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Fair Use and the Digital Millennium Copyright Act

Thomas J. Loos

University of Michigan Law School

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NOTE

FAIR USE AND THE DIGITAL MILLENNIUM COPYRIGHT ACT

*Thomas J. Loos**

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Let us make no mistake about the scope of what we are doing here today in adopting [the DMCA], about the tremendously powerful new right to control access to information that we are granting to information owners for the very first time. If left unqualified, this new right, as the Commerce Committee heard in testimony from the public and private sectors alike, could well prove to be the legal foundation for a society in which information becomes available only on a 'pay-per-use' basis . . . Copyright law is not just about protecting information. It's just as much about affording reasonable access to it as a means of keeping our democracy healthy and doing what the Constitution says copyright law is all about: promoting 'Progress in Science and the useful Arts.' If this bill ceases to strike that balance, it will no longer deserve Congress' or the public's support.¹

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* J.D., expected May 2007, the University of Michigan Law School; Ph.D., Computer Science, Indiana University; Master of Computer Studies, North Carolina State University; B.S., Computer Science, University of Nebraska-Lincoln. Many thanks to Susan Kornfield and Jeremiah Helm for their help with this Note.

1. 144 CONG. REC. H7074 (1998) (statement of Rep. Bliley).

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I. ONCE UPON A TIME, THERE WAS REAL PROPERTY . . .

The bundle of property rights that possessors of real property enjoyed grew over time as the power of the government began to shrink. Starting in 1066, the rights in real property were defined by a feudal relationship or bargain—the Crown gave a tenant possession of the land, and in return the tenant delivered military service (e.g. 2 knights per year). The tenant did not have ownership; they were on the land with the consent of the Crown (or an intermediary, like Baron de Ros²) and could not transfer their real interest without penalty.

After more than 200 years, the 1290 *Statute Quia Emptores* allowed “that shall be lawful for any free man to sell at will his lands or tenements or a part of them” without paying a penalty to the Crown.³ The long-term effect of the *Statute Quia Emptores* was that “[f]orms of [real] property that required a feudal relationship between lord and tenant were eliminated . . . reduc[ing] feudal property to saleable forms”⁴ The statute helped enable the shift from feudalism to a monetary society.

Similarly, the bundle of copyright owners’ property rights has increased over time. The Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵ The public gets the rights to work once beyond copyright protection; in exchange, the author controls copying and distribution of that work while protected. Alienability and heritability⁶ of U.S. copyrights have never been an issue, but the duration of protection

2. Wikipedia, *Baron de Ros*, http://en.wikipedia.org/wiki/Baron_de_Ros. (Baron de Ros is the most ancient baronage of England, created in 1264, predating the *Statute Quia Emptores*) (last visited March 17, 2007).

3. See Ernest F. Henderson, *Select Historical Documents of the Middle Ages*, pp.149–150 (George Bell & Sons 1910), available at <http://www.fordham.edu/halsall/source/ed1-quia.html>.

4. Joshua Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1071–72 (2005).

5. *U.S. Const.* art. I, § 8, cl. 8 (“Copyright Clause”). The Copyright Clause is also known as the Intellectual Property Clause.

6. Heritability is defined “capable of being inherited.” BLACK’S LAW DICTIONARY 745 (8th ed. 2004).

and other rights reserved to the public, particularly first use and fair use, have changed over time.

In the last decade of the 20th Century, more than 200 years after the first Copyright Act of 1790, the rights of copyright owners have increased relative to those of the public. The Visual Artists Rights Act of 1990 provided a limited right to visual artists to control their work; even after sold, limiting first use rights.⁷ The first copyright act had a 28 year term; in 1998, the term of copyright was increased to the life of the author plus 70 years.⁸ The Digital Millennium Copyright Act (DMCA) of 1998 dramatically shrank the fair use rights provided under 17 U.S.C. § 107 for works with anti-circumvention provisions.

II. CONGRESSIONAL AND CONSTITUTIONAL RATIONALE FOR THE DMCA

Congress intended to add a new right when they enacted 17 U.S.C. § 1201(a)(2) and (b). The Senate Judiciary Committee stated the two sections “are designed to protect two distinct rights and to target two distinct classes of devices.”⁹ 17 U.S.C. § 1201(a)(2) protects access which is distinct from the traditional copyright rights protected by 17 U.S.C. § 1201(b).¹⁰ The Committee outlawed circumvention of access controls as “roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.”¹¹ Since controlling access to works is not one of the standard copyright rights listed in 17 U.S.C. § 106, the DMCA grants a new right to copyright owners.¹² The Senate report explains that “[t]he prohibition in 1201(a)(1) is necessary because prior to this Act, *the conduct of circumvention [of access controls] was never before made unlawful.*”¹³ The device limitation in 1201(a)(2) enforces this new prohibition on conduct.¹⁴ Since copyright law prohibits infringement, the device limitation in 1201(b) is intended to enforce the longstanding prohibitions on infringements.¹⁵ To illustrate the difference between 17 U.S.C. § 1201(a) and (b), suppose a CD included software called “COPY PROTECT” that ensured the CD, filled with copyrighted works, was not copied but did

7. Pub. L. No. 101-650 §§ 601-10 (1990).

8. Pub. L. No. 105-298 § 102 (1998), 1 Stat. 124 (1790).

9. S. Rep. No. 105-190 at 12 (1998).

10. *Id.*

11. *Id.* at 11.

12. *See id.* at 12.

13. *Id.* (emphasis added).

14. *Id.*

15. *Id.*

not control access to the works. COPY PROTECT could modify the CD so it cannot play on a computer CD drive. Circumventing COPY PROTECT would violate 17 U.S.C. § 1201(b) which is tied to the traditional rights against copying in 17 U.S.C. § 106(1) and distribution under 17 U.S.C. § 106(3).¹⁶ COPY PROTECT protects the copyright owner from infringement, so 17 U.S.C. § 1201(b) reinforces the existing prohibitions against violating a copyright owner's rights. Now suppose the same CD contained a second piece of software called "CONTROL ACCESS". CONTROL ACCESS could protect the same CD filled with copyrighted works from being accessed without preventing copying; for example, by encrypting the works. Manufacturing, importing, offering to the public, or providing a method for circumventing CONTROL ACCESS would violate 17 U.S.C. § 1201(a)(2).¹⁷

In a September 16, 1997 letter to Congress, 62 copyright scholars expressed concern with the DMCA's expansion of copyright holders' rights.¹⁸ They stated that "liability under the section [now 17 U.S.C. 1201(a)] would result from conduct separate and independent from any act of copyright infringement or any intent to promote infringement."¹⁹ They stated that the DMCA would "represent an unprecedented departure into the zone of what might be called *paracopyright* . . . by regulating conduct which traditionally has fallen outside the regulatory sphere of intellectual property law."²⁰ A working definition of a *paracopyright* is any copyright-like right not specifically addressed by the Copyright Clause. Congress can only provide a paracopyright by invoking some additional Constitutional provision(s). To enact the DMCA's paracopyright, Congress called on their powers under both the Copyright and the Commerce Clauses.²¹

A. *The Commerce Clause and Paracopyright*

Outside the DMCA, 17 U.S.C. § 1101 created a paracopyright to prevent recording of live performances.²² Prior to the enactment of 17 U.S.C. § 1101, *Dowling v. United States* held that taping of live performances is not a copyright violation since a live performance is not "fixed."²³

16. *See id.*

17. *See* 17 U.S.C. § 1201(a)(2) (2006).

18. 144 CONG. REC. E2137 (1998).

19. *Id.*

20. *Id.* (emphasis added).

21. *See id.*

22. 17 U.S.C. § 1101 (2006).

23. *Dowling v. United States*, 473 U.S. 207 (1985).

United States v. Moghadam directly addressed a Copyright Clause challenge to the anti-bootlegging statute.²⁴ The *Moghadam* Court assumed “that the Copyright Clause could not sustain this legislation because live performances, being unfixed, are not encompassed by the term ‘Writings’ which includes a fixation requirement.”²⁵ Discussing the relationship between the Commerce Clause and the Copyright Clause, the *Moghadam* Court stated: “[T]he Supreme Court’s analysis in the *Trade-Mark Cases* stands for the proposition that legislation which would not be permitted under the Copyright Clause *could* nonetheless be permitted under the Commerce Clause, provided that the independent requirements of the latter are met.”²⁶

The Supreme Court recognizes “three general categories of regulation in which Congress is authorized to engage under its commerce power.”²⁷ These three categories are: (1) regulation of the channels of interstate commerce, (2) regulation and protection of the instrumentalities of interstate commerce, and persons or things in interstate commerce and (3) regulation of activities that substantially affect interstate commerce.²⁸

If a court followed *Moghadam* in allowing Congress to augment the Copyright Clause powers with the Commerce Clause, then the access control paracopyright granted 17 U.S.C. § 1201 would be Constitutional. The *Moghadam* Court did not reach issues of limited duration or new rights, which could be raised considering protection of public domain works.²⁹ However, in a footnote, the *Moghadam* court stated “[o]ur holding is limited to the fixation requirement, and should not be taken as authority that the other various limitations in the Copyright Clause can be avoided by reference to the Commerce Clause.”³⁰

The access prohibitions created by the DMCA are paracopyrights. A U.S. District Court has held that “17 U.S.C. § 1201(b) of the DMCA was within Congress’ Commerce Power to enact, and because it is not *irreconcilably inconsistent* with any provision of [Art 1. § 8, cl. 8], Congress did not exceed its constitutional authority in enacting the law.”³¹

24. *United States v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999). The specific anti-bootlegging statute at issue was 18 U.S.C. 2318–19 which provides for criminal penalties for bootlegging. *Id.* at n.4.

25. *Id.* at 1277.

26. *Id.* at 1278.

27. *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005) (citations omitted).

28. *Id.* (citations omitted).

29. *Moghadam*, 175 F.3d at 1281.

30. *Id.* at 1281, n.14.

31. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1141–42 (N.D. Cal 2002) (emphasis added).

The *Elcom* court commented that the “DMCA does not allow a copyright owner to effectively prevent [a work] from ever entering the public domain, despite the expiration of the copyright.”³² The *Elcom* court stated that “at best, the publisher has a technological measure embedded within the digital product precluding certain uses of that particular copy of the work.”³³ Further, “the user/purchaser has acquiesced in this restriction when purchasing/licensing the work.”³⁴ The *Elcom* court concluded “None of [the 17 U.S.C § 106] rights is extended beyond the statutory term merely by prohibiting the trafficking in or marketing of devices primarily designed to circumvent use restrictions on works in electronic form.”³⁵

Elcom’s reasoning implies all items protected with anti-circumvention technology are subject to a license or other contractual agreement. Suppose a person buys a copy of an e-book whose contents have passed into the public domain without signing an End User License Agreement. Unlike *Elcom*, this person did not “acquiesc[e] in [a] restriction when purchasing/licensing the work.”³⁶ But the person could not buy, borrow or write software to freely access their own work, if that software could access copyrighted e-books as well. Why? 17 U.S.C. 1201(a)(1) forbids providing such circumvention measures if they protect copyrighted works, even to one who could legitimately say “I will swear in blood and in court my only use of your product is to access public domain materials.” This type of impermissible extension of copyright into the public domain was left unaddressed by the *Elcom* court.

III. FAIR USE—DMCA STYLE

Fair use under paracopyright “in reference to a range of consumer interests in copyright . . . [is] continued access, *under reasonable terms*, to information governed by [a paracopyright] regime.”³⁷ The Commerce Clause’s intrusion into Copyright concerns “reasonable terms.”³⁸ Technological circumvention of access controls may not directly infringe a copyright. These protection provisions do not clearly define a method or

32. *Id.* at 1141.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. 144 CONG. REC. E2137 (1998) (emphasis added).

38. *Id.*

allowance for fair use.³⁹ The fairness of a use often turns on the intent of the alleged infringer.⁴⁰

17 U.S.C. § 1201(a) is facially a strict liability statute that says “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”⁴¹ The authors of the DMCA felt they were protecting fair uses when they allowed for exemptions for libraries, reverse engineering, encryption research, allowing restrictions on what minors see on the Internet, and security testing.⁴² 17 U.S.C. § 512 limits the infringement liability of internet service providers due to the acts of their subscribers.⁴³ Further, the DMCA required the Registrar of Copyrights to inform Congress of the fair use needs for distance education, which are now part of the Copyright Act.⁴⁴ A provider of “circumvention of technological measures” is strictly liable under 17 U.S.C. § 1201(a) or (b), *unless* the provider’s activity is on the DMCA’s list of fair uses.⁴⁵ As a practical matter, this means that the only uses of materials subject to the DMCA are the uses allowed by the copyright owner or specifically permitted by the Copyright Act.

The DMCA invokes 17 U.S.C. § 107 when it states “Nothing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title.”⁴⁶ The DMCA appears to have betrayed the spirit of 17 U.S.C. § 107. The intent of 17 U.S.C. § 107 was to codify common law exceptions to copyright infringement based on equity.⁴⁷ 17 U.S.C. § 107 determines if a use is fair (as opposed to copyright infringement) based on the purpose and the character of the use, nature of the work, amount of the work copied, and effect on the market.⁴⁸ Balancing these factors indicates that the copyright holder must suffer an actual harm before denying the fair use defense.⁴⁹ However, the structure and wording of the DMCA seem to indicate that fair use must be pigeonholed into a safe harbor against the presumption that copyright

39. See 17 U.S.C. §§ 1201(a)–(b).

40. See 17 U.S.C. § 107 (2006) (“the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright.”).

41. 17 U.S.C. § 1201(a)(1)(A) (2006) (emphasis added).

42. 17 U.S.C. § 1201(d), (f)–(h), (j) (2006).

43. 17 U.S.C. § 512 (2006).

44. 17 U.S.C. § 110(2) (2006).

45. See *321 Studio v. MGM Studios*, 273 F.3d 429, 444 (9th Cir. 2000).

46. 17 U.S.C. § 1201(c)(1) (2006).

47. See H.R. REP. NO. 94-1476 (1976), available at <http://www.title17.com/content/LegMat/houseReport/chpt01/sec107.html>.

48. 17 U.S.C. § 107.

49. *Id.*

holders control rights for any use of the work, especially if a “technological measure had been violated.”⁵⁰

A. DMCA Fair Use Hypothetical

The following hypothetical illustrates the bounds between fair use and the DMCA:

Carla Counselor, renowned copyright attorney, does some amazing work for Doubleday on *The Da Vinci Code* in copyrighting the book, illustrated versions, CD’s, video games, etc. including the legal work behind setting up an e-book website for them. Tripleday Publishing, planning to do something similar for their new book “The Michelangelo Method”, asks her to tell them about her firm’s legal services.

Carla prepares a roughly 100 page presentation, all on paper, with two pages from the 480 page *The Da Vinci Factor: Special Illustrated Edition*. One page consists of text describing the Louvre at night and the second shows a corresponding photo of the Louvre. Tripleday requests an electronic version of her slides. Carla agrees.

Instead of just scanning her slides, she decides to use Doubleday’s new e-book website (after all, she helped create it). Carla buys the e-book version of *The Da Vinci Factor: Special Illustrated Edition*, “flips” to the page she wants to use, and tries to cut/paste the text into her slide. To protect against unauthorized copying, Doubleday’s software does not allow her to download an entire copy of the book or to cut/paste either the text or the image she wanted. Frustrated, Carla surfs the web. She finds that Screengrab, written by Andy Mullen, might help her out. After all, “Screengrab saves entire web pages as images.”⁵¹ She uses Screengrab to duplicate the two pages of the e-book she needs for Tripleday, adds those two pages to the rest of the presentation, and e-mails it to Tripleday. Tripleday loves her presentation and gives her firm all of their copyright work. In gratitude to Andy Mullen, Carla sends him \$20 for providing Screengrab. Doubleday becomes angry when it learns that Carla used their work in any fashion to help their competitor and sues Carla. After discovery, Doubleday adds Andy Mullen to the suit.

1. Question 1: Is the Original Paper Version of the Presentation a Fair Use Under 17 U.S.C. § 107?

Under 17 U.S.C. § 107, the four fair use factors generally weigh in her favor.⁵² Factor 1, the nature of the use, weighs against Carla as a

50. 17 U.S.C. §§ 1201(a)–(b) (2006).

51. Mozilla, Screengrab!::Firefox Add-ons, <https://addons.mozilla.org/en-US/firefox/addon/1146> (last visited Apr. 12, 2006).

52. 17 U.S.C. § 107.

commercial use. The unfairness of her commercial use is likely exceeded by the transformative nature of her use.⁵³ Factor 2, the nature of the copyrighted work, weighs against Carla as the work is creative.⁵⁴ Factor 3, the amount/substance of the work used is in Carla's favor, as she used about 0.5% of the book.⁵⁵ Factor 4, the effect on the work's market, weighs in Carla's favor since her presentation has no obvious effect on the market for *The Da Vinci Code*.⁵⁶

2. Question 2: Is Carla in Violation of 17 U.S.C. § 1201(a)(1)?

17 U.S.C. § 1201(a)(1) states that "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."⁵⁷ The *Da Vinci Code* is copyrighted and protected under the Copyright Act.⁵⁸ The issue is if Carla "circumvented the access controls" provided by the website by using Screengrab to get the text and image from Doubleday.⁵⁹

First, does it matter that her use was likely a fair use under 17 U.S.C. § 107? If a court believed that access control is a right distinct from copyright infringement, then it may read 17 U.S.C. § 1201(c) as only preserving Carla's defenses to copyright infringement. The plain reading of the statute does not say that fair use is a defense to circumvention of access controls. 17 U.S.C. § 1201(c) states that "Nothing in this section shall affect . . . defenses to *copyright infringement*, including fair use, under this title."⁶⁰

Doubleday is pursuing remedies for circumvention of access controls, not copyright infringement. Doubleday could claim the market for cut/paste access to their works, which they could separately market as a "premium" feature, would be adversely affected by uses such as Carla's. The claimed presence of a premium feature market could undermine Carla's fair use defense by tilting the market effect fair use factor against her.⁶¹

53. Campbell v. Acuff-Rose, 510 U.S. 569, 584–85, 591 (1994).

54. See *id.* at 586.

55. *Id.*

56. *Id.* at 590–91.

57. 17 U.S.C. § 1201(a)(1).

58. See 17 U.S.C. §§ 101, 106.

59. 17 U.S.C. § 1201(a)(1).

60. 17 U.S.C. § 1201(c) (2006) (emphasis added). See also *Universal City Studios v. Corley*, 273 F.3d 429, 443 (2nd Cir. 2001) ("[T]he DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred.").

61. See *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (market creation for licensing photocopied works leads to finding against fair use for photocopy shop owner).

One question is if the lack of a cut/paste function on the website was an effective access control under the statute. Carla could argue it was a bug in the design of the website since many web pages allow cut and paste access to their text at least. Carla could also argue that, by displaying the text on a screen with knowledge of the existence of tools like Screengrab, Doubleday effectively provided no protection to the work. Doubleday could counter with the argument that they had designed the web page without cut/paste control intentionally to control access to copying their works. Doubleday could argue that Carla had to resort to a separate piece of software to gain access. Without Screengrab or similar software, Doubleday's failure to provide cut/paste access would be an effective control over the work.

The issue would likely depend on the court's interpretation of cut/paste access and if Doubleday's lack of support for cut/paste acts as an effective access control, and if any user agreement Carla affirmed covered access rights.⁶² The *Lexmark* court recognized that 17 U.S.C. 1201(a)(3) requires the application of a process to gain access to the work and not to "restric[t] one form of access but leav[e] another route wide open."⁶³ If a court decided lack of cut/paste support was intentional, Screengrab may be an illegal "means . . . to avoid . . . a technological measure, without the authority of the copyright owner" to access the e-book.⁶⁴ Any user agreements Carla made may be taken into account—she may have waived any fair use rights she had.⁶⁵

3. Question 3: Is Carla in Violation of 17 U.S.C. 1201(a)(2)?

If Carla is found in violation of 17 U.S.C. 1201(a)(1), then since she sent \$20 to Andy, she may have "trafficked" in access control technology. Since Andy likely did not violate 17 U.S.C. 1201(a)(2) by providing Screengrab (see Question 4 below), Carla likely did not violate 17 U.S.C. 1201(a) by sending Andy \$20 for Screengrab.

4. Question 4: Is Andy in Violation of 17 U.S.C. § 1201(a)(2) or 17 U.S.C § 1201(b)?

Andy is probably not in violation of 17 U.S.C. § 1201(a) or 17 U.S.C. § 1201(b), as Screengrab and other tools have other uses and were in existence (collectively) before Doubleday's e-book website. Andy may argue that Screengrab did not violate 17 U.S.C.

62. See *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546–47 (6th Cir. 2004) (discussion on how effective access controls must be under DMCA).

63. *Id.*

64. 17 U.S.C. 1201(a)(3)(A).

65. See *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005) (explaining ability of end users to waive rights under contract).

1201(a)(2)(A), as it was not primarily designed or produced for the purpose of circumventing access controls. Andy could argue Screengrab was not designed to circumvent access controls that did not yet exist. Doubleday could counter that Andy's purpose was to duplicate screen content from a web browser, Doubleday's work along with many other copyrighted works are displayed on a web browser, and so Screengrab was intentionally designed to circumvent Doubleday's access controls.

Andy could also argue that 17 U.S.C. 1201(a)(2)(B) was not violated since Screengrab has many other significant uses other than circumvention of access controls (for example, providing web designers, photographers, and other visual artists a way to create portfolios). Also he could argue that 17 U.S.C. 1201(a)(2)(C) was not violated, as Screengrab was not marketed with the anticipation of violating access controls. Finally, Andy asked for donations, not payment.⁶⁶

If Carla's use was fair (as it would likely be, unless there was a true market concern), then Andy would not be liable under 17 U.S.C. § 1201(b) as Screengrab did not then violate a copyright right, has other significant purposes, and was not marketed to infringe copyrights.⁶⁷

IV. ANOTHER VIEW OF FAIR USES—ACTIVE COPYRIGHT CONSUMERS

Joseph Liu characterized copyright works consumers on a spectrum.⁶⁸ On one end are passive copyright consumers who do no more than consume the work (a.k.a. couch potatoes).⁶⁹ On the other end of the spectrum are "authors" who create new and/or derivative works based on their experiences with the copyrighted work.⁷⁰ In the middle of these extremes, Liu characterizes people as active copyright consumers exercising their "autonomy, communication, and creative self-expression" interests.⁷¹

The interests of active copyright consumers center around "autonomy." An autonomous use is the right to control one's use of the work in a different fashion than the author intended.⁷² Autonomy interests cover the ability to use the work when, where, and how the owner would like.⁷³

66. Andy Mutton, Step 3: Profit!, <http://andy.5263.org/archives/2005/09/21/step-3-profit/#more-52> (Sept. 21, 2005 entry) (last visited Apr. 10, 2007).

67. 17 U.S.C. § 1201(b).

68. Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. Rev 397, 402-405 (2003).

69. *Id.* at 402.

70. *Id.* at 405.

71. *Id.* at 406.

72. *Id.*

73. *Id.* at 407.

Many fundamental autonomous uses are customarily protected by copyright law. A basic autonomous use is skipping to the end of a book or movie.⁷⁴ Another autonomous use is the first sale doctrine—the right to sell a legitimate copy of a work.⁷⁵ The private performance right to show the work to a few people in a private setting is also an autonomous use.⁷⁶

Active copyright consumers use works in their own acts of creative self-expression that may be less than authorship of a new work. Active copyright consumers may comment on the work, including retelling the story in one's own language, criticism of the work, and writing notes in the margins about the work. This right is preserved under 17 U.S.C. § 107, which allows “criticism, comment, news reporting, teaching . . . , scholarship, and research” as legitimate fair uses.⁷⁷ The commentary interest is evidenced in web logs or blogs, for short. One definition of a blog is “[a] frequent, chronological publication of personal thoughts and Web links.”⁷⁸ Blogs cover the spectrum of human interests.⁷⁹ In the digital realm, it is legal to make digital files of one's own CDs.⁸⁰ Making personal copies can run afoul of the copyright owner's right to control distribution of their work. Uploading and distributing digital files made from copyrighted works is not legal, even if there is a transformation from the original work to the digital format.⁸¹

When the creative self-expression turns into “macro-authorship” of a derivative work, the derivative work doctrine applies.⁸² One common method of creative self-expression is to create a mix tape, CD, or play list of favorite or expressive music.⁸³ Another creative use of copyrighted works is recasting of copyrighted works in new creations—children's drawings of Batman, using snippets of poems in personal writings, and fan fiction.⁸⁴ These works are typically legal today as fair uses. The real

74. *Id.* at 406.

75. *Id.* at 407.

76. *Id.* at 408.

77. 17 U.S.C. § 107.

78. Dept. of Management, Marketing, and International Business, College of Business Administration, University of Texas-Pan American, <http://www.baclass.panam.edu/mana3333/glossary/chapter02.html> (last visited Mar. 15, 2007).

79. For a small sample of interests covered by blogs, see Blog-City, <http://www1.blog-city.com/community/category/> (last visited Mar. 15, 2007).

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

81. *UMG Recordings v. Mp3.com, Inc.*, 92 F. Supp. 2d 349, 353 (S.D.N.Y. 2000).

82. Liu, *supra* note 68, at 417–18.

83. *Id.*

84. *Id.*

and tenuous protection for “micro-authorship” uses may be the forbearance of the copyright owner.⁸⁵

When active copyright consumer uses another’s copyrighted works to create their own, they may cross from micro-authorship to creation of a derivative work. In *Micro Star v. Formgen*, the defendant sold new game scenarios using plaintiff’s copyrighted game engine and library of art.⁸⁶ The *Micro Star* Court held creation of new game scenarios was a derivative work, since the defendant’s scenarios were sequels “telling new . . . tales of Duke’s fabulous adventures”.⁸⁷ The DMCA wants fair use “at reasonable terms.”⁸⁸ The strictness and the complexity of the law will not necessarily ensure compliance. This arrangement will work only if the market provides suitable alternatives to copyright infringement.⁸⁹ Technology may prevent or hinder legitimate uses, and technological solutions are potentially invasive of privacy.⁹⁰ The markets often are slow to provide usable technological (if not legal) alternatives to piracy, such as the delay in providing commercial downloadable music.⁹¹ This array of public interests, particularly those of active copyright consumers, is not well served.

V. WWMD—WHAT WOULD MADISON DO?

I believe that fair use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright. . . . [T]he fact that the fair use right must be procedurally asserted as an affirmative defense does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes.⁹²

85. See *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1998) (artist claimed if a postcard purchaser jotted a note on a postcard, used it as a coaster, or cut it in half, such “changes prepare derivative works, but that as a practical matter artists would not file suit”).

86. *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998).

87. *Id.* at 1112.

88. 144 CONG. REC. E2137 (1998) (remarks of Rep. Bliley).

89. *Id.*

90. Hiawatha Bray, *Security Firm: Sony CDs Secretly Install Spyware*, Boston Globe, Nov. 8, 2005, at D1 (available at http://www.boston.com/business/technology/articles/2005/11/08/security_firm_sony_cds_secretly_install_spyware/).

91. Mark Cooper, Consumer Federation of America, *Time for the Recording Industry to Face the Music: the Political, Social and Economic Benefits of Peer-To-Peer Communications Networks* 5 (2005) (available at <http://www.consumersunion.org/pub/PEERtoPEERISSUEBRIEF.pdf>).

92. *SunTrust Bank v. Houghton-Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (Birch J.).

The Second Congress enacted the Copyright Act of 1791 “to implement the three copyright policies inherited from the Statute of Anne—the promotion of learning, the right of public access, and the protection of the public domain—and included in the Copyright Clause.”⁹³ The DMCA’s creation of a paracopyright adversely affects the last two of these historical copyright policies. 17 U.S.C. § 1201(a) and (b) limit public access to works effectively controlled by anti-circumvention measures.⁹⁴ The public domain is constrained without limiting the time anti-circumvention measures are allowed to protect a work.⁹⁵ The public domain is further restrained when anti-circumvention measures protect both copyrighted and public domain materials, as the DMCA does not distinguish between protections for copyrighted and public domain works.⁹⁶ Active copyright consumers’ rights may be protected more by copyright owners’ restraint or a limitation of DRM technology than as a function of law.

When a government of the people specifies new rights, the governed often want to ensure they have their basic rights specified. “When a new Federal Constitution was proposed in 1787, the most powerful objection leveled against it was that it lacked a bill of rights.”⁹⁷ When drafting the Bill of Rights, Madison identified two categories of rights: (1) *natural rights*, or “those . . . which are retained when particular powers are given up to be exercised by the legislature”; and (2) *positive rights*, such as trial by jury, which were equally “essential to secure the liberty of the people.”⁹⁸ Many of the rights protected by the Bill of Rights are positive rights.

A copyright consumer does not currently have a natural or positive right to fair use; instead fair use is an affirmative defense under 17 U.S.C. § 107. Under the DMCA, 17 U.S.C. § 1201(c) specifically provides for fair use.⁹⁹ Fair use should be retained even when Congress exercises its powers to regulate commerce, copyright, and the public

93. L. Ray Patterson, *An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 945 (2003).

94. 17 U.S.C. § 1201(a)-(b).

95. *See id.*

96. *See id.* For example, it appears that the DMCA would prevent anti-circumvention measures being applied to a CD containing copies of Mozart’s original sheet music, which is in the public domain, as long as it had copyrightable material, such as a brief description of Mozart’s works.

97. Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of the Freedom of Expression*, 78 B.U.L. REV. 1275, 1288 (1998).

98. *Id.* at 1290.

99. 17 U.S.C. §§ 107, 1201(c).

domain. Under the current legal scheme, fair use is subject to erosion when laws and markets change.¹⁰⁰

Fair use should be a positive paracopyright supported by both the First Amendment and the Copyright Clause. As Judge Birch indicated, fair use has “constitutional significance as a guarantor to access and use for First Amendment purposes.”¹⁰¹ A “Bill of Fair Use Rights” may include at least:

- The right to use at least a *de minimis* amount of all media for personal or commercial use, particularly commentary.¹⁰²
- The first sale right should extend to all media regardless of contractual terms. An allied right is making complete copies of media for personal use, such as mix tapes, and disaster recovery. To ensure the rights of copyright holders, personal copies could not be sold and must be destroyed upon first sale.
- The making of micro-authored works, such as annotated copies of books, music, and video, should be protected for personal use. This right would also allow creation of software to help users create micro-authored works. If micro-authored works were sold, the creation software was used to copy copyrighted works, or micro-authored works evolved into derivative works, there would be a violation of copyright law.
- Explicitly permit circumvention and copying of media that contained public domain or unprotected materials to fight copyright misuse. This would protect only digital media that contained copyrighted materials. This right would uphold the *Lexmark* Court’s finding that “fair use doctrine preserves public access to the ideas and functional elements embedded in copyrighted computer software programs.”¹⁰³
- Create a “copyright consumer’s voice;” for example, a permanent committee of people unaligned with the copyright industries to represent the public’s right to fair uses.

100. *Basic Books Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991) (quoting *Harper & Row*, 471 U.S. 539, 568 (1985)) (“To negate fair use, one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work.”).

101. *SunTrust Bank v. Houghton-Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001).

102. This would overturn *Bridgeport Music v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (de minimis sampling of a sound recording not permitted).

103. *Lexmark Int’l Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 537 (6th Cir. 2004).

When markets change or other new paracopyrights are enacted, a thoughtful balance between specified fair uses and market realities could be reached by comparing the market need or paracopyright to the fair use rights. This balancing would promote copyright's policies of ensuring public access, maintaining the public domain, and protecting the rights of authors by giving all three goals positive rights.