

# The Move to Counter the Move to Counter Fair Use\*

Bruce Abramson\*\*

## Introduction

“Fair use” has two meanings. In its colloquial guise, most people who buy books, CDs, DVDs, software, or consumer goods think that it is only “fair” for them to be able to use their purchases however they choose, and that it would be “unfair” for the manufacturer to prohibit noncommercial use. In its technical guise, fair use is a copyright law doctrine that mirrors the colloquial conception quite imperfectly. As technology enables consumers to engage in new and exciting activities with the information products that they purchase, the intuitive colloquial notion of “fair use” expands—increasingly often in ways that appear to contradict the copyright laws.

Congress responded to this expansion in the Digital Millennium Copyright Act of 1998 (DMCA). The DMCA explicitly prohibits “circumvention,” or the disabling of a technological solution that a copyright owner put in place to “control access” to the copyrighted product. The DMCA also reopened the discussion of numerous issues related to third-party liability for copyright infringement. Both of these issues have proved critical in the recent battles among copyright holders, technologists, and the public.

The anticircumvention provision helped copyright owners protect e-books, DVDs, and media players. The first few cases interpreting this new statutory provision were stark, and their language was often harsh. The district court opinions in *Universal City Studios v. Reimerdes*<sup>1</sup> and in *RealNetworks v. Streambox*,<sup>2</sup> and the Second Circuit’s

---

\* Working paper prepared exclusively for the TPRC 33<sup>rd</sup> Research Conference on Communication, Information, and Internet Policy, September 23-25, 2005. Please do not cite or quote without the author’s explicit permission. All ideas laid out herein are preliminary. This working paper emphasizes a basic argument and narrative. It is not intended as a scholarly presentation of all relevant literature and/or case law. A scholarly version is in preparation, and suggestions and pointers into the literature are encouraged. By way of full and fair disclosure, Bruce Abramson served as a law clerk to the Hon. Arthur Gajarsa when the Federal Circuit ruled in *Chamberlain v. Skylink*, one of the cases discussed in this paper.

\*\* President, Gordian Solutions, Inc. Ph.D., Computer Science, Columbia; J.D., Georgetown. Preferred contact information: [bdabramson@gmail.com](mailto:bdabramson@gmail.com); [www.theinformationist.com](http://www.theinformationist.com). Dr. Abramson is the author of *Digital Phoenix: Why the Information Economy Collapsed and How it will Rise Again* (MIT Press, 2005). See [http://www.theinformationist.com/index/bruce/comments/digital\\_phoenix/](http://www.theinformationist.com/index/bruce/comments/digital_phoenix/).

<sup>1</sup> *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 319 (S.D.N.Y. 2000).

affirmance of *Reimerdes* in *Universal City Studios v. Corley*,<sup>3</sup> established anticircumvention as a powerful new tool for copyright owners seeking to impede potentially invasive technology. Much of these courts' language also cast doubt upon the interaction of this new provision with established notions of fair use.

Consumer products manufacturers knew a good deal when they saw one, and moved to protect the copyrighted encrypted software embedded in their products. These manufacturers argued that competitors whose components interacted with their own base products necessarily circumvented the encryption to access the embedded software. Under this logic, any manufacturer who sold a base unit containing embedded software could monopolize all related aftermarkets. These claims seemed to follow logically from the earlier rulings. Yet both the Federal Circuit in *Chamberlain v. Skylink*<sup>4</sup> and the Sixth Circuit in *Lexmark v. Static Control Components*<sup>5</sup> ruled against them, using language supporting the traditional boundaries of fair use.

Though the gap between *Riemerdes*, *RealNetworks*, and *Corley* on the one hand, and *Chamberlain* and *Lexmark* on the other, do not qualify as a circuit split, the implications of their language suggests that one may be looming in the not too distant future. Such a split would mirror a debate in the scholarly literature discussing the DMCA—which, from its inception, has attracted commentators advocating the broadest reasonable reading, the narrowest reasonable reading, and various interpretations in between.<sup>6</sup> The tension between fair use and anticircumvention is real, and is likely to grow in importance over the next few years.

Meanwhile, the discussions about third-party liability have shifted into high gear, and in many ways assumed an even higher profile than the explicit statutory interpretation associated with anticircumvention. A specific technology impelled this shift: Peer-to-Peer (P2P) file-sharing. Whereas more than a century of new technologies had reduced the ease of *copying* copyrighted materials, P2P was the first to eliminate the

---

<sup>2</sup> *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889, at \*23, No. 2:99CV02070 (W.D. Wash., Jan. 18, 2000)

<sup>3</sup> *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001).

<sup>4</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.* 381 F.3d 1178 (Fed. Cir. 2004).

<sup>5</sup> *Lexmark, Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6<sup>th</sup> Cir. 2004).

<sup>6</sup> See e.g., Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium"* 23 Colum.-VLA Journal of Law & the Arts 137 (1999); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act* 148 U. Pa L. Rev. 673 (2000).

barriers to the massive *distribution* of copyrighted materials. From its inception in 1999, the majority of digital products distributed through P2P systems have been music files, covered by copyright, and distributed without authorization. The first such system, Napster, met its demise rather quickly, when a trial court in San Francisco and the Ninth Circuit both ruled that its implementation of P2P rendered it liable for its users' infringement.<sup>7</sup>

New systems using different P2P implementations arose to take its place. In *MGM v. Grokster*,<sup>8</sup> the Supreme Court refused to rule on either P2P itself or the implementations at issue, but announced that business plans predicated upon encouraging infringement might subject their users to third-party liability. Meanwhile, copyright holders started pressuring Congress to include an explicit indirect infringement provision into the Copyright Act. Debate on such a provision continues. Once again, though, there is a real tension between the needs of copyright holders for protection from third-party "enablers" of mass distribution and the needs of public for new communication technologies that enable fair use. This tension, too, is likely to grow in importance over the next few years.

Neither of these problems is amenable to a quick fix—or, for that matter, to a sustainable judicial resolution. The conflicts among contemporary digital technology, the rights of copyright holders, and the fair use doctrine are fundamental. They will not be resolved with anything short of a reconsideration of the regulatory scheme known as "copyright law." Technology has frayed the basic contract between "the public" and "the creative classes." Attempts to salvage this contract, though understandable given how long it has served the interests of both parties, are doomed to failure. Only a fundamental rethinking and renegotiation can yield a creativity contract appropriate for the information age. Because the Constitution gave Congress the primary responsibility for crafting such contracts, Congressional action is required. But the sorts of Congressional deliberations that led to the DMCA, that yielded the anticircumvention provisions, and that are currently considering a third-party liability provision are inadequate by design; they more-or-less assume a retention of all basic contract clauses, and hustle to draft riders that do little more than increase the complexity and uncertainty of copyright law. Technology has rendered that contract unenforceable. Fundamental reconsideration is needed.

---

<sup>7</sup> See *A&M Records v. Napster*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001).

<sup>8</sup> *MGM Studios, Inc. v. Grokster*, 125 S. Ct. 2764 (2005).

I have prepared this working paper exclusively for the TPRC 33<sup>rd</sup> Research Conference on Communication, Information, and Internet Policy, to be held September 23-25, 2005 at the George Mason University School of Law in Arlington, VA. My goals in this draft—best characterized as a personal communication outlining my thoughts rather than as a citable presentation of formal work—are to present a narrative and to outline a basic argument. In many ways, it expands some of the arguments that I presented in my recent book, *Digital Phoenix*.<sup>9</sup> I am currently expanding this draft into a scholarly presentation, where I will cite heavily to both case law and scholarship. I expect to refine, and I may even change, some of my arguments as this expansion proceeds. I welcome all comments, suggestions, and pointers that will help me make both the formal scholarship and the informal presentation as accurate and as compelling as possible.

## **The Setting**

Copyright law is under attack. Copyright holders have noticed the attack, and have taken great strides to sensitize the public to its travails. Their spokesmen warn of eroding property rights, a snickering contempt for the law, and a wave of piracy unmatched since the days that Congress founded the United States Navy to combat threats off the Barbary Coast. Their lawyers file suit against those pirates—many bearing the clever disguises of Junior High School students rather than flying the Jolly Roger—as well as against all who would supply the equipment that enables their perfidious deeds. Their Associations have joined the ranks of victims' rights groups, complaining of the need for greater protection, greater public investment, more policing, and looser restrictions on activities necessary to identify, apprehend, convict, and punish their nemeses. Yet, the attacks continue; they abate momentarily after each victory for copyright holders, but soon resume their inevitable upward trajectory.

The inevitability of that upward trajectory tells the real story. The copyright holders' tales of pirates, thieves, and brigands notwithstanding, their true foe is a neutral, unthinking force that lies outside the scope of the law, a longtime ally turned vicious adversary. Copyright holders are fighting a rearguard action against technology—specifically, against information technology. As we have discovered in every conflict

---

<sup>9</sup> Bruce Abramson, *Digital Phoenix: Why the Information Economy Collapsed and How it Will Rise Again* (MIT Press, 2005).

between convention and technology since that day lost in time when our ancient ancestors improved food safety by throwing their kill into a fire against all conventional wisdom, good ideas will force us to reassess much of what we already know to be true. In the long run, technology will triumph.

But the long run can take a long time to arrive, and we live at an interstice between the industrial age, when technology was the greatest ally of traditional copyright principles, and the information age, when technology will ally itself with other approaches to economics and regulation. The common feature of all such transitions is struggle. Technology has removed a critical pillar supporting the basic principles of copyright law. Nevertheless, we—under the auspices of the Congressionally-written Copyright Act—continue to grant traditional copyrights on a daily basis. Is it right and fair for us to create and disseminate regulatory grants that technology can no longer sustain? If so, then we must counter technology’s new enmity with the only tool at our disposal: new regulations that enable copyright holders to enforce the rights that we grant them. If not, then we should stop, investigate the stability of copyright law’s other pillars, and begin to issue regulatory grants consonant with the pillars that still stand.

We must also consider what happens to “the public” in all of this analysis and reregulation.<sup>10</sup> The public’s place in copyright law is critical, if subtle. In the Hobbesian world devoid of copyrights, the public’s cruel, brutal treatment of creators would render their exclusive rights to their creations quite short—fleeting, in fact. In such a world, “copyrights” would devolve to the single *droit de divulgation*.<sup>11</sup> Once a creator chose to expose his or her work to the public, all of its creative, expressive brilliance would dwell in the public domain. The public, at least in part to motivate additional creative expression and perhaps in part for other reasons grounded in some abstract notion of “morality,”<sup>12</sup> decided to cede many (though never all) of its unfettered free-market rights in exposed creations back to the creator. In the United States, we implemented that decision by empowering Congress to reserve to creators “exclusive rights” lasting a

---

<sup>10</sup> Much of this discussion is as applicable to patents as it is to copyrights.

<sup>11</sup> See 3 Melville Nimmer & David Nimmer, *Nimmer on Copyright* 8D.05[A].

<sup>12</sup> In this article, I describe a contractarian view of intellectual property. There is an entirely different view of intellectual property, important in legal systems derived from the Napoleonic Code but alien to Anglo-American law, grounded in “moral rights.” I defer the comparison of the moralistic and the contractarian perspectives to another day.

“limited time.”<sup>13</sup> Congress responded by selecting a set of rights that appeared appropriate in 1790, and encoded them as our first Copyright Act.

For 185 years, U.S. courts interpreted the contours of the statutory grant. Where did the public cession of rights end? Which, if any, fettered rights did the public retain? The statute offered little direct guidance, but custom, convention, public policy, technological feasibility, and economic reality all conveyed useful information. The rights reserved for the public domain were those that copyright holders could not “fairly” restrict, and we named the principle governing this reservation the “fair use doctrine.” No one quite knew precisely what the words meant, or how to determine whether or not a specific unauthorized use was “fair,” but somehow or another the courts muddled through. In 1976, Congress reentered the fray and incorporated the judicial fair use doctrine into the Copyright Act.<sup>14</sup> The courts continued their case-by-case analysis.

In many ways, the 1976 revisions to the Copyright Act marked the culmination of three centuries of deliberation, debate, scholarship, and legal development. From the early days of industrialization in England and in the Netherlands (the first two countries to enter the industrial age), governments had intervened to promote progress and the dissemination of knowledge despite the cruel vagaries of the free market. By the 1970s, those interventions had led to a well-defined bargain. Creators knew more-or-less which rights they retained; the public knew more-or-less which rights *it* retained. Traditional copyrights and traditional fair uses led to occasional marginal disputes, but nevertheless combined in a coherent, relatively predictable manner to generate creative industries that served many public interests well. And then two things occurred. First, we—both in the United States and across the developed world—made a tremendous push to export our understanding of copyrights into the international arena.<sup>15</sup> Second, and of greater significance to our current discussion, technology shifted beneath our feet and our seemingly coherent system became increasingly incoherent. That shift sets the stage for our current reconsideration of the system’s fundamentals.

---

<sup>13</sup> U.S. Const. Art. I, § 8, cl. 8.

<sup>14</sup> See 17 U.S.C. § 107.

<sup>15</sup> A discussion of our obligations under various treaties, notably though hardly exclusively TRIPS, is beyond the scope of this article..

## **The Traditional Establishment**

Throughout human history, the reproduction of creative works was difficult, time consuming, and expensive. It was so expensive, in fact, that mass reproduction was out of the question; even orders of monks laboring for centuries with quills could not satiate the latent European demand for bibles. Much of the public responded to this shortage by keeping itself blissfully illiterate. The Church—effectively the controller of this important work, though not in any sense its owner—equated translations and other unauthorized “derivative works” as blasphemous, and punished transgressors with penalties that even today’s aggrieved copyright holders might consider draconian. The reproduction of paintings and sculptures, though arguably less controversial, was even more difficult, time consuming, and expensive.

For a time, the Chinese experimented with printing, a capital intensive process that appeared to have some potential for mass consumption. The absence of sufficient demand rendered the technology cost-ineffective and led to its dismissal. In the mid-15<sup>th</sup> Century, Johannes Gutenberg developed Europe’s first printing press. His bibles were inappropriate for mass consumption, though; they appeared in a technical language that only those with ample training could understand, and he priced them around three years of the average white-collar salary. Several decades later, however, the technology improved, prices plummeted, and Martin Luther devised a killer app—the vernacular Bible. All of a sudden, Europe’s Christians had a reason to embrace literacy. And with a literate public, creative sorts developed a new impetus not only to create, but to express themselves in written form. Though reproduced paintings and sculpture remained beyond the reach of most of “the public,” the printed word began to permeate throughout society.

That permeation, in turn, led to new business opportunities in the generation and distribution of copied creative work. But whereas the primary inputs into creativity remained personal time, effort, and inspiration, the primary inputs into copying and distribution were capital intensive printing presses, paper mills, and sales networks—and capital was, is, and always will be much more fungible than inspiration. In other words, once some individual creator revealed something worth distributing, *anyone* blessed with the necessary capital could distribute it. That fungibility, set within the market economy that started emerging in Sixteenth and Seventeenth Century England, led to a seeming paradox. The growing literacy and cultural appreciation that mass distribution had

wrought generated a significant demand for mass produced, widely distributed, creative works—but competition and the absence of pricing power dampened the expected returns on the capital investments necessary to meet those demands. Simple economics made it undesirable to invest in the technologies necessary to meet consumer demand.

In the Eighteenth Century, the British Parliament, the framers of the American Constitution, the first U.S. Congress, and others adopted a very clever fix. In contemporary terms, they recognized the conflict between economics and technology as a market failure. They understood that an unfettered free market was unlikely to motivate sufficient investment in creativity, production, or distribution to meet the burgeoning demand. In response, they devised a surprisingly sophisticated regulatory system that they believed would meet the societal imperative of increased supply. Unlike many of the command-and-control regulations promulgated throughout the middle decades of the Twentieth Century, these Eighteenth Century regulators adopted a market-based approach. They chose to employ a “property rights” regime, under which the public granted a set of “exclusive rights” to creators for a “limited time.”

The original relationship among technology, economics, and the regulatory regime known as “copyright” is critical to understanding just how complete a betrayal technology’s current attack represents. The regulators’ goal was not simply to increase the quantity (or even the quality) of creative works being produced. Their goal was to increase the quantity of such works *reaching the public*. In the words of the Constitution, the public agreed to accept less-than-full rights in written (or more broadly, creative) works “to promote the progress of science.”<sup>16</sup> That promotion, in turn, required a regulatory scheme that motivated investment in every single phase of the process that placed a putative creator’s idea into the public’s hands. Because the vagaries of the free market seemed to make underinvestment in creation, production, and distribution inevitable, a suitable regulation had to motivate additional investment in each of creating, production, and distribution.

Though it seems unlikely that the Eighteenth Century founders of copyright law viewed the world in these rather contemporary terms, there is little doubt that they understood the technological and economic framework within which any market in creative works would have to develop. And so they crafted their package of “exclusive rights” carefully. To begin with, they were very careful to distinguish between an

---

<sup>16</sup> U.S. Const. Art. I § 8 cl. 8.

underlying idea and the expression of that idea: the idea itself would enter the public domain immediately upon disclosure, and the creator would retain rights only in his or her specific expression.

What rights would the creator retain? Given the technological requirement of significant capital investment in production, an exclusive production—or copying—right was critical. Given the further technological requirement of significant capital investment in distribution, an exclusive distribution right was equally critical. From the very inception of copyright law, then, these two central rights dominated. Only the creator (or his authorized agents) could create new copies of the work; and only the creator (or his authorized agents) could distribute copies of the work. This regulatory scheme responded precisely—and brilliantly—to the failures of the free market. It delineated a contract between the broad public and its creative classes. The public accepted restricted access over a larger set of creative works for a limited time. Creators were able to exploit those restrictions to extract economic compensation for their efforts and investments.

Technology, economics, and regulation combined to yield a coherent body of copyright law. Congress had propertized precisely the rights necessary to motivate investment. Numerous “content creation industries” flourished; popular culture exploded onto the American (and world) scene; and books, periodicals, songs, plays, and movies proliferated (though the Bible remains the killer app, the best selling book of all time, with more than 2.5 billion copies sold). Every now and again some member of the public created and/or distributed a copy of a creative work without authorization, and proclaimed her action necessary to serve some important public policy goal. The creator—or more likely, the creators’ agents, who had invested in exclusive copying and distribution rights—disagreed. The courts considered both arguments, and ruled on a more-or-less case by case basis. From these seemingly ad hoc roots grew the fair use doctrine. By and large, though, technology remained wedded to the copyright holders; even “fair” public uses required significant capital outlays.

Eventually, though, technology began to stray. A series of clever innovations began to reduce the costs of copying. Between the late Nineteenth and the late Twentieth centuries, the cost of copying text, image, music, and video spiraled downward rapidly; the mass production of creative works no longer required much of a capital outlay. With each cost reduction, members of the public discovered new capabilities. They learned to copy, distribute, reconfigure, and combine creative works—works that copyright

protected—in new and creative ways. Each of these new uses led to a new clash between copyright holders asserting a lack of authorization and accused members of the public citing a higher purpose of public policy. The courts continued to evaluate these claims on an ad hoc basis.

Finally, roughly 185 years after first codifying the basics of copyright, Congress took it upon itself to codify the lessons of fair use that the courts had teased from these many cases; the Copyright Act of 1976 contained a new, statutory fair use provision. Fair use had joined the establishment.

### **The Push for Disestablishment**

The years following the 1976 Congressional imprimatur on fair use proved tumultuous for copyright holders and the public alike. Copying technology continued to improve in quality, expand in scope, and decline in price. Mass production of text, pictures, music, and film became progressively easier, and the capital required to own and master the necessary technology plummeted. Copyright holders waged a massive attack on one such technology, the VCR.<sup>17</sup> They claimed—correctly—that Sony’s VCR rendered trivial the unauthorized production of their copyrighted work. Sony conceded that point, but asserted—equally correctly—that its VCRs also enabled numerous non-infringing and otherwise fair uses. The copyright holders conceded *that* point.

This considerable concord over the range of uses of the VCR notwithstanding, a critical question remained: Should Sony be allowed to manufacture and sell a device that facilitates infringement? Would the courts really allow Sony to proceed, allow myriad infringements, and force the copyright holders to chase millions of small infringers in suits across the country? Or would the courts terminate the development and commercialization of a potentially useful and popular technology simply to prevent its likely misuse?

The matter reached all the way to the Supreme Court. By a 5-4 margin, the Court ruled in favor of Sony.<sup>18</sup> In so doing, it set the dominant contemporary test for new technologies. According to the Sony court, any technology that enables “substantial

---

<sup>17</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>18</sup> *Id.*

noninfringing uses” is legal, even if it also paves the way for significant infringement. The copyright holders stewed over this loss for a while, but quickly accommodated themselves to the new technological terrain and learned how to profit despite the setback.

The *Sony* case, however, put copyright law on notice: technology was no longer its ally. And so, with each passing year, the mass production of high quality copies got easier and less expensive. In the mid-1990s, when it next came time for Congress to consider the Copyright Act, copyright holders arrived armed with a laundry list of measures that recognized its erstwhile ally as an imminent threat. Chief among their desiderata in this preemptive attack was anticircumvention, which became law as part of the Digital Millennium Copyright Act (DMCA) of 1998. The anticircumvention provisions marked a radical change to copyright law—in many ways, the single most radical change since copyright’s basic contours were set in the Eighteenth Century. For nearly 300 years, the substantive contract between “the public” and “the creative classes” had been set. Creators obtained limited (though significant) exclusive rights to produce and distribute works of their creation. The public obtained an ostensibly larger collection of creative works, the right to make fair use of these works with or without authorization, and eventual full ownership of all creative works. Creators and the public had certainly renegotiated specific contract terms over the centuries: the time limit had increased markedly, the rules for contracting had changed (e.g., by removing the registration requirement), new and novel fair uses arose, new classes of creative works entered the contract, special cases and terms led to a proliferation of statutory clauses, and the general complexity of the copyright contract grew over time. But the fundamental substantive bargain remained unchanged until 1998.

The anticircumvention provisions created a new right for copyright holders, adding a new rider to their contract with the public. This right had nothing at all do with either the mass production or the distribution of creative works. It related entirely to the technological attack on copyright law by allowing copyright holders to prohibit the application of otherwise legal technologies to their works—and in some cases, to outlaw those technologies in their entirety. Like most new statutes (or fundamentally new riders to existing contracts), however, its language included a certain amount of ambiguity; the sheer complexity of the task that it undertook injected even more uncertainty into its actual scope or meaning. There could be little doubt, though, that the DMCA’s anticircumvention provisions represented copyright law’s response to the challenge of technology. Numerous commentators also worried, however, that the effect of these

provisions would spread, and curtail many uses that would otherwise have qualified as fair.<sup>19</sup>

The first few courts to consider the new statute saw it applied as intended, and not only ruled in favor of the copyright holders, but also applied language and created a trail of dicta sympathetic to their cause. In short order, judges ruled that the anticircumvention provisions prohibited Streambox’s virtual VCR from capturing images streamed over RealNetworks player,<sup>20</sup> and more significantly, that they rendered illegal an open source program that enabled users to decrypt and copy DVDs without explicit authorization.<sup>21</sup> Defendants in each of these cases argued that they were simply providing a technology protected under the *Sony* standard. They also argued that many of their customers were simply making fair use of copyrighted works—by, for example, decrypting legally purchased copies of DVDs to view on “unauthorized” playback devices. Trial and appellate judges alike appeared unswayed by these arguments. While all conceded that the case might have been closer prior to the DMCA, the anticircumvention provisions rendered the copyright issue moot. The defendants developed and circulated decryption devices that circumvented algorithms put in place specifically to “control access” to those copyrighted work. Infringement, or the simultaneous enablement of significant noninfringing activity, was more-or-less irrelevant. Anticircumvention was not a “copyright.” Though part of the copyright act, it was an entirely new beast—and a beast whose form and powers appeared formidable, but were still ill-understood.

By the time that the courts finished ruling on these few cases, the fair use doctrine appeared imperiled. Technology had challenged copyright law, copyright law came back with anticircumvention guns blazing, and the fair use doctrine lay bleeding in the cross-fire. Judicial dicta suggested that the DMCA might have overruled the *Sony* rule, and pro-copyright commentators asserted that unauthorized access in the name of fair use remained illicit.<sup>22</sup> It started to seem as if the DMCA had successfully disestablished *Sony*—and left much of the established fair use doctrine in doubt.

---

<sup>19</sup> See e.g., Ginsburg, *supra* n. 6; Nimmer, *supra* n. 6.

<sup>20</sup> *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889, at \*23, No. 2:99CV02070 (W.D. Wash., Jan. 18, 2000)

<sup>21</sup> *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 319 (S.D.N.Y. 2000).

<sup>22</sup> See, e.g., Ginsburg, *supra* n. 6.

## **Antidisestablishmentarianism**

Two further developments, however, arose to call this inference into question. First, a broader category of copyright holders began to pay attention to anticircumvention provisions. Second, technology attacked from another front; Peer-to-Peer (P2P) systems enabled inexpensive mass *distribution* for the first time. These new challenges reopened the question, and suggested that the copyright holders' victory over both technology and fair use was not as complete as it had seemed to be at first.

The first of these challenges produced an interesting result: it narrowed the DMCA's scope in a way that added coherence to the statute. The challenge arose because whereas Congress *had* considered the growing impact of inexpensive production technologies on media products like movies and songs, it *had not* anticipated the implication of anticircumvention to more mundane products. In early 2003, two consumer goods manufacturers filed suit under the anticircumvention provisions. In both cases, the manufacturers had built poor encryption algorithms into base products in order to monopolize their aftermarkets. When competitors broke the encryption algorithms, the original manufacturers sued.

In one case, Chamberlain, who manufactures automatic garage door openers, introduced a kluge that it claimed could confound illicit entry. Skylink found a not-terribly-sophisticated hack around Chamberlain's algorithm, and sold universal clickers capable of operating multiple types of garage door base units—including Chamberlain's.<sup>23</sup> In the other, the printer company Lexmark encrypted the handshake between its printers and replacement toner cartridges. Static Control Systems decrypted the handshake and sold replacement cartridges compatible with Lexmark's printers.<sup>24</sup> Both plaintiffs forwarded the same DMCA argument: Their products contained embedded software, which, like all software, was copyrighted. Their encryption algorithms controlled access to their copyrighted software. Anyone who decrypted these algorithms to interact with the software therefore circumvented their access controls. Anyone who sold devices that enabled such circumvention was a trafficker subject to DMCA liability. QED.

The *prima facie* cases sounds strong, and the policy implications seem obvious: The DMCA destroyed the possibility for competitive aftermarkets. Increasing number of

---

<sup>23</sup> *Chamberlain Group, Inc. v. Skylink Techs., Inc.* 381 F.3d 1178 (Fed. Cir. 2004).

<sup>24</sup> *Lexmark, Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6<sup>th</sup> Cir. 2004).

products contain embedded software (i.e., any product that contains a microchip), and much of that software must communicate with other products. According to Chamberlain and Lexmark, the DMCA provided manufacturers with an ironclad way to restrict the devices with which its own devices may communicate. No one believed that Congress had anticipated this outcome.<sup>25</sup> The question, however, was whether the statute mandated it nonetheless.

Though the Supreme Court has yet to weigh in, the circuit courts that heard these cases both ruled for the defendants: the Federal Circuit for Skylink and the Sixth Circuit for Static Control. Both appellate courts explained that even though circumvention remained a violation distinct from infringement, a valid complaint at least had to allege an infringing act. In the absence of such an allegation, the anticircumvention claim was little more than a bald attempt to prevent consumers from making legitimate and/or fair uses of the specific copies of a copyrighted product that they had purchased. Contrary to the concerns of some early commentators, then, it seems that the DMCA *did not* give copyright holders the right to interfere with broad swathes of commerce. The move to disestablish the fair use doctrine hit a brick wall. Consumers' fair expectation that they can use products that they purchase—including those with embedded software—survived the onslaught of anticircumvention. We won't quite know, however, whether the roadblock that these circuit courts placed in its path is solid or merely chimeric until the Supreme Court considers the matter.

The second challenge *did* reach the Supreme Court—where it produced results that are even more confusing than those surrounding anticircumvention.<sup>26</sup> The Supreme Court weighed in on an issue that has been confounding CEOs and High School students alike: Is file sharing over peer-to-peer (P2P) networks legal? But the Court declined to answer the question in a manner likely to do anything more than increase litigation, slow innovation, and increase costs among all those interested and involved in P2P technology.

By way of background, P2P technology is little more than a new way for engineers to set up networks. Most networks, like the private set powering businesses and the more public Internet, link all individual desktops and laptops to powerful designated servers, and then link the servers together. Individual users then go through their local server to find files or information resident on other servers. Two individuals

---

<sup>25</sup> See, e.g., Ginsburg, *supra* n. 6.

<sup>26</sup> *MGM Studios, Inc. v. Grokster*, 125 S. Ct. 2764 (2005).

who want to communicate must work through their local servers. P2P technology creates new networked pathways that allow those individuals to bypass their servers and to communicate directly. P2P is thus a generic technology potentially useful for all sorts of communication. In other words, P2P eliminates the capital requirement for the mass distribution of creative works—a key pillar justifying the substantive copyright contract between creators and the public.

Beyond abstract engineering theory, however, P2P developed quickly because of its killer ap: sharing music files. In 1999, Napster launched the first P2P system, and encouraged college students to use it to make and to share unauthorized copies of their music collections. The record labels, as the owners of the copyrights on most of that music, sued Napster for *indirect* copyright infringement. Napster defended itself by claiming that its P2P networks were just like the VCR—and thus subject to the *Sony* standard. But Napster had been too cavalier in its attitude towards indirect liability. Both a trial court and the Ninth Circuit concluded that Napster did more than just make and sell P2P software; it also maintained a centralized directory of every shareable file on every peer computer attached to its network. That direct involvement in every single infringing download differentiated Napster from Sony and led quickly to Napster’s demise.<sup>27</sup>

Grokster arose to take Napster’s place. Through some clever programming tricks, Grokster eliminated the centralized directory and proclaimed that *its* P2P network was just like the VCR. The entertainment industry sued, declaring that Grokster’s trickle of legal downloads was “not significant enough” to qualify as a “significant non-infringing use.” A unanimous Supreme Court disagreed with *both* arguments, and sent the matter back for a trial.<sup>28</sup> According to Justice Souter, Grokster lost not because it *enabled* its customers’ infringement, but because it *encouraged* infringement. Its entire business model and marketing campaign centered on encouraging infringement.

The court was far from unanimous, however, on the legal status of P2P. Justice Ginsburg, along with Justice Kennedy and Chief Justice Rehnquist, argued that P2P was different enough from the VCR to be illegal. They saw minimal prospects for appropriate use, and wanted the court to announce that it is illegal to develop or to market technologies whose primary purpose is infringement. Justice Breyer, along with Justices

---

<sup>27</sup> *A&M Records v. Napster*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2004).

<sup>28</sup> *MGM Studios, Inc. v. Grokster*, 125 S. Ct. 2764 (2005).

Stevens and O'Connor, took the opposite view. They saw ample potential for appropriate uses of P2P technology, and wanted the court to announce that no one can be held liable simply for developing or marketing a potentially valuable technology, even if most users use it inappropriately. But the center held. Granted, Justices Souter, Thomas, and Scalia, make for an unusual center, but apparently neither Ginsburg nor Breyer could win their backing.

Holding the center, though, achieved little more than keeping the fair use doctrine in limbo. The two recent challenges to its advent have slowed the expanse of its power, but only a bit. The critical questions still remain very much in play. Do the anticircumvention provisions protect consumer goods manufacturers seeking aftermarket monopolies? Is the *Sony* doctrine still good law? If not, what is the line separating legal from illegal new technologies? If so, where do P2P technologies fall? The Supreme Court has yet to address any of these questions. *Grokster* is a slim victory for the forces of disestablishment, but antidisestablishmentarianism remains alive and relatively well; after all, technology is on its side.

## **Conclusions?**

So where does all of this leave us? In a state of serious flux. The courts are simply not equipped to resolve the underlying problems because their roots are too deep. Copyright law was a brilliant regulatory system that took advantage of technological and economic constraints to spur creativity at minimal cost to the public. The fair use doctrine was a critical component of the resultant contract between the public and its creative classes. But the technological and economic pillars upon which the entire system rests have eroded. The Copyright Act grants creators exclusive rights over distribution. This grant made sense when distribution was difficult and costly. It motivated copyright owners to invest in distribution networks, and was easy to enforce by policing only the few competing companies who had made similar investments. In the modern world, the distribution of digital files is trivial and virtually cost-free; anyone with a computer on the Internet can do it. We no longer need to motivate investment in distribution, and enforcement costs have skyrocketed.

Copyright today sits atop an unstable platform. Enforceability is disappearing, histrionics are growing shrill, accusations are flying, and the fair use doctrine is disappearing. None of it makes any sense any longer. Congress must act—not at the

margins, as it did in the DMCA—but at the core of the copyright contract. Congress must rethink what it means to promote progress in the information age.

In the meantime, the courts will do their best to resolve disputes as they arise. The Federal and Sixth Circuits kept consumer aftermarkets competitive—at least for a while. The Supreme Court may have forced Grokster out of business (the jury is still out on that one), but it left open virtually all other relevant questions. Someone will probably soon launch a P2P system without a marketing campaign that encourages infringement. Lawyers with training in digital copyright issues will see an expanded call for their services, but have few clear answers to give their clients. Technologists and software developers engaged in a whole range of communication technologies may decide that discretion is the better part of valor, and shut down otherwise promising research and development efforts. Those who stay in business may find themselves in court explaining the differences between their business and marketing models and Grokster's. Copyright owners will gain a bit of breathing room, but not as much as some might believe. In short, technology will suffer, costs will rise, and litigation will expand—even though the courts are the wrong place to fight this battle. And that's the outcome of a moderate, sensible, Supreme Court ruling. One can only shudder to think what the impact might have been had Justice Ginsburg swayed a majority.

The law's fundamentals remain what they long have been, and the courts are certainly correct in allowing copyright owners to enforce the rights that Congress granted them. The likely costs to the public of this "correct" interpretation of the law are significant, and growing—wholly unsurprising given that our laws are now working *against* technology rather than *with* it.

In the final analysis, disputes like those spurred by Napster, Grokster, Chamberlain, and Lexmark are inevitable when a regulatory system works against technology. The time has come to deregulate—or more likely to re-regulate. Congress must act. We need new ways to motivate creativity in the information age.