

**Before the United States Senate Committee on the Judiciary
Subcommittee on Intellectual Property
116th Congress**

**Hearing on
How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?**

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Summary of Testimony

The DMCA, more specifically, 17 USC secs. 512 (notice and takedown) and 1201 (technological protection measures), provides several mechanisms to accommodate copyright limitations and exceptions. I will identify these mechanisms and then will inquire whether legislative reforms could better achieve the DMCA’s objectives in practice.

Fair Use and Online Service Provider Liability

The structure of sec. 512 accommodates fair use in the following ways. First, it puts the onus on copyright owners to demand removal of user-posted content, and copyright owners may refrain from requesting the takedown of clearly or even arguably fair uses. Second, section 512(g)’s counter notification procedure enables end users to assert fair use to obtain the reinstatement of their postings. Third, the section 512(f) misrepresentation action is supposed to deter abusive takedowns of legally authorized material, including fair uses.

In practice, however, the structural reconciliation of the notice and takedown system of private enforcement with the preservation of user enjoyment of fair use may not have worked out as intended. This is largely because, as witnesses in previous Hearings have emphasized, the vast number of postings has far surpassed anything Congress anticipated. The immense volume of allegedly infringing postings has led to a concomitant volume of “robo-notices.” Unless these notices are limited to 100% matches between protected works and unauthorized postings, they may sweep in postings that could be non-infringing fair uses. The apparently low proportion of ensuing counter notifications could mean that many fair uses are being suppressed, or it could

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simply mean that the vast majority of postings are in fact infringing. Even if the number of takedowns flowing from false positives is not as great as some proclaim, it may well be possible that fear or ignorance will cause some fair users to decline to send a counter notification.

In addition, the statutorily-specified timing for put back may prove problematic for fair users as well as for rightholders. A posting that the service has removed in response to a takedown notice must be restored within 10-14 business days from the service's receipt of the counter notification, unless the copyright owner has within that time initiated an infringement action. That is a tight deadline for rightholders, but potentially a devastatingly long one for fair users.

Potential solutions:

Approaches of varying ambition, and implicating different institutional actors, may respond to some of the problems evoked above.

Fair use pre-review: The Ninth Circuit has held that a copyright owner's good faith assertion that a service provider is hosting unlawful content must be predicated by a review of the posting for fair use. Whether that review must be conducted by human beings or can be undertaken by algorithmic processes is not clear. While the Copyright Office has "questioned" the basis for the Ninth Circuit's declaration, it is reasonable to inquire how, short of a 100% match, a copyright owner could form a good faith belief that the posting was not "authorized . . . by law" without some effort to distinguish clear infringements from probable fair uses. Under current circumstances, however, in which staggeringly high numbers of postings containing unlicensed copies of works are occurring continuously, to mandate pre-review, and especially human pre-review, could defeat Congress' purpose of providing a rapid and effective, if potentially temporary, remedy to the problem of infringing postings. Perhaps, just as the process of detecting unlicensed postings and generating takedown notices has become increasingly automated, various means of separating pirate postings from fair uses already exist or are in prospect, so that pre-review would not be unduly onerous. But the facts may be sufficiently in flux to counsel against legislative action now.

Timing and mechanism for put-back: The counter notification procedure should provide an important fair use safeguard. But the statutory deadlines may undermine the goal of expeditious restoration of non infringing content. The Copyright Office has recommended that Congress adopt an alternative dispute resolution mechanism, possibly inspired by the Domain Name online dispute resolution system, to respond to concerns regarding speed and costs. The European Union's regime regarding Online Content Sharing Service Providers also contemplates alternative dispute resolution of end user demands to replace blocked postings. Adding an ADR component to the counter notification process could make the system more responsive to both copyright owners and users.

Not every response to these problems necessitates a legislative fix. For example, through private ordering, including individual copyright owner policies, or joint copyright owner-service provider agreements, stakeholders can set the percentage of duplication that warrants a takedown notice. If the match between rightholder content and posted content falls below that percentage, the copyright owner will refrain from sending a takedown notice with respect to that material. A match below the agreed threshold is likely to contain independent content that might point toward fair use. Equating anything less than the identified proportion to a fair use may be a very rough measure, but it is capable of easy automation.

1201, 1202: technological protection measures, copyright management information and fair use

In sections 1201 and 1202, Congress created copyright-independent violations in order to provide copyright owners the security to create new digital business models that would increase and diversify the availability of works of authorship. Congress implemented that goal by prohibiting unauthorized circumvention of access controls and trafficking in devices and services designed to circumvent access and copy controls, as well as prohibiting removal or alteration of copyright management information under sec. 1202. By design, sec. 1201 does not provide a general fair use defense, but rather sets out certain specific exceptions, and directs the Copyright Office to conduct triennial reviews to identify classes of works whose non infringing use the prohibition on the act of circumvention is impeding or will impede. As to those classes of works, the prohibition on the act of circumvention will be suspended for the next three years. The prohibition on trafficking in access-circumvention devices, however, remains in effect.

Twenty years of triennial rulemakings have shown the process on the whole to respond effectively to the essential challenge of sec. 1201(a): to underpin an Internet economy based on access to works of authorship while permitting non infringing uses of access-protected works. In the online environment, the fairness of the use may depend on the ubiquity of the access control. Access controls protect business models based on price discrimination according to intensity of use; they are not intended to prohibit scholarly or critical examination or “transformative fair uses” of the works themselves. So long as a work’s expression remains available in hard copies or unprotected digital copies or for that matter in (human) memory, fair users may continue to build on prior works to create their own expression. The principal threats to fair use emerge if traditional hard copies and unprotected digital copies disappear, or if, despite the availability of other formats, the fair user requires access to specific access-controlled formats. The former scenario, of dreaded digital lockup, has not yet generally transpired; the latter is the province of the triennial rulemakings. Accumulated experience, particularly with repeat renewals of particular classes of works, points the way toward legislative reform; the Copyright Office has recommended that several of these, having proved their persistence, shift from triennial review to permanent exemptions. And the Office’s recommendation to modify the anti-trafficking prohibition to permit services to assist the circumventions that the triennial rulemaking designates should enable fair use by persons unable themselves to undertake the permitted acts.

Statement

Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee,

Thank you for inviting me to appear before you today to offer testimony about the DMCA's accommodation of copyright exceptions and limitations. I have been teaching, writing, and speaking about domestic and international copyright for over thirty years. (A copy of my cv is appended to this statement.)

The DMCA, more specifically, 17 USC secs. 512 (notice and takedown) and 1201 (technological protection measures), provides several mechanisms to accommodate copyright limitations and exceptions. I will identify these mechanisms and then will inquire whether they have achieved their objectives in practice. If they fall short, can judicial interpretation or Copyright Office guidance fill the gap, or should Congress amend the Copyright Act to preserve non-infringing uses of works of authorship in the contexts covered by the DMCA? If Congress were to act, would "tweaks" to secs. 512 and 1201 suffice, or should Congress revisit the core policy choices it made in 1998 in structuring liability for infringements committed by users of online content-hosting services and for circumventing technological protection measures and trafficking in circumvention devices? I will first address fair use and online service provider liability, and then turn to technological protection measures.

Online Service Provider Liability Limitation Act, 17 USC sec. 512

Policy and structure of sec. 512:

Through OCILLA, Title II of the DMCA, Congress fostered the development of online content-hosting services by relieving them of the obligation to obtain copyright owner authorization to reproduce content posted by the service's users, or to publicly perform or display it by transmission, so long as the services met certain statutory prerequisites and responded expeditiously to takedown notices sent by copyright owners.¹ The services incurred no duty to monitor their sites for infringing activity; rather, copyright owners bore the burden of policing host sites to identify instances of infringement and request their removal. Notice and takedown was expected to be a cooperative endeavor,² affording copyright owners rapid redress, in return for disallowing damages claims against the services. Congress also anticipated that in some instances, this redress without judicial process might come too rapidly, leading to removal of user-posted content that was not infringing.³ Congress accordingly accompanied the notice and takedown

¹ See 17 USC sec. 512(c).

² See, e.g., *The Digital Millennium Copyright Act at 22: What is it, Why was it Enacted, and Where are We Now Before the Subcomm. on Intellectual Prop. of the S. Judiciary Comm.*, 116th Cong. (2020) Statement of Senior Judge Edward J. Damich at 3; Statement of Steve Metalitz at 5-6.

³ Section 512 arguably exacerbates that prospect because it encourages service providers who have received notice to take down the material immediately; the text insulates service providers who comply with the statutory requirements

procedure with a counter notification measure that would allow users to demand the reposting of their content, and would oblige copyright owners to initiate infringement actions in court if they wished the content to remain blocked.⁴ Finally, Congress also gave aggrieved users a further counterweight to copyright owner overreaching, in the form of an action against copyright owners for willful misrepresentation that the posting was infringing. The prospect of damages and attorney’s fees for willful misrepresentation was designed to deter misuse of the notice and takedown system to obtain the removal of postings that, *inter alia*, clearly qualified as fair uses.

The structure of sec. 512 thus accommodates fair use in the following ways. First, it puts the onus on copyright owners to demand removal of user-posted content, and copyright owners may refrain from requesting the takedown of clearly or even arguably fair uses. The Ninth Circuit, moreover, has interpreted sec. 512(c)(3)(A)(v), which requires the takedown notice to “state[] that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,” to mean that the copyright holder must before sending the notice form a good faith belief that the posting is not a fair use.⁵ It is not clear whether only human review can generate the requisite belief, or if the copyright holder may employ automated processes to assess fair use.⁶ It also is not clear whether the Ninth Circuit’s position correctly interprets the statute; the Copyright Office’s recent study of sec. 512 “questions” the Ninth Circuit for “imputing the good faith requirement in sec. 512(c)(3) for sending notices into the analysis of sec. 512(f)’s knowing misrepresentation requirement.”⁷ Second, sec. 512(g)’s counter notification procedure enables end users to assert fair use to obtain the reinstatement of their postings. Third, the sec. 512(f) misrepresentation action is supposed to deter takedowns of legally authorized material, including fair uses.

Section 512’s accommodation of fair use in practice:

In practice, however, the structural reconciliation of the notice and takedown system of private enforcement with the preservation of user enjoyment of fair use may not have worked out as intended. This is largely because, as witnesses in previous Hearings have emphasized, the vast

from suit by persons including the posting user disgruntled at the removal of the material from the server. *Id.* sec. 512(g)(1)(4).

⁴ *Id.* sec. 512(g)(2)(3).

⁵ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1154 (9th Cir. 2016) (indiscriminate sending of takedown notices would contravene the court’s “unequivocal holding that [the rightholder] must consider fair use before sending a takedown notification;” failure to “consider” lawful uses would render the rightholder “liable for damages under § 512(f).”)

⁶ See, e.g. Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 *Notre Dame L. Rev.* 499, 532–33 (2017) (finding an “obvious implication” in *Lenz* to require human review, but suggesting that algorithm-based reviews might still be permissible); SECTION 512 OF TITLE 17, A REPORT OF THE REGISTER OF COPYRIGHTS 150 52(May 2020) (discussing uncertainty regarding need for human review or permissibility of automated search programs to form a good faith belief that posted content is not fair use).

⁷ REGISTER’S SECTION 512 REPORT at 5.

number of postings has far surpassed anything Congress anticipated.⁸ The immense volume of allegedly infringing postings has led to a concomitant volume of “robo-notices”⁹ (typically from copyright owners who can afford the costs of identifying infringements in this manner and sending mass takedown notices).¹⁰ Unless these notices are limited to 100% matches between protected works and unauthorized postings, they may sweep in postings that could be non-infringing fair uses. The apparently low proportion of ensuing counter notifications¹¹ could mean that many fair uses are being suppressed, or it could simply mean that the vast majority of postings are in fact infringing. Even if the number of takedowns flowing from false positives is not as great as some proclaim,¹² it may well be possible that fear or ignorance will cause some fair users to decline to send a counter notification.¹³

In addition, the statutorily-specified timing for put back may prove problematic for fair users as well as for rightholders. Under sec. 512(g)(2)(c), a posting that the service has removed in response to a takedown notice must be restored within 10-14 business days from the service’s receipt of the counter notification, unless the copyright owner has within that time initiated an infringement action. That is a tight deadline for rightholders, but potentially a devastatingly long one for fair users. As the Copyright Office has observed, for those users who do send counter notifications, given “the length of time [statutorily] mandated for ‘put back’—with both politically

⁸ See, e.g., *The Digital Millennium Copyright Act at 22: What is it, Why was it Enacted, and Where are We Now Before the Subcomm. on Intellectual Prop. of the S. Judiciary Comm.*, 116th Cong. (2020) (statement of Mark Schultz, Chair, IP & Tech. Law Ctr., Univ. of Akron Sch. of Law, at 5); *Id.* (statement of Jessica Litman, Prof. of Law, Univ. of Michigan at 8). See also REGISTER’S SECTION 512 REPORT at 28-29.

⁹ Joe Karaganis & Jennifer Urban, *The Rise of the Robo Notice*, 58 COMMUNICATIONS OF THE ACM 28 (2015).

¹⁰ Section 512 of Title 17, *Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the House Judiciary Comm.*, 113th Congress at 16 (2014) (testimony of Prof. Annemarie Bridy noting copyright owners who “can’t afford automated systems” may have to rely on websites with pre-packaged forms to readily send takedown requests); Motion Picture Association of America, *Comment on Section 512 Study Before the U.S. Copyright Office*, 80 Fed. Reg. 81,862, at 16 (April 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90285> (noting that “smaller entities may not be able to afford to use technology to enable discovery of infringing content”).

¹¹ Though data is limited, one study analyzing the notice and takedown regime interviewed 29 intermediary online service providers of various sizes as well as six “major notice senders” (rightholders and enforcement agents) and found that one only respondent “reported receiving more than a handful [of counter-notices] a year” and that many reported no counter-notices, despite processing thousands of takedown requests. Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, U.C. BERKELEY PUB. L. & LEGAL THEORY RES. PAPER SERIES, 44 (2017). Another study analyzed more than 540,000 notices to Google and Twitter between 2001 and 2012. It estimated that of notices analyzed in 2011, only 0.131 percent were counter-notices, and in 2012 the number was 0.02 percent. It found no counter-notices for the years 2008 through 2010. Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of the State of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 426, 462 (2014). *But see* REGISTER’S SECTION 512 REPORT, at 147 n. 788 (raising questions about the Urban et al. study’s methodology).

¹² See, e.g., Urban, Karaganis & Schofield, *supra* at 88, arguing that 31 percent of takedown requests in a survey sample were “potentially problematic.” However, the authors said only 4.2 percent were “fundamentally flawed” (for instance, by identifying an incorrect work), while 19.5 percent were due to concerns about meeting the notification requirements (including everything from missing signatures to links the authors thought might be insufficiently specific to allow the service provider to identify the particular infringing work at issue), and another 6.6 percent presented what the authors felt were fair use questions.

¹³ See Urban, Karaganis & Schofield, *supra* at 44-45.

sensitive and timely content, the delay can leave a user in a position where their counter notice prevails and the content is put back up, but the audience for that content has moved on.”¹⁴

Moreover, under sec. 512(g)(2)(c), if the copyright owner does seek a court order, the posting will remain blocked. This feature of the statute poses a risk that, notwithstanding a plausible fair use contention, the user may be disinclined to incur the costs of contesting the takedown in court. If the copyright owner has pursued judicial relief in bad faith, sec. 512(f) may provide a remedy, but not every fair using end user will be prepared to defend the action through to the merits dismissal that would have to precede adjudication of a misrepresentation counterclaim.

A further impediment to preventing the removal of lawful postings may result from judicial interpretation of the statutory disincentives to abuse the notice and takedown system. Section 512(f) provides for damages and attorneys’ fees against the rightholder’s “knowing material misrepresentation” that the posted content was infringing. Courts’ application of that standard has proven very forgiving.¹⁵ The Ninth Circuit has held that “a copyright holder need only form a subjective good faith belief that a use is not authorized.”¹⁶ To engage the rightholder’s liability for knowing misrepresentation, the lawful nature of the posting must be so patent that the rightholder could not subjectively believe that the content infringed. That sets a high bar likely to screen out many misrepresentation claims.¹⁷ On the other hand, subjective good faith standards such as the “knowing material misrepresentation” set out in sec. 512(f) do not invite judicial second-guessing.¹⁸

Potential solutions:

Approaches of varying ambition, and implicating different institutional actors, may respond to some of the problems evoked above.

¹⁴ REGISTER’S SECTION 512 REPORT at 33.

¹⁵ On the other hand, the most egregious reported case did result in the award of damages and attorneys’ fees, see *Online Policy Grp. v. Diebold, Inc.*, 337 F.Supp.2d 1195 (N.D.Cal.2004), in which the court found that the copyright owner met the statutory standard because the disclosure of internal company emails for whistle-blowing purposes was clearly fair use, and that the copyright holder was using the notice and takedown regime “as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.”

¹⁶ See, e.g., *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016); *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir.2004); *Stern v. Lavender*, 319 F.Supp.3d 650, 683 (S.D.N.Y. 2018); *Johnson v. New Destiny Christian Ctr. Church, Inc.*, 6:17-cv-710-Orl-37DCI, 2019 WL 1014245 at *4–5 (M.D. Fl. March 4, 2019), appeal pending.

¹⁷ On the effectiveness, or lack of it, of sec. 512(f) as a deterrent to misuse of the notice and takedown system, see REGISTER’S SECTION 512 REPORT at 145-50 (discussing conflicting stakeholder assessments).

¹⁸ The discussion to this point has ignored a signal feature of today’s Internet: for every posting a copyright owner may have taken down, some other user may repost. This so-called “whack-a-mole” problem has prompted much discussion with respect to pirate postings. See, e.g., REGISTER’S SECTION 512 REPORT at 1, 33, 81. Moreover, unauthorized copies may exist simultaneously several locations, not all of which are on the takedown notice, so that even upon takedown of one unauthorized copy at one specific location, a copyright owner might not succeed in removing all copies, even for an instant. But putative fair users might also organize multiple simultaneous uploads, or reloads of blocked content as well, thus potentially short-circuiting some of the problems identified here, at least until (or unless) courts or Congress implemented a takedown/staydown remedy.

1. Fair use pre-review: Congress might codify, or other courts might follow, the Ninth Circuit’s lead in interpreting sec. 512(c)(3)(A)(v)’s good faith requirement as incorporating a duty to conduct a fair use pre-review of the postings identified in the takedown notice. Congress, or courts, might also determine whether human beings must conduct the pre-review, or whether algorithmic processes could assume that task. Such a level of detail, however, seems undesirable because the fair use detection capacities of artificial intelligence are likely to evolve;¹⁹ statutorily precluding them altogether or dictating their functioning risks rendering the solution instantaneously obsolete.

Responses to the broader question of whether sec. 512(c) requires any fair use pre-review must be nuanced and may turn on facts yet to be ascertained. As the Copyright Office has indicated, the statutory text does not clearly link the standard for misrepresentation under sec. 512(f) with the elements of notice under sec. 512(c)(3);²⁰ the Ninth Circuit’s conflation of these provisions therefore might be unwarranted. That said, it is reasonable to inquire how, short of a 100% match, a copyright owner could form a good faith belief that the posting was not “authorized . . . by law” without some effort to distinguish clear infringements from probable fair uses. Under current circumstances, however, in which staggeringly high numbers of postings containing unlicensed copies of works are occurring continuously, to mandate pre-review, and especially human pre-review, could defeat Congress’ purpose of providing a rapid and effective, if potentially temporary, remedy to the problem of infringing postings. Perhaps, just as the process of detecting unlicensed postings and generating takedown notices has become increasingly automated, various means of separating pirate postings from fair uses already exist or are in prospect, so that pre-review would not be unduly onerous. But the facts may be sufficiently in flux to counsel against legislative action now.²¹

2. Timing and mechanism for put-back: The counter notification procedure should provide an important fair use safeguard. But, as discussed above, the statutory deadlines, and the potential to perpetuate the takedown by seeking judicial redress, may undermine the goal of expeditious restoration of non infringing content. The Copyright Office has recommended that Congress adopt an alternative dispute resolution mechanism, possibly inspired by the Domain Name online dispute resolution system, to respond to concerns regarding speed and costs.²² The European Union’s regime regarding Online Content Sharing Service Providers, discussed in detail below, also contemplates alternative dispute resolution of end user demands to replace blocked postings.

¹⁹ See, e.g., Maayan Perel and Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 Stan. Tech. L. Rev. 473, 487–88 (2016).

²⁰ REGISTER’S SECTION 512 REPORT at 5, 150-52.

²¹ It is also worth noting that human pre-review is not a panacea. While concern with false positives has generally focused on large copyright owners’ robo-notices, individual authors and small copyright owners can also send takedown notices; some authors may have a lower tolerance for appropriations from their works than would large corporate copyright owners. Some authors’ unhappiness may prompt a good faith belief that a posting is infringing, even if many others might objectively class the use fair.

²² REGISTER’S SECTION 512 REPORT at 181-82.

Not every response to these problems necessitates a legislative fix. For example, through private ordering, including individual copyright owner policies, or joint copyright owner-service provider agreements such as the *Principles for User Generated Content Services*, or more user-oriented guides such as the Electronic Frontier Foundation’s *Fair Use Principles for User Generated Video Content*, stakeholders can set the percentage of duplication that warrants a takedown notice. If the match between rightholder content and posted content falls below that percentage, the copyright owner will refrain from sending a takedown notice with respect to that material. A match below the agreed threshold is likely to contain independent content that might point toward fair use. Equating anything less than 90% identity (EFF proposal) or less than some other proportion to a fair use may be a very rough measure, but it is capable of easy automation.²³ (Requiring a 100% match seems the surest way to limit takedown notices to piratical postings, but might also invite manipulation of the file to introduce trivial differences to elude detection.)

Another non-legislative solution, this one judicial, might address the potential problem of fair use postings that remain down because the copyright owner has responded to a counter notification by seeking a court order. In the offline context, a copyright owner who has identified infringing conduct would bring an infringement action, starting with seeking a TRO in order to keep the infringing work from reaching or remaining on the market. In the context of sec. 512, the infringing content has already been removed; if the user wishes restoration of access pending further disposition of the action, she would need to seek an order to show cause why the content should not be reposted. At that point, the court could rapidly assess the strength of the fair use claim. The more persuasive the putative fair use, the more the copyright owner’s suit might seem like an attempt to string out the content-blocking, potentially rendering the copyright owner vulnerable to a sec. 512(f) counterclaim for willful misrepresentation.

A much more radical solution, requiring legislation, would be to reconsider the policies and balances drawn in 1998. In article 17 of its 2019 Digital Single Market Directive,²⁴ the European Union has recently adopted that approach, shifting the default from a system very similar to sec. 512(c) to one in which Online Content Sharing Service Providers [OCSSP] (a defined subclass of hosts) must preclear rights in user-posted works.²⁵ With respect to the subject of this Hearing, the Directive includes elaborate provisions on user rights. Article 17(7) requires member States to ensure that users may continue to upload content covered by specific E.U. copyright exceptions

²³ Any such agreement or unilateral copyright owner policy should not estop a rightholder from bringing an infringement action against an alleged infringer whose copying falls below the threshold designated for takedown tolerance.

²⁴ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market, OJEU L 130/92.

²⁵ For a general description of article 17 and a comparison with section 512, see Jane C. Ginsburg, *A United States Perspective on Digital Single Market Directive, art. 17*, in Irini Stamatoudi and Paul Torremans, Eds., EUROPEAN UNION COPYRIGHT LAW: A COMMENTARY (2d ed. forthcoming Edward Elgar 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579076 This article builds on my written testimony to this Subcommittee, March 10, 2020.

and limitations, particularly for quotation, criticism, review, caricature, parody or pastiche. To that end, Recital 70 explains, “It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes.” Art. 17(9) details the mechanism for expeditious redress. First, OCSSPs’ terms and conditions must inform users that they can avail themselves of copyright exceptions, and the OCSSPs must “put in place” (and implicitly, inform users of) an “effective and expeditious complaint and review mechanism” so that users may challenge the blocking or disabling of their postings. Second, rightholders must “duly justify” their takedown notices. User complaints then must be “processed without undue delay” by the OCSSP, who must engage in human review of the challenged postings. Art. 17(9) also requires member States to provide both access to courts and to alternate dispute resolution measures so that users may assert their entitlement to copyright exceptions (presumably in the event that the OCSSP maintains the takedown over the user’s objection).

U.S. service providers might not enthusiastically embrace these duties, notably the obligation to engage in human review of users’ put back demands; no more than they are likely to cheer the overall burden-shifting that article 17 establishes. But given the Copyright Office’s recognition “that Congress’ original intended balance has been tilted askew,”²⁶ not only for copyright owners but also for some fair users, it is worth monitoring developments in the European Union to assess whether assigning to service providers the role of implementing copyright exceptions proves more successful than sec. 512 in ensuring continued access to user-posted content “authorized by law.”

1201, 1202: Technological protection measures, copyright management information and fair use

In sections 1201 and 1202, Congress created copyright-independent violations in order to provide copyright owners the security to create new digital business models that would increase and diversify availability of works of authorship. Congress implemented that goal by prohibiting unauthorized circumvention of access controls and trafficking in devices or services designed to circumvent access and copy controls, as well as prohibiting removal or alteration of copyright management information under Sec. 1202. As Prof. Justin Hughes testified at an earlier Hearing:

§ 1201 now undergirds much of the internet economy. It supports, if not provides the bedrock for, many legitimate internet businesses today. Audio and audiovisual streaming services -- delivered via the Internet or cable television systems -- are typically encrypted subscription-based services, meaning that “access” to the streamed content is protected by § 1201(a) technological measures. . . . Different operating systems have different dominant § 1201(b) technological measures to prevent reproduction: Microsoft’s “Playready,” Apple’s “Fairplay,” and the “Widevine” system for Google’s Android operating system. Such TPM preventing a stream from becoming a download is fundamental to streaming

²⁶ REGISTER’S SECTION 512 REPORT at 1.

business models – Netflix, Hulu, Disney+, CBS All Access, Spotify, Amazon Prime, etc. . . .

And effective digital locks are not just important to commercial enterprises. Today, 43,000 libraries and educational institutions provide e-book lending services through Overdrive: digital copies of books are “lent” to the library patron using § 1201(a) technological measures to limit access to a specified period of “lending,” not too different from the way Spotify’s “tethered” copies of music tracks on a consumer’s device will self-delete if the Spotify account is not maintained. . . .²⁷

By design, Sec. 1201 does not provide a general fair use defense, but rather sets out certain specific exceptions, and directs the Copyright Office to conduct triennial reviews to identify classes of works whose non infringing use the prohibition on the act of circumvention is impeding or will impede.²⁸ As to those classes of works, the prohibition on the act of circumvention will be suspended for the next three years. The prohibition on trafficking in access-circumvention devices, however, remains in effect.

I will address the following questions:

1. To what extent does fair use currently figure in the sec. 1201 scheme?
2. How has the Copyright Office’s triennial rulemaking evolved over time to encompass more “classes of works?”
3. In the absence of a general fair use defense, have courts perceived a need to create a first amendment-based fair circumvention exception?
4. Relevance of fair use to sec. 1202.

1. Fair use and related exceptions under current sec. 1201

²⁷ Hearing Before the United States Senate Judiciary Committee Subcommittee on Intellectual Property, *Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy?* (10 March 2020) Statement of Professor Justin Hughes at 14 (footnotes omitted).

²⁸ For a general review of the policies underlying section 1201, *see, e.g.*, SECTION 1201 OF TITLE 17, A REPORT OF THE REGISTER OF COPYRIGHTS (June 2017) i-iii, 8-10, 42-45, 102-04 (hereafter REGISTER’S SECTION 1201 REPORT); *see also* Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM. J. L. & THE ARTS 137, 137-56 (1999) (overview of sec 1201 and analysis of its subsections); Jane C. Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the US Copyright Act*, 16 INFORMATION & COMMUNICATIONS TECHNOLOGY LAW 191 (2007) (updating 1999 study).

There is no general fair use exception to sec. 1201.²⁹ As detailed in the Copyright Office’s sec. 1201 report, several of the specific exemptions, for example subsec. 1201(f) for interoperability, are consistent with caselaw interpretations of sec. 107.³⁰ The criteria articulated for the triennial rulemaking in subsec. 1201(a)(1)(C) also echo some of the sec. 107 factors. But there is no right to circumvent an access control in order to make a fair use of the work. The prohibition reaches the predicate act of access control circumvention, regardless of the subsequent use of the access-breached work. Nor, for the same reason, is there a right to traffic in an access-circumvention device in order to enable users to make a fair use of the work. The statute clearly distinguishes access controls from “rights” controls; gaining unauthorized access is the wrongful act, independently of the presence or absence of a follow-on infringement.³¹

With respect to circumvention of “rights” controls, by contrast, there is no prohibition on the act of circumvention, because the act will culminate in conduct that either is an infringement of the rights of reproduction, public performance, etc., or is a fair use or other exempted act. There is no need to create a distinct anti-circumvention violation. On the other hand, sec. 1201(b) prohibits trafficking in any device that “is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; 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 anti-trafficking provision creates direct liability in lieu of the less stringent standard for contributory infringement under *Sony Corp. of America v. Universal City Studios, Inc.*³² Moreover, in the case of trafficking, the statute again distinguishes circumvention from infringement; because the targeted device will be designed to circumvent copy protections in general, the device will not “know” the purpose for which it is neutralizing a copy control.³³ As a result, an exception for trafficking in devices which could be used to circumvent for fair use purposes (as well as for infringing purposes) would substantially undermine the prohibition.³⁴

²⁹ Section 1201(c)(1) states: “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” But a circumvention violation is not copyright infringement.

³⁰ See REGISTER’S SECTION 1201 REPORT at 67-70.

³¹ See e.g., REGISTER’S SECTION 1201 REPORT at 66 (“violations of section 1201(a) must be evaluated separately from questions of copyright infringement”); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L.REV. 673, 729 (2000) (“the WIPO Treaties Act adds a wholly separate tort of unauthorized circumvention, to which the fair use defense is inapplicable.”).

³² 464 U.S. 417 (1984).

³³ By contrast, a person who provides a specific circumvention service confined to an identified fair use purpose might not run afoul of section 1201(b)(1)’s ban on trafficking in “any . . . service . . .” because a “right of a copyright owner under this title” does not include the right to prevent fair use. Cf. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 524 (2013) (“§106 is by its terms ‘[s]ubject to’ the various doctrines and principles contained in §§107 through 122”).

³⁴ See REGISTER’S SECTION 1201 REPORT at 103 (“such an exemption would constitute a fundamental departure from Congress’ considered decision to establish the triennial rulemaking as the forum for consideration of specific exemption requests grounded in fair use”).

As the Copyright Office’s 2017 study emphasizes, in addition to the specific fair use-inflected exceptions for reverse engineering, encryption research, and security testing,³⁵ Congress made the “considered decision to establish the triennial rulemaking as the forum for consideration of specific exemption requests grounded in fair use.”³⁶ That rulemaking process, in its case-by-case evaluations, may in fact be more flexible and responsive to fair use interests than sec. 1201’s restrictively-drafted permanent exemptions. I next turn, therefore, to a review of the Copyright Office’s administration of those rulemakings.

2. Evolution, and gradual enlargement, of exempted “classes of works”:

As the Copyright Office noted in its 2017 review, the first rulemaking resulted in just two temporary exemptions: one for lists of websites blocked by filtering software applications, and one for literary works protected by TPMs that fail to permit access due to malfunction, damage, or obsolescence.³⁷ By contrast, the seventh rulemaking in 2018 announced 25 classes.³⁸

An important change in the definition of classes of works, announced in 2006, accounts at least in part for the growth in triennially exempted classes. The Register then determined that

in certain circumstances, it will also be permissible to refine the description of a class of works by reference to the type of user who may take advantage of the exemption or by reference to the type of use of the work that may be made pursuant to the exemption rather than merely by the type of work. The Register reached this conclusion in reviewing a request to exempt a class of works consisting of “audiovisual works included in the educational library of a college or university’s film or media studies department and that are protected by technological measures that prevent their educational use.” Concluding that a “class” must be properly tailored not only to address the harm demonstrated, but also to limit the adverse consequences that may result from the creation of an exempted class, the Register has concluded that given the facts demonstrated by the film professor proponents of the exemption and the legitimate concerns expressed by the opponents of the proposed exemption, it makes sense that a class may, in appropriate cases, be additionally refined by reference to the particular type of use and/or user.³⁹

³⁵ 17 U.S.C. sec. 1201(f)(g)(j).

³⁶ REGISTER’S SECTION 1201 REPORT at 103

³⁷ REGISTER’S SECTION 1201 REPORT at 25

³⁸ U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION (2018) [hereinafter SEVENTH TRIENNIAL PROCEEDING] 83 Fed.Reg. 54,010 (Oct. 26, 2018).

³⁹ See Library of Congress, Copyright Office, 37 CFR Part 201, [Docket No. RM 2005-11], Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 6-7 [hereafter 2006 Rulemaking]

This announcement departed significantly from prior rulemakings, in which the Register had concluded that Congress limited her authority to declaring classes of works without reference to classes of users.⁴⁰ In the case of technologically protected films, the “works only” approach would have produced results that would have been overbroad had the exemption been granted, or underinclusive had it been denied. Defining the class as films in protected digital format would have opened all DVDs and access-protected videostreams or downloads to circumvention. But refusing any exemption would, according to the record the Register found persuasive, have frustrated specific non infringing educational uses of the films. Adding a user specification tailors the “class” to the non infringing uses the triennial rulemaking is designed to enable.

A second development that has promoted the inclusion of more classes of works (now defined by user characteristics as well as by the nature of the work) is the streamlined rulemaking procedure introduced in seventh rulemaking in 2018, through which proposed class renewals that receive no meaningful opposition are fast-tracked through the triennial process. As the Copyright Office anticipated in its 2017 Report, the reform “should facilitate the process of renewal, enabling proponents to focus on expanding the exemption’s scope to include new technologies and/or on eliminating obsolete technologies.”⁴¹ In the 2018 Rulemaking, the Librarian granted all the renewal requests, in addition to adding three more classes of works. Moreover, the 2018 Rulemaking in fact expanded in some way all but one of the existing exemptions. Many of the expansions changed the details of the limitations on the exemptions, making them less restrictive.⁴²

The most common exemptions are perhaps best identified by those the Copyright Office in its 2017 study proposed be made permanent. These include assistive technologies for the visually impaired.⁴³ Since 2003, there has been some form of exemption for access-controlled eBooks to allow visually impaired people to use screen-readers.⁴⁴ An exemption for using assistive

⁴⁰ See Exemption to the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64556, 64559 (proposed Oct. 27, 2000); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62011, 62014-15 (Oct. 31, 2003).

⁴¹ REGISTER’S SECTION 1201 REPORT at 102.

⁴² For example, the exemptions for K–12 and college and university use of motion pictures were amended to remove the limitation to “film studies or other courses requiring close analysis” and to eliminate most distinctions between K–12 and higher education and between faculty and students. 83 Fed.Reg. at 54,017. The exemption for uses of film clips in documentary films was expanded to allow using clips in narrative films “for purposes of criticism and comment, where the clip is used for parody or its biographical or historically significant nature.” *Id.* at 54,018. The exemption for using film clips in multimedia e-books was expanded from books “offering film analysis” to all nonfiction multimedia e-books (but an expansion to fictional e-books was rejected). While the “unlocking” exemption had previously been limited to “used” devices, the 2018 Rulemaking eliminated that limitation. The “jailbreaking” exemption was extended to voice assistant devices (such as the Amazon Echo and Google Home). The exemption for security research, which had been limited to computer programs operating certain devices (voting machines, motorized land vehicles, and implanted medical devices) was broadened by removing the limitation to those devices to allow research on any lawfully acquired or accessed computer program. The exemption for videogame preservation was extended to videogames that are not dependent on an external server but that are no longer reasonably available.

⁴³ REGISTER’S SECTION 1201 REPORT at 86.

⁴⁴ *Id.* at 84.

technologies on motion pictures was promulgated in 2012 and again in 2018.⁴⁵ The Office also suggested a permanent exemption for repairing devices or otherwise accessing devices that have become obsolete, noting that the rulemaking requirement to exempt only *classes of works* hampers its ability to create a sweeping exemption for this purpose.⁴⁶ In the first four rule-makings there was an exemption for computer programs protected by “dongles” that prevented access because of obsolescence or malfunction.⁴⁷ There have also been numerous more recent exemptions for various software to allow for preservation and repair (a version for CDs and floppy disks promoted by the Internet Archive in 2003⁴⁸ and renewed in 2006;⁴⁹ for the preservation of certain video games in 2015⁵⁰ and 2018;⁵¹ for repairing vehicles in 2015⁵² and 2018;⁵³ for repairing other smart devices in 2018;⁵⁴ and for preservation of other computer software in 2018⁵⁵). Finally, the Copyright Office suggested making permanent an exemption for unlocking devices—which has been a consistently renewed exemption since 2006, and expanded from mobile phones to other technologies in 2015.⁵⁶

Another trend grants exemptions that effectively expand the scope of the permanent exceptions to promote interoperability and for security research. A jailbreaking exemption for mobile phones, and then other technologies, has been granted in each rulemaking since 2010.⁵⁷ In both 2015 and 2018, the Librarian granted an exemption for computer software in 3D printers to allow generic feedstock to be used.⁵⁸ Regarding security research, the Office allowed one-off

⁴⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260, 65270 (Oct. 26, 2012) [hereinafter 2012 TEMPORARY EXEMPTIONS]; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. 54010, 54018 (Oct. 26, 2018) [hereinafter 2018 TEMPORARY EXEMPTIONS].

⁴⁶ *Id.* at 91–92.

⁴⁷ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64565 (Oct. 27, 2000) [hereinafter 2000 TEMPORARY EXEMPTIONS]; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62011, 62013 (Oct. 31, 2003)) [hereinafter 2003 TEMPORARY EXEMPTIONS]; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68475 (Nov. 27, 2006) [hereinafter 2006 TEMPORARY EXEMPTIONS]; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43825, 43833 (July 27, 2010) [hereinafter 2010 TEMPORARY EXEMPTIONS].

⁴⁸ 2003 TEMPORARY EXEMPTIONS, *supra* n. 8 at 62014.

⁴⁹ 2006 TEMPORARY EXEMPTIONS, *supra* n. 8 at 68474.

⁵⁰ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65944, 65956 (Oct. 28, 2015) [hereinafter 2015 TEMPORARY EXEMPTIONS].

⁵¹ 2018 TEMPORARY EXEMPTIONS at 54014.

⁵² 2015 TEMPORARY EXEMPTIONS at 65954.

⁵³ 2018 TEMPORARY EXEMPTIONS at 54014.

⁵⁴ *Id.* at 54021.

⁵⁵ *Id.* at 54023.

⁵⁶ REGISTER’S SECTION 1201 REPORT at 98

⁵⁷ 2010 TEMPORARY EXEMPTIONS, at 43828; 2012 TEMPORARY EXEMPTIONS at 65263; 2015 TEMPORARY EXEMPTIONS at 65952; 2018 TEMPORARY EXEMPTIONS at 54013.

⁵⁸ 2015 TEMPORARY EXEMPTIONS at 65958; 2018 TEMPORARY EXEMPTIONS, at 54014, 54026.

exemptions in 2006 (for sound recordings)⁵⁹ and 2010 (for video games),⁶⁰ and a narrow computer software exemption for certain devices in 2015⁶¹ that was expanded in 2018 to allow circumvention of software for security research on nearly any device, computer system, or computer network.⁶²

Finally, there is a clear trend toward granting exemptions for various educational purposes—these have existed in some form in every rulemaking since 2006 (though it was then relegated to audio visual clips used in film and media studies courses,⁶³ before being broadly expanded for other educational purposes in 2012).⁶⁴ In its 2017 policy study, the Copyright Office specifically did not recommend making this exemption permanent because its scope has changed with each rulemaking.⁶⁵

While the triennial rulemaking reveals increasing flexibility and responsiveness over time, a potential impediment remains to the effective enjoyment of these exemptions. The rulemakings suspend the prohibition on the act of access circumvention, but Congress has not concomitantly permitted the dissemination of devices designed to circumvent the access controls on the listed works. In other words, the beneficiaries of the exemptions had better be able to neutralize the access control themselves; they will not find lawfully-marketed devices that will do it for them. Trafficking in devices remains prohibited, probably because a device that could be used to circumvent an access control on a listed class of works will remain equally capable of circumventing access controls on non listed classes. The inability of the device to tell the difference means either that all works will be vulnerable if the circumvention device may be distributed, or that non infringing uses of listed works will, for many, be difficult to achieve if the device is banned. Congress has drawn the line in favor of strong protection for technological measures, at the possible cost of some non infringing uses.

The same dog-wagging problem may not be present with regard to circumvention services, however. A person doing the circumvention can differentiate between, for example, unlocking a cell phone’s access code in order to allow the customer to use other wireless services and hacking through a streaming service’s paywall. Moreover, if the beneficiaries of the “particular class” exemptions may neither acquire a circumvention device, nor engage the services of a person competent to effect the circumvention, then listing the class may have little practical effect, unless the beneficiary of the exemption, such as an educational institution, has IT staff capable of circumventing the access controls. Individuals or businesses without those resources might

⁵⁹ 2006 TEMPORARY EXEMPTIONS at 68477.

⁶⁰ 2010 TEMPORARY EXEMPTIONS at 43832.

⁶¹ 2015 TEMPORARY EXEMPTIONS at 65955.

⁶² 2018 TEMPORARY EXEMPTIONS at 54025.

⁶³ 2006 TEMPORARY EXEMPTIONS at 68473; 2010 TEMPORARY EXEMPTIONS at 43827.

⁶⁴ 2012 TEMPORARY EXEMPTIONS at 65266; 2015 TEMPORARY EXEMPTIONS at 65946; 2018 TEMPORARY EXEMPTIONS at 54014–19.

⁶⁵ REGISTER’S SECTION 1201 REPORT at 101–02.

continue to find their fair uses frustrated. But the statute does not empower the Librarian to ensure that users in fact be able to perform the non infringing acts the class listing in theory enables. As a result, the Copyright Office in its 2017 Report has recommended statutory change to permit assistance in authorized circumvention: “The Office believes it is important that intended users of exemptions can take full advantage of them even if this requires aid from third parties. Accordingly, the Office believes that a targeted statutory amendment authorizing the provision of assistance to exemption beneficiaries in appropriate circumstances is advisable.”⁶⁶

Recommendations:

Twenty years of triennial rulemakings have shown the process on the whole to respond effectively to the essential challenge of sec. 1201(a): to underpin an Internet economy based on access to works of authorship while permitting non infringing uses of access-protected works. In the online environment, the fairness of the use may depend on the ubiquity of the access control. Access controls protect business models based on price discrimination according to intensity of use; they are not intended to prohibit scholarly or critical examination or “transformative fair uses”⁶⁷ of the works themselves. So long as a work’s expression remains available in hard copies or unprotected digital copies or for that matter in (human) memory, fair users may continue to build on prior works to create their own expression. The principal threats to fair use emerge if traditional hard copies and unprotected digital copies disappear, or if, despite the availability of other formats, the fair user requires access to specific access-controlled formats, such as ebooks. The former scenario, the dreaded digital lockup,⁶⁸ has not yet generally transpired; the latter is the province of the triennial rulemakings. Accumulated experience, particularly with repeat renewals of particular classes of works, points the way toward legislative reform; the Copyright Office has recommended that several of these, having proved their persistence, shift from triennial review to permanent exemptions.⁶⁹ And the Office’s recommendation to modify the anti-trafficking prohibition to permit services to assist the circumventions that the triennial rulemaking designates⁷⁰ should enable fair use by persons unable themselves to undertake the permitted acts.

3. Caselaw on fair use and first amendment exceptions to sec. 1201

Early attempts to persuade courts to recognize a general fair use defense to sec. 1201 did not succeed, perhaps in part because the facts of the cases involved blatant infringements. In one of the first cases, the Southern District of New York reviewed Congress’ careful balancing of user interests and copyright owner interests in crafting § 1201, and noted that several elements

⁶⁶ REGISTER’S SECTION 1201 REPORT at 59-60. See also *id.* at iv, 52-62.

⁶⁷ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

⁶⁸ See e.g., Julie H. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L. J. 161 (1997); Julie H. Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 CONN. L. REV. 981 (1996); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 519 (1999).

⁶⁹ REGISTER’S SECTION 1201 REPORT at 84-102.

⁷⁰ REGISTER’S SECTION 1201 REPORT at 59-60.

of the regime already account for potential fair use concerns—including the statutory exemptions, and the rulemaking procedure for temporary exemptions.⁷¹ The Second Circuit in an appeal from the SDNY soon thereafter reached a similar conclusion. Though on appeal the defendants did not make an express fair use claim, they asserted a First Amendment challenge based in part on the claim that users of the defendant’s DVD decryption code engaged in fair use. The Court noted there is “no authority for the proposition that fair use . . . guarantees copying by the optimum method or in the identical format of the original,” and that the DMCA anti-trafficking provisions do “not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie.”⁷² Because unprotected copies in non-digital media remained available for all the usual fair use purposes, including by means of analog copying, the court rejected the defendants’ “extravagant claim.”⁷³ Although copying from protected media, such as DVDs, might have been rendered more cumbersome, it was not completely foreclosed. The courts emphasized that “[f]air use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.”⁷⁴ Other courts have adopted similar reasoning to reject general fair use defenses.⁷⁵ For example, “Defendant has cited no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use. The existing authorities have rejected that argument.”⁷⁶

In the absence of a general fair use defense, some litigants asserted the unconstitutionality of sec. 1201’s anti-circumvention provisions. They have contended that fair use is constitutionally mandated and that sec. 1201 “eliminates fair use.”⁷⁷ As a result, Congress would not have power to preclude fair use defenses to circumvention. Alternatively, these claimants have argued that sec. 1201 suppresses speech and therefore violates the First Amendment. Until recently, every court that had encountered these challenges rejected them.⁷⁸

With regard to the First Amendment, courts have observed that computer programs are a form of speech, but they are also functional. To the extent the government regulates the software’s

⁷¹ *Universal City Studios v. Reimerdes*, 111 F.Supp.2d 294, 324 (S.D.N.Y. 2000).

⁷² *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).

⁷³ *Corley*, 273 F.3d at 458.

⁷⁴ *Id.* at 459.

⁷⁵ See *321 Studios v. MGM Studios Inc.*, 307 F.Supp.2d 1085, 1102 (N.D. Cal. 2004) (observing that users can still conduct fair uses of works with access restrictions “although such copying will not be as easy, as exact, or as digitally manipulable as plaintiff desires”); *United States v. Crippen*, 2010 U.S. Dist. LEXIS 143583, *7 (C.D. Cal., Nov. 23 2010) (granting the government’s motion to exclude evidence of fair use, finding that “a reading of § 1201(c) that adds the fair use arrow to a defendant’s § 1201(a) quiver contradicts the plain meaning of the statute and must be rejected”); *Realnetworks Inc. v. DVD Copy Control Ass’n*, 641 F.Supp. 2d 913, 943–44 (N.D. Cal. 2009) (acknowledging that users making back-up copies of their own DVDs could be fair use, but finding that the tool which allows the creation of back up copies nevertheless violates § 1201 because “the fair use of the copyrighted material by end users is not a defense to, and plays no role in determining, liability under the DMCA”).

⁷⁶ *U.S. v. Elcom*, 203 F.Supp. 2d 1111, 1131 (N.D. Cal. 2002).

⁷⁷ *Corley*, 273 F.3d at 458.

⁷⁸ See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *U.S. v. Elcom*, 203 F.Supp. 2d 1111 (N.D. Cal. 2002); *321 Studios v. MGM*, 307 F.Supp. 2d 1085 (N.D. Cal. 2004).

functional aspects, the law is “content neutral” as to the speech aspects. The law will not be considered to violate the First Amendment if the regulation advances a legitimate government interest and is reasonably tailored to achieve that purpose. Congress’ interest was in promoting electronic commerce in copyrighted works, and Congress could legitimately seek to achieve this objective by making the distribution of circumvention devices unlawful.⁷⁹

More recently, one district court has declined in part to dismiss a first amendment challenge to sec. 1201(a). In *Green v. DOJ*,⁸⁰ a professor who investigates security of computer systems claimed existing exemptions did not accommodate his work, and a technology entrepreneur claimed inability to create his high-definition digital video-editing software. The court acknowledged that “DMCA and its triennial rulemaking process burden the use and dissemination of computer code, thereby implicating the First Amendment.”⁸¹ It nonetheless rejected a facial challenges of overbreadth and viewpoint-discrimination.⁸² The court found that the sec. 1201 anti-circumvention rules were a content-neutral regulation, and thus did not trigger strict scrutiny.⁸³ Following the Second Circuit’s *Corley* decision and other early adjudication of first amendment challenges to sec. 1201, the court stated:

because the anti-circumvention and anti-trafficking provisions target the functional, non-speech component of plaintiffs' use and dissemination of code and only incidentally burden the ability of the code to express a message to a human (i.e., the "speech" component), those provisions are properly deemed content-neutral. Those provisions are also properly deemed content-neutral even when plaintiffs' various other arguably-burdened First Amendment rights are considered. Those expressive rights—the rights to gather, share, publish, and receive information—are only incidentally burdened for the same reason the right to use and disseminate expressive code is only incidentally burdened: The DMCA provisions target the functional, non-speech capacity of code to communicate messages to a computer. Accordingly, no matter which of plaintiffs' First Amendment rights is implicated, the DMCA provisions are appropriately deemed content-neutral.⁸⁴

However, applying intermediate scrutiny, the court allowed an as-applied challenge to survive the motion to dismiss. Ruling that the plaintiffs had “alleged facts sufficient to show that the DMCA provisions, as applied to their intended conduct, burdens substantially more speech than is necessary to further the government's legitimate interests,” the court held that, at the pleading stage, the government had not carried its “burden to demonstrate that the provisions do not burden substantially more speech than is necessary to further the government's legitimate

⁷⁹ See, e.g., *Corley*, 273 F.3d at 453-58; *Elcom*, 203 F.Supp. 2d at 1127-37.

⁸⁰ 392 F. Supp. 3d 68 (D.D.C. 2019).

⁸¹ *Id.* at 86.

⁸² *Id.* at 89–91.

⁸³ *Id.* at 92.

⁸⁴ *Id.*

interest.”⁸⁵ The action, which will require development of facts regarding the harms posed by the plaintiffs’ proposed dissemination of circumvention tools, as well as the tailoring of sec. 1201 to respond to those harms, is still pending.

4. Relationship to Section 1202 protection of copyright management information

At first blush, sec. 1202’s prohibition of the removal or alteration of copyright management information (CMI) does not pose fair use issues. Fair use remains relevant, however, because sec. 1202 concerns intentional removals or alterations of CMI “knowing, or, with respect to civil remedies under sec. 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.” If the removal or alteration facilitated fair uses of CMI-bearing works, then, because a fair use is “not an infringement of copyright,”⁸⁶ the person charged with the removal or alteration would lack the requisite knowledge that she had facilitated infringement. This raises the question whether removal or alteration of CMI could facilitate fair use.

It is not apparent that changing or stripping information that identifies, among other things,⁸⁷ the author and the “terms and conditions for use of the work,” would promote fair use of the work. On the contrary, removal or alterations of CMI risk compromising the reliability of digital information about a work that may be essential to successful e-commerce in works of authorship. There may be value in affirming that intentional alteration or removal of CMI is inconsistent with such fair use purposes as promoting knowledge about works,⁸⁸ and undermines Congressional policy.

Recognition that removal or alteration of authors’ names are inconsistent with fair use would buttress the proposition that CMI removal or alteration promotes infringement of copyright. Scholars have suggested amending sec. 107 to add a fifth fair use factor focusing on authorship attribution,⁸⁹ or to make attribution a part of the inquiry into the nature and purpose of the use.⁹⁰ But courts could, without Congressional intervention, interpret the current fair use factors, notably the fourth factor “value of the copyrighted work,” to include a consideration of whether the defendant has credited the author of the copied work.⁹¹

⁸⁵ *Id.* at 95.

⁸⁶ 17 U.S.C. sec. 107.

⁸⁷ See *id.* sec. 1202(c) (defining CMI).

⁸⁸ See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

⁸⁹ See Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007).

⁹⁰ See Jane C. Ginsburg, *The Most Moral of Rights: The Right to be Recognized as the Author of One’s Work*, 8 GEO. MASON J. INT’L. COM. L. 44, 72-73 (2016)

⁹¹ See Jane C. Ginsburg, *Essay – Fair Use Factor Four Revisited: Valuing the “Value of the Copyrighted Work,”* forthcoming, J COPYR. SOC. USA (2020), <http://ssrn.com/abstract=3537703>

Congressional recognition that CMI alteration or removal is not fair use would bring the U.S. closer to fulfillment of its international obligations under the Berne Convention and the 1996 WIPO Treaties. Article 12 of the WIPO Copyright Treaty requires “Contracting Parties to prohibit, inter alia, unauthorized removal or alteration of electronic rights management information, when the actor knows or has reasonable grounds to know that the removal or alteration: will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty *or the Berne Convention*. . . .” (emphasis added). The “right[s] covered by the Berne Convention” are not only those found within the U.S. Copyright Act. Article 6bis of the Berne Convention declares authors' rights “to claim authorship of the work” Apart from a very limited class of Works of Visual Art,⁹² there is no such explicit right in US copyright law. Section 1202 thus falls short of the WIPO treaty requirement, because sec. 1202, unlike the international rule, concerns only copyright management information whose removal or alteration facilitates or conceals copyright infringement. By contrast, were Congress to recognize that denying or changing authorship credit by removing or altering CMI is not fair use, it would narrow the gap between acts that infringe US copyright, and acts that violate international norms.

⁹² See 17 U.S.C. sec. 106A.

Appendix

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May 2002 – April 2008	Co-Reporter, American Law Institute: Intellectual Property - Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes (with Prof. Rochelle Dreyfuss and Prof. François Dessemontet)
July 1998	Hague Academy of International Law, teaching course on “The Private International law of Copyright in an Era of Technological Change”
January 1991-November 1992	Professor of Law, Columbia University School of Law
January 1987-December 1990	Associate Professor of Law, Columbia University School of Law

Fall 1983	Adjunct Assistant Professor, Benjamin N. Cardozo School of Law, taught basic copyright course
November 1981-August 1984	Associate, Cowan, Liebowitz & Latman, P.C., New York City
August 1980-August 1981	Law Clerk, Hon. John J. Gibbons, United States Court of Appeals for the Third Circuit

ONGOING FELLOWSHIPS

From April 2015	American Academy of Arts and Sciences, Member
From May 2013	American Philosophical Society, Member
From July 2011	British Academy, Corresponding Fellow
From 2007	Emmanuel College, University of Cambridge, Honorary Fellow

OTHER FELLOWSHIPS, AWARDS AND VISITING TEACHING POSITIONS

May 2020	Visiting Professor, Bocconi University Faculty of Law, Milan (online)
March 2019, January 2020	Visiting Professor, École de droit, Sciences-Po, Paris
October 2017, December 2005	Senior Fellow, University of Melbourne Law School
Fall 2016	Alliance Visiting Professor, Université de Paris I (Panthéon-Sorbonne)
October 2018, January 2016, May 1998	University of Lyon III (teaching U.S. and international copyright law)
September 2019, November 2018, September 2017, November 2016	Hanken Business School, Helsinki Finland (teaching U.S. and international copyright law)
October 2015	ChIPs Women in IP Hall of Fame Honoree
October 2015	University of Cambridge Center for Intellectual Property and Information Law [CIPIIL] Fellow, teaching international copyright
May 2015	American Bar Association Section on Intellectual Property, Mark T. Banner Award
March-May 2015	Resident, American Academy in Rome Michael Sovern Affiliated Fellow (March-May 2009); Visiting Scholar (April-May; December 2010; December 2011; September 2012; December 2013; May 2016; May 2017)

October-November 2014	New Zealand Law Foundation Distinguished Visiting Fellowship (lecturing at six universities)
November 2012	Visiting Professor, University of Technology, Sydney
May 2012	Hebrew University in Jerusalem, Martin and Susan Adelman Visiting Professorship in Intellectual Property Law (first holder)
Jan. 2012, Jan. 2016, March 2018	Visiting Professor, University of Paris I (Panthéon-Sorbonne) (comparative copyright law and new technologies)
2010-11	Phi Beta Kappa Visiting Scholar (5 colleges)
2009	Order of the Coif Distinguished Visitor (Texas Tech; de Paul)
October 2009	Legal Research Foundation Visiting Fellow, University of Auckland law faculty
Fall 2008	Herbert Smith Fellow, University of Cambridge Faculty of Law
2008	IP Hall of Fame inductee
1994-2020 (various months)	University of Paris XI -- Sceaux (teaching copyright protection of new technologies)
1998-2012; 2014; 2016 (various months)	University of Toulouse I (teaching U.S. legal methods, and copyright protection of new technologies)
June 1991, May 1997; April 2005	University of Nantes (teaching U.S. and French intellectual property law)
November 1993-June 1994	Universities of Paris I -- Sorbonne, and II -- Panthéon (teaching U.S. contracts law and legal methods)
July 1994, 1992, 1990, 1988	Columbia-Leiden-Amsterdam program in American Law (teaching U.S. copyright law)
December 1991	French University of the Pacific, Papeete, French Polynesia (teaching U.S. contracts law)

LANGUAGES

French, Italian, Spanish

EDITORIAL AND ADVISORY BOARDS

Cambridge University Press, Intellectual Property and Information Law Series, Advisory Board

International Advisory Board, UK Arts and Humanities Research Council “Primary Sources on Copyright” History Project

Board of Advisors, Columbia-VLA Journal of Law & the Arts

Editorial Board, Journal of the Copyright Society of the USA

Editorial Board, Entertainment Law Review, London, U.K.

International Editorial Board, Cahiers de la propriété intellectuelle (Canada)

MEMBERSHIPS AND OTHER ADVISORY POSITIONS

Vice President, Association Littéraire et Artistique Internationale (ALAI); President, ALAI-USA

Board of Advisers, Cambridge Centre for Intellectual Property and Information Law (CIPIIL) (UK)

American Law Institute, Life Member (since 1990)

Co-Reporter, Intellectual Property - Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes

Adviser, Restatement of Copyright

Adviser, Principles of the Law of Software Contracts

International Law Association, Committee on Private International Law and Intellectual Property

American Association of Universities, Copyright Working Group

Digital Public Library of America, Copyright Working Group

Council on Foreign Relations, Member

Board of Guarantors, Italian Academy in America (2007-10)

Columbia University, Co-Chair, University-wide committee to create and oversee University copyright ownership policy (2000-01)

Library of Congress, Advisory Committee on Copyright Registration and Deposit (ACCORD) 1993-95

Chair, ABA Patent, Copyright, Trademark Section, Committee on Pictorial, Graphic, Sculptural and Choreographic Works (1990-91)

Chair, American Association of Law Schools, Section on Intellectual Property (1990-91)

PUBLICATIONS

ssrn author abstract url: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=222890#reg

NELLCO Legal Scholarship Repository author url: http://lsr.nellco.org/columbia_pllt/0591

Books

INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND, with Prof. Sam Ricketson (2 vols.) (2d ed. Oxford University Press, 2006), 3d edition in preparation

LEGISLATION: STATUTORY INTERPRETATION IN THEORY AND IN PRACTICE, with David Louk (with Teacher's Manual) (*forthcoming* Foundation Press 2020)

CAMBRIDGE HANDBOOK ON INTERNATIONAL AND COMPARATIVE TRADEMARK LAW, Editor with Prof. Irene Calboli (*forthcoming*, Cambridge University Press 2020)

DEEP DIVE: BURROW-GILES LITHOGRAPHING V. SARONY (US 1884) COPYRIGHT PROTECTION FOR PHOTOGRAPHS AND CONCEPTS OF AUTHORSHIP IN AN AGE OF MACHINES (Twelve Tables Press 2020)

CASES AND MATERIALS ON LEGAL METHODS, with David Louk (with Teacher's Manual) (Foundation Press, 5th edition 2020)

COPYRIGHT: CASES AND MATERIALS, with Prof. R.A. Gorman and Prof. R.A. Reese (Foundation Press 9th edition 2017); 2020 Case Supplement with Prof. R.A. Reese

TRADEMARK AND UNFAIR COMPETITION LAW, with Prof. Jessica Litman and Mary L. Kevlin, Esq. (with Teachers' Manual and 2020 Update) (Carolina Academic Press, 6th edition 2017)

INTERNATIONAL COPYRIGHT LAW - US AND EU PERSPECTIVES: TEXT AND CASES, with Prof. Edouard Treppoz (Edward Elgar, 2015)

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COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE, Editor, with Prof. Lionel Bently and Dr. Jennifer Davis (Cambridge University Press 2010)

TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE, Editor, with Prof. Lionel Bently and Dr. Jennifer Davis (Cambridge University Press 2008)

INTELLECTUAL PROPERTY STORIES, Editor, with Prof. Rochelle Dreyfuss (Foundation Press, 2005)

FOUNDATIONS OF INTELLECTUAL PROPERTY LAW, Editor, with Prof. R.P. Merges (Foundation Press, 2004)

ADJUNCTS AND ALTERNATIVES TO COPYRIGHT: PROCEEDINGS OF THE 2001 CONGRESS OF THE ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE, Editor, with June Besek, Esq. (Kernochan Center for Law, Media and the Arts, 2002)

THE PRIVATE INTERNATIONAL LAW OF COPYRIGHT IN AN ERA OF TECHNOLOGICAL CHANGE, 1998 *Recueil des cours* of the Hague Academy of International Law, part 273, 239-405 (1999)

Book Chapters

Floors and Ceilings in International Copyright Treaties (Berne/TRIPS/WCT minima and maxima), in Axel Metzger and Henning Grosse Ruse-Khan, editors, INTELLECTUAL PROPERTY ORDERING BEYOND BORDERS (*forthcoming* Cambridge University Press 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3640668

A United States Perspective on Digital Single Market Directive, art. 17, in Irini Stamatoudi and Paul Torremans, Eds., EUROPEAN UNION COPYRIGHT LAW: A COMMENTARY (2d ed. *forthcoming* Edward Elgar 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579076

Territoriality and Supranationality: Judicial and Legislative Competence in International Trademark Disputes, with Prof. Edouard Treppoz, in Irene Calboli and Jane C. Ginsburg, Eds., CAMBRIDGE HANDBOOK ON INTERNATIONAL AND COMPARATIVE TRADEMARK LAW (*forthcoming*, Cambridge U. Press 2020)

Overlapping Copyright and Trademark Protection in the United States: More Protection and More Fair Use?, with Prof. Irene Calboli, in Irene Calboli and Jane C. Ginsburg, Eds., CAMBRIDGE HANDBOOK ON INTERNATIONAL AND COMPARATIVE TRADEMARK LAW (*forthcoming*, Cambridge U. Press 2020)

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Authors and Machines, with Luke Ali Budiardjo, 34 Berkeley Technology Law Journal 343 (2019), <https://journals.library.columbia.edu/index.php/lawandarts/article/view/1984>

Intellectual Property as Seen by Barbie and Mickey: The Reciprocal Relationship of Copyright and Trademark Law (13th annual Christopher Meyer lecture) 65 Journal of the Copyright Society of the USA 245 (2018) <http://ssrn.com/abstract=3078944>

Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives, with Luke A. Budiardjo (CLS '18), 41 Columbia Journal of Law & the Arts 153 (2018), <https://lawandarts.org/article/liability-providing-hyperlinks-copyright-infringing-content/>

Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation, 2/2019 Nordic Intellectual Property Review 215 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997

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The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on *Brein v. Filmseper* [C-527/15] (2017) and *Brein v. Ziqgo* [C-610/15] (2017) (English translation of article in French in 2016/5-6 AUTEURS ET MÉDIAS 401 (2017), see “articles in French”) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024302

Euro-Yearnings? Moving Toward a “Substantive” Registration-Based Trademark Regime [Response to Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867 (2017)], 130 Harv. L. Rev. F. 95 (2017) <http://harvardlawreview.org/2017/01/euro-yearnings-moving-toward-a-substantive-registration-based-trademark-regime/>

“Courts have twisted themselves into knots”: US Copyright Protection for Applied Art, 40 Columbia J. Law & the Arts 1 (2016); http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837728

The Most Moral of Rights: The Right to be Recognized as the Author of One’s Work, 8 Geo. Mason J. of Int’l. Commercial L. 44 (2016) <http://www.georgemasonjicl.org/wp-content/uploads/2016/08/Summer-Issue-2016.pdf> http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806316

Berne-Forbidden Formalities and Mass Digitization, 96 Boston U. L. Rev. 745 (2016) <http://ssrn.com/abstract=2772176>

Private International Law Aspects of Authors' Contracts: the Dutch and French Examples, with Prof. Pierre Sirinelli, 39 Colum. J.L. & the Arts 171 (2016) <http://ssrn.com/abstract=2704017>

We (still) need to talk about Aereo: New controversies and unresolved questions after the Supreme Court’s decision, with Rebecca Giblin 38 Colum. J. Law & the Arts (2015) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514648

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