The Digital Millennium Copyright Act and the First Amendment: How Far Should Courts Go to Protect Intellectual Property Rights?

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Federal courts are currently upholding the newly tested Digital Millennium Copyright Act of 1998[1] ("DMCA") on challenges that it violates freedoms of expression protected by the First Amendment.[2] The powerful players in the entertainment industries enjoy judicial support for now, but may look to their opponents' discoveries to find an avenue to future success.

I. INTRODUCTION

Digital technology has made it much more difficult to protect a copyrighted work from infringement. Digital media allows copies to be made without deterioration in quality and increases transportability over the Internet, where it can be made available throughout the world.[3] The major players in the copyright industry are making strides to keep up with advancing technology and they are armed with the DMCA at their side. The validity of the DMCA is at issue in this Note.

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1. 17 U.S.C. § 1201 (2000).

2. Universal City Studios, Inc. v. Remierdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000); *see also* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

3. STUART BIEGEL, BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE 74 (2001) (citing Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet,* 12 BERKELEY TECH. L.J. 15, 36 (1997)).

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In 1976, Universal City Studios, copyright owner of television programs broadcasted on public airwaves, sued the Sony Corporation of America and the manufacturers of a newly developed video tape recorder, alleging that their distribution of copying equipment violated their rights under the Copyright Act through contributory infringement.[4] After Sony prevailed in the United States District Court,[5] the Ninth Circuit granted Universal City Studios relief on appeal[6] and the United States Supreme Court decided the issue in 1984.[7] In what seemed to be a major blow for the copyright industry, the Court held that the production and sale of the video tape recording device was not contributory infringement.

In the aftermath of the Sony decision,[8] the copyright industry adapted to the changing technologies and developing markets. Considerable and unforeseen profits sprouted from the business of video rentals and sales.[9] By losing their initial fight, copyright owners discovered a new avenue for creating profits.

A more recent example of industry adapting to changing technologies involves music file sharing over the Internet. In March of 2002, the United States Court of Appeals in the Ninth Circuit upheld an injunction in an action brought by record companies and music publishers against Napster.[10] The record industry is still fighting the battle against file sharers.[11] They filed 261 law suits on

4. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984); Universal City Studios, Inc. v. Sony Corp., 480 F. Supp. 429 (D.C. Cal. 1979).

5. Universal City Studios, Inc. v. Sony Corp., 480 F. Supp. 429 (D.C. Cal. 1979) (entering judgment for defendants on basis non-commercial viewing of copyrighted material in non-competitive manner was not contributory or vicarious copyright infringement).

6. Universal City Studios, Inc. v. Sony Corp., 659 F.2d 963 (9th Cir. 1981) (holding sale of video tape recorders did not constitute fair use and defendants were liable for contributory infringement of the copyright rights because they knowingly induced those who purchased device to copy protected materials).

7. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

8. Universal City Studios, Inc., v. Reimerdes, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000) (stating DMCA supercedes Sony decision).

9. The prime example of the expansion in the business of video rentals and sales is Blockbuster Video who opened its doors in 1985. *Blockbuster Video posts increase in Q1 net income*, N.M. BUS. WKLY., April 23, 2003, *at* http://albuquerque.bizjournals.com/albuquerque/stories/2003/04/21/daily14.html (last visited Oct. 4, 2003). There are now 8,200 Blockbuster stores through four different continents; Blockbuster, Inc., brought in $84.9 million in revenue over the quarter year ending in March of 2003. *Id*.

10. A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002). Napster is an Internet service that facilitated the transportation of digital audio files between its users. *Id.* at 1095.

11. Erica Hill, *End of an Era*, CNN Headline News, Sept. 17, 2003, *at* http://www.cnn.com/2003/TECH/09/17/hln.wired.end.era/index.html (last visited Oct. 10, 2003).

September 8, 2003.[12] If the record industry loses their battle, they may learn from the technology created by their adversaries to find the next new market for their products just as the film industry has done with videos.

The DMCA extends copyright protection from the infringing act to the act of gaining access to the protected work. To override digital copyright protection, a programmer may write a computer code that is capable of breaking down the protection. The DMCA arguably regulates the writing and use of this code. The code itself has been found to be protected expression under the First Amendment.[13]

We will see how a balance exists between copyright protections and freedoms of expression and how both strive for common goals. The matter at issue here will depend on the level of scrutiny that courts may give to particular code under a First Amendment analysis. The level of scrutiny will be determined by the classification of code as either pure speech or expressive conduct. This Note examines this First Amendment issue in the context of the major motion picture associations' fight against programmers that have broken down the digital protections of DVDs.

II. THE GENTLE BALANCE BETWEEN THE FIRST AMENDMENT AND COPYRIGHT PROTECTION

A. First Amendment Protection

The First Amendment to the Constitution explicitly prohibits Congress from making any law that will abridge one's right to free speech.[14] Several different rationales back the freedom of expression encompassed in the First Amendment. In *Abrams v. United States,*[15] Justice Holmes expressed, in dissent, that the best filter for the truth occurs when thoughts are allowed to enter freely into the common market of ideas.[16] Professor Thomas I. Emerson endorsed the ideology that free speech in itself fosters the human potential.[17]

12. *Id.*

13. *E.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445-46 (1st Cir. 2001).

14. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech . . ."

15. 250 U.S. 616 (1919).

16. *Id.* at 630. Holmes pronounced "that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." in a discussion regarding free speech in the Constitution. *Id.*

17. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963). Emerson stated that free "expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self."

The Supreme Court has broken government-imposed restrictions on speech into two major categories, which determines what type of scrutiny the restriction on that speech will receive.[18] The Court categorized the restrictions as either content-based or content-neutral.[19] Content-based speech that is analyzed under strict scrutiny and speech that is content-neutral receives less scrutiny or intermediate scrutiny.[20]

State acts regulating the subject matter of an expression or the communicative impact of speech is considered content-based.[21] For example, an ordinance was deemed content-based because it banned all demonstrations near a high school unless they were predominantly peaceful.[22] The Court reasoned that the statute was picking and choosing the content of speech that they were allowing near the high school because it allowed only the peaceful demonstrators to picket.[23]

Government legislation that regulates content-based speech is presumptively invalid.[24] In order for the government to regulate the content of speech, it must prove that such legislation is narrowly tailored to serve a compelling government interest.[25] The government may regulate speech based on its content if that speech incites immediate lawlessness,[26] is obscene or pornographic,[27] or is

Id.

18. Turner Bro. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95-6 (1972)

19. *See, e.g.*, Hill v. Colo., 530 U.S. 703, 719-25 (2000) (holding statute creating "bubble zone" in which free speech is restricted around those entering health care facility was not violation of First Amendment protections under scrutiny test that Court applied).

20. *See generally* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 427 (2002) (demonstrating content-based restrictions receive strict scrutiny, while content-neutral receive intermediate scrutiny).

21. *E.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 428-30 (1992) (Stevens, J., concurring) (stating subject-matter regulation on speech is content-based restriction).

22. *Police Dep't of Chi.*, 408 U.S. at 95.

23. *Id.* at 95.

24. *See* Ward v. Rock Against Racism, 491 U.S. 781, 793 (1989).

25. *See* Boos v. Barry, 485 U.S. 312, 321 (1988); *see also Alameda Books, Inc.*, 535 U.S. at 455.

26. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Constitutional protections of free speech do not allow "a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*

27. Miller v. California, 413 U.S. 15, 23 (1973). "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Id. See also* Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389, 1400 (2002) (stating that the First Amendment is limited from protecting certain materials, including pornography depicting children).

characterized as "fighting words."[28] Regulations curbing such speech do not violate the First Amendment.[29]

The Court gives less scrutiny to state actions that regulate speech without regard to its content.[30] An example of a content-neutral regulation on speech is a city ordinance that outlaws making loud noises in the street at night.[31] Such a regulation does not reflect the communicative aspect of the speech.[32] The ordinance solves the problem of loud noises at night, regardless of the content the noises convey.[33] Government legislation regulating speech that is content-neutral must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[34]

B. Copyright: The Idea/Expression Dichotomy

As the First Amendment promotes the free flow of ideas, copyright provides an incentive that procures the advancement of creativity in the arts and sciences.[35] The United States has sought to protect societal interests in the promotion of social and technological advancement.[36] As a result, the framers of the Constitution gave Congress authority to protect a citizen's creative works and authored expression.[37]

Works protected by copyright traditionally transcend literary and artistic expression.[38] To merit protection, the work must be fixed in a

28. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (deciding First Amendment does not protect against "fighting words"). Words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are considered "fighting words." *Id.*

29. *Id.*

30. *E.g.* Hill v. Colorado, 530 U.S. 703, 741-43 (2000) (Scalia, J., dissenting).

31. *See* Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

32. *Id.*

33. *Id.*

34. Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

35. *See* Rachel Simpson Shockley, Note, *The Digital Millennium Copyright Act and The First Amendment: Can They Co-Exist?*, 8 J. INTELL. PROP. L. 275, 276 (2001).

36. *See id.*

37. U.S. CONST. art. I, § 8, cls. 1, 8. "The Congress shall have 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." *Id.* "Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials." Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431, 104 S.Ct. 774 (1984). *See generally* Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L. J. 109 (1929).

38. Fogerty v. Fantasy, Inc., 510 U.S. 517, 518-19 (1984). "[T]he Copyright

"tangible medium of expression."[39] Copyright duration is the life of the author plus 70 years and in the case of works created by an employee of an entity, so-called works for hire, the duration of the protection is 95 years.[40]

Once copyright protection is established, the owner has a bundle of certain exclusive rights.[41] The copyright owner possesses a monopoly over the reproduction, modification, distribution, public performance, and public display of their works, subject to certain exceptions.[42] One might wonder how there are so many different depictions of the same historical events or fabled stories. The answer is that copyright protection is given only to "the expression of an idea" and "not the idea itself."[43]

Congress codified unprotected expression at section 102(b) of the Copyright Act as follows, "[i]n no case does copyright protection for an original work of authorship extend to an idea, procedure, process,

Act's primary objective is to encourage the production of original literary, artistic, and musical expression for the public good." *Id.* at 517.

39. 17 U.S.C. § 101 (2000). "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.*

40. 17 U.S.C. § 302(c). "In the case of an anonymous work, a pseudonymous work, or a work made for hire the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first." *Id.*

41. 17 U.S.C. § 101 (2000); *but see* 17 U.S.C. § 107 (2000) (discussing doctrine of first sale as exception to holder's exclusive rights). An exception to the copyright holder's rights is the doctrine of First Sale, which permits one who has legally obtained a copy of the work to sell or otherwise dispose of the work without authorization from the copyright owner. *See* STUART BIEGEL, BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE 293-94 (2001). It allows bona fide purchasers of copyrightable material to copy, distribute, and sell the works they have purchased. *Id.* For example, First Sale enables libraries to lend books to cardholders and allows video rental stores, such as "Blockbuster Video," to both lend and sell videos and DVD's to their customers despite the fact that the author still holds a copyright on the works. *See id*.

42. 17 U.S.C. § 101 (2000); *see also* STUART BIEGEL, BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE 293 (2001). It should be noted that before commencement of a suit for infringement, the work must be deposited in the Library of Congress and, generally, copyrights do not have to be registered to receive protection. *See* ITOFCA, Inc. v. MegaTrans Logistics, Inc., 322 F.3d 928, 928 (N.D. Ill. 2003).

43. Mazer v. Stein, 347 U.S. 202, 217 (1954); Baker v. Selden, 101 U.S. 99, 107 (1879). The *Baker* Court found that an author may obtain and sustain a copyright over an instructive essay describing a certain accounting system but may not sustain the exclusive rights over his implementation of that system because it's not deemed a unique idea, but rather a useful suggestion on how to implement a system. *Id.*

system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[44] This dichotomy between the expression of the idea and the idea itself alleviates the pressures that develop between copyright and the First Amendment.[45] An author's publication is protected from unauthorized copying and distribution, but the ideas and facts that are being expressed may be imitated without infringement.[46] Copyright protects the way or manner that an author expresses an idea, but the First Amendment protects the right for anyone to express the idea as he or she chooses.[47]

C. Fair Use

The Fair Use Doctrine represents an exception to the exclusive rights of the copyright holder.[48] Under fair use, protected works may be copied, publicly displayed, sold, or modified for teaching, researching, criticism, or reporting.[49] Fair use is an affirmative defense to copyright infringement.[50] Section 107 of the Copyright Code[51] sets forth the following factors that must be weighed in determining the applicability of the defense: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion of the work used; and the effect that such use has on the market for that work.[52] If a possible infringer relies upon fair use as a defense, the court must consider whether the

44. 17 U.S.C. § 102(b) (1982 & Supp. I 1983); House Comm. on the Judiciary, COPYRIGHT LAW REVISION, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 56, 56-57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670 ("section 102(b) makes clear that copyright protection does not extend to an idea, procedure, process . . .").

45. David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. REV. 983, 989.

46. *See, e.g.*, Dymow v. Bolton, 11 F.2d 690, 692 (2d Cir. 1926) (maintaining defendant who had previously read plaintiff's work and subsequently wrote play with similar plot did not violate plaintiff's copyright because it was not immediately obvious entire plot was copied).

47. *Id. See also* Freedman v. Grolier Enter., 179 U.S.P.Q. (BNA) 476, 478 (S.D.N.Y. 1973).

48. 17 U.S.C. §§ 109, 107. *See also* STUART BIEGEL, BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE 294-95 (2001).

49. 17 U.S.C. § 107 (2000).

50. Belmore v. City Pages, Inc., 880 F. Supp. 673, 676-77 (D. Minn., 1995) (reiterating that defendant's publication of plaintiff's work was fair use, which is an affirmative defense to charges of copyright infringement).

51. 17 U.S.C. § 107 (2000).

52. *Id*; Encyclopaedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243, 249-52 (W.D.N.Y. 1978).

use was for commercial gain, whether the use involved the entire work or a part of it, and whether the use substantially damaged the copyright holder's ability to market or make a profit from the work.[53]

Due to the nature of the Fair Use Doctrine, many believe that the doctrine alleviates copyright infringements on First Amendment protections where the idea/expression dichotomy cannot.[54] There is an overlap between the interests of First Amendment protection to stimulate spreading ideas[55] and the basis in copyright to encourage the creation of new artistic endeavors.[56] When the two interests meet, fair use will often allow copyrighted works to be disseminated when done for a productive purpose.[57] For instance, copyrighted work may be available for reporting, teaching, and study when it otherwise would be copyright infringement.[58]

Scholars have identified a possible area where a First Amendment "privilege" or defense to copyright infringement may be necessary.[59] Professor Melville Nimmer discusses a scenario that addresses a gray area of copyright and the First Amendment as follows: consider a creative work, like a photo or painting, where the idea is so entwined in the expression that the idea/expression dichotomy cannot be established and utilized; making one have to reproduce the protected expression in order to convey the idea; and the fair use doctrine does not work as an effective defense to infringement because the use will substantially damage the marketability or value of the protected work.[60] Nimmer argues that in such a situation the constructs of

53. Wright v. Warner Books, Inc., 953 F.2d 731, 735 (2d Cir. 1991) (indicating that the fair use test is a fact-based inquiry that takes into account all four factors when determining its applicability). *But cf.* Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044, 1048 (S.D.N.Y. 1994) (stating that courts generally emphasize the use's potential affect on the market in their analysis); Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201, 208-09 (D. Mass. 1986) (reiterating that a finding of use for profit will often weigh heavily against fair use).

54. David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. REV. 983, 991 n. 42.

55. *See e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762 –63, 92 S.Ct. 2576 (1972) (proffering First Amendment allows for truth to come through free market place of ideas and protects receiving of ideas as well as offering of them).

56. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985). "[T]he Framers intended copyright itself to be the engine of free expression." *Id*.

57. Shipley, *supra* note 54, at 994.

58. Shipley, *supra* note 54, at 994-95.

59. Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977) (stating in future courts may have to distinguish between fair use doctrine and limitations on copyright by the First Amendment), *cert. denied*, 434 U.S. 1014 (1978).

60. *See* Shipley, *supra* note 54, at 996-97 (citing MELVILLE NIMMER, NIMMER

copyright and the First Amendment cannot work in harmony and such a work should be in the public domain under a First Amendment privilege.[61]

While Nimmer has discovered what seems to be an aptly unaddressed area of the law, the Supreme Court believes that the working mechanisms within copyright adequately address First Amendment challenges.[62]

D. The Compelling Interest

The United States government has a strong motivation to maintain and strengthen copyright enforcement in the digital environment.[63] However, major entertainment industries, including the movie and music industries, which have vested interests, also have growing concerns that the current copyright protections are not sufficiently protecting their interests.[64]

The United States' most valued production of exports comes from the copyright industries.[65] Sales from videos, music, literature, and software exceed both the exports on agriculture and automobiles.[66] The copyright industries are vulnerable to technological advances. According to the Motion Picture Association of America ("MPAA"), they lose $2.5 billion a year in profits due to inadequate protections from rising copyright infringement technology.[67] As an economic

ON COPYRIGHT § 1.10[A] (1981)).

61. *See* Shipley, *supra* note 54, at 996-97 (citing MELVILLE NIMMER, NIMMER ON COPYRIGHT § 1.10[A] (1981)).

62. Shipley, *supra* note 54, at 998.

63. *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 330 (S.D.N.Y. 2000). Judge Kaplan recognizes that copyright infringement and the danger of piracy is much more prevalent in the electronic environment. *Id*.

64. *See* Rachel Simpson Shockley, Note, *The Digital Millennium Copyright Act and The First Amendment: Can They Co-Exist?*, 8 J. INTELL. PROP. L. 275, 277 (2001). *See also* Congressional Testimony of Digital Millennium Copyright Act by Mr. Steven j. Metalitz for the Motion Picture Association of America referring to the fact that physical piracy throughout the world costs the movie industry over $2 billion dollars each year in lost profits.

65. Rachel Simpson Shockley, Note, *The Digital Millennium Copyright Act and The First Amendment: Can They Co-Exist?*, 8 J. INTELL. PROP. L. 275, 277 (2001).

66. S. REP. NO. 105-190, at 10 (1998). The report further notes that "the copyright industries contribute more to the U.S. economy and employ more workers than any single manufacturing sector, including chemicals, industrial equipment, electronics, food processing, textiles and apparel, and aircraft." *Id*.

67. Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protection for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. 397, 405 (1999) (citing Bonnie J. K. Richardson, Congressional Testimony, May 21, 1998 *available at* 1998 WL 12760304 ¶ 7). CNN reports that according to U.S. Movie Industry, piracy costs $3.0 billion a year in lost sales. *Norwegian Cleared of DVD Piracy Charges*, CNN.COM, *at*

asset, the United States has a prime interest in protecting the copyright industries with copyright legislation. The United States legislature faces the challenge in this digital age to adequately protect its major economic asset through copyright legislation, while remaining within the confines of constitutional limitations.[68] What follows will examine if that task has been achieved in regards to the motion picture industry.

III. THE DMCA ANTI-CIRCUMVENTION PROVISIONS

In 1998 the United States joined the World Intellectual Property Organization ("WIPO") Copyright Treaty.[69] The DMCA ratified Article 11 of the WIPO Copyright Treaty in the United States, which required each member nation to enact legislation that would give a legal remedy to authors who wish to protect their rights with technological measures.[70]

Congress' major concern about the DMCA was whether or not the anti-circumvention provisions were inappropriate extensions of copyright impediments on fair use.[71] Those in support of ratifying the treaty via the DMCA believed that the measures were essential for protecting copyrighted works in the digital age.[72] The two most contentious provisions in the DMCA are sections 1201(a)(1) and 1201(a)(2).[73]

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http://www.cnn.com/virtual/editions/europe/2000/roof/change.pop/frameset.exclude.html (last visited on Jan. 19, 2004).

68. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431 (discussing importance and history of Congress to accommodate competing interests in copyright, especially with innovative technology).

69. T.R. Goldman, *Slackers Make History*, LEGAL TIMES, December 21, 1998, (noting the importance of passing the WIPO Treaty as a bill that will have long term effects on the world economy). WIPO is an organization run by the United Nations with its main objective "to promote the protection of intellectual property throughout the world." *See* http://wipo.int/about-wipo/en/index.html (last visited Nov. 25, 2003); United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1119 (N.D. Cal. 2002) (commenting WIPO Treaty was formed in part as response to international recognition of need for copyright holders to employ technological means in order to maintain the integrity of their works in digital age).

70. United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1119 (N.D.Cal 2002) (referring to fact that in the digital age authors are forced to implement technological security measures to protect their works from being exploited).

71. *Id.*

72. *Id. See* Copyright Issues and Digital Music on the Internet: Hearing before the Senate Judiciary Comm. Hearing on the Future of Digital Music: Is there an Upside to Downloading?, 2000 WL 964352 (statement of Sen. Orrin Hatch) (reiterating support for the DMCA because it provides a concrete legal environment that encourages copyright holders to disseminate their information without fear that the works will be infringed upon).

73. 17 U.S.C. § 1201 (2000). These sections of the Digital Millennium

Section 1201(a)(1) of the DMCA prohibits the circumvention of a technological measure protecting a copyrighted work.[74] The statute defines the act of circumventing a technological measure as to "descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."[75] Under the statute, one is effectively punished for possessing the technology that enables its user to decode encrypted copyrighted works. The act of decoding a copyright encryption is "the electronic equivalent of breaking into a locked room in order to obtain a copy of a book" and one is punished accordingly.[76]

The anti-trafficking provision, under 1201(a)(2) of the DMCA, protects against the distribution of the so called tools of digital piracy.[77] Potential criminal liability under the section exists when the individual is found to have been in possession of a device or technology that is designed to circumvent a protected work, has no other readily significant commercial value, and is marketed with the knowledge that it is used to circumvent copyright protection devices.[78]

The statute does not specifically prohibit a particular piece of technology; rather, Congress left the determination open to encompass all present and potential technologies. Accordingly, courts have been deciding those technologies that fall under the guise of the DMCA.[79] In *Universal City Studies, Inc. v. Remierdes, Inc.*,[80] the United States District Court for the Southern District of New York stated in dicta that the applicability of the statute is clear that it prohibits "any technology," and is not limited to conventional

Copyright Act ban the acts of circumventing access control restrictions and the trafficking and marketing of such devices, respectively. *Id.* at §1201(a)(1) and §1201(a)(2). *Elcom Ltd.*, 203 F. Supp. 2d at 1119.

74. 17 U.S.C § 1201(a)(1)(A) (2000).

75. § 1201(a)(3)(A).

76. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 316 (2000).

77. *See id.* at 327 (stating that the distribution of the anti-circumvention devices allows all who receive such a device to become a primary source of infringement).Trafficking in terms of the statute means that no one "shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof" that is primarily used for circumvention. *See* 17 U.S.C. § 1201(a)(2)(A).

78. *See* 17 U.S.C. § 1201 (a)(2), (a)(2)(A), (a)(2)(B), and (a)(2)(C).

79. *See generally* United States v. Elcom, Ltd., 203 F. Supp. 2d 1111 (2002) (deciding technology involved fell within realm of statute); *Reimerdes*, 111 F. Supp. 2d 294 (2000) (deciding computer code involved was encompassed by DMCA).

80. 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

devices.[81] The legislative objectives of the DMCA were, in part, to extend anti-circumvention regulations in the digital age and to protect copyrighted works that are disseminated by technological means.[82]

Enabling courts to determine the technological measures that the DMCA applies to demonstrates the broad nature of the statute.[83] The open-ended language of the DMCA may, however, be problematic because some courts have already extended the statute to cover technology that cannot effectively circumvent where the legislative intent was to punish those "keyholders" who possessed actual circumventing technology.[84]

IV. JOHANSEN, DECSS, AND UNIVERSAL STUDIOS, INC. V. REIMERDES[85]

As analog and similar technologies have been replaced by digital counterparts, it helps to take a closer look at some of the technological advancements in order to understand the full reach of the DMCA. Digital technology encodes audio and visual information so that it can then be formatted for viewing, transmitting, or editing.[86] Digital files can be held in different types of mediums that have developed to hold larger and larger quantities of data.[87] Digital technology that allows the information to be copied without any distortion in quality and the mediums allow the data to be readily transportable, in an almost instantaneous manner, with minor

81. *Id.* at 317 n.135 (stating DMCA was intended to protect "'*any technology*,' not simply black boxes") (emphasis provided).

82. S. REP. NO. 105-190 at 10-12 (1998).

83. Brian Bolinger, *Focusing on Infringement: Why Limitations on Decryption Technology Are Not The Solutions To Policing Copyright*, 52 CASE W. RES. L. REV. 1091, 1094 (2002).

84. *See Reimerdes*, 111 F. Supp. 2d at 318 (citing RealNetworks, Inc. v. Streambox, Inc., No. 99CV02070, 2000 WL 127311, at *9 (W.D. Wash. Jan. 18, 2000)) (stating that a measure generally complies with the statute will fall under it regardless of whether or not it is "strong means of protection"); *see also* Brian Bolinger, *Focusing on Infringement: Why Limitations on Decryption Technology Are Not The Solution To Policing Copyright*, 52 CASE W. RES. L. REV. 1091 (2002). Bolinger uses the analogy that a person who intends to access a scrambled digital message has two options: to receive permission to read the message or to decode it. *Id*. at 1091. If one decides to decipher the message without permission, one is per se in violation of the DMCA despite the fact that one does not intend to disseminate the material contained therein. *Id*. at 1091-92.

85. 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

86. Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protection for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. 397 (1999).

87. *Reimerdes*, 111 F. Supp. 2d at 307. The most recognized digital storage mediums are floppy disks; however, CD-ROMs, five-inch wide optical disks, store around 650 megabytes of data and the DVDs are capable of holding 4.7 gigabytes of data, which allows them to hold an entire full-length motion picture. *Id.*

expense.[88]

The advent of digital versatile discs ("DVDs") allows a full length film to be stored in a digital form.[89] In an attempt to dissuade dissemination of free copies of movies across the globe through the Internet, the motion picture companies played a role in developing and adopting the Content Scramble System ("CSS").[90] CSS, a technological measure taken to protect DVDs from being copied or used without authorization from the copyright owner,[91] works by encrypting the information on a DVD in such a manner that it can only be decrypted in an authorized DVD player or an authorized computer DVD driver.[92] With the authorized player or driver, one can descramble the encryption and play the DVD, but still can not copy it.[93] Numerous manufacturers are licensed to have the CSS encryption algorithms and as of the year 2000, over 4,000 films had been released in the DVD format.[94]

While the movie industry began producing DVDs with the CSS protecting their copyrighted interests, a 15-year old Norwegian, named Jon Johansen, determined how to play his favorite DVD on an unauthorized player.[95] Through reverse engineering a DVD player and receiving some help from individuals over the Internet, Johansen was able to figure out the CSS encryption algorithm from a licensed player.[96] Using the CSS decryption keys in the algorithm, Johansen

88. *Reimerdes*, 111 F. Supp. 2d at 307. *See also* Carolyn Adrepont, *Digital Millennium Copyright Act: Copyright Protection for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. 397, 400 (1999).

89. *Reimerdes*, 111 F. Supp. 2d at 304.

90. *Id.* at 309. CSS was presented by Matsushita Electric Industrial Co. and Toshiba Corp. in 1996, at which time the studios adopted it. *Id.*

91. *Id.*

92. *Id.* CSS encrypts the digital data that constitutes the motion picture according to an encryption algorithm. *Reimerdes*, 111 F. Supp. at 310. An algorithm is a set of instructions that are often in computer code, but could be any language. *Id.* at n. 59. CSS-protected DVDs are decrypted with the use of an appropriate algorithm that employs a set of keys that are on the DVD and the DVD player. *Reimerdes*, 111 F. Supp. 2d at 310. Having the appropriate keys allows for the DVD to be played in an unscrambled form. *Id.*

93. *Reimerdes*, 111 F. Supp. 2d at 309-10. The CSS decryption keys are licensed to manufacturers who then produce authorized DVD players and drivers. *Id.* There are strict requirements that manufacturers must follow to keep their license, which includes the prohibition of making a device that will also allow the DVD to be copied after decryption. *Reimerdes*, 111 F. Supp. 2d at 310.

94. *Reimerdes*, 111 F. Supp. 2d at 310. The motion picture companies put DVDs containing full-length movies on the market in 1997 after the CSS was put into place. *Id.*

95. *Reimerdes*, 111 F. Supp. 2d at 311. In his testimony, Jon Johansen claimed that he wanted to play the DVD on the Linux operating system. *Id.*

96. Sunde v. Johansen, (Oslo, Norway Jan. 7, 2003), *English translation at* http://www.eff.org/IP/Video/DeCSS_prosecutions/Johansen_DeCSS_case/2003010

then wrote the DeCSS program, which enabled him to view the DVD on an unauthorized player free from encryption or scrambling.[97] He posted a copy of DeCSS on his personal website.[98] Thereafter, the program was available on hundreds of websites over the Internet.[99]

The defendants in *Reimerdes* operate a web site that posted a downloadable version of the DeCSS program as well as hyperlinks to additional web sites that posted the program.[100] When the plaintiffs, eight major United States motion picture studios,[101] learned of the proliferation of the program over the Internet, they urged the defendants to take the program off of their web site.[102] The defendants refused and the United States Federal District Court of the Southern District of New York granted the plaintiffs a preliminary

9_johansen_decision.html (translated to English by the Electronic Frontier Foundation) (last visited on Nov. 10, 2003).

97. *Reimerdes*, 111 F. Supp. 2d at 311; David A. Petteys, *The Freedom to Link?: The Digital Millennium Copyright Act Implicates the First Amendment in Universal City Studios, Inc. v. Reimerdes*, 25 SEATTLE U. L. REV. 287, 295 (2001). DeCSS is a program that decrypts encrypted DVDs, allows them to be played back and allows for the files to be saved on a computer hard drive. David A. Petteys, *The Freedom to Link?: The Digital Millennium Copyright Act Implicates the First Amendment in Universal City Studios, Inc. v. Reimerdes*, 25 SEATTLE U. L. REV. 287, 295 (2001).

98. David A. Petteys, *The Freedom to Link?: The Digital Millennium Copyright Act Implicates the First Amendment in Universal City Studios, Inc. v. Reimerdes*, 25 SEATTLE U. L. REV. 287, 295 (2001).

99. Petteys, *supra* note 98 at 295. Johansen was acquitted by a Norwegian First Instance Court after being charged for his role in creating the DeCSS program. Sunde v. Johansen, (Oslo, Norway Jan. 7, 2003), *English translation at* http://www.eff.org/IP/Video/DeCSS_prosecutions/Johansen_DeCSS_case/20030109_johansen_decision.html (translated to English by the Electronic Frontier Foundation) (last visited on Nov. 10, 2003) (prosecutors urged for a 90-day jail term for Johanen). A Norwegian Appeals Court upheld the acquittal of the then 20-year old Johansen. *Norwegian Cleared of DVD Piracy Charges*, CNN.COM, *at* http://www.cnn.com/virtual/editions/europe/2000/roof/change.pop/frameset.exclude.html (last visited on Jan. 19, 2004). The acquittal became final when the Norwegian authorities decided not to take the appeal to the Norwegian Supreme Court. *Johansen Acquittal Final*, ELECTRONIC FRONTIER FOUNDATION, *at* http://www.cnn.com/virtual/editions/europe/2000/roof/change.pop/frameset.exclude.html (last visited on Jan. 19, 2004).

100. *Reimerdes*, 111 F. Supp. 2d at 325. Eric Corley, a well known computer hacker, and his company, defendant 2600 Enterprises, Inc., publish a magazine named 2600: The Hacker Quarterly, founded by Corley in 1984. *Id.* at 308. 2600: The Hacker Quarterly has published articles on topics including stealing internet domain names, accessing other people's e-mails, and breaking into the computer systems of businesses. *Id.* Corley and the other co-defendants began operating their web site at http://www.2600.com in 1995. *Id.*

101. *Reimerdes*, 111 F. Supp. 2d at 303. The plaintiffs each operate a business that produces and distributes copyrighted materials, including motion pictures, and the majority of the motion pictures distributed on DVD come from them. *Id.* at 308.

102. *Id.* at 312.

injunction to remove the program from the site.[103] The defendants removed the program, but continued to post hyperlinks to sites that still posted the program and encouraged visitors of their site to download as many copies of the program as they could in an act of "electronic civil disobedience."[104]

The plaintiffs soon thereafter filed an action against the defendants under the DMCA to enjoin them from both posting DeCSS and posting hyperlinks to the sites that continued to post the program.[105] The defendants argued that the DMCA should not reach their activities because it would give the copyright holder monopoly control over the work that bars any type of fair use or non-infringing use of the work, and they say that programs like DeCSS are necessary to circumvent the technological measures to use the work in ways that are long protected by our copyright law.[106] They also claimed that DeCSS as computer code is speech and should be granted the highest level of First Amendment protection.[107]

V. CODE: THE PROGRAMMER'S EXPRESSION

Programmers and legal scholars alike recognize that code is language.[108] Minimally, code consists of a set of instructions given to a computer or machine to make it execute a specific function.[109] Code makes everything from a calculator run to popular computer programs like Microsoft Word or Windows. The programmer translates his idea into code, which the machine recognizes allowing it to operate.[110]

Code is generally broken into two categories reflecting the amount

103. Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (granting motion for preliminary injunction).
104. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 312-13 (2000).
105. *Id.* at 303.
106. *Id.* at 303-04.
107. *Reimerdes*, 111 F. Supp. 2d at 304. The defendant's other arguments included the following: that their use was an exception to the DMCA under section 1201(g)(4) for use as encryption research; that their action is exempt for security testing under section 1201(j); that the injunctive relief against dissemination of DeCSS is barred by the prior restraint doctrine; and other constitutional arguments (overbreadth and overly vague). Eric W. Young, *Universal City Studios, Inc. v. Reimerdes: Promoting the Progress of Science and the Useful Arts by Demoting the Progress of Science and the Useful Arts?*, Note, 28 N. KY. L. REV. 847, 859 (2001).
108. Ryan Christopher Fox, *Old Law and New Technology: The Problem of Computer Code and the First Amendment*, 49 UCLA L. REV. 871, 877-79 (2002).
109. *Id.* at 876.
110. *Reimerdes*, 111 F. Supp. 2d at 304.

of "translation" the programmer puts into it.[111] The classification of code reflects the amount of ease that a human can comprehend it.[112] The classifications are known as source code and object code.[113]

Code that is in a specific programming language is generally referred to as source code.[114] There are several types of programming languages, which may be grouped together because they are either known by the programmer or written using a text editor or a visual programming tool.[115] Unbeknownst to the novice computer user is that most programmers can actually read source code and many take pride in the style that they incorporate.[116]

Object code is characterized as pure instructional data.[117] Object is rarely considered to be "designed" by the programmer.[118] Generally, object code is comprised of a sequence of 0's and 1's and is usually read by a specific computer rather than a programmer.[119] Experienced programmers can write object code, but generally programmers use software known as a "compiler" to put the code together in the same manner as they would from the source code.[120] Many computer programs must be written in object code.[121] While object code does not resemble English, French, or German it still falls into the logical progression that starts with the programmer's expressive intent and ends with the code.

In *Universal City Studios, Inc. v. Corley,*[122] the Second Circuit analyzed the comparison between code and a basic set of instructions.[123] A programmer may glean information from the code and possibly use that information to improve his own skills.[124] Furthermore, the programmer can discuss the content of the code with others demonstrating the expression contained in it.[125] Even if the code were meant to direct a computer, to not give it First

111. Fox, *supra* note 108, at 876.
112. Fox, *supra* note 108, at 876.
113. Fox, *supra* note 108, at 876.
114. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 306 (S.D.N.Y. 2000).
115. Fox, *supra* note 108, at 876.
116. Fox, *supra* note 108, at 876.
117. Fox, *supra* note 108, at 880.
118. Fox, *supra* note 108, at 880.
119. *Reimerdes*, 111 F. Supp. 2d at 306.
120. *Reimerdes*, 111 F. Supp. 2d at 306 n. 17.
121. *Id.* at 305-06.
122. 273 F.3d 429 (2d Cir. 2001) (aff'g the *Reimerdes* decision).
123. *Id.* at 447-48.
124. *Id.* at 448.
125. *Id.*

Amendment consideration would reverse years of precedent.[126]

The Federal District Court of the Northern District of California, in *Elcom*, agreed with the *Reimerdes* Court's explanation that there is a continuum between the expressions of the programmer, to source codes, to object codes.[127] While the expression written by the programmer becomes more and more attenuated as it moves along the continuum, and it takes higher levels of expertise to understand the code, it is still the independent expression of the ideas of the programmer.[128] It is settled law that any restriction on code by the government must be examined under the auspices of the First Amendment.[129]

In order to consider First Amendment challenges, a court must first find a restriction placed on a type of expression.[130] Johansen's code in the DeCSS program requires First Amendment consideration because it is his expression.[131] It is the restrictions imposed by the DMCA on Johansen's expression and the others who distribute it that calls for a First Amendment analysis.

VII. FIRST AMENDMENT CHALLENGES ON THE DECSS PROGRAM

A. Protected Speech

Computer viruses exemplify code that falls into categories of unprotected speech.[132] The Michelangelo virus of the early 1990s demonstrates the harm that a computer virus may cause.[133] The Michelangelo virus had the ability to lie dormant within a computer hard drive for days throughout the year and then on a specified date would begin rapidly erasing all stored data when the computer was turned on.[134]

126. *Corley*, 273 F.3d at 446; *see* Junger v. Daley, 209 F.3d 481, 484 (6th Cir. 2000).
127. United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1126-27 (N.D. Cal. 2002); *Reimerdes*, 111 F. Supp. 2d at 326-27.
128. *Reimerdes*, 111 F. Supp. 2d at 326-27.
129. *Id.*
130. *E.g.* Massachusetts v. Oaks, 491 U.S. 576, 590-92 (1989) (Brennen, J. dissenting) (expressing framework for First Amendment analysis clearly begins with whether or not the statute in question restricts expression protected by First Amendment).
131. *Corley*, 273 F.3d at 445-46 (stating communication does not lose its "speech" quality when translated into computer code).
132. Fox, *supra* note 108, at 882-83.
133. Fox, *supra* note 108, at 882-83.
134. Fox, *supra* note 108, at 882-83

First Amendment analysis starts by considering whether there is an expression and then whether the expression is of a protected form.[135] In the context of unprotected code, consider the trafficking of a computer floppy disk that contained a program assisting in carrying out illegal gambling.[136] The Ninth Circuit found that when the speech element is an "integral part of the crime," then there is no defense under the First Amendment.[137]

The DeCSS program effectively circumvents the CSS protections on DVDs, creating a per se violation of the DMCA. The *Corley* Court affirmed *Reimerdes*, and held that the DMCA's regulation of DeCSS was a content-neutral regulation of protected speech because it regulated the non-speech elements of the software code.[138] While the court decided that the DeCSS code was worthy of a First Amendment analysis, they did not hold that the DMCA was unconstitutional.

If any court determines that the First Amendment does not protect the speech in question, then the analysis ends. In *Corley*, the DeCSS program is characterized as a burglary tool and the court alludes to an argument for why the DeCSS expression could fall into a category of an unprotected form of expression.[139] While Judge Newman acknowledged that DeCSS allows for unlawful access to property[140] he did not argue as follows: copyright infringement is unlawful; DeCSS may be used to assist infringing on a copyright holder's rights by breaking a copyright protection; therefore, the use of the expression contained in DeCSS forwards the immediate commission of a crime and therefore, should not be afforded protection under the First Amendment.[141] Judge Newman focused on the scope of the protection that the speech components of DeCSS will receive and concluded that the nature of the code's ability to facilitate an unlawful act—copyright infringement—forms and limits the nature of the protection it will receive under the First Amendment, rather

135. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 383-84 (1992) (holding permissible to ban all forms of obscenity, but First Amendment does not permit banning of certain aspects of obscenity due to particular view point that is not connected to reasons why obscenity is banned in first place).

136. United States v. Mendelsohn, 896 F.2d 1183, 1184 (9th Cir. 1990); Fox, *supra* note 108, at 883.

137. United States v. Mendelsohn, 896 F.2d 1183, 1185-86 (9th Cir. 1990).

138. Universal City Studios, Inc. v. Corley, 274 F.3d 429, 454-55 (2001).

139. *Id* at 452-53.

140. *Id* at 453.

141. Schenck v. United States, 249 U.S. 47, 51-53 (1919) (giving example shouting "fire" in crowded theatre and causing panic is not protected by First Amendment).

than removing it from the protected realm altogether.[142]

When Johansen testified in *Reimerdes*, he stated that the purpose for producing the DeCSS program was to view a movie that he had rightfully purchased in a manner of his liking.[143] In Norway, Johansen was acquitted of criminal charges for developing the program, placing it on the Internet, and using it to view a copy of a DVD.[144] He was acquitted of those charges in January of 2003.[145] The decision of the Norwegian court was primarily based on their findings that Johansen was viewing something that he had legally obtained in the manner that he so chose.[146] This analysis may explain why Judge Newman and others did not categorize DeCSS as speech that incites immediate lawlessness.

In a discussion on the First Amendment implications of the DMCA on circumvention software, one is forced to conclude that the DeCSS and other anti-circumvention programs deserve First Amendment protection.[147] The question then becomes what level of scrutiny will be given to restricting the protected expression.

B. Content-based v. Content-neutral

Owners of the *2600* web site[148] advocate that DeCSS not only represents constitutionally protected expression, but that the DMCA improperly prevents them from communicating it.[149] The fact that protected expression is present does not place that expression beyond

142. *Corley*, 273 F.3d at 454-55.

143. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 320 (2000) (adding court does not credit testimony of Johansen and believed he created the program as an end unto itself).

144. Sundre v. Johansen, (Oslo, Norway Jan. 7, 2003), *English translation at* http://www.eff.org/IP/Video/DeCSS_prosecutions/Johansen_DeCSS_case/20030109_johansen_decision.html (translated to English by the Electronic Frontier Foundation) (last visited Nov. 10, 2003).

145. *Id.*

146. Sundre v. Johansen, (Oslo, Norway Jan. 7, 2003), *English translation at* http://www.eff.org/IP/Video/DeCSS_prosecutions/Johansen_DeCSS_case/20030109_johansen_decision.html (translated to English by the Electronic Frontier Foundation) (last visited Nov. 10, 2003). The Johansen Norway case was primarily decided on arguments analogous to fair use arguments rather than any type of restriction on freedom of expression. *Id.* It may be argued that the DMCA anti-circumvention provisions restrict fair use and disrupt the balance between the First Amendment and copyright protections, but they aren't the focus of this Note.

147. *See, e.g.*, United States v. Elcom, 203 F. Supp. 2d 1111, 1126 (2002); Universal City Studios v. Corley, 273 F.3d 429, 445-46 (2001); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 327 (2000).

148. http://www.2600.com.

149. *Reimerdes*, 111 F. Supp. 2d at 327.

government regulation.[150] Our discussion narrows to the scope of the First Amendment protection and the scrutiny the courts should apply to the given restriction.

The law permits content-based restrictions only if they serve a compelling state interest by the least restrictive means possible, because the government does not have the power to restrict speech based on its message, its ideas, or its subject matter.[151] Content-neutral restrictions receive less scrutiny because the restriction is not motivated by the message.[152] If it is the message in Johansen's code that Congress restricts with the DMCA, it is a content-based restriction and should have to meet the levels of strict scrutiny.

Content-neutral regulations often come into play when speech and non-speech elements co-exist in the regulated arena.[153] The leading case law holds that testing content neutrality is based on weighing speech element regulations with non-speech elements.[154] *United States v. O'Brien*[155] held that a statute that prohibited the burning of a draft card did not violate the First Amendment because it regulated the non-speech element of the protest and the government interest in prohibiting the non-speech element outweighed the incidental effect on the speech elements.[156] Thus the *O'Brien* Court determined that when there are speech and non-speech elements that are being governed, the regulation must stand up to a balancing test.[157] The regulation must further an important governmental interest, be "unrelated to the suppression of free expression," and "the incidental restriction on alleged First Amendment freedoms" must be "no greater than is essential to the furtherance" of the government interest.[158]

Judge Kaplan, in *Reimerdes*, applies intermediate scrutiny to the DMCA, finding that regulating the DeCSS program in this instance was content-neutral, noting the dichotomy between the speech aspect

150. *Id.*
151. *Id.* at 328; *but see Reimerdes*, 111 F. Supp. 2d at 329-30 (stating incidentally restricting programmer's ideas or expression is permissible if there is functional aspect is being regulated).
152. *Reimerdes*, 111 F. Supp. 2d at 327-28.
153. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (expressing Court's opinion when the government has compelling interest in regulation and speech has non-speech components it may survive First Amendment challenge). The *O'Brien* Court held that burning a draft card was not protected by the First Amendment. *Id*.
154. *Id* at 377.
155. 391 U.S. 367 (1968).
156. *O'Brien*, 391 U.S. at 377.
157. *See id.* at 376-77.
158. *Id.* at 377.

of the computer code and its functional counterpart.[159] While Judge Kaplan noted that speech may not be regulated due to the government's agreement or disagreement with the message it conveys,[160] he reasoned that the expression in DeCSS is not being regulated and that the code in DeCSS does more than express the programmer's ideas.[161] Judge Kaplan concludes that there are very distinctive functional aspects of the code, which is highly distinctive to the programmer's expressions.[162] By having a distinctive functional element, the code has a non-speech element.[163]

In *Reimerdes*, Judge Kaplan found a non-speech element in the DeCSS program by analogizing the code with the expressive conduct found in *O'Brien*.[164] However, a distinction exists between the conduct, which may or may not be expressive, and the functional element of expression.[165] In *O'Brien*, there was a government regulation on the conduct associated with burning a draft card, which is unequivocally different from regulating the DeCSS code because the *O'Brien* Court states that the conduct in burning a draft card may or may not have a speech aspect, allowing for intermediate scrutiny to be applied.[166] Here, the analogy falls apart because the code, even if one may look just to the functional aspect, is always going to be an expression of the programmer's thoughts, which is protected as content.

The *Reimerdes* analysis directs the court toward the vital conclusion that Congress enacted the DMCA anti-circumvention provisions not to stop any particular content of speech, but to stop the functions of such speech—the act of the circumvention.[167] Thus the court held that the DMCA, as applied, is a content-neutral regulation on expression.[168] Judge Whyte's decision in *Elcom*[169] quotes Judge Kaplan, saying "[t]he reason that Congress enacted the anti-trafficking provision of the DMCA had nothing to do with

159. *Reimerdes*, 111 F. Supp. 2d at 329.
160. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
161. *Reimerdes*, 111 F. Supp. 2d at 329.
162. *Id.* Judge Kaplan states that DeCSS is a series of instructions that make the computer carry out a task, which is then functional and non-speech. *Id.*
163. *Reimerdes*, 111 F. Supp. 2d at 329.
164. *Id* at 327-28.
165. Lora Saltarelli, *The Digital Millennium Copyright Act and the Functionality Fallacy*, 77 NOTRE DAME L. REV. 1647, 1665-66 (2002) (stating "[r]egulating the functional aspect of source code is not analogous to regulating conduct because conduct may or may not be expressive").
166. *O'Brien*, 391 U.S. at 376-77.
167. Fox, *supra* note 108, at 894-95.
168. Fox, *supra* note 108, at 894-95.
169. United States v. Elcom, 203 F. Supp. 2d 1111.

suppressing particular ideas of computer programmers and everything to do with functionality."[170]

Judge Newman, in *Corley*,[171] made a similar finding to affirm Judge Kaplan's decision, but his argument was slightly different. Judge Newman first acknowledges the appellee's argument that associates a computer code to being similar to that of a blue print to an engineer and a recipe to a cook, but then made a distinction: a blue print and a recipe are unable to provide a functional result without a human taking action on them.[172] The computer code needs only be entered into the computer and the computer can then carry out the function or tasks that the code prescribes, with much less attenuation despite the appellants argument that without human intervention, "code does not function, it engages in no conduct. It is as passive as a cake recipe."[173]

C. Separating Function of the Expression from the Expression Itself

Speech is expressive and functional simultaneously.[174] There would be no purpose in expressing oneself if it were not to achieve a specific function.[175] Expression in any form, any manner, for any reason, embodies its intent. The expressional intent cannot be differentiated from the "function" spoken of by Judge Kaplan.[176]

If speech carried no intent or served no function, there would be no need for freedom of speech or First Amendment protections.[177] If the

170. *Id.* at 1128.
171. *Corley*, 273 F.3d at 451.
172. *Id.*
173. *Id.* at 451 n.27 (quoting Brief of Amici Curiae Dr. Harold Abelson et al.).
174. Shockley, *supra* note 65, at 293; *but see* Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 585-86 (2002) (stating functionality and expression are not mutually exclusive).
175. Shockley, *supra* note 65, at 293 (concluding one cannot separate function from expression). Shockley comes to her conclusion by examining examples of certain functions of other kinds of expression, such as literature and persuasive speech, and seeing what impact would be created by extracting the function from it. *Id.*
176. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 310 n. 7 (1984) (Marshall, J. dissenting). In *Clark*, demonstrators used sleep-ins on a park ground to express their opposition to park policies. *Id.* at 289. The protestors slept in their tents symbolically to address issues of public importance. *Id.* at 302. Marshall argued that not only is symbolic expression of sleeping in the tents protected by the First Amendment, but that there is no difference between the function that is derived from sleeping and the symbolic expression that follows. *Id.* at 310 n.7.
177. *See* Kime v. U.S., 459 U.S. 949, 950-51 (1982) (Brennan, J., dissenting from denial of cert.). The appellants were convicted of violating a U.S. statute for burning the American flag. *Id.* at 949. Justice Brennan made the correlation between the necessary intent required to violate the statute and the intent of their

government is allowed to extract the functional element of speech from the speech itself and regulate it with less First Amendment scrutiny, then all government regulations on speech could be considered content-neutral, according to Judge Kaplan's reasoning. Due to the fact that an expressional intent behind speech exists and a functional element so entwined that American citizens have been blessed with protections against government regulations on expression.

Expression holds the power of function and without the functional element, the expression is evaporated. The following questions remain: how can government regulate the functional aspect of speech without regulating the content of that speech at the same time? How can government regulation focus merely on the function of a computer programmer's expression, regardless of the expression itself?[178] If Congress has disagreed with the functional element of the DeCSS program and has decided to regulate it, then they are regulating the program based on the expression of the programmer. The function of the programmer's expression is the content of that expression and this is what Congress disagrees with and has regulated.

If the DMCA regulates the content of the programmer's expression, then strict scrutiny should be applied in the analysis of the statute in First Amendment challenges. We have established that there is a compelling government interest in protecting the copyrighted works through technological protections; the government would then have to show that the law is narrowly tailored to fit that interest. It is rare that a statute will stand up to a strict scrutiny analysis.[179]

VIII. CONCLUSION

When considering whether or not regulating DeCSS through the DMCA violates the First Amendment, one must consider the validity of the property rights in question. The crux of the First Amendment

expression while burning the flag. *Id.* at 950-51. Justice Brennan protested the Court and the lower court's finding that expressional content could be absent (taking away First Amendment scrutiny) and the requisite intent to effectuate the expression was found to be present (allowing Appellant to have necessary intent to be in violation of statute) at the same time. *Id.*

178. *But see* Junger v. Daley, 209 F.3d 481, 484 (2000). "The issue of whether or not the First Amendment protects encryption source code is a difficult one because source code has both an expressive feature and a functional feature." *Id.*

179. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (stating strict scrutiny is "strict in theory and fatal in fact").

argument falls on the line that is formed with the rights of the property holder on one side and the right to free expression on the other. The rights of the property owners, the copyright holders in this case, are just as valid as the protections offered by the First Amendment.

Property owners possess a right to prohibit access to their property. If one owns a home they can put a lock on the door and if one owns valuables they may put them in a safe. The *Corley* Court notes that CSS works for DVDs and a copyright holder in the same way that a safe works for the property owner.[180] The court continues to analogize DeCSS, to a skeleton key that a burglar uses to bypass a lock on a house and a combination obtained by a thief to get into a safe.[181]

The compelling government interest holds a major influence on the court decisions regarding the DMCA and the First Amendment. Many who challenge the DMCA disregard the necessity to protect the rights of property holders. Those who advocate for the status quo as dictated by Congress through the DMCA disregard some of the fundamental rights that the United States was founded upon. At this point the courts have concluded that Congress will have the last word in this American debate as First Amendment challenges to prosecuting anti-circumvention technology via the DMCA have continued to fail.

As we have seen in the past with video cassettes and may see in the near future with the compact discs and the recording industry, any technological measure that is implemented to protect a copyrighted work will eventually be broken or circumvented. The tension that is created between the advancing technologies of designing technological protections and advancement in circumvention technologies may create the next major medium for marketing copyrighted materials.

In the past decades the video cassette technology created a new market for film makers and recently the *Sony* case made news again as the Supreme Court refused to hear an appeal from an Internet file-sharing service, whose technology may also be used by others to infringe on copyrighted material.[182] The was asked to revisit the

180. *Corley*, 273 F.3d at 452-53.

181. *Id.*

182. Lyle Denniston, *Court Refuses Aimster Case Plea Was 1st Appeal Of Net Music Ruling to Reach Justices*, BOSTON GLOBE, Jan. 13, 2004, at F1. Aimster, who has now been renamed Madster, appealed federal court ruling ending their distribution of free software to millions who could then share music files with each other. *Id.* While Aimster did not infringe on copyright protections themselves,

doctrines that were set forth in the *Sony* decision.[183] It is only logical to assume that the music industry and later the film industry will stop fighting the constantly advancing technologies and acquiesce to some type of compromise that will lead to greater, unforeseen, profits. Without question new technological advancements will continue to change the intellectual property landscape and with these changes the industries success may lie with accepting the changes rather fighting them.

they may have facilitated others to receive free unauthorized copies of the music files. *Id*. The file sharing service may be analogized to the video cassette recorders made by Sony that allowed others to make unauthorized copies of copyrighted television programs.

183. Lyle Denniston, *Court Refuses Aimster Case Plea Was 1st Appeal Of Net Music Ruling to Reach Justices*, BOSTON GLOBE, Jan. 13, 2004, at F1.