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Universal City Studios, Inc. v. Reimerdes: Promoting the Progress of Science and the Useful Arts by Demoting the Progress of Science and the Useful Arts?

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UNIVERSAL CITY STUDIOS, INC. V. REIMERDES: PROMOTING THE PROGRESS OF SCIENCE AND THE USEFUL ARTS BY DEMOTING THE PROGRESS OF SCIENCE AND THE USEFUL ARTS?

by Eric W. Young¹

I. INTRODUCTION

It is the year 2010. The technological prowess of the publishing industry has blossomed. Books are no longer printed in paper format. All books, like Jack London's *Call of the Wild*, are available exclusively via a new technology called a Digital Book Reader.² The text of Mr. London's classic novel can be viewed only by connecting the Digital Book Reader to a broadband-internet connection, commonplace in many homes in the year 2010. The text is then downloaded to the Digital Book Reader. In order to download the text, users must submit payment via credit card to *Mass Market DigiBook*, a large on-line supplier of authored works. Payment of the fee only allows the user one week of use. Additionally, the downloaded file is protected from copying by technology that automatically "dissolves" the file exactly 168 hours after initial download. If the user requires additional use, they must resubmit payment.

Now, imagine that your son, Chris, an academically sound and industrious 4th grade student, is required to write a paper on Mr. London's *Call of the Wild*. Furthermore, Chris is somewhat of a computer genius. He is aggravated by the fact that he can only access the *Call of the Wild* for 168 hours. He needs to be able to keep certain portions of the text so that he may include it in a digital presentation he plans to make for extra credit points. Through application of Chris' computer programming knowledge, he is able to develop a computer program that he aptly calls *FairUseMaker*. The program can circumvent the copyright protection measures inherent in the digital book, thus allowing permanent preservation on the hard drive of his personal computer. The next day at school he conveys this new-found ability to his classmates. Many of his classmates express an interest in obtaining the computer code that circumvents the copyright protection measures of the Digital Book Reader and digital books. Subsequently, he emails the code to all his classmates. His best friend, David, posts just the computer code on a web site so that his cousin, Brian, living in another state, can use the code for the same purpose for which it was invented. David's cousin then inserts a link on his personal web page linking to the site David created.

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² A "Digital Book Reader" is a made-up device for purposes of this hypothetical.

Two weeks later *Mass Market DigiBook* sues Chris, David, and Brian for violation of the Anti-Trafficking provision of the Digital Millennium Copyright Act.³ Chris, David, and Brian assert that the purpose of the FairUseMaker was to allow “fair use” of Call of the Wild. The judge, however, finds the three boys “traffickers” of anti-circumvention technology and issues a permanent injunction disallowing posting of the code or linking to the code.

If this situation seems unlikely to occur, it isn't. Just recently the United States District Court for the Southern District of New York came to the same conclusions on facts similar to those posited above.⁵ The opinion, written by Judge Kaplan, failed to recognize the importance of the “fair use.” This comment evaluates the decision of the Southern District of New York. Part II discusses the historical background of DVD players and DVDs, the Digital Millennium Copyright Act, and the development of DeCSS. Part III details the facts that were before the Court in *Reimerdes*. Part IV discusses the reasoning that led to the Court's decision in *Reimerdes*. Part V presents an analysis and critique of the Court's holding in *Reimerdes*.

II. HISTORICAL BACKGROUND

A. The Emergence of DVDs

A Digital Versatile Disc (DVD) is a high capacity optical disc used to store everything from massive computer applications to full-length movies.⁶ DVDs are similar in physical size and appearance to a CD-ROM;⁷ however, the storage capacity of a DVD is much greater than that of a CD-ROM.⁸ The development

³ See 17 U.S.C. § 1201(a)(2) (2000). This provision reads in pertinent part, “No person shall . . . offer to the public, provide, or otherwise traffic in any technology . . . that (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act]; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act]; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act].” *Id.*

⁴ See 17 U.S.C. § 107 (2000). Fair use of copyrighted materials is allowed in certain circumstances by this section of the Copyright Act.

⁵ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000). This decision centered on the creation, posting, and linking of DeCSS a computer code used to circumvent CSS, the copyright protection device, inherent in Digital Versatile Disks (DVD's) and DVD players. *Id.* This case is currently on appeal and is set for trial before the 2nd Circuit Court of Appeals on May 1, 2001. On appeal the appellant, Reimerdes, argues in their brief that the District court's interpretation of the pertinent portions of the Digital Millennium Copyright is too broad. The appellant urges that the interpretation violates his First Amendment rights and fair uses that should be enjoyed by ordinary DVD owners, computer scientists and others. See *EFF?2600 Appellate Reply Brief in MPAA v. 2600 Case* (visited Mar. 8, 2001) <http://www.eff.org/IP/Video/MPAA_DVD_cases/20010319_ny_eff_appeal_reply_brief.html>.

⁶ *CNET Glossary* (visited Sep. 27, 2000) <<http://coverage.cnet.com/Resources/Info/Glossary/Terms/dvd.html>>.

⁷ *Id.*

⁸ *Id.* A CD-ROM stores 650MB of data whereas a DVD can store 4.7GB of data. One gigabyte is

of DVD began as a battle between two standards.⁹ The battle was between Time Warner-Toshiba and Sony-Phillips.¹⁰ As a result of this battle of standards, computer companies (led by IBM) insisted that the battling DVD proponents agree upon a single standard.¹¹ Eventually this battle resulted in the development of the DVD Consortium.¹² This consortium consisted of ten companies.¹³

In 1997, the first DVD players hit the U.S. market.¹⁴ Previous to this release, however, the Motion Picture Association of America (MPAA), the Consumer Electronics Manufacturers Association (CEMA), and members of the computer industry put together an *ad hoc* group to discuss the technical problems of protecting digital video from piracy.¹⁵ This group is called the Copy Protection Technical Working Group.¹⁶ This concern prompted the development of technological measures to protect DVDs from piracy.¹⁷ Two principles guided the development of these technological measures.¹⁸ These two principles were: (1) that the copy protection system not be mandatory — dividing devices (DVD

equal to 1,024 megabytes. So, a DVD can store almost seven and one half times the amount of information as a CD-ROM can. There are also two-layer standard DVDs that can hold up to 8.5GB and DVDs can be double-sided, increasing the maximum data storage capability of one two-layer standard DVD to 17GB.

⁹ *A War of Standards, Sony-Phillips vs. Time Warner-Toshiba* (visited Oct. 7, 2000) <<http://www.monterey.edu/students/dh/farleyaaronm/world/dvd/war.html>>. Sony, Phillips, and friends backed the MMCD standard, while the competing SD standard was backed by Toshiba, Time Warner, and company:

The standards that the factions were independently developing incorporated two similar but different digital technologies. Sony-Phillips proposed their original DVD format as being a one-sided disc that had two layers: the top one on a piece of translucent plastic, the bottom one on a standard reflective layer. Their player's laser beam had a special focusing mechanism that could read either layer instantaneously, thus effectively doubling the disc's running time without having to flip sides. The Toshiba/Time Warner Brothers DVD group had insisted all along that a dual-layer approach is basically unworkable, and that a dual-sided disc is infinitely easier to make. It was obvious that a repeat of the classic "VHS vs. BETA" scenario, which split the video market in the early eighties, was about to do the same to the DVD market.

Id.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Jim Taylor, *DVD FAQ's, DVD Demystified* (visited Oct. 7, 2000) <<http://dvddemystified.com/dvdfaq.html#6>>. The DVD Consortium has since changed its name to the DVD Forum <<http://www.dvd.org>>.

¹³ *Id.* These ten companies were: Hitachi, JVC, Matsushita, Mitsubishi, Phillips, Pioneer, Sony, Thomson, Time Warner, and Toshiba. *Id.*

¹⁴ *A Brief History of DVD* (visited Oct. 7, 2000) <<http://www.cdpage.com/DVD/dvdhistory.html>>.

¹⁵ See Jeffrey A. Bloom et al., *Copy Protection for DVD Video*, 87 PROC. OF THE IEEE 1267, 1268 (1999) [hereinafter Bloom, *Copy Protection*]. In 1996, the International Anti-Counterfeiting Coalition estimated the U.S. economy suffers losses of over \$200 billion annually to all forms of intellectual property piracy. See Hugh C. Hanson, *International Intellectual Property Law and Policy*, 371 (1998).

¹⁶ See Bloom, *Copy Protection*, *supra* note 15, at 1268.

¹⁷ *Id.*

¹⁸ *Id.*

players) into compliant and noncompliant. The medium (DVDs) would have to be protected in such a way as to not play on noncompliant devices and, (2) the medium protection system would be cost effective, which in turn would not allow protection against the most determined hackers, "since that level of security would require more computing power than is reasonable"¹⁹

Two protection measures developed: (1) DVD Regional Codes²⁰ and the (2) Content Scrambling System (CSS).²¹ CSS will play an integral role in the continuing discussion of this paper. Although the movie industry originally felt these anti-piracy technologies would be sufficient to protect their copyrighted material, it was only a matter of time before CSS was cracked, and copying of DVDs was a reality.

B. The Digital Millennium Copyright Act

President Clinton signed the Digital Millennium Copyright Act (DMCA) into law on October 28, 1998.²² The DMCA incorporated and implemented two 1996 World Intellectual Property Organization (WIPO) treaties: The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).²³ The DMCA, thus, addressed a number of significant copyright-related issues.²⁴

¹⁹ Bloom, *Copy Protection*, *supra* note 15, at 1268.

²⁰ See *DVD Regional Locking* (visited Oct. 8, 2000) <<http://www.dvdcity.com/dvdregions.html>>. The movie industry, with the help of the electronics industry, included a block in DVD players that would ensure that DVD discs would not be transportable between the various markets around the world. There are six regional DVD codes. In essence, regional coding ensures that a player marketed in one territory will refuse to play a disc intended for another territory. A search on the Internet, however, returned numerous sites purporting to sell "Region Free DVD" players; therefore, allowing any DVD to be viewed, regardless of what region it originated from. See, for example <http://www.codefreedvd.com/dvd_dvdregionlockingexplained.htm>.

²¹ Bloom, *Copy Protection*, *supra* note 15, at 1268:

CSS is a low cost method of scrambling MPEG-2 video, developed by Matsushita. Descrambling requires a pair of keys. One of the keys is unique to the disk, while the other is unique to the MPEG file being descrambled. The keys are stored on the lead-in area of the disk, which generally can only be read by compliant drives (see above footnote, however). Keys can be passed from a DVD drive to a descrambler over a PC bus using a secure handshake protocol. The purpose of CSS is twofold. First and foremost, it prevents byte-for-byte copies of a MPEG stream from being playable since such copies will not include the keys. Second, it provides a reason for manufacturers to make compliant devices, since CSS scrambled discs will not play on noncompliant devices. Anyone wishing to build a compliant device must obtain a license, which contains the requirement that the rest of the copy-protection system be implemented.

Id. Licenses can be obtained from the DVD Copy Control Association <<http://www.dvcca.org/dvcca/>>.

²² Statement on Signing the Digital Millennium Copyright Act, 34 WEEKLY COMP. PRESS. 2168 (Oct. 28, 1998).

²³ U.S. Copyright Office, *The Digital Millennium Copyright Act of 1998: US Copyright Office Summary*, COPYRIGHT OFF. SUMMARY 1, 1 (1998) [hereinafter U.S. Copyright Office, *Summary*].

²⁴ *Id.* at 1.

The provision of the DMCA relevant to this discussion is that relating to circumvention of technological protection measures and the exceptions therein. Each of the WIPO treaties mentioned above contain language obligating member states to prevent "circumvention of technological measures used to protect copyrighted works, and to prevent tampering with the integrity of copyright management information."²⁵ Article 11 of the WCT²⁶ and Article 18 of the WPPT²⁷ deal with this need to protect copyrighted materials from circumvention measures.²⁸ Section 103 of the DMCA added a new chapter 12 to Title 17 of the U.S. Code²⁹ following the lead and mandate of the two treaties.³⁰ Section 1201 implements the obligation to provide "adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works."³¹ Section 1201(a)(1)(A) reads:

(a) Violations Regarding Circumvention of Technological Measures.
(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title [the Copyright Act].³²

Section 1201(a)(1)(A) divides technological measures into two categories: Unauthorized *access* to copyrighted work, and unauthorized *copying* of protected works.³³ Making or selling devices or services whose purpose is to circumvent

²⁵ *Id.* at 3.

²⁶ WIPO Copyright Treaty (adopted by a diplomatic conference in Geneva), Dec. 20, 1996, art. 11. This article reads:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Id.

See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294, 315-16 (S.D.N.Y. 2000) (citing n.128 WIPO Copyright Treaty, Apr. 12, 1997, available in 1997 WL 447232).

²⁷ WIPO Performances and Phonograms Treaty (adopted by a diplomatic conference), Dec. 20, 1996, chap. 4, art. 18. This article reads:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Id.

²⁸ U.S. Copyright Office, *Summary*, *supra* note 23, at 3.

²⁹ *Id.*

³⁰ See *id.* at 1.

³¹ *Id.*

³² 17 U.S.C. §1201 (a)(1)(A) (2000).

³³ See U.S. Copyright Office, *Summary*, *supra* note 23, at 3-4.

technological measures, so that unauthorized accessing or copying can be accomplished, is prohibited under certain circumstances.³⁴

Those circumstances where unauthorized access or copying is prevented are: (1) when the device or service is primarily designed or produced to circumvent; (2) where the device or service has only a limited commercially significant purpose or use other than to circumvent; or (3) where the device or service is marketed for use in circumventing.³⁵ Section 1201(a)(2) reads:

(a)(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that —

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

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

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title [the Copyright Act].³⁶

A number of exceptions were built into Section 1201.³⁷ One exception relates to law enforcement, intelligence, and government activities, and it applies to the entire section.³⁸ There are other exceptions relating to Section 1201(a), the provision dealing with the category of technological measures that control access to works.³⁹ The broadest exceptions are contained in sections 1201(a)(1)(B)-(E).⁴⁰ These sections establish a continuous administrative rule-making process to determine the effect of the prohibition against circumvention.⁴¹ The boundaries of the exemption are to be determined through periodic rulemakings by the Librarian of Congress, upon the recommendation of the Register of Copyrights, who in turn is to consult with the Assistant Secretary of Commerce for Communications and Information.⁴² The DMCA initially provided for two years in which these guidelines or definitions concerning the exceptions could be announced.⁴³ A notice published in the Federal Register solicited comments to

³⁴ See *id.* at 4.

³⁵ See *id.*

³⁶ 17 U.S.C. § 1201(a)(2) (2000).

³⁷ See U.S. Copyright Office, *Summary*, *supra* note 23, at 5.

³⁸ See 17 U.S.C. § 1201(e) (2000).

³⁹ See U.S. Copyright Office, *Summary*, *supra* note 23, at 5.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

assist in this determination.⁴⁴ The deadline for comments was subsequently twice extended.⁴⁵ The determinations became effective October 28, 2000.⁴⁶

In addition to this broad exception there are seven other exceptions (six unique to the DMCA and the other, the Fair Use exception).⁴⁷ These exceptions are:

1. Nonprofit library, archive, and educational institution exception: (section 1201(d)). The prohibition on the act of circumvention of access control measures is subject to an exception that permits nonprofit libraries, archives and educational institutions to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain authorized access to the work.

2. Reverse Engineering: (section 1201(f)). This exception permits circumvention, and the development of technological means for such circumvention, by a person who has lawfully obtained a right to use a copy of a computer program for the sole purpose of identifying and analyzing elements of the program necessary to achieve interoperability with other programs, to the extent that such acts are permitted under copyright law.

3. Encryption Research: (section 1201(g)). An exception for encryption research permits circumvention of access control measures, and the development of the technological means to do so, in order to identify flaws and vulnerabilities of encryption technologies.

4. Protection of Minors (section 1201(h)). This exception allows a court applying the prohibition to a component or part to consider the necessity for its incorporation in technology that prevents access of minors to material on the Internet.

5. Personal Privacy (section 1201(i)). This exception permits circumvention when the technological measure, or the work it protects, is capable of collecting or disseminating personally identifying information about the online activities of a natural person.

6. Security Testing (section 1201(j)). This exception permits circumvention of access control measures, and the development of technological means for such circumvention, for the purpose of testing the security of a computer, computer system or computer network, with the authorization of its owner or operator.

7. Fair Use: (section 107 of the Copyright Act). Section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. By

⁴⁴ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 64 Fed. Reg. 66139 (1999).

⁴⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 14505 (2000).

⁴⁶ See *Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works* (visited Jan. 20, 2001) <<http://www.loc.gov/copyright/1201/hearing.html>>.

⁴⁷ See U.S. Copyright Office, *Summary*, *supra* note 23, at 5-6.

contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.⁴⁸

Sections 1203 and 1204 allow for civil and criminal penalties to be levied against violators of Section 1201.⁴⁹ Section 1203 gives courts the power to levy monetary damages and equitable remedies (e.g., injunctions).⁵⁰ Under this Section, the court has the discretion to diminish or excuse these remedies in cases of innocent violations.⁵¹ The violator must prove, however, that “[he] was not aware and had no reason to believe [his] acts constituted a violation.”⁵² Libraries, archives, and educational institutions are entitled to complete remission of damages in this type of circumstance.⁵³

Upon the signing of the DMCA into law, President Clinton stated, “[t]hrough enactment of the Digital Millennium Copyright Act, we have done our best to protect from digital piracy the copyright industries that comprise the leading export of the United States.”⁵⁴ The Act has, however, had an impact on other areas not envisioned by Congress or the President.

C. Putting the De in CSS

In November of 1999, a small group of Norwegian programmers developed a means to circumvent CSS protection on DVDs.⁵⁵ The group called themselves MoRE (Masters of Reverse Engineering).⁵⁶ One member of this programming group, a sixteen-year-old boy, received the most attention from the press and authorities.⁵⁷ Norwegian authorities arrested the boy as well as the boy’s father.⁵⁸ The Norwegian Police Economic Crime Unit was reported as saying: “[t]he charges concern whether [the boy] developed a cracker program that breaks the (DVD) copying code and distributed it on the Internet”⁵⁹ The teen asserted that he had not broken any laws and that the purpose of the code was written to

⁴⁸ *Id.* at 5, 6.

⁴⁹ 17 U.S.C. § 1203 (2000) and 17 U.S.C. § 1204 (2000).

⁵⁰ *See* 17 U.S.C. § 1203 (2000).

⁵¹ *See* 17 U.S.C. § 1203(c)(5)(A) (2000).

⁵² *Id.*

⁵³ *See* 17 U.S.C. § 1203(c)(5)(B)(ii) (2000).

⁵⁴ Statement on Signing the Digital Millennium Copyright Act, 34 WEEKLY COMP. PRESS DOC. 2168, 2169 (Oct. 28, 1998).

⁵⁵ Kate Crawford, *Hollywood Presses for Ban on Movie Software*, SYDNEY MORNING HERALD, Mar. 8, 2000, at 26, available in 2000 WL 14584685.

⁵⁶ Andy Patrizio, *Why the DVD Hack was a Cinch* (visited Feb. 15, 2000) <<http://www.wired.com/news/print/0,1294,32263,00.html>>.

⁵⁷ *See* John Snell, *Copyright and Wrong*, PORTLAND OREGONIAN, Jan. 31, 2000, at B1, available in 2000 WL 5372739.

⁵⁸ *Id.*

⁵⁹ Doug Mellgren, *Norwegian Teen Faces Charges in DVD Security Case*, ASSOCIATED PRESS NEWSWIRE, Jan. 26, 2000, available in 2000 WL 18463475. The teen’s web site reportedly received up to 10,000 hits per day as word spread that the code was available. *Id.*

view lawfully purchased DVDs on computers operating Linux,⁶⁰ not for copying.⁶¹ The teen and his fellow programmers named the code "DeCSS."⁶²

DeCSS is only a 60 KB utility.⁶³ Once the DeCSS utility is run and the DVD file decrypted, the decrypted file can then be saved to the user's hard drive.⁶⁴ In simpler terms, DeCSS unscrambles DVDs and allows viewing on non-compliant machines, as well as copying.⁶⁵ However, "[s]ince DVD movies can range in size from 4.7 GB to 9.4 GB and recordable DVD has at best 2.5 GB capacity (or 5.2 GB for double-sided discs) direct DVD copying is unfeasible."⁶⁶

Immediately after the teen's arrest, the DVD Copy Control Association (DVDCCA) sued 27 named and 72 unnamed defendants over the posting of the circumvention code.⁶⁷ The DVDCCA argued that if the distribution of the code was not stopped, illegal copying of DVDs would proliferate, and the film industry would be irreparably harmed.⁶⁸ The DVDCCA alleged theft of their trade secret (that of CSS).⁶⁹ Judge William J. Elfving in Superior Court in Santa Clara County, California granted a preliminary injunction against those individuals who posted the code, stating that the posting amounted to a theft of trade secrets.⁷⁰ However, the court refused to grant an injunction against linking

⁶⁰ Linux is an Intel-processor-based alternative to Unix. Linux (pronounced lin-nucks) is currently used by millions of people around the world. The operating system has made some inroads into corporate life, especially as an inexpensive substitute for high-priced Unix web servers. DVDs, at the time of the creation of the circumvention code, could not be viewed on computers running Linux. See *CNET Glossary* (visited Sept. 27, 2000) <<http://coverage.cnet.com/Resources/Info/Glossary/Terms/linux.html>>.

⁶¹ Doug Mellgren, *Norwegian Teen Faces Charges in DVD Security Case*, ASSOCIATED PRESS NEWSWIRE, Jan. 25, 2000, available in 2000 WL 18463475.

⁶² *Movie Studios Win Preliminary Injunction Barring Website Operators from Distributing Software that Permits Users to Decrypt and Copy Movie DVDs*, 22 ENT. L. REP. 13, 13 (2000).

⁶³ Andy Patrizio, *Why the DVD Hack was a Cinch* (visited Feb. 15, 2000) <<http://www.wired.com/news/print/0,1294,32263,00.html>>.

⁶⁴ *Id.*

⁶⁵ See Andy Patrizio, *DVD Piracy: It Can be Done* (visited Feb. 15, 2000) <<http://www.wired.com/news/print/0,1294,32249,00.html>>.

⁶⁶ Andy Patrizio, *Why the DVD Hack was a Cinch* (visited Feb. 15, 2000) <<http://www.wired.com/news/print/0,1294,32263,00.html>>. Next year 4.7 GB recordable DVD drives will be available, making duplication of DVD discs much easier. However, the total data volume of a typical movie DVD is between 7 and 9 GB of data. You can't "burn" this to a regular CD, since a CD only holds 650 MB of data. The only people for whom DVD piracy is profitable are the professional pirates who own expensive equipment and for whom CSS encryption is not a problem. These types of pirates do bitwise copies, which means that their pirate copies are precise duplicates of the originals, including the CSS encryption. The DVD player will notice no difference between such a copy and the original version. CSS cannot stop this kind of piracy.

⁶⁷ See Adam Gifford, *DVD 'Piracy' Battle Line Drawn*, NEW ZEALAND HERALD, Jan. 25, 2000, available in 2000 WL 7609600.

⁶⁸ See *id.*

⁶⁹ See Lisa M. Bowman, *Hollywood's War on Open Source*, ZDNET NEWS FROM ZDWIRE, Feb. 25, 2000, available in 2000 WL 4019608.

⁷⁰ See *DVD Copy Control Association, Inc. v. McLaughlin*, 2000 WL 48512 at *1 (Cal. Superior Jan. 21, 2000).

to other sites that contained the code.⁷¹ The court felt that such an injunction would be “overbroad and extremely burdensome.”⁷²

At the same time the DVDCCA took action, major Hollywood studios reacted to the proliferation of DeCSS.⁷³ These major Hollywood studios, acting through the Motion Picture Association of America (MPAA), stated that DeCSS could cost the industry billions of dollars yearly and that the DVD industry was a “product under siege.”⁷⁴ The MPAA sued the website, *2600.com*, seeking an injunction preventing the site from posting or linking to the DeCSS code.⁷⁵ This suit alleged violation of the DMCA and will be discussed in the following sections in detail.⁷⁶

The Internet community responded to this legal action in various ways. For instance, open-source⁷⁷ advocates responded by putting DeCSS on as many sites as they could.⁷⁸ E-mail campaigns emerged supporting the Norwegian teen that created DeCSS and boycotts of Hollywood products were propounded on many sites.⁷⁹ Legal funds were established to help with the teen’s defense.⁸⁰ The organization entitled OpenDVD⁸¹ and others claimed the MPAA was “chipping away at personal copying rights in the name of copyright protection.”⁸² Bumper stickers were distributed at the LinuxWorld 2000 convention reading, “Free Jon Johansen” (the Norwegian teen) and “Coding is Not a Crime.”⁸³ Flyers were passed out at movie theaters with the code printed on them and t-shirts were sold with the code printed on them.⁸⁴

Mark Lemley, a University of California at Berkeley law professor, was quoted as saying in response to this burgeoning crisis: “I think the DMCA as it’s

⁷¹ *Id.* at *4.

⁷² *Id.*

⁷³ See David Wichner, *Movie Moguls, Defending DVDs: Wage War on Piracy*, THE ARIZONA DAILY STAR, Feb. 3, 2000, at 10A, available in 2000 WL 10236526.

⁷⁴ *Id.*

⁷⁵ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000). *2600.com* is the web site for a leading hacker magazine.

⁷⁶ See *id.*

⁷⁷ Open-source is defined as: “A method and philosophy for software licensing and distribution designed to encourage use and improvement of software written by volunteers by ensuring that anyone can copy the open source and modify it freely.” *Open Source* (last modified Dec. 12, 1999) <<http://wombat.doc.ic.ac.uk/foldoc/index.html>>.

⁷⁸ Adam Gifford, *DVD ‘Piracy’ Battle Line Drawn*, NEW ZEALAND HERALD, Jan. 25, 2000, available in 2000 Westlaw 7609600.

⁷⁹ Ian Harvey, *Netizens Rally Behind Teen Hacker*, THE TORONTO SUN, Jan. 28, 2000, at 70, available in 2000 WL 2301095.

⁸⁰ *Id.* However, the teen probably did not need a whole lot of money as he reportedly was offered jobs at major computer companies.

⁸¹ OpenDVD’s website is: <<http://www.opendvd.org>>.

⁸² David Wichner, *Movie Moguls, Defending DVDs: Wage War on Piracy*, THE ARIZONA DAILY STAR, Feb. 3, 2000, at 10A, available in 2000 WL 10236526.

⁸³ See Lisa M. Bowman, *Hollywood’s War on Open Source*, ZDNET NEWS FROM ZDWIRE, Feb. 25, 2000, available in 2000 WL 4019608.

⁸⁴ *Id.*

written is a disastrous statute. Congress probably didn't think all the way through the ramifications of the way they structured the bill."⁸⁵ He asserted that the DMCA could erode the fair use doctrine.⁸⁶ "It's a real mistake to try to roll back technology . . . My fear is if we sort of lose these freedoms by degree, no one will really notice."⁸⁷ Clearly, the battle lines were being drawn for the subsequent decision in *Reimerdes*.

III. THE FACTS OF UNIVERSAL CITY STUDIOS, INC. V. REIMERDES

A defendant's company (Eric Corley's), *2600 Enterprises, Inc.*, publishes a magazine entitled, *2600: The Hacker Quarterly*.⁸⁸ *2600: The Hacker Quarterly* is considered a "bible" to the hacker community.⁸⁹ The name of the magazine commemorates hackers, who in the 1960's successfully found a way to explore "un-accessible" areas of the telephone system.⁹⁰ This ability was accomplished by using a 2600-hertz tone over a long distance trunk connection to gain access to "operator mode."⁹¹ The website is a companion to the defendant's magazine and is primarily managed by Mr. Corley.⁹² The website has been in existence since 1995.⁹³

Beginning in November of 1999, the source and object code for DeCSS was posted on the *2600.com* website.⁹⁴ Additionally, the website provided links to other sites that supposedly "mirrored" or offered DeCSS for download.⁹⁵ The links to the "mirror" sites took three forms:⁹⁶ (1) A link was provided to a website.⁹⁷ The linked website would then, itself, contain a link from which

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 309.

⁹³ *Id.*

⁹⁴ See *Reimerdes*, 111 F. Supp. 2d at 312.

⁹⁵ *Id.* A mirror site is:

A Web site that is a replica of an already existing site, used to reduce network traffic (hits on a server) or improve the availability of the original site. Mirror sites are useful when the original site generates too much traffic for a single server to support. Mirror sites also increase the speed with which files or Web sites can be accessed: users can download files more quickly from a server that is geographically closer to them. For example, if a busy New York-based Web site sets up a mirror site in England, users in Europe can access the mirror site faster than the original site in New York. Sites such as Netscape that offer copies or updates of popular software often set up mirror sites to handle the large demand that a single site may not be able to handle.

Mirror Site (visited Jan. 3, 2001) <http://webopedia.internet.com/TERM/m/mirror_site.html>.

⁹⁶ See *Reimerdes*, 111 F. Supp. 2d at 312.

⁹⁷ *Id.*

DeCSS could be downloaded.⁹⁸ These pages might or might not contain other information than the link to DeCSS.⁹⁹ (2) The link from *2600.com*'s website would bring the web user to a website that provided links to other pages which purportedly contained links to DeCSS.¹⁰⁰ (3) By following the link, the download of DeCSS began immediately, albeit from a website other than the defendant's.¹⁰¹

Subsequently, the plaintiffs, eight major motion picture studios (including Universal City Studios), discovered the availability of DeCSS on the Internet.¹⁰² This discovery occurred in October 1994 through the investigative arm of the Motion Picture Association of America (MPAA).¹⁰³ The plaintiffs responded by sending out numerous cease and desist letters to sites that had DeCSS available for download.¹⁰⁴ *2600.com* failed to remove the code or the links from their website.¹⁰⁵ Consequently, the plaintiffs brought suit against Eric Corley and two others.¹⁰⁶

The federal district court granted a preliminary injunction on January 20, 2000, enjoining defendants from posting DeCSS.¹⁰⁷ Plaintiffs also sought to enjoin the defendants from providing links to other sites containing the DeCSS code.¹⁰⁸ The court declined to hear this issue, because the plaintiffs failed to raise the issue in their complaint.¹⁰⁹ *2600.com* observed the court's order and removed any posting of the DeCSS code on their website; however, in an act of "electronic civil disobedience," the defendants maintained links to over 500 sites that contained the code.¹¹⁰ The site, in furtherance of their "electronic civil disobedience," posted a banner that read: "Stop the MPAA."¹¹¹ *2600.com* also

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *Reimerdes*, 111 F. Supp. 2d at 312.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The two other defendants entered into consent decrees with the plaintiffs. Furthermore, plaintiffs amended the complaint to add 2600 Enterprises, Inc. as a defendant. *Id.* at 312, n.91.

¹⁰⁷ *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000). A preliminary injunction was also granted on January 21, 2000 by the Superior Court, Santa Clara County, California. See *DVD Copy Control Association, Inc. v. McLaughlin*, 2000 48512 WL (Cal. Superior Jan. 21, 2000). The DVD Copy Control Association, Inc. sought a preliminary injunction against several individuals – requiring that they desist from posting the DeCSS code on their web sites and desist from linking to other sites that did. *Id.* The state court granted the injunction in part; however, it refused to enjoin the defendants from linking to other sites. *Id.* It is important to note that the injunction granted by the state court was based on trade secret laws and not a violation of the Digital Millennium Copyright Act as is the federal case. *Id.*

¹⁰⁸ *Reimerdes*, 111 F. Supp. 2d at 312.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 312-13.

urged their users to post, in as many different cyber locations as possible, DeCSS.¹¹²

Plaintiffs then sought a permanent injunction against defendants from posting the DeCSS code and from providing links to any other sites that contained the code.¹¹³ The action was based upon violations of the Digital Millennium Copyright Act (DMCA).¹¹⁴ The court on August 17, 2000 determined that the defendants had in fact violated the DMCA and were permanently enjoined from posting the DeCSS code or from providing links to other sites that did.¹¹⁵

IV. THE REASONING OF THE COURT IN UNIVERSAL CITY STUDIOS, INC. V. REIMERDES

The court in *Universal City Studios, Inc. v. Reimerdes* faced many issues. These included: (1) Whether the defendants violated the Anti-Trafficking provision of the DMCA;¹¹⁶ (2) Whether the defendants' conduct fell into one of the exceptions afforded under the Act; (3) Whether linking to other sites that contain the DeCSS code is prohibited by the DMCA; (4) Whether the DeCSS code is protected speech for First Amendment purposes;¹¹⁷ and, (5) Whether injunctive relief against dissemination of DeCSS is barred by the prior restraint doctrine, the overbreadth doctrine, or vagueness.¹¹⁸

A. The Court Found a Violation of the Anti-Trafficking Provision of the DMCA

First, section 1201(a)(2) of the DMCA states in relevant part that:

No person shall . . . offer to the public, provide or otherwise traffic in any technology . . . that --

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

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act]; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that

¹¹² *Id.* at 313.

¹¹³ *See id.* at 313.

¹¹⁴ *Reimerdes*, 111 F. Supp. 2d at 313.

¹¹⁵ *Id.* at 346. *See also* Amended Final Judgment, *id.* at 346-47.

¹¹⁶ *See* 17 U.S.C. § 1201(a)(2) (2000).

¹¹⁷ *See Reimerdes*, 111 F. Supp. 2d at 327-333.

¹¹⁸ *Id.* at 333-41.

effectively control access to a work protected under [the Copyright Act].¹¹⁹

Judge Kaplan concluded that defendants had “offered and provided and, absent a court ruling, would continue to offer and provide DeCSS for download”¹²⁰ DeCSS is, the court reasoned, “technology” as defined by the DMCA.¹²¹ The DMCA clearly defines “circumvent a technological measure” as, “descrambling a scrambled work, decrypting an encrypted work, or ‘otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner’”¹²²

During pretrial proceedings and at the trial, Corley argued that CSS is so weak an encryption method that it does not “effectively control” access to plaintiffs’ copyrighted material and, thus, cannot be protected by this part of the DMCA.¹²³ Judge Kaplan responded to this argument by quoting language from the DMCA.¹²⁴ The DMCA states, “a technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information or a process or a treatment, without the authority of the copyright owner, to gain access to a work.”¹²⁵ The court further reasoned that:

One cannot gain access to a CSS-protected work on a DVD without application of the three keys that are required by the software. One cannot lawfully gain access to the keys except by entering into a license with the DVD CCA [DVD Copyright Control Association] under authority granted by the copyright owners or by purchasing a DVD player or drive containing the keys pursuant to such a license CSS “effectively controls access” to copyrighted DVD movies. It does so, within the meaning of the statute, whether or not it is a strong means of protection.¹²⁶

This reading of the statute is furthered, the court stated, by an investigation into the legislative history of this section of the DMCA.¹²⁷ The legislative history was clear, according to Judge Kaplan, “that a technological measure ‘effectively controls access’ to a copyrighted work if its *function* is to control access”¹²⁸ Therefore, CSS in its ordinary operation (without the presence of some program like DeCSS) actually worked and “effectively controlled” access within the meaning of the statute.¹²⁹ Furthermore, the court reasoned that if the statute intended protection only to be offered to “efficacious” methods of protecting copyright, then the statute would be useless or “gutted” because any method that

¹¹⁹ 17 U.S.C. § 1201(a)(2) (2000).

¹²⁰ *Reimerdes*, 111 F. Supp. 2d at 317.

¹²¹ *Id.*

¹²² *Id.* at 317 (citing 17 U.S.C. § 1201(a)(3)(A) (2000)).

¹²³ *See Reimerdes*, 111 F. Supp. 2d at 317.

¹²⁴ *Id.*

¹²⁵ 17 U.S.C. § 1201(a)(3)(B) (2000).

¹²⁶ *Reimerdes*, 111 F. Supp. 2d at 317-18.

¹²⁷ *Id.* at 318.

¹²⁸ *Id.*

¹²⁹ *See id.*

is circumvented would, if adopting Corley's view, be ineffective.¹³⁰ The Court opined that application of the statute in the manner Corley espoused would provide protection to those methods that do not need it and leave unprotected those methods that do.¹³¹

Having established that CSS effectively protects plaintiffs' copyrighted works, the court turned to the question of whether DeCSS was designed primarily to circumvent CSS.¹³² Judge Kaplan concluded, based on admissions by both the creator of DeCSS and Corley, that DeCSS's sole purpose was the decryption of CSS.¹³³ Therefore, the Court found that absent any statutory exception, defendants "clearly violated Section 1201(a)(2)(A) by posting DeCSS to their web site."¹³⁴

The Court resolved, simply, whether defendants had violated Section 1201(a)(2)(B) by reasoning that a violation of Section 1201(a)(2)(B) naturally follows a violation of Section 1201(a)(2)(A).¹³⁵ Defendants argued that the true reason for the creation of DeCSS was not to violate copyright, but rather to allow DVDs to be viewed on computers operating Linux.¹³⁶ The court dispensed with this argument quickly.¹³⁷ It held that the true reason for the creation of DeCSS did not matter because defendants still violated the anti-trafficking clause of the DMCA:¹³⁸

[T]he question whether the development of a Linux DVD player motivated those who wrote DeCSS is immaterial to the question whether the defendants now before the Court violated the anti-trafficking provision of the DMCA. The inescapable facts are that (1) CSS is a technological means that effectively controls access to plaintiffs' copyrighted works, (2) the one and only function of DeCSS is to circumvent CSS, and (3) defendants offered and provided DeCSS by posting it on their web site. Whether defendants did so to infringe, or to permit or encourage others to infringe, copyrighted works in violation of other provisions of the Copyright Act simply does not matter for purposes of 1201(a)(2). The offering or provision of the program is the prohibited conduct

¹³⁰ *See id.*

¹³¹ *Id.*

¹³² *See Reimerdes*, 111 F. Supp. 2d at 318.

¹³³ *Id.* at 319.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* Judge Kaplan determined that the creators of DeCSS did not create the utility to play DVDs on the Linux Operation system. *Id.* Judge Kaplan's findings are contrary to declarations made by Jon Johansen immediately after his arrest:

Well, I got involved with DVD about two years ago. I bought my first DVD-ROM and an MPEG-2 decoder card. And, about at the end of September last year, I got in contact with a German computer programmer and a Dutch computer programmer, and we decided that it was time to add DVD support to Linux – and, of course, to other operating systems, such as FreeBSD.

J.S. Kelly, *Interview with Jon Johansen* (visited Jan. 10, 2000) <<http://www.linuxworld.com/linuxworld/lw-2000-01/lw-01-dvd-interview.html>>.

¹³⁷ *See Reimerdes*, 111 F. Supp. 2d at 319.

¹³⁸ *See id.*

— and it is prohibited irrespective of why the program was written, except to whatever extent motive may be germane to determining whether their conduct falls within one of the statutory exceptions.¹³⁹

In conclusion, the court found that the defendants violated Section 1201(a)(2)(A) of the DMCA.¹⁴⁰ The Court turned next to defendants' asserted statutory exceptions.¹⁴¹

B. The Court Finds No Statutory Exception Applicable

Defendants in this case raised four statutory defenses (exceptions) to their actions.¹⁴² The exceptions were contained either in the DMCA or the Copyright Act.¹⁴³ The exceptions claimed were: (1) reverse engineering; (2) encryption research; (3) security testing; and, (4) fair use.¹⁴⁴ The defendants, in their post-trial memorandum limited their argument to only the Reverse Engineering defense, but Judge Kaplan discussed all their originally claimed defenses in his opinion and concluded that all four were "entirely without merit."¹⁴⁵ The Court's handling of these four defenses will be discussed in turn.

1. Reverse Engineering

The reverse engineering exception of the DMCA provides that one may circumvent, or develop and employ technological means to circumvent access-control measures in order to achieve interoperability with another computer program provided that doing so does not infringe another's copyright.¹⁴⁶ Furthermore, one may make the results of this reverse engineering effort "available to others, if the person [in question] . . . provides such information . . . solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement"¹⁴⁷ The Court did not find the reverse engineering exception applicable to the defendants.¹⁴⁸

In finding that this exception was not available to the defendants, the Court determined that Section 1201(f)(3) permits only the one who performed the reverse engineering the right to disseminate that information.¹⁴⁹ Here, the defendants did not reverse engineer anything, "[t]hey simply took DeCSS off

¹³⁹ Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

¹⁴⁰ See *id.*

¹⁴¹ *Id.* at 319-24.

¹⁴² *Id.*

¹⁴³ See *id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *Reimerdes*, 111 F. Supp. 2d at 319.

¹⁴⁶ 17 U.S.C. § 1201(f)(1), (2) (2000).

¹⁴⁷ 17 U.S.C. § 1201(f)(3) (2000).

¹⁴⁸ *Reimerdes*, 111 F. Supp. 2d at 320.

¹⁴⁹ *Id.*

someone else's website and posted it on their own."¹⁵⁰ Additionally, the Court reasoned that, even if defendants had done the reverse engineering themselves, they could only post DeCSS for the sole purpose of providing interoperability and the defendants in this case did not post DeCSS solely for interoperability purposes.¹⁵¹ Therefore, the Court concluded that this exception would not apply to the defendants' case.¹⁵²

2. Encryption Research

The encryption research exception provided in Section 1201(g)(4) of the DMCA states in relevant part:

Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to —

(A) develop and employ technological means to circumvent a technological measure for the sole purpose of that person performing the acts of good faith encryption research described in paragraph (2); and

(B) provide the technological means to another person with whom he or she is working collaboratively for the purpose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).¹⁵³

Paragraph (2) sets the parameters for determining whether or not the circumvention of the technological measures for encryption research was done in good faith. The encryption research was done in good faith if:

(A) the person lawfully obtained the encrypted copy, phonorecord, performance, or display of the published work;

(B) such act is necessary to conduct such encryption research;

(C) the person made a good faith effort to obtain authorization before the circumvention; and

(D) such act does not constitute infringement under this title. . . .¹⁵⁴

To determine if good faith had occurred, the Court considered factors such as:

whether the results of the putative encryption research [were] disseminated in a manner designed to advance the state of knowledge of encryption technology versus facilitation of copyright infringement, whether the person in question [was] engaged in legitimate study of or work in encryption, and whether the

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 320-21 (citing 17 U.S.C. § 1201(g)(4) (2000)).

¹⁵⁴ *Reimerdes*, 111 F. Supp. 2d at 321 (citing 17 U.S.C. § 1201(g)(2) (2000)).

results of the research [were] communicated in a timely fashion to the copyright owner.¹⁵⁵

The court concluded that defendants made no effort to provide the results of the DeCSS effort to the copyright owners.¹⁵⁶ There was no evidence to suggest that the defendants made any good faith effort to obtain permission from the copyright owners, and furthermore, defendants were not engaged in encryption research.¹⁵⁷ Therefore, the court concluded, defendants could not fall under the exception provided in Section 1201(g).¹⁵⁸

3. Security Testing

The security testing exception, found in Section 1201(j) of the DMCA is limited to:

assessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting [of a] security flaw or vulnerability, with the authorization of the owner or operator of such computer system or computer network.¹⁵⁹

The Court found that nothing in the record of *Reimerdes* indicated DeCSS had anything to do with testing computers, computer systems, or computer networks.¹⁶⁰ Additionally, the defendants did not seek authorization from the plaintiffs in any manner.¹⁶¹ This exception, the court found, had no bearing on the case.¹⁶²

4. Fair Use

The defendants' final attempt at a statutory exception was the fair use doctrine.¹⁶³ This doctrine is codified in Section 107 of the Copyright Act.¹⁶⁴ The fair use doctrine states in its simplest form that others (those other than the copyright owner) may make limited use of portions of a copyrighted work.¹⁶⁵ These uses can include the right "to reprint or quote a suitable part of a copyrighted book or article in certain circumstances."¹⁶⁶ fair use promotes

¹⁵⁵ *Reimerdes*, 111 F. Supp. 2d at 321 (citing 17 U.S.C. § 1201 (g)(3) (2000)).

¹⁵⁶ *Reimerdes*, 111 F. Supp. 2d at 321.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (citing 17 U.S.C. § 1201 (j)(1) (2000)) (alteration in original).

¹⁶⁰ *Reimerdes*, 111 F. Supp. 2d at 321.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ 17 U.S.C. § 107 (2000).

¹⁶⁵ *See Reimerdes*, 111 F. Supp. 2d at 321.

¹⁶⁶ *Id.*

“artistic criticism, teaching and scholarship, and other socially useful forms of expression.”¹⁶⁷

The Court acknowledged that certain uses deemed fair would still violate the DMCA.¹⁶⁸ The Court worked its way around the conflict between the DMCA and the fair use doctrine by holding fast to the fact that defendants were not charged with copyright violation.¹⁶⁹ Rather the Court held that defendants were charged with circumventing a technological measure that controlled access to copyrighted works in violation of the DMCA.¹⁷⁰ Had Congress wanted fair use to apply to situations like the one before us, the Court noted, Congress would have said so.¹⁷¹

The policy concerns raised by defendants were considered by Congress. Having considered them, Congress crafted a statute that, so far as the applicability of the fair use defense to Section 1201(a) claims is concerned, is crystal clear. In such circumstances, courts may not undo what Congress so plainly has done by ‘construing’ the words of a statute to accomplish a result that Congress rejected. The fact that Congress elected to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so is a matter for Congress unless Congress’ decision contravenes the Constitution, a matter to which the Court turns below. Defendants’ statutory fair use argument therefore is entirely without merit.¹⁷²

C. The Court Found Linking to Other Sites Violates the DMCA

The Court posited that: “The ‘dispositive question is whether linking to another web site containing DeCSS constitutes ‘offer[ing DeCSS] to the public’ or ‘provid[ing] or otherwise traffic[king]’ in it within the meaning of the DMCA.”¹⁷³ To answer this question the Court announced that consideration of the different types of linking is paramount.¹⁷⁴ A discussion of what “linking” is and what different types of “linking” exist was put forth by the Court.¹⁷⁵ The types of linking the court discussed can be seen in Part III of this paper above.

The Court further stated that trafficking in something involves engaging in that something by conduct that involves awareness of the nature of the subject of the trafficking.¹⁷⁶ To “provide” something, the Court noted for purposes of the DMCA, is to make it available and to “offer” is “to present or hold out that something for consideration.”¹⁷⁷ Judge Kaplan concluded that the anti-trafficking

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 322.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Reimerdes*, 111 F. Supp. 2d at 322.

¹⁷² *Id.* at 324.

¹⁷³ *Id.* (alteration in original).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 325.

¹⁷⁷ *Reimerdes*, 111 F. Supp. 2d at 325.

provision of the DMCA is “implicated where one presents, holds out or makes a circumvention technology device available, knowing its nature, for the purpose of allowing others to acquire it.”¹⁷⁸

The Court concluded that links to sites where the DeCSS downloading is automatically begun once the user clicks on the link is trafficking.¹⁷⁹ Also, links to sites that provide only the DeCSS code or simply provide another link to the code is trafficking.¹⁸⁰ The last type of linking, where the page linked to contains a “good deal” of content other than DeCSS, the Court posited is more troublesome.¹⁸¹ However, the Court held, regardless of the potential problems with banning links to these types of pages, that defendants’ conduct involved the active solicitation of others to post the code and by doing so they offered or otherwise trafficked in the DeCSS code.¹⁸²

D. The Court Found DeCSS Not Fully Protected by the First Amendment

The Court began its argument for not granting computer code full First Amendment protection by stating:

It cannot seriously be argued that any form of computer code may be regulated without reference to First Amendment doctrine. The path from idea to human language to source code to object code is a continuum. As one moves from one to the other, the levels of precision and, arguably, abstraction increase, as does the level of training necessary to discern the idea from the expression . . . [O]nly a relatively small number of skilled programmers and computer scientists will understand the machine readable object code.¹⁸³

The court held that all computer code — whether source code or object code — is a means of expressing ideas, and the First Amendment must be brought into play before code may be prohibited or restricted.¹⁸⁴ However, determining the level of scrutiny to be applied to statutes or regulations that prohibit or restrict computer code is the question of most importance, the Court noted.¹⁸⁵ The Court stated that simply because “words, symbols and even actions convey ideas and evoke emotions does not inevitably place them beyond the power of government.”¹⁸⁶

Two categories of restrictions on speech have been developed by the Supreme Court: (1) content-based restrictions (restrictions based on the message, ideas, or subject matter of the contents), and (2) content-neutral restrictions (restrictions not motivated by a desire to limit the message).¹⁸⁷ The restriction on

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Reimerdes*, 111 F. Supp. 2d at 326.

¹⁸⁴ *Id.* at 327.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

speech is subject to a legal standard depending upon the type of restriction (either content-based or content-neutral).¹⁸⁸ Restrictions on non-speech elements of expressive conduct, the Court claimed, should receive a content-neutral analysis.¹⁸⁹

In upholding a regulation of non-speech elements or content-neutral restrictions, the restriction must serve an important governmental interest and restrict First Amendment principles no more than necessary.¹⁹⁰ The court determined that DeCSS has a sufficiently high level of functional, non-speech elements inherent in it (as do all computer programs) to deserve only a content-neutral analysis under the First Amendment doctrine.¹⁹¹

The Court asserted that in passing the test employed for content-neutral or non-speech elements, the DMCA was a law passed to further an important governmental interest — that of suppressing copyright piracy and to promote the availability of copyrighted works in digital form, not of suppressing the expressive content that may be inherent in DeCSS and code similar to it.¹⁹² Furthermore, the Court expressed that the regulation (DMCA) is no more restrictive than it needs to be.¹⁹³ The Court consequently stated:

Accordingly, this Court holds that the anti-trafficking provision of the DMCA as applied to the posting of computer code that circumvents measures that control access to copyrighted works in digital form is a valid exercise of Congress' authority. It is a content neutral regulation in furtherance of important governmental interests that does not unduly restrict expressive activities . . . [The holding is a narrow one, however limiting itself] (1) to programs that circumvent access controls to copyrighted works in digital form in circumstances in which (2) there is no other practical means of preventing infringement through use of the programs, and (3) the regulation is motivated by a desire to prevent performance of the function for which the programs exist rather than any message they might convey.¹⁹⁴

E. The Court Found No Merit in the Defenses of Prior Restraint, Overbreadth, or Vagueness

1. Prior Restraint¹⁹⁵

The Court engaged in a discussion of the past ways in which the Prior Restraint doctrine had been used successfully to thwart attempts to regulate

¹⁸⁸ *Id.*

¹⁸⁹ *See Reimerdes*, 111 F. Supp. 2d at 328.

¹⁹⁰ *Id.* at 327-28.

¹⁹¹ *Id.* at 329.

¹⁹² *Id.* at 329-30.

¹⁹³ *Id.* at 330.

¹⁹⁴ *Id.* at 332-33.

¹⁹⁵ Prior restraint is a restriction imposed by the government on speech before the speech is actually expressed. Prior restraints have been held to violate the First Amendment.

speech and found those instances incompatible with the situation before it.¹⁹⁶ The Court focused more on the reasons for the restriction (combating piracy and protecting the monopoly granted to copyright owners), and found the First Amendment interests of DeCSS minimal.¹⁹⁷ The Court concluded this discussion by stating, “[h]ence, those of the traditional rationales for the prior restraint doctrine that relate to inhibiting the transmission and receipt of ideas are of attenuated relevance here.”¹⁹⁸

2. Overbreadth¹⁹⁹

The Court attacked defendants’ contention “that Section 1201(a)(2) is unconstitutional because it prevents others from making fair use of copyrighted works by depriving them of the means of circumventing plaintiffs’ access control system,”²⁰⁰ by holding that the overbreadth of the statute is not substantial enough.²⁰¹ The Court noted that it did not really know if the interests of third parties asserted by the defendants in applying the overbreadth doctrine were substantial, and whether the DMCA as applied in this case would affect their ability to make fair use of the plaintiffs’ copyrighted materials.²⁰² The Court emphasized the fact that substantially all of plaintiffs’ copyrighted materials (motion pictures) were available on videocassette and potentially, unknown third parties that may be affected by the DMCA and the overbreadth doctrine could make fair use of the videocassettes.²⁰³

3. Vagueness²⁰⁴

The Court quickly dismissed defendants’ complaint that the DMCA is vague and cannot be understood by persons of ordinary intelligence.²⁰⁵ It asserted that one who “engages in some conduct that is clearly proscribed [by the challenged

¹⁹⁶ *Reimerdes*, 111 F. Supp. 2d at 335.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ The Overbreadth Doctrine holds that if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of its chilling effect – even if it also prohibits acts that may be legitimately forbidden.

²⁰⁰ *Reimerdes*, 111 F. Supp. 2d at 326.

²⁰¹ *Id.* at 337.

²⁰² *Id.* It is interesting to note, however, that Judge Kaplan admits that Congress has prohibited technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works from doing so, while allowing those who are technologically sophisticated the ability to exercise fair use. *See id.* at 338. The technologically unsophisticated, I would posit, are vast in numbers compared to the technologically sophisticated.

²⁰³ *Reimerdes*, 111 F. Supp. 2d at 339.

²⁰⁴ The Vagueness Doctrine requires that a criminal statute state explicitly and definitely what acts are prohibited, so as to provide fair warning and preclude arbitrary enforcement.

²⁰⁵ *Reimerdes*, 111 F. Supp. 2d at 339.

statute] cannot complain of the vagueness of the law as applied to the conduct of others.”²⁰⁶ Therefore, the defendants could not argue vagueness.²⁰⁷

F. The Court's Remedy

The Court granted the plaintiffs' request for a permanent injunction barring the defendants from posting the DeCSS code on their websites and from knowingly and intentionally linking (for the purpose of providing access to DeCSS) to sites that provide or link to DeCSS code.²⁰⁸ Furthermore, the defendants were required to pay costs, but the Court declined to allow the payment of plaintiffs' attorneys' costs by the defendants as is allowed in the DMCA.²⁰⁹

G. The Court's Remedy is Not Futile

The court admitted that it was troubling that since DeCSS was already plastered all over the Internet that an injunction might be futile.²¹⁰ However, Judge Kaplan decided that countervailing arguments overcome this “horse out of the barn” concern.²¹¹ Judge Kaplan commented:

[A]ny such conclusion effectively would create all the wrong incentives by allowing defendants to continue violating the DMCA simply because others, many doubtless at the defendants' urging, are doing so as well.²¹²

The Court was further concerned with the opinion that a single Internet user could conceivably destroy intellectual property rights by posting DeCSS on the web.²¹³ Judge Kaplan concluded that equity should look “skeptically” at the idea that a defendant has done the entire harm that can potentially be done and therefore an injunction would be warrantless.²¹⁴ Judge Kaplan concluded, “[defendants] will not be allowed to continue [posting DeCSS] simply because others may do so as well.”²¹⁵

V. ANALYSIS: THE DECLINE OF FAIR USE

A robust public domain in existing information and in various creative uses of copyrighted or otherwise exclusively owned information similarly is not intended to displace professional commercial production. It is, however, intended to assure that enough cultural raw material is available to

²⁰⁶ See *id.* (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982)).

²⁰⁷ See *Reimerdes*, 111 F. Supp. 2d at 339.

²⁰⁸ *Id.* at 346-47.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 344.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Reimerdes*, 111 F. Supp. 2d at 344.

²¹⁴ *Id.*

²¹⁵ *Id.*

nonprofessionals for reworking, so that users can create their own collages and expressions of the world and participate in the production of their own information environment.²¹⁶

A. The Doctrine of Fair Use

The major shortcoming of the *Reimerdes* decision is its failure to give sufficient recognition to the importance of fair use. In order to analyze this shortcoming, a basic understanding of the fair use doctrine is required. Section 107 of the Copyright Act codifies the fair use doctrine.²¹⁷ The fair use defense to copyright violation claims permits copying for certain purposes.²¹⁸ These purposes can include criticism; comment; news reporting; teaching; scholarship or research; and parody.²¹⁹ These criteria are mentioned in the codification of the fair use doctrine.²²⁰

If a defendant's use falls into one of the categories mentioned above it does not necessarily render that use fair.²²¹ The use must also comport with "four factors" enunciated in the statute.²²² These four factors are: (1) Is the use educational or commercial?; (2) What is the nature of the copyrighted work?; (3) What is the amount of the copyrighted work taken?; and (4) What is the economic effect on the work taken?²²³ The doctrine of fair use allows a holder of the privilege to use copyrighted material in a reasonable manner without the consent of the copyright owner.²²⁴

B. The *Reimerdes* Decision

The Court in the Southern District of New York failed to take into consideration the importance of the fair use doctrine and the erosive effect that the DMCA and the Court's decision in *Reimerdes* have and will continue to have on that doctrine. Accepting the Court's reading of the DMCA to prohibit any person from offering to the public, providing or otherwise trafficking in any technology, product, service, device, component, or part thereof if it permits a consumer to circumvent technological measures designed to control access to the copyrighted work, is the beginning of this derogation of the fair use doctrine.

For the Court to adopt the plaintiff's position, it would have to agree that Congress intended radically and fundamentally to change copyright law by

²¹⁶ See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 577 (2000) [hereinafter Benkler, *From Consumers to Users*].

²¹⁷ 17 U.S.C. § 107 (2000).

²¹⁸ See Jonathin Zavin, *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series*, 612 PLI/Pat 147, at 180 (2000).

²¹⁹ *Id.*

²²⁰ 17 U.S.C. § 107 (2000).

²²¹ See Zavin, *supra* note 218, at 180.

²²² 17 U.S.C. § 107 (2000).

²²³ *Id.*

prohibiting any access to digital copyrighted works, even if such access is necessary to make fair use by those in lawful possession of the work.²²⁵

A more tenable view would be that Congress intended the anti-circumvention provisions of the DMCA to aid in the fight against piracy, by giving the copyright holder additional tools to enforce the traditional rights already granted to copyright holders, not by extending them so as to defeat the existing, important right of fair use.²²⁶ The Court acknowledged that the fair use doctrine “traditionally has facilitated literary and artistic criticism, teaching and scholarship, and other socially useful forms of expression.”²²⁷ This decision does not further the acknowledged purpose of the fair use doctrine; instead it subordinates it by granting the copyright holder additional rights traditionally not permitted.

C. The Fear of a Pay-Per-Use Society

There is a fear, expressed by many commentators, that products such as books, movies, magazines, newspapers, etc. could become available only on a pay-per-use basis, thus preventing the possibility that works would ever enter the public domain, and thereby eliminating the fair uses currently permitted by copyright law.²²⁸ If technological measures that prevent access to materials continue to receive the protection of the DMCA and the courts, it is conceivable that materials traditionally in the public domain could only be accessed by paying a fee every time a user wished to access the material.

David Nimmer posited the following scenario (the scenario in the *Introduction* parallels his scenario): Louisiana cookbooks from the 1890’s are now available only electronically.²²⁹ There are technological measures protecting these electronic cookbooks (technological measures allowed under the DMCA and given further support by the *Reimerdes* decision). To circumvent these measures would be a violation of law, punishable by fines and the possibility of prison.

To the extent that the service charged the same access fee for [the cookbooks] as for new [cookbooks] subject to copyright protection, the effective result would

²²⁴ See *Narell v. Freeman*, 872 F.2d 907, 913 (9th Cir. 1989).

²²⁵ *Defendant's Post Trial Memorandum of Law - Preliminary Statement* (visited Sep. 27, 2000) <<http://www.2600.com/dvd/docs/2000/0808-brief1.html>>.

²²⁶ See *id.*

²²⁷ *Reimerdes*, 111 F. Supp. 2d at 321.

²²⁸ See David Nimmer, *A Riff On Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000) [hereinafter Nimmer, *Riff*]. See also Benton J. Gaffney, *Copyright Statutes that Regulate Technology: A Comparative Analysis of the Audio Home Recording Act and the Digital Millennium Copyright Act*, 75 WASH. L. REV. 611 (2000) [hereinafter Gaffney, *A Comparative Analysis*]; See also Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000) [hereinafter Benkler, *From Consumers to Users*]; See also Alan Heinrich, Karl Mannheim, & David J. Steele, *At the Crossroads of Law and Technology*, 33 LOY. L.A. L. REV. 1035 (2000) [hereinafter Heinrich, *At the Crossroads*].

²²⁹ Nimmer, *Riff*, *supra* note 228, at 713.

be to convert public domain works into royalty-generating items . . . [This scenario] requires payment to gain access even to works that nominally lie in the public domain, such as works from centuries past, even if the purpose of the access is for one that the law favors, such as to quote a few sentences for scholarly purposes. Under [this] scenario, the work itself is effectively placed under lock and key²³⁰

The Court in *Reimerdes* failed to recognize this potential destruction of the fair use doctrine. It found that Congress did not mean for the fair use exception to apply to the DMCA, i.e., to acts of “providing technology designed to circumvent technological measures that control access to copyrighted works.”²³¹ In fact, the Court relies heavily on the distinction made in the DMCA between (1) measures that prevent unauthorized access and (2) measures that prevent unauthorized copying.²³² This distinction the Court found important because Section 1201(a)(1) does not “‘apply to subsequent actions of a person once he or she has obtained authorized access to a copy of a [copyrighted] work’[and found that] ‘the traditional defenses to copyright infringement, including fair use, . . . fully applicable’ provided the ‘access is authorized.’”²³³

Stated in simpler terms, Section 1201(a)(1) does not prohibit the act of circumventing a technological measure that prevents copying, once lawful access is acquired.²³⁴ Section 1201(a), however, does prohibit circumventing technology used to gain access to copyrighted material.²³⁵ Thus, one who is unable to develop circumventing technology on his own to copy a lawfully accessed copyrighted material would be prevented from making the fair use that is purportedly allowed under the DMCA. In order for this technological novice to make a copy of lawfully accessed material they must rely on the ingenuity of others. Unfortunately, the anti-trafficking provision of the DMCA would prevent this reliance. The Court acknowledged that the DMCA, “leave[s] technologically unsophisticated persons who wish to make fair use of copyrighted works without the technical means of doing so”²³⁶

Section 1201(a)(2), the anti-trafficking provision of the DMCA, does not, according to the Court, have anything to do with copyright (despite the fact that the title of the act is the Digital Millennium *Copyright Act* [emphasis added]).²³⁷ Instead, Section 1201(a)(2) deals only with “offering or providing technology that may be used to circumvent technological means of controlling access to copyrighted works.”²³⁸ To avoid this affront against fair use, users should:

²³⁰ *Id.* at 713.

²³¹ See *Reimerdes*, 111 F. Supp. 2d at 322.

²³² See *id.* at 316, 323.

²³³ *Id.* at 323 (quoting Judiciary Comm. Rep. 18).

²³⁴ *Reimerdes*, 111 F. Supp. 2d at 323.

²³⁵ See Joseph P. Zammit & Felicia Gross, *Web Site Liability: Risks and Cost of Compliance*, 611 PLI/Pat 815, 854 (2000).

²³⁶ See *Reimerdes*, 111 F. Supp. 2d at 324.

²³⁷ *Id.* at 324.

²³⁸ *Id.* at 319.

resist the efforts of owners of copyrighted materials [to] quash the development of software [(e.g., DeCSS, *added by author*)] that gives users the power to manipulate and fit to their own needs the cultural or information products that they use. It is of central importance to reverse the attempts to use the DMCA to close up the software layer of the information environment and diminish the possibility that a robust public domain will in fact lead to widespread accessibility to the basic building blocks of participation in our public conversation.²³⁹

It is not too hard to imagine a system in which copyrighted material (e.g., a book or movie) is restricted on a pay-per-use basis and where the ability to copy even small portions of a legally obtained work is denied. Only those individuals who have the technological prowess to circumvent the technology would be allowed to make fair use of the copyrighted material. "If the courts apply Section 1201 as written, the only users whose interests are truly safeguarded are those few who personally possess sufficient expertise to counteract whatever technological measures are placed in their path."²⁴⁰

Return to the scenario posited in the *Introduction*. Chris (our technologically savvy student) would be found guilty of developing a circumvention technology that gained access to a copyrighted material. Recall that Chris' *FairUseMaker* utility would effectively retain access to the work after the allotted 168 hours, thus violating Section 1201(a)(1). Therefore, he would be guilty of trafficking (by the act of e-mailing *FairUseMaker* to his classmates) in circumventing technology. David and Brian would also be guilty of trafficking in circumventing technology.

Furthermore, all his friends who used the utility would be guilty of gaining access to a copyrighted material they no longer had a legal right to access. The only way Chris would be able to perform his in-class presentation would be by paying for the use to view *The Call of the Wild* within at least 168 hours prior to the presentation. Clearly, *Reimerdes* and the DMCA could lead us down the path to a society where we own very little and must pay every time we want to use something. We would in essence be a "pay-per-use" society. "[T]he possibility of [these] scenarios calls forth the need to temper the categorical reach of [this] basic provision [of the DMCA]."²⁴¹

D. The Aftermath of the Reimerdes Decision

Unfortunately, the Court's decision in *Reimerdes* did little to calm the troubled waters whirling around the issue of DVDs, CSS, and DeCSS. Although *2600.com* is no longer posting the DeCSS code on their web site or providing links to other web sites that contain the code, they are providing a list of web site addresses (in non-linkable form) that contain the DeCSS code.²⁴² Mr. Corley, on the *2600.com* web site, stated:

²³⁹ Benkler, *From Consumers to Users*, *supra* note 228, at 577.

²⁴⁰ Nimmer, *Riff*, *supra* note 228, at 739-40.

²⁴¹ Nimmer, *Riff*, *supra* note 228, at 693.

²⁴² *How You Can Help* (visited Oct. 17, 2000) <<http://www.2600.com/news/1999/1227-help.html>>. This site contains approximately 440 URLs to sites that contain the DeCSS code. Although a user

We can no longer post DeCSS on our site nor can we link to it. We still have the right to list those sites that have it in non-linkable form and we also have the right to speak out against the injustice we're being hit with. The MPAA would like those rights taken away as well. We cannot allow them to succeed.²⁴³

Offshore DeCSS sites sprang up immediately after the decision with names like, *Do Not Sue Me*.²⁴⁴ David Touretzky, who testified at the *Reimerdes* trial²⁴⁵ and is a member of the faculty and Principal Scientist in the Computer Science Department at Carnegie Mellon University,²⁴⁶ subsequent to the *Reimerdes* decision developed a "DeCSS Gallery."²⁴⁷ Professor Touretzky provides in his gallery an English translation of the DeCSS code, a song containing the DeCSS code, a dramatic reading of the DeCSS code, and a picture of the code.²⁴⁸ Professor Touretzky considers the gallery an "academic publication."²⁴⁹ In possibly an even stranger manner of posting the code, DeCSS is embedded in a textual adventure game and to get to the code the character in the game must find the code (which is carved in a small stone) and destroy the MPAA lawyer that guards the stone.²⁵⁰ Even mainstream publications were troubled by the decision. *U.S. News and World Report* published the following remark:

The Motion Picture Association of American is the junkyard dog of the digital

cannot click on one of the addresses provided in the list, they can highlight the address, right-mouse click, copy the address, paste the address into their browser location bar, and find the code this way. The author followed these steps and had downloaded the DeCSS code to his computer in a matter of minutes. The author is already looking over his shoulder waiting for the MPAA to come knocking.

²⁴³ Emmanuel, *Analysis of the Decision Against 2600* (visited Oct. 17, 2000) <<http://www.2600.com/news/2000/0821.html>>.

²⁴⁴ Damien Cave, *A Bug in the Legal Code* (visited Sept. 27, 2000) <<http://www.salon.com/tech/feature/2000/09/13/touretzky/print.html>>.

²⁴⁵ See *Transcript of Trial - Day 6, MPAA v. 2600* (visited Oct. 18, 2000) <http://www.eff.org/pub/Intellectual_property/Video/MAPP_DVD_cases/20000725_ny_trial_transcript.html>.

²⁴⁶ *People* (visited Oct. 18, 2000) <<http://www.cs.cmu.edu/people/directory/1405.html>>. Professor Touretzky's personal web page (<<http://www.cs.cmu.edu/~dst/>>) provides many links to various pages concerning the DeCSS controversy. Included are links to trial transcripts, commentaries by other noted academics, links to the DeCSS code, and thorough explanations of DeCSS and how it works.

²⁴⁷ Damien Cave, *A Bug in the Legal Code* (visited Sept. 27, 2000) <<http://www.salon.com/tech/feature/2000/09/13/touretzky/print.html>>.

²⁴⁸ See David Touretzky, *Gallery of CSS Descramblers* (last modified Sept. 27, 2000) <<http://www.cs.cmu.edu/~dst/DeCSS/Gallery/index.html>>. The "DeCSS Song" was originally posted on Napster and MP3.com. Joe Wecker, of the band, *Don't Eat Pete*, adapted his song from the "plain English" rendition of the DeCSS code done by Touretzky. MP3.com removed the song from its database stating that the song, "has either a song title or lyrics that are offensive." See Corey Grice, *MP3.com Yanks Song with Illegal DVD-Hacking Code* (visited Sep. 27, 2000) <<http://news.cnet.com/news/0-1005-200-2771352.html>>. The song was not removed from Napster, however.

²⁴⁹ Damien Cave, *A Bug in the Legal Code* (visited Sep. 27, 2000) <<http://www.salon.com/tech/feature/2000/09/13/touretzky/print.html>>.

²⁵⁰ Don Clark et al., *Pump It Up*, *THE WALL ST. J.*, Sept. 28, 2000, at B6, available at 2000 WL-WSJ 26611336. Once the MPAA lawyer is slain, the lawyer bleeds, dies, and is consumed by maggots.

age: It has the same bone-snapping jaws, the same indiscriminate nose. It will clamp on anyone and anything, including law-abiding couch potatoes watching TV.²⁵¹

VI. CONCLUSION

Clearly, the proliferation of DeCSS will be hard to stop. Individuals have the capability to pass the code along in Internet chat rooms where it is nearly impossible to detect and prevent. *2600.com*, furthering its call for “electronic civil disobedience,” has read the wording of the injunction in such a way that it continues to provide lists of web sites containing the DeCSS code. Members of academia have posted galleries of the code and mainstream publications have questioned the ruling.

Copyright has as a primary goal the securing of a fair return for an author’s creative labor; however, it also has the ultimate goal of promoting artistic, scholarly, and creativity for the good of the general public.²⁵² Copyright grants authors rights to provide incentives to create, but the Copyright Act also provides users the right to fair uses. The evolution of the Internet is “stretching the current framework for traditional copyright protection.”²⁵³

The DMCA was to bring United States copyright “squarely into the digital age,”²⁵⁴ providing the elasticity that copyright law needed in order to meet the demands of the digital age. However, the DMCA and the Court’s decision in *Reimerdes* have not stretched copyright law, rather, they have shortened and tightened it. “Reactionary or ill-considered laws” (like the DMCA) can have the adverse effect of frustrating technological and creative advancement.²⁵⁵ Courts are forced to decide cases based on legal doctrines that “may no longer adequately address current realities and challenges.”²⁵⁶ Fair use has been derogated by the DMCA and the *Reimerdes* decision. Professor Julie Cohen²⁵⁷ asserted that:

[T]here is a strong likelihood that the increasing use of persistent access control technologies [such as the encryption on DVDs] will sharply curtail the access privileges that individuals have enjoyed under the fair-use doctrine and other limitations on copyright scope.²⁵⁸

²⁵¹ Randall E. Stross, *Chill, Hollywood, Chill. Let the People Watch What They Want, When They Want To.*, U.S. NEWS & WORLD REP., Oct. 2, 2000, at 46 [hereinafter Stross, *Chill*].

²⁵² See Gaffney, *A Comparative Analysis*, *supra* note 228, at 613.

²⁵³ Byron F. Marchant, *On-Line on the Internet: First Amendment and Intellectual Property, Uncertainties in the On-Line World*, 39 HOW. L.J. 477, 489 (1996) [hereinafter Marchant, *Uncertainties*].

²⁵⁴ REPORT OF THE SENATE COMM. ON THE JUDICIARY, S, REP. NO. 105-190, at 2 (1998).

²⁵⁵ See Heinrich, *At the Crossroads*, *supra* note 228, at 1043.

²⁵⁶ *Id.* at 1044.

²⁵⁷ Professor Cohen is an Associate Professor of Law at Georgetown University Law Center.

²⁵⁸ Julie Cohen, *Rulemaking on Exemptions from Prohibition Against Circumvention of Technological Measures that Control Access to Copyrighted Works: Testimony of Julie E. Cohen*,

On September 18, 2000, the Federal Communications Commission (FCC) issued a ruling that allows Hollywood to require the manufacturers of digital VCRs, high-definition televisions, cable set-top boxes, and related equipment, to implement copy restriction technology into the devices.²⁵⁹

By inserting instructions into the digital programming stream that are obeyed by the hardware, the studios are able to control the public's ability to save or copy programming. Since the devices will only permit the consumer to copy the content that the studios code as copyable (not likely to be much, if anything), the public's fair use rights would effectively be extinguished in the digital television realm.²⁶⁰

Do you want to make a copy of the latest *Friends* or *Law and Order* episode? Do you own a High Definition television? Too bad. Hollywood could potentially prevent you from making that copy, thus preventing you from being able to watch the episode at a later time. Do you want to circumvent that technology so you can make that copy? You had better not. The DMCA and the courts will stop you.

Clearly, the DMCA has failed in its effort to "master the intricate details of this complex subject."²⁶¹ To deflect the deleterious effects of the DMCA and the *Reimerdes* decision, courts should reject technology control suits and the legislature should include a broad fair-use exemption in the anti-circumvention section of the DMCA.²⁶² Courts should apply the fair use doctrine as it has been developed to situations like the one in *Reimerdes* or the hypothetical in the *Introduction*. Application of the DMCA is not the "fair" approach.

The DMCA and Judge Kaplan's decision in *Reimerdes*, in their attempt to "promote the progress of science and the useful arts," have eroded an important, fundamental doctrine of copyright law. This "promotion" will lead to the eventual divestment of copyrighted works from the public domain — works that could foster further creative and scientific advancements. A "pay-per-use" society is on the horizon; a society wherein owners of copyrighted materials have constant and continuous control over those materials. Elementary school students and teachers, law professors, and others in pursuit of scholarly, scientific, or creative achievements would be prevented from employing the fair use doctrine to aid in their pursuits. This "promotion" effectively results in a "demotion of the sciences and useful arts."

Associate Professor of Law, Georgetown University Law Center, Library of Congress (visited Oct. 18, 2000) <<http://www.loc.gov/copyright/1201/hearings/cohen.pdf>> (alteration in original).

²⁵⁹ See *FCC Paves the Way for Requiring Anti-Copy Technology in Digital TV* (visited Oct. 20, 2000) <http://www.eff.org/IP/Video/HDTV/20000930_eff_hdtv_rule_statement.html>.

²⁶⁰ *Id.*

²⁶¹ Nimmer, *Riff*, *supra* note 228, at 740.

²⁶² See Benkler, *From Consumers to Users*, *supra* note 228, at 577.