, at 572 (discussing the affect of automated rights management and contractual licensing on fair use).

467. S. REP. NO. 105-190, at 65.

468. 17 U.S.C. § 1201(a)(2), (b) (2001).

469. H.R. REP. NO. 105-551, pt.1., at 10 (1998); Dam, *supra* note 439, at 401.

470. H.R. REP. NO. 105-551, pt.1., at 10; Dam, *supra* note 439, at 401. These provisions will apply only to technology that:

[is] primarily designed to grant free, unauthorized access to copyrighted works; (2) have only limited commercially significant purpose or use other than to grant such free access; or (3) are intentionally marketed for use in granting such free access.

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

471. *See* S. REP. NO. 105-190, at 28; H.R. REP. NO. 105-551, pt.1., at 10.

472. S. REP. NO. 105-190, at 28; H.R. REP. NO. 105-551, pt.1., at 10.

473. H.R. REP. NO. 105-551, pt.2., at 36.

474. *Supra* note 256-59 and accompanying text.

copyright balance.⁴⁷⁵ Although they acknowledge that the traditional notion of fair use may be a thing of the past, they assert that similar to technology and copyright law, fair use must also change to adapt to new technology.⁴⁷⁶ These commentators claim that § 1201's exorbitant amount of criticism of is not directed at the possibility that there will be less information available to the public, but merely that such information will no longer be free.⁴⁷⁷ They also claim that digitized fair use or "fared use," as Professor Bell refers to it, will provide many new benefits to users and the public that were traditionally unavailable.⁴⁷⁸

Professor Bell and other commentators who support § 1201 assert that the majority of commentators who decry the end of fair use and copyright's private-public balance base their entire arguments on the normative misconception that in a "pay-per-use world" information will no longer be free.⁴⁷⁹ This misconception, however, fails to take into consideration that even if there have been no monetary costs, there have always been costs in the form of transaction costs and lost opportunities.⁴⁸⁰ Transaction costs and lost opportunities are important because according to Coase's theorem, if transaction costs are high there will be less productivity and dissemination of information.⁴⁸¹ If all transaction costs are abolished, however, then "the market would internalize all costs and allow only value-maximizing transfers."⁴⁸² Therefore, they claim that opponents of § 1201 fail to consider that although traditional fair uses have no monetary charge, they have many transaction and lost opportunity costs.⁴⁸³ Whereas, the use of information in a pay-per-use world has few, if any, transaction or lost opportunity costs, and any monetary costs are for the service and conve-

475. See Bell, *supra* note 91, at 579-92 (describing the advent of fared use and its advantages); Dam, *supra* note 439, at 404-07, 411-12 (discussing some benefits of trusted systems); Stefik, *supra* note 19, at 156-58 (asserting the possibility of digital trusted systems functioning within copyright law through the aid of special commissions).

476. Bell, *supra* note 91, at 569-70.

477. *Id.*; Dam, *supra* note 439, at 394, 410; Stefik, *supra* note 19, at 146-47.

478. Bell, *supra* note 91, at 600; Dam, *supra* note 439, at 404-407, 411-12; Stefik, *supra* note 19, at 147-53.

479. Bell, *supra* note 91, at 558-59; Dam, *supra* note 439, at 393 n.1.

480. Dam *supra* note 439, at 412; Stefik, *supra* note 19, at 144-45.

481. See generally Bell, *supra* note 91, at 583; R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 193 (1960); Dam, *supra* note 439, at 408.

482. Bell, *supra* note 91, at 583.

483. *Id.* at 579-80.

nience of superior quality information.⁴⁸⁴ Furthermore, although copyright's goal is the creation and dissemination of thoughts and ideas to as broad a population as possible they claim that, "it is not clear that [this] means that the copyright owner should be under a greater obligation to facilitate copying or even to avoid steps to make copying harder just because some user may be a fair user."⁴⁸⁵

These commentators also rely on recent case law, *American Geophysical Union v. Texaco, Inc.*⁴⁸⁶ and *Princeton University Press v. Michigan Document Services, Inc.*⁴⁸⁷ to support their assertion that users are not always entitled to unlimited, absolute, or free fair uses.⁴⁸⁸ These cases narrowed fair use by holding that users are not entitled to exploit copyrighted works for free for traditional fair use purposes, such as research and education, when the copyright owner has created a market for such uses and makes it feasible to pay for such uses.⁴⁸⁹ Therefore, they assert that it logically follows that in a digital pay-per-use world where copyright owners condi-

484. *Id.* at 580-81. Traditionally, if a user wanted several pages of information about a relevant subject he would have to go to the library, search and find a source, and then photocopy the relevant pages. Although the only monetary charges were the photocopying fees, because the entire process would take two to four hours, he incurred many transaction and lost opportunity costs. Whereas, in a pay-per-world while the user may have to pay more than just the photocopying fees because all information will be digitized, the entire process will take only several minutes and can be done from any personal computer connected to the Web. *See id.* (discussing how digital technology will improve and make more efficient the use of copyrighted works).

485. Dam, *supra* note 439, at 409.

486. 60 F.3d 913, 930-31 (2d Cir. 1994) (holding that "the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor, [the affect on the copyright owner's market,] when the means for paying for such a use is made easier"). In this case, eighty three publishers of scientific and technical journals sued Texaco for copyright infringement based on Texaco's copying and archiving articles so that they could be later used for research purposes. *Id.* at 914-15. The Second Circuit held that the copying was not considered fair use because the publishers had set up a system to make easy payment through the Copyright Clearance Center. *Id.* at 930-31.

487. 99 F.3d 1381, 1385-87 (6th Cir. 1996) (Holding that where the copyright holder has an interest in exploiting a licensing market and has succeeded in doing so it is appropriate that the potential licensing revenues be considered in a fair use analysis). In this case, Princeton University Press and other publishers sued the defendant for making unauthorized copies of their copyrighted material in creating coursepacks for university students. *Id.* at 1383-84. The Sixth Circuit held that it was not fair use because plaintiffs had successfully created a market for such use, which defendants could have used, even though it would have taken up to four weeks to get permission. *Id.*

488. Bell, *supra* note 91, at 567-75; Dam, *supra* note 439, at 410-12; Stefik, *supra* note 19, at 145-46.

489. *Princeton Univ. Press*, 99 F.3d at 1385-88; *Am. Geophysical Union*, 60 F.3d at 930-31.

tion the exploitation of all fair and non-fair uses on a trivial price,⁴⁹⁰ neither fair use nor the copyright balance will be hindered or diminished.⁴⁹¹

These commentators assert that even a digital pay-per-use world such as that envisioned by Professor Stefik, where all copyrighted works are protected and managed by TPMs,⁴⁹² will be more beneficial to both copyright owners and users⁴⁹³ even if it shifts the balance and puts more power in the publishers' hands.⁴⁹⁴ First, they claim TPMs will enable copyright owners to create entirely digital libraries without the fear of rampant infringement.⁴⁹⁵ Second, TPMs would provide copyright owners with attribution and integrity rights that can be very important in maintaining their work's legitimacy and authenticity.⁴⁹⁶ These benefits, among others, will increase the value copyrighted works, which will encourage copyright owners to further create and disseminate.⁴⁹⁷ The decrease in transaction costs will significantly increase transactional efficiency, which will provide users with cheaper access to copyrighted works.⁴⁹⁸ Furthermore, the digitalization of information content will make copyrighted works more organized and of better quality.⁴⁹⁹

These commentators also claim that the implementation of TPMs may actually spread, rather than hinder ideas.⁵⁰⁰ Foremost, TPM's automation and ability to provide fair uses for a certain price will make fair use claims clear and precise, allowing users to

490. These commentators envision a world in which copyright owners will implement TPMs in trusted systems that make it very easy to make payments for all uses including fair uses such as quoting, citing, parody, and satire. Bell, *supra* note 91, at 576-77; Dam, *supra* note 439, at 403-05; Stefik, *supra* note 19, at 145-47.

491. See Bell, *supra* note 91, at 579-90; Dam, *supra* note 439, at 409-10; Stefik, *supra* note 19, at 146-52 (describing how DRLs will affect fair use).

492. Stefik, *supra* note 19, at 145-55.

493. Bell, *supra* note 91, at 580-81; Dam, *supra* note 439, at 405-06; Stefik, *supra* note 19, at 146-53.

494. Stefik, *supra* note 19, at 155. Professor Stefik, however, claims that an uncontrolled digital pay-per-use world would shift the balance totally towards users, thus abolishing the copyright balance. *Id.*

495. *Id.* at 147-49.

496. Dam, *supra* note 439, at 405-06. TPMs can ensure that a copyright owner's work has not been tampered, altered, or modified, which may ruin their work's reputation. See *id.* (discussing how TPMs will maintain an author's integrity and moral rights).

497. Bell, *supra* note 91, at 589.

498. *Id.* at 586-88; see also Dam, *supra* note 439, at 409 (discussing how self-help systems will make payment and the use of copyrighted works more efficient).

499. Bell, *supra* note 91, at 581, 589.

500. Dam, *supra* note 439, at 409.

use and reuse materials without the fear of infringement and liability.⁵⁰¹ The lack of fear of liability and infringement claims will also encourage public discourse because individuals will be more likely to criticize, comment, and parody all types of views and sources.⁵⁰² Finally, commentators claim that because digitization and the use of TPMs will encourage more copyrighted works whose copyright terms will eventually expire, such works will ultimately fall into the public domain, thereby, significantly expanding it.⁵⁰³

They also assert that fair use is not in danger because there are many forces that will ensure that fair use is not restricted or annihilated.⁵⁰⁴ Courts will always monitor and make sure that fair use is maintained.⁵⁰⁵ There are also many other safeguards, such as the free market,⁵⁰⁶ First Amendment advocates,⁵⁰⁷ and civil disobedience through the public and mass media.⁵⁰⁸ Although these commentators claim that the copyright balance will be maintained by the many benefits that TPMs will provide, this claim is, however, based on the assumption that contractual licensing will not impede or restrain their ability to coexist and benefit fair use.⁵⁰⁹

2. *UCC-2B/UCITA as the Real Danger to Fair Use and the Copyright Balance*

Although many commentators claim that the DMCA's § 1201 and copyright owners' use of TPMs will adversely affect fair use and other privileges,⁵¹⁰ this problem is not contained in a vacuum. There is also a strong consensus among commentators who contend that the copyright balance is in danger of being disrupted by

501. Bell, *supra* note 91, at 586-88.

502. See Stefik, *supra* note 19, at 150-51 (asserting that digital technology will encourage and facilitate use and reuse).

503. Bell, *supra* note 91, at 589-90. Professor Stefik envisions the public domain increasing either through publishers providing free access once their copyright term expires, which may be unlikely, or by copyright owners providing the Library of Congress with a copy of their work. Stefik, *supra* note 19, at 152-53.

504. Bell, *supra* note 91, at 578-79, 592, 601; Stefik, *supra* note 19, at 156.

505. Bell, *supra* note 91, at 578-79.

506. They claim that if a copyrighted work is obtained only through restrictive limitations users will not buy the product and copyright holders will lose money. *Id.* at 601; Stefik, *supra* note 19, at 156. In addition, if copyrighted works are cheaply available this will also discourage circumvention and unauthorized exploitation. Bell, *supra* note 91, at 601; Stefik, *supra* note 19, at 156.

507. Bell, *supra* note 91, at 592.

508. *Id.* at 593.

509. Bell, *supra* note 91, at 560-65, 577-79; Dam, *supra* note 439, at 393-95; see also Stefik, *supra* note 19, at 146, 151 (describing exclusive rights' limitations).

510. *Supra* Part.II.A.1.

the precedent set forth in *ProCD v. Zeidenberg* and its progeny, UCITA.⁵¹¹ UCITA stands to hinder fair use and the copyright balance because it legitimizes shrink-wrap like contracts that allow copyright owners to evade copyright law while reaping all its benefits.⁵¹² Thus, unlike TPMs, which offset the stronger protection by providing greater benefits to the public UCITA provides copyright owner with extensive protection and rights with very few benefits to the public.⁵¹³

Commentators' main problem with contractual licensing of digital information,⁵¹⁴ "shrink-wrap" contracts,⁵¹⁵ UCITA⁵¹⁶ is that they will have the effect of destroying the balance that copyright intended to create and maintain.⁵¹⁷ These commentators contend that copyright law and its delicate balance between copyright owners' private interests and users' public interests was created in accordance with the utilitarian⁵¹⁸ concept of copyright law rather than the Natural Rights⁵¹⁹ view.⁵²⁰ They support this distinction by pointing to the fact that copyright law provides copyright owners with limited exclusive rights only;⁵²¹ yet, these rights are sufficient enough to provide them with the incentive to further create and disseminate.⁵²² Moreover, copyright law offsets copyright owners'

511. See, e.g., Dennis S. Karjala, *Symposium: Copyright Owner's Rights and User's Privileges on the Internet: Federal Preemption of Shrinkwrap and Online Licenses*, 22 DAYTON L. REV. 511, 512-13 (1996) (discussing how the proposed UCC-2B must be preempted by Copyright law because it provides copyright owners the right to force users to contract away all their rights, thereby creating an unbalanced copyright system); Mark A. Lemley, *Symposium: Beyond Preemption: The Law and Policy of Intellectual Property Licensing Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 113 (1999) (discussing the dangers that UCC-2b poses and possible defenses); Madison, *supra* note 73, at 1026-31.

512. *Supra* note 190-96 and accompanying text.

513. *Supra* Part I.C.3.b.

514. *Supra* note 65-76 and accompanying text.

515. Although contractual licensing of digital information takes many other forms such as "browser-wraps" and "click-wraps" for the purpose of convenience they are referred to as "shrink-wrap" contracts for the remainder of this Note. See *supra* notes 165-166 and accompanying text (discussing the different type of electronic contracts).

516. *Supra* notes 169-204 and accompanying text.

517. Karjala, *supra* note 511, at 514-15.

518. *Supra* note 430 and accompanying text.

519. *Supra* note 411 and accompanying text.

520. Karjala, *supra* note 511, at 514-15.

521. *Supra* note 231 and accompanying text.

522. Karjala, *supra* note 511, at 517-18. Professor Lemley provides three reasons why copyright law does not provide copyright owners with exclusive rights:

First, granting exclusive rights raises the cost of new works to the public, and in some cases means that the public won't get access to the works at all. Second, granting property rights to original creators allows them to prevent subsequent creators from building on their works, which means that a law

rights with various limitations that in turn provide the public with many exceptions and privileges.⁵²³

In addition to asserting that it is uncontested that copyright law contains this balance, they also maintain that the balance is unalterable and non-negotiable.⁵²⁴ They contend that the copyright balance is not a default position, which can be negotiated and altered by parties through agreement because of the explicit and inherent limitations placed upon copyright owners' exclusive rights.⁵²⁵ Rather, they argue that these limitations are the means provided by copyright law to adjust the balance.⁵²⁶ Therefore, if the Framers of the Constitution had intended to make these limitations negotiable, the copyright balance would be superfluous because copyright owners who have higher bargaining power would be able to bargain away all or a substantial part of these limitations.⁵²⁷ Hence, the ability to bargain away rights and privileges destroys the copyright balance and its utilitarian founding by providing copyright owners with all the benefits of copyright law, without any offset or benefit to the public that have traditionally accrued from free and fair use of information.⁵²⁸ This effect would also be inconsistent with the constitutional Founders' intent to provide copyright owners with a limited right only.⁵²⁹

Accordingly, contractual licensing of digital information has the potential to upset the copyright balance. The main reason commentators fear this outcome is that, "[in] the digital future, access to many works may be available only to people who 'contract' in advance [to many restrictions that are contrary to public policy] . . .

designed to encourage the creation of first-generation works may actually risk stifling second-generation creative works. Third, the goal of intellectual property is only to provide the "optimal incentive," not the largest incentive possible.

Lemley, *supra* note 511, at 124-25.

523. Karjala, *supra* note 511, at 517-19; *supra* note 317 and accompanying text. It is this attempt to design a system that will provide copyright owners with the incentive to create, offset by providing users with many exceptions and privileges, that gives form to copyright's intricate balance.

524. Karjala, *supra* note 511, at 518; Lemley, *supra* note 511, at 125-26; Madison, *supra* note 73, at 1078.

525. Karjala, *supra* note 511, at 518-19; Madison, *supra* note 73, at 1079; *see also supra* note 231.

526. Madison, *supra* note 73, at 1079.

527. Karjala, *supra* note 511, at 521; Lemley, *supra* note 511, at 125-26.

528. Karjala, *supra* note 511, at 521. This notion implies that even if users are willing to bargain away all or most of their privileges in exchange for either access or a cheaper price they should not be allowed to do so because the policy implications of eroding the copyright balance are too great. *Id.* at 519.

529. Lemley, *supra* note 511, at 125-26.

[if] these 'licenses' are uniformly enforceable, all of the users' rights of copyright will soon disappear."⁵³⁰ They claim this fear is not unfounded since many contracts written by copyright owners attempt to privately regulate or bargain for greater rights than those provided in the Copyright Act.⁵³¹ For instance, many copyright owners attempt to restrict copying,⁵³² fair use,⁵³³ reverse engineering,⁵³⁴ first sale doctrine,⁵³⁵ public performance or displays,⁵³⁶

530. Karjala, *supra* note 511, at 513. The restrictions that are deemed "contrary to public policy" are not quoting, citing, criticizing, or using any factual information or ideas. *Id.* Shrinkwrap contracts seem to hinder information spillover, which Professor Gilson believes is essential to the furtherance and success of creation and dissemination of copyrighted works, because if copyright owners are contractually restricted from using certain elements then they are limited and restricted from creating and disseminating. Gilson, *supra* note 297, at 595, 601-02.

531. Lemley, *supra* note 511, at 128, 131; *see also* Bell, *supra* note 91, at 579, 597 (stating that absent contractual licensing fair use will maintain its balance).

532. Besides implicating fair use issues, if the copyrighted work is a computer program it may be inconsistent with 17 U.S.C. § 117, which provides users with the right to copy and adapt the program in order to properly utilize it and for archival purposes. *Vault Corp v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (holding that Section 117 authorized defendant to make a copy of plaintiff's software in order to test and analyze it); Lemley, *supra* note 511, at 128, 130. *But see* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 n.5 (9th Cir. 1993) (finding that "[s]ince MAI licensed its software, the Peak customers do not qualify as 'owners' of the software and are not eligible for protection under § 117").

533. *See, e.g.*, RICK FEINBERG, PECULIAR PATENTS: A COLLECTION OF UNUSUAL AND INTERESTING INVENTIONS FROM THE FILES OF THE U.S. PATENT OFFICE iv (1994) (stating "No part of this book may be reproduced in any form, except by a newspaper or magazine reviewer who wishes to quote brief passages in connection with a review."). In addition, IBM's InfoMarket Service, a commercial TPM, contains a restriction that states, "Unless IBM specifies otherwise, you may not copy, modify, create derivative works based upon, adapt, reproduce, [or] translate . . . any aspect of this service." Bell, *supra* note 91, at 577 n.98.

534. Lemley, *supra* note 511, at 130. It is not hard to imagine a computer program that provides in its end user agreement that the use of the program constitutes an agreement not to reverse engineer the program.

535. *Id.* at 131. The first sale doctrine entitles the "owner of a particular copy or phonorecord lawfully made . . . , or any person authorized by such owner . . . to sell or otherwise dispose of the possession of that copy or phonorecord." (emphasis added). 17 U.S.C. § 109(a) (2001). This limitation makes explicit that the copyright owner's first sale extinguishes her right to public distribution of that copy. *Id.* The owner of that particular copy, however, is still subject to the copyright owner's other exclusive rights, specifically the right to reproduce and perform. *Id.* § 106. Since this exemption is only applicable to "owners" of copyrighted works individuals that acquire them through leases, licenses, or rentals may not transfer or dispose of the work without the copyright owner's permission. *Id.* § 109(b)(1)(A). This limitation to the first sale doctrine also applies to sound recordings and computer programs lent or disposed for the "direct or indirect commercial advantage." *Id.* Accordingly, this "ownership" loophole has motivated and encouraged copyright owners to increasingly distribute their works as licenses rather than as a transfer of title using contractual measures such as

transfer rights,⁵³⁷ terms of ownership,⁵³⁸ and most importantly the public domain.⁵³⁹ They acknowledge, however, that contracting within the bounds and terms of copyright law is allowed and should be enforceable.⁵⁴⁰

Due to the potential dangers that contractual licensing of information content presents, Professor Karjala believes that Judge Easterbrook's holding in *ProCD v. Zeidenberg* validating "shrink-wrap" contracts was mistaken.⁵⁴¹ He claims that Judge Easterbrook was mistaken because he failed to recognize and to take into consideration copyright balance's public interest and how "shrink-wrap" contracts would affect it.⁵⁴² Furthermore, by enforcing "shrink-wrap" contracts Judge Easterbrook altered users' conventional sense of what is deemed an appropriate use to mirror copyright owner's expectations.⁵⁴³ Most significantly, *ProCD* gives the illusion that fair use and other limitations that create the copyright balance are a question of purely private definition.⁵⁴⁴

Having concluded that "shrink-wrap" contracts pose a great danger to the spirit of copyright law and that Judge Easterbrook was

"shrink-wrap" and "click-wrap" contracts. THE DIGITAL DILEMMA, *supra* note 62, at 34-35, 178.

536. Lemley, *supra* note 511, at 131-32.

537. *Id.*

538. Lemley, *supra* note 511, at 132. The Copyright Act sets out in detail the specific ways in which works "made for hire" are created. Lemley, *supra* note 511, at 132; *see also* § 204. For instance, it requires that all contracts be written. § 204.

539. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

540. *See* Lemley, *supra* note 511, at 135 (stating that parties can contractually agree to remedies for copyright infringement); Madison, *supra* note 73, at 1079 (stating that "private contract . . . may assign rights within, but not beyond the limits set by Congress"). An example of contracting within the bounds of copyright law is agreeing in advance as to the remedies that will be available to the respective parties in the event of an infringement, such as, agreeing to waive the remedy of injunctive relief for a better price. *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1293 (1996) (discussing the emergence of collective copyright agencies as a way to bargain within copyright and its compulsory licenses). Another example is when access to an unpublished, otherwise unavailable copyrighted work is made contingent on the agreement that the user not use any of the underlying ideas. Karjala, *supra* note 511, at 513.

541. Karjala, *supra* note 511, at 521; *see also ProCD, Inc.*, 86 F.3d at 1449.

542. Karjala, *supra* note 511, at 521. Professor Karjala believes that Judge Easterbrook mistakenly held that merely because the subject matter was not copyrightable defendants were free to do as they pleased with the database. *Id.* at 521-22. His main contention is that he failed to take into consideration various factors such as the difference between a private contract between two individuals that may not have been published and a mass market license of a published work, and whether the Supremacy Clause would have invalidated the contract. *Id.*

543. Madison, *supra* note 73, at 1058-59.

544. *Id.* at 1059.

mistaken in holding them enforceable, the majority of commentators opposed to UCITA claim that there are two main ways that “shrink-wrap” contracts may be invalidated; preemption under either § 301 of the Copyright Act⁵⁴⁵ or the Supremacy Clause.⁵⁴⁶ Only the latter option, however, will have any possible impact on shrink-wrap contracts’ validation and enforcement.⁵⁴⁷

Preemption under § 301 of the Copyright Act appears at first glance to remedy the “shrink-wrap” issue.⁵⁴⁸ The first prong of § 301 does not present a problem because “a work is [considered copyrightable] subject matter if it is of a type covered by sections 102 and 103 of the Copyright Act, even if federal law denies protection to all or a part of a work in a particular case.”⁵⁴⁹ The second prong, that the right to be preempted must be “equivalent to any of the exclusive rights within the general scope of copyright,” however, is problematic.⁵⁵⁰ The problem arises because of the ease by which a copyright owner can evade § 301’s preemption.⁵⁵¹ A copyright owner can evade preemption by proving that his contractual or other rights contain an “extra element,” which “changes the

545. 17 U.S.C. § 301 (2001).

546. U.S. CONST. art. VI, cl. 2.

547. Karjala, *supra* note 511, at 531; Lemley, *supra* note 511, at 139-42; Madison, *supra* note 73, at 1052, 1127.

548. Karjala, *supra* note 511, at 527.

549. *Id.* Sections 102 and 103 define what is considered copyright subject matter:

§103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

§ 103.

§ 102. Subject matter of copyright: In general

(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.

§ 102.

550. 17 U.S.C. § 301 (2001).

551. Karjala, *supra* note 511, at 527-28; Lemley, *supra* note 511, at 140; Madison, *supra* note 73, at 1128-29.

nature of the action [to make it] qualitatively different from a copyright infringement claim.”⁵⁵² Accordingly, shrink-wrap contracts easily evade preemption by proving that the agreement was a bilateral promise formed by bargaining and assent, which are extra elements since the Copyright Act does not require either.⁵⁵³ In addition, many commentators, including the drafters of UCITA, believe that contract claims cannot be preempted because they are intrinsically different from copyright law infringement claims; copyright law creates rights against the world, whereas contract law defines rights between two assenting parties.⁵⁵⁴ Even if contract claims can in fact evade preemption, they claim that mass-market licenses should be preempted because they lack a true bargain.⁵⁵⁵

Preemption under the Supremacy Clause presents a better chance against shrink-wrap contracts because it will preempt any rights that “[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵⁵⁶ According to the leading case *Goldstein v. California*, courts should preempt any state contractual claim that attempts to regulate a work that falls into the subject matter of copyright and frustrates the purposes and objectives of Congress.⁵⁵⁷ Thus, shrink-wrap contracts should be preempted because they stand to frustrate and erode the basic federal copyright policy, that copyright owners’ rights are not exclusive, but are limited by various limitations.⁵⁵⁸ In

552. *Expeditors Int’l of Wash., Inc. v. Direct Line Cargo Mgmt. Serv., Inc.*, 995 F. Supp. 468, 480-85 (D.N.J. 1998) (denying defendant’s motion for summary judgment claiming that contract claims were preempted, citing *ProCD*); see also *Lattie v. Murdach*, No. C-96-2524 MHP, 1997 U.S. Dist. Lexis 3558, at *16-17 (N.D. Cal. Jan. 8 1997) (remanding to state court a breach of contract claim concerning public domain material after applying the “extra element” standard); Karjala, *supra* note 511, at 527-28; Lemley, *supra* note 511, at 140; Madison, *supra* note 73, at 1128-29. The “extra element,” however, must be real and cannot be fictitiously created through a statutory label because this would allow states to instantly replace all of copyright law through one legislative act. Karjala, *supra* note 511, at 528.

553. Karjala, *supra* note 511, at 527-28; Lemley, *supra* note 511, at 147-50; Madison, *supra* note 73, at 1128-30. Under § 301, the minority standard approach, and the “private legislation” argument, contract claims would be preempted by copyright law. Madison, *supra* note 73, at 1129-30. Under the minority standard, “courts preempt enforcement of a state contract law claim unless the claim requires proof of an element that is both not required by the Copyright Act . . . and goes to a right or promise that is beyond the scope of copyright holder’s right enumerated in the Copyright Act.” *Id.* Under the “private legislation” argument, the Copyright Act will preempt claims when they become so prevalent that users have no other choice. *Id.* at 1130.

554. Lemley, *supra* note 511, at 147.

555. Karjala, *supra* note 511, at 531-32.

556. U.S. CONST. art. VI, cl. 2.

557. Karjala, *supra* note 511, at 534.

558. *Id.* at 535, 541.

practice, however, courts have been inconsistent in their decisions regarding preemption under the Supremacy Clause.⁵⁵⁹

Other commentators claim that, although preemption under the Supremacy Clause is vital and may have an important effect since UCITA will make shrink-wrap contracts more common, it is not sufficient to resolve the entire issue.⁵⁶⁰ They claim preemption under the Supremacy Clause has many deficiencies.⁵⁶¹ First, the clause is a strong and broad tool that can have the effect of preempting an entire field of law from a particular subject.⁵⁶² Due to this overbroad possible effect, courts may be reluctant to use it to preempt shrink-wrap contracts.⁵⁶³ Furthermore, it may not be effective when the copyright issue is not statutory, but rather equitable or implied from copyright's balance principle.⁵⁶⁴ Accordingly, other remedies will have to attempt to invalidate shrink-wrap contracts such as unconscionability⁵⁶⁵ and copyright misuse.⁵⁶⁶

Consequently, these commentators oppose UCITA because it stands to validate and enforce shrink-wrap contracts. They claim that UCITA fundamentally changed contract law by expanding the scope and power of contracts.⁵⁶⁷ They attribute these changes to UCITA's broad definition of "license;"⁵⁶⁸ its application to almost

559. Lemley, *supra* note 511, at 143.

560. *Id.* at 145.

561. *Id.* at 145-67.

562. *Id.* at 145.

563. *Id.*

564. *Id.* at 145-46. Since these cases are unclear as to whether there is a conflict, courts may be reluctant to preempt. *Id.* at 146.

565. Although this is an option, it has many deficiencies such as it is hardly used, it is hard to implement, and *ProCD* has provided "shrink-wrap" contracts with a fool-proof method of evading unconscionability. Lemley, *supra* note 511, at 151.

566. *Id.* at 151-58. Although the drafters of U.C.I.T.A. admitted that this may be a potential limitation to "shrink-wrap" contracts, it will not cover all cases including those dealing with state intellectual property law. *Id.* at 157.

567. *Id.* at 118-23.

568. Karjala, *supra* note 511, at 534-35. The major contention against this definition is that it changes the usual standard for determining whether a transaction was a sale, license, or lease based on the "economic realities of the exchange." Lemley, *supra* note 511, at 118-19; *see also* Karjala, *supra* note 511, at 534-35. Under UCITA section 1(a)(41), anything that fits within this broad definition regardless of the "economic realities of the exchange" is considered a license. Unif. Computer Info. Transaction Act § 1(a)(41) (Final Act Aug. 2002); Karjala, *supra* note 511, at 534-35; Lemley, *supra* note 511, at 118-19. UCITA § 1(a)(41) states:

"License" means a contract that authorizes access to, or use, distribution, performance, modification, or reproduction of, information or informational rights, but expressly limits the access or uses authorized or expressly grants fewer than all rights in the information, whether or not the transferee has title to a licensed copy. The term includes an access contract, a lease of a computer program, and a consignment of a copy. The term does not include

all copyright subject matter because of its definition of “information;”⁵⁶⁹ the enforcement of a standard form contract with no true bargain or assent;⁵⁷⁰ its property-like character that seems to be more like an equitable servitude;⁵⁷¹ and, most significantly, that it allows the contract drafters to enforce almost any terms they choose.⁵⁷²

They also argue that UCITA codifies the argument and standards created by *ProCD*,⁵⁷³ which assures that it will reinforce rather than suspend the growing norm in shrink-wrap contracts as private bilateral restrictions on information use and distribution.⁵⁷⁴ UCITA strengthens and supports this growing trend in several manners. It mandates that the control of use and reuse of “information” be determined solely through contracts.⁵⁷⁵ It enforces any restrictions on transfers and makes any of the licensee’s duties enforceable on any and all future assignees.⁵⁷⁶ Hence, in effect it makes the contractual terms’ rights effective against the world, not merely between the two agreeing parties. Finally, it has the potential to allow copyright owners the right to restrict the use of ideas, facts, and fair use of their works, which would also be binding against the entire world.⁵⁷⁷

a reservation or creation of a security interest to the extent the interest is governed by [Article 9 of the Uniform Commercial Code].

Unif. Computer Info. Transaction Act. § 1(a)(41) (Final Act Aug. 2002).

569. Madison, *supra* note 73, at 1124-26. UCITA § 1(a)(35) defines information as, “data, text, images, sounds, mask works, or computer programs, including collections and compilations of them.” Unif. Computer Info. Transaction Act § 1(a)(35) (Final Act Aug. 2002).

570. Professor Lemley believes that UCITA has this affect because it considers the terms part of a contract if the buyer manifests assent, which includes using information already bought, or by having been given prior notice. Lemley, *supra* note 511, at 118-22, 120 n.19.

571. *Id.* at 121.

572. *Id.* at 121-23.

573. *ProCD, Inc. v. Zeidenberg*, 908 F.Supp 640, 650-58 (W.D. Wis. 1996); *supra* Part I.C.3.

574. Madison, *supra* note 73, at 1127.

The Draft thus (i) validates ‘mass-market’ license terms that are not ‘unconscionable,’ (ii) allows negotiated licenses to take precedence over mass-market license terms, and (iii) imposes a mandatory refund option for mass-market license terms that cannot be accessed or reviewed before the user pays for the ‘information.’ This is the contract framework applied by the court in *ProCD*.

Id.

575. Karjala, *supra* note 511, at 535; *see also* Unif. Computer Info. Transaction Act § 208 (Final Act Aug. 2002).

576. Karjala, *supra* note 511, at 535; *see also* Unif. Computer Info. Transaction Act § 506 (Final Act Aug. 2002).

577. Karjala, *supra* note 511, at 536.

Consequently, UCITA has the potential to disrupt copyright's delicate balance because it does not provide the ability to opt-out of copyright law.⁵⁷⁸ Rather, UCITA provides copyright owners with the right to combine copyright and contract laws that would disproportionately place the power of the court in their favor.⁵⁷⁹ Since copyright owners would have ultimate control over what is enforceable, the main fear is that users will suffer by being bound to a contractual copyright law that provides them with barely any privileges.

III. ABSENT SHRINKWRAP CONTRACTS THE DMCA WILL PROVIDE A DIGITIZED FAIR USE AND MAINTAIN THE COPYRIGHT BALANCE

The emergence of digital technology and the Web has revolutionized the world in every aspect of our lives from how we sleep, eat, learn, listen to music, watch TV, read books, and even communicate. In every field in which it has been embodied in, it has provided immense benefits and advantages to the public. Therefore, although § 1201 may provide copyright owners with greater protection and control, copyright's balance is preserved by the offset in benefits and advantages that digital technology provides.⁵⁸⁰ The real peril to fair use and copyright's balance, however, emanates from the NCCUSL's enactment of UCITA rather than from the DMCA.⁵⁸¹ UCITA poses a tremendous danger to fair use and copyright's balance because it provides copyright owners with unlimited control over and beyond copyright law, without providing any benefits to the public.⁵⁸²

Copyright law has traditionally been sufficiently able to deal with unauthorized exploitation and piracy to the extent that it prevented significant damage to copyright owners.⁵⁸³ Digital technology, however, is so novel that traditional copyright law was insufficiently structured to deal with all its legal implications.⁵⁸⁴ It is primarily because of copyright's inadequacy that TPMs play a vital role in the digital revolution by allowing copyright owners to

578. *Supra* Part II.1.c.

579. Lemley, *supra* note 511, at 150.

580. *Supra* note 493-504 and accompanying text.

581. *Supra* Part II.B.2.

582. *Supra* note 578-80 and accompanying text.

583. *See supra* note 69-76 and accompanying text (discussing the implications of digital information).

584. *See supra* note 69-76 and accompanying text (discussing the implications of digital information).

protect their works from unauthorized exploitation and piracy.⁵⁸⁵ TPMs, however, are not impenetrable and with patience and skill can be circumvented.⁵⁸⁶

Although some commentators espouse the view that the modern market and TPMs provide copyright owners with sufficient ability to protect themselves,⁵⁸⁷ WIPO,⁵⁸⁸ Congress,⁵⁸⁹ and former President Clinton's National Information Infrastructure Task Force's Working Group on Intellectual Property⁵⁹⁰ correctly believed that new legislation was required "to [bring] copyright law squarely into the digital age."⁵⁹¹ They were also correct in declaring that, if copyright law was not updated to recognize and accommodate digital information content, it would have detrimental consequences.⁵⁹² Copyright's inadequacy would prevent the further economic success of these industries, and it would hinder the advancement and growth of digital technology.⁵⁹³ Yet, most importantly, it would hinder the growth of digital copyrighted works and their dissemination on the Web because of the unanimous fear that any digital works disseminated on the Web would be susceptible to unauthorized exploitation and piracy.⁵⁹⁴

The DMCA's § 1201 is necessary not only to protect copyright owners from unauthorized exploitation and piracy, but also to ensure that copyright owners continue to create and disseminate works so that the public can fully benefit from the digital revolution. Although commentators oppose § 1201 for various reasons,⁵⁹⁵ their main contention is that it would have the adverse effect of hindering or diminishing fair use and copyright's balance.⁵⁹⁶

To the contrary, § 1201 does not adversely affect fair use or copyright's balance. The arguments declaring that § 1201 will adversely affect fair use and copyright's balance are erroneous for one compelling reason. These arguments' reasoning are based on

585. *Supra* Part I.C.2.d.

586. *Supra* notes 140-41 and accompanying text.

587. *Supra* Part II.A.3.

588. *Supra* notes 8, 14, 212-14 and accompanying text.

589. *Supra* note 58-59, 217, 463-74 and accompanying text.

590. *Supra* note 206-11 and accompanying text.

591. S. REP. NO. 105-190, at 2 (1998).

592. *Supra* note 452-57 and accompanying text.

593. *Supra* note 452-57 and accompanying text.

594. *Supra* note 452-57 and accompanying text.

595. *Supra* Part II.A.

596. *Supra* Part II.A.1.

mainly two incorrect normative assumptions.⁵⁹⁷ This is significant because the use of these incorrect normative assumptions as their arguments' axioms will always lead to the conclusion that § 1201 or any other major change in copyright law will adversely effect fair use and copyright's balance.

The first incorrect normative assumption is the presupposition that copyright owners and Congress have a duty to provide not only access for fair use purposes, but also provide it for *free*.⁵⁹⁸ It is important to realize that fair use is not a *right* or entitlement, as some commentators either mistakenly or intentionally have stated.⁵⁹⁹ Rather, fair use is merely a *privilege*. This distinction is very important because if fair use were a right then copyright owners and Congress would indeed have a legal duty to provide fair use to the public. Since it is only a privilege, neither copyright owners nor Congress have a duty to affirmatively provide it. Furthermore, these commentators seem to assume that the public has a right to free fair use because it has traditionally been free to the public.⁶⁰⁰ This misconception is a result of the inadequacies of traditional analog mediums, such as books, magazines, and photographs to prevent copyright infringements.

The second incorrect normative assumption is that copyright owners cannot prevent or prohibit access to their copyrighted works or make copying or other fair uses harder to accomplish.⁶⁰¹ This incorrect assumption is also a misconception caused by society's predominant norms and beliefs as to what uses the public is entitled to under copyright law and why they are entitled to such uses.⁶⁰² For instance, many individuals believe that copyright owners cannot prevent an individual from photocopying their book, magazine, or pictures. Since most individuals have been able to freely do this their entire lives, they erroneously perceive TPMs that prevent this ability as taking away a *right* that they have always had. This is exactly where the misconception lies. The public does not realize that throughout most of our lives we have been infringing upon other people's copyright by either photocopying, videotaping, quoting, even by using a computer to browse the

597. *Supra* Part II.A.1.

598. *Supra* note 468-85 and accompanying text.

599. *See supra* note 485 and accompanying text (stating that copyright owners do not have an obligation to make fair use easier).

600. *Supra* note 468-85 and accompanying text.

601. *Supra* note 468-85 and accompanying text.

602. *Supra* note 468-85 and accompanying text.

Web.⁶⁰³ Although some of these infringements are exempt from liability by privileges such as fair use when they are vital to furthering the Copyright Clause's policy of promoting education and progress of the arts;⁶⁰⁴ many others, such as photocopying, were never intended to be a privilege. Rather, these uses were considered an inevitable loss that were incidental to the use of analog materials such as books, which copyright owners could not do anything to curtail.

Accordingly, once these misconceptions are taken into consideration, it is not hard to realize that a pay-per-use world as envisioned by commentators that oppose § 1201 is very unlikely to occur.⁶⁰⁵ Although, the details of the vision may provide a glimpse into the future, in practice the pay-per-use world will not adversely affect fair use. First, as previously explained, a copyright owner has no duty to provide the public with free access for fair use purposes or to make a specific fair use.⁶⁰⁶ In addition, individuals fail to realize that in this digital pay-per-use world there will no longer be many transaction and lost opportunity costs that plague the analog world.⁶⁰⁷ Thus, although an individual may have to pay a certain amount, most likely less than the analog version for access or to partake in fair use of a copyrighted work, this monetary cost will most likely be less than that of the prior transaction and lost opportunity costs.⁶⁰⁸

Nevertheless, even if a TPM protected by § 1201 would condition the use of the copy, paste, save, or other function on some monetary cost or explicitly prohibit quoting, citing, or copying, it is hard to imagine how absent contractual conditions this hinders fair use. TPMs are only able to control access and use of the copyrighted works.⁶⁰⁹ Therefore, a user would still be able to cite, quote, and copy once they had paid for access by using traditional means such as writing it down, retyping the text, taking a picture of the screen with a digital or analog camera, or using an external recorder to record audio from the speakers. If they prefer to make their fair use more convenient and of better quality, then they would have to pay the amount that the copyright owner requires.

603. *Supra* note 66-76 and accompanying text.

604. 17 U.S.C. § 107 (2001)

605. *See supra* Part II.A.1 (discussing the advent of a pay-per-use world).

606. *Supra* note 598-602 and accompanying text.

607. *Supra* note 480-85 and accompanying text.

608. *See supra* note 480-85 and accompanying text (discussing the decrease in transaction costs caused by digital information).

609. *See supra* Part I.C.2.d (discussing TPMs available to copyright owners).

This illustration make clear that, although in a pay-per-use world there may be a monetary cost to each use including fair uses, this monetary cost will be an option only for those users that desire to obtain a better quality and more convenient alternative, a “fared use” as Professor Bell refers to it.⁶¹⁰

Moreover, the realization of a pay-per-use world would not destroy or make asymmetrical copyright’s balance.⁶¹¹ Although TPMs, in conjunction with § 1201, provide copyright owners with unprecedented power and control,⁶¹² this does not necessarily mean that copyright’s balance has been disproportionately thwarted. Copyright’s balance is maintained because through the implementation and protection of TPMs the public stands to significantly benefit.⁶¹³

Foremost, as Coase’s theorem asserts,⁶¹⁴ the lowering of transaction costs will have the inevitable effect of increasing production of copyrighted works.⁶¹⁵ This increased production through the medium of the Web will provide for greater creation and dissemination of information than remotely possible in the analog world.⁶¹⁶ In addition, because all copyright owners will be able to produce quantitatively more works at lower transaction costs, the market factors along with competition will provide the public with cheaper access.⁶¹⁷ This outcome, however, is directly dependent on § 1201 because if copyright owners’ TPMs are not protected from circumvention, they will be severely discouraged from creating and publishing on the Web.⁶¹⁸ The protection of copyrighted works will also not have the effect that professor Gilson asserts as Massachusetts’ Route 128’s demise⁶¹⁹ because the sharing of ideas and inventions and Silicon Valley’s success is a factor that copyright

610. *Supra* note 478, 492-99 and accompanying text.

611. *See supra* Part II.B.1 (discussing commentator’s argument that digital fair use will not affect the copyright balance, but actually benefit users and copyright owners).

612. *See supra* Part I.C.2.d (discussing TPMs available to copyright owners); *supra* note I.C.4 (discussing § 1201’s provisions).

613. *Supra* note 492-99 and accompanying text.

614. *Supra* note 481 and accompanying text.

615. *See supra* note 481-84, 500-03 and accompanying text (discussing transaction costs and benefits of digital technology).

616. *See supra* note 500-03 and accompanying text (discussing the benefits of digital information).

617. *See supra* note 481-84 and accompanying text (discussing the decrease in transaction costs).

618. *Supra* note 452-64 and accompanying text.

619. *Supra* note 297 and accompanying text.

supports.⁶²⁰ Alternatively, if copyright owners' decide to create and disseminate, the price for these works will be much higher to take into consideration losses from circumvention and piracy.

In addition to greater creation and dissemination of information, a digital pay-per-use world will also provide many other benefits to the public, such as better quality copyrighted works, greater selection, greater diversity, authenticity of works, and the ability to find and access copyrighted works faster and easier.⁶²¹

Section 1201's ban on trafficking and additional violations provisions also do not sway copyright's balance towards copyright owners. Contrary to the view that they are too broad and nondiscriminatory because they apply to all uses alike,⁶²² commentators fail to consider that Congress intended them to apply only to black box technology.⁶²³ Therefore, if an individual somehow circumvents a TPM using technology that falls outside of the factors identifying black box technology, then they would not be liable under this provision.

Similarly, § 1201's Library Rule Making Procedure and exception for libraries and archives are not inadequate solely because these provisions still apply. It is possible that an individual who satisfied the Library of Congress' conditions who was then brought to court for violation of these provisions may be relieved of liability by the court. By applying § 1201's legislative intent, the court has the ability to hold that Congress did not intend for that individual to be liable—as long as he was not using black box technology. In addition, although the library and archive exemption does not provide immunity from these provisions, as professor Benkler, asserts it is most likely that publishers will provide libraries with the ability to circumvent their TPMs because it will be economically beneficial to them.⁶²⁴

Although the First Amendment is a constitutional fundamental right, the First Amendment/democratic paradigm's argument that § 1201 violates this fundamental right by diminishing or locking up the public domain also does not withstand scrutiny. Foremost, as

620. Copyright's idea/expression dichotomy supports the Silicon Valley results because the information spill over that occurred did not involve copyrighted expression, but merely ideas and inventions. Accordingly, the dissemination of this information would have been encouraged by copyright law as promoting the progress of science.

621. *See supra* note 500-03 and accompanying text (discussing the benefits of digital information).

622. *Supra* note 302-05 and accompanying text.

623. *Supra* note 236-46 and accompanying text.

624. *Supra* note 392.

professor Netanel asserted, even though TPMs in conjunction with § 1201 may provide copyright owners with an overabundance of protection, the important factor is that this will cause an increase in creation and dissemination.⁶²⁵ Accordingly, even though some individuals may not be able to make fair use of copyrighted works as they have always had, this greater quantity and quality of work will eventually fall into the public domain; thereby, increasing this great source of speech.

Moreover, because copyright's idea/expression dichotomy, notwithstanding contractual provisions, explicitly allows the free use of copyrighted works' ideas and facts during the copyright term and the copyrighted expression once the copyright term has expired,⁶²⁶ § 1201 will greatly benefit the public domain. As professor Netanel, however, also addresses, the real threat to the public domain may derive from our present copyright term that is unjustifiably too long.⁶²⁷

Contrary to the market failure champions' assertions⁶²⁸ the proper resolution to § 1201 is not to provide copyright owners with the ability to opt-out of copyright law and rely on common law rights. This resolution is inappropriate because § 1201 does not sway the copyright balance too unfavorably towards copyright owners and because providing them with this right would have in fact have the feared effect of distorting copyright's balance and reducing access.

Copyright law was not created as a response to the market's failure to protect authors; it was created to promote education and the arts in fulfillment of either the utilitarian vision or the democratic paradigm.⁶²⁹ Accordingly, if Congress enacted copyright law in furtherance of the utilitarian vision as these commentators proclaim,⁶³⁰ it does not support their proposition because utilitarianism is merely about producing the consequences that will provide the greatest amount of benefit for the greatest amount of individuals and has nothing to do with rights.⁶³¹ Hence, since by opting-out of copyright law only the copyright owners would benefit, this would not satisfy the utilitarian principle.

625. Netanel, *supra* note 17, at 298-99.

626. 17 U.S.C. § 102 (2001); *Baker v. Selden*, 101 U.S. 99, 102-05 (1879).

627. Netanel, *supra* note 17, at 298-99.

628. *Supra* Part II.A.3.

629. *Supra* Part I.A.

630. *Supra* note 519-23 and accompanying text.

631. *Supra* note 430 and accompanying text.

Commentators' fears for the future of fair use and the copyright balance, however, are not unfounded, but rather misplaced. The digital pay-per-use world as envisioned by Professors Stefik and Dam, who have illustrated the many benefits it can provide, as well as the adequacy of the ban on trafficking, additional violations provisions, and § 1201's exceptions unfortunately rely on one important, but erroneous assumption.⁶³² They presuppose that contractual licensing will support "faired use" and the copyright balance that the digital world will create.⁶³³ Therefore, the real danger to fair use and copyright's balance stems from the adoption of the UCITA.⁶³⁴

UCITA stands to adversely affect fair use and copyright's balance because a contractual license can condition access on the user's agreement that he refrain from making traditional fair uses as well as digital "faired uses."⁶³⁵ Additionally, unlike § 1201, UCITA may prevent information spillover, which professor Gilson credits as the cause of Silicon Valley's success.⁶³⁶ Since the information spilling over was facts, ideas, and inventions, copyright law could not restrict it, however, UCITA is not bound to copyright law and can prohibit the use of facts, ideas, and inventions.

Although many proponents of UCITA may raise as a counter-argument that copyright owners will not be able to enforce or notice a breach of this provision, it is important to take into consideration present and future TPMs. For instance, present TPMs such as watermarks and webcrawlers have the ability to monitor the entire Web, which in a digital pay-per-use world is the entire copyright world, in search of unauthorized uses.⁶³⁷ Thus, a contractual license in conjunction with TPMs provides copyright owners with the ability to self-enforce their restrictions and to partake in self-help.⁶³⁸

Furthermore, besides providing copyright owners with the ability to condition access to almost any restriction, UCITA makes matters worse by providing copyright owners with the ability to enforce these restrictions in "shrink-wrap" contracts.⁶³⁹

632. *Supra* Part II.B.1.

633. *Supra* note 509 and accompanying text.

634. *Supra* Part II.B.2.

635. *Supra* note 530-40 and accompanying text.

636. *Supra* note 297 and accompanying text.

637. *Supra* Part I.C.2.d.iii.

638. *See supra* note 203-204 and accompanying text (discussing UCITA's self-help provisions).

639. *Supra* note 510-13 and accompanying text.

Accordingly, unlike § 1201 and TPMs, UCITA provides copyright owners with unlimited power and control over their copyrighted works without any limitations that may enable users to partake in fair use. Most importantly, UCITA does not provide any countervailing benefits to the public that can equalize the copyright balance between copyright owners and the public.

CONCLUSION

As a result of the advancement of technology and the harms and consequences that digital information can have on copyrighted works and its industries Congress' enactment of the DMCA's § 1201 was necessary and vital. Due to its unprecedented approach this legislation was not welcomed by legal scholars who claim that it stands to hinder and possibly abolish fair use and copyright's balance; that it will adversely affect the public domain and that it will disproportionately sway protection in favor of copyright owners to the detriment of the public. Contrary to these claims, the DMCA's § 1201 does not hinder fair use, copyright's balance, or the public domain.