Order Code RL31827

CRS Report for Congress

"Digital Rights" and Fair Use in Copyright Law

March 24, 2003

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Distributed by Penny Hill Press

http://pennyhill.com

Prepared for Members and Committees of Congress

Congressional Research Service

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Summary

Consumers have never been as deeply involved in the nuances of copyright law and as directly impacted by copyright infringement litigation as they are today. As a consequence of litigation, popular means of access to digital entertainment media may be foreclosed or dramatically altered. While the public audience for digital "consumption" of entertainment grows, the law and technology increasingly focus on digital means to protect copyright interests because of the great risk of piracy inherent in digital media exchanged over the Internet. Consumers have reacted vociferously to new limitations imposed or proposed by new technological constraints.

Many content users argue that new limitations on access to copyrighted materials impair their right to "fair use." But the contours of fair use as personal, noncommercial use by end users, *i.e.,* consumers, in a digital environment and over the Internet have not been fully established or articulated by the courts. Arguably, this process is in its early stages.

This report examines judicial case law which has considered the doctrine of fair use in relation to the First Amendment, the Digital Millennium Copyright Act, and as a means of protecting private, noncommercial use of digital music and film by consumers. It concludes that when the potential to infringe is great, as it almost always will be in a digital environment, the courts have not been willing to expand fair use to encompass subsidiary uses such as time shifting, space shifting, or personal noncommercial use.

While many consumer advocates may wish to broaden the contours of fair use to permit free exchange of digital entertainment media via the Internet in a consumer context, the courts have not done so. In cases to date, courts appear to be unwilling to employ the doctrine to trump the copyright holder's interest in exclusive control of protected work.

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"Digital Rights" and Fair Use in Copyright Law

Introduction. Consumers have never been as deeply involved in the nuances of copyright law as they are today. The Internet and digital technology have created vast new possibilities for and methods of distribution of popular entertainment such as music and film. The public's current distribution and exchange practices of copyrighted material on the Internet, which may not be in compliance with the rights of copyright holders, have nonetheless fueled consumer expectations. And, perhaps more than at any other time, infringement claims are bringing the copyright holder and the end user into closer proximity. Suits against several peer-to-peer file sharing services, such as Napster, for vicarious and contributory copyright infringement may have a direct impact on the global Internet community.

Copyright law is ultimately a commercial law; it protects the creator's right to financially exploit his or her intellectual property. To some extent, traditional methods of copyright enforcement pitted the holder against a "middleman." Illegal replication and distribution were more centralized in the activities of a "bootlegger" or the innocent infringer. Digital technology has essentially cut out the middleman, and means of curtailing infringement are more visible and of greater interest to the public. Once unprotected material is transmitted over the Internet then, as a practical matter, the copyright holder can no longer attempt to effectively curb infringement by going after individual infringing distributors. Hence, both the law and copyright holders view prevention as the key to copyright protection. Encryption and other technological measures utilized to protect digital media are referred to as digital rights management (DRM).

But, while law and technology increasingly focus on DRM to prevent piracy, the public's experience to date with acquiring and manipulating digital media has created broad new expectations for continued access to desirable entertainment content. Copyright holders' attempts to limit unauthorized distribution through encryption and other forms of DRM, and new laws that support digital protection, have arguably upset those expectations. Consumers have reacted vociferously to new limitations imposed or proposed by new technological constraints.

Many content users argue that new limitations on access to copyrighted materials impair their right to "fair use." But the contours of fair use as personal, noncommercial use by end users, *i.e.,* consumers, in a digital environment have not been fully established or articulated by the courts. Arguably, this process is in its early stages.

This report examines the concept of fair use as interpreted by the courts in a very limited sense: what does it mean to the public with regard to its access to music

and film in a private, noncommercial *but* digital environment? And how do copyright protection laws like the Digital Millennium Copyright Act affect it?

Background. The Copyright Clause of the Constitution, Art. I, § 8, cl. 8 authorizes Congress "To 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." The grant of copyright bestows a monopoly on its holder to control various uses of the protected property, including reproduction, distribution, public performance, display, and the preparation of derivative works.[1]

The Copyright Act has many statutory limitations to the copyright monopoly, of which fair use is but one. They include the "first sale doctrine" which limits the copyright owner's exclusive control over distribution.[2] "First sale" permits the owner of a particular copy or phonorecord to sell or dispose of the copy without the copyright owner's permission. But it expressly disallows disposal by for-profit rental, leasing, or lending of sound recordings and computer programs. Other limitations include allowing certain reproductions by libraries and archives;[3] limited performances and displays for educational purposes or in the course of services at a place of worship; and certain performances for non-profit, charitable causes.[4]

Fair use has its origins as "an equitable rule of reason" derived from English common law.[5] It is a judicially-articulated concept that creates an exemption to the monopoly rights of the copyright holder. Many attribute its first prominent appearance in U.S. law to be Justice Story's decision in *Folsom v. Marsh,*[6] in which a two-volume abridgement of the writings and letters of George Washington was found to borrow too heavily from another author's twelve-volume compilation.[7] The case is premised on the rule that "a fair and bona fide abridgment of an original work is not a piracy."[8] Although the opinion holds that the abridgement in question was infringing, it sets forth the factors which distinguish a "fair and bona fide abridgment" from an infringing one. These factors characterize the essence of fair use.

Fair use remained exclusively judge-made doctrine until the 1976 Copyright Act, when Congress codified it at 17 U.S.C. § 107. The statute does not purport to provide an all inclusive definition; rather, it lays out its parameters. Specifically, § 107 provides that it will not be deemed infringement when copyrighted material is

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[1]17 U.S.C. § 106. Different forms of media enjoy different elements of copyright protection.

[2]17 U.S.C. § 109.

[3]17 U.S.C. § 108.

[4]17 U.S.C. § 110.

[5]Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).

[6]9 F. Cas. 342 (D. Mass. 1841).

[7]WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed. 1995).

[8]9 F. Cas. at 345.

used "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research":

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include–
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The purposes listed, however, are illustrative, not comprehensive.[9] And, because fair use is an "equitable rule," the courts will consider the public interest in and the goals of copyright.[10] A court's conclusion that a use is "fair" is a mixture of law and fact in any specific context.

Fair Use and the First Amendment. Fair use is traditionally referred to as an "affirmative defense" to an allegation of copyright infringement. Several recent cases raise the question whether copyright laws, including copyright protection laws such as the anticircumvention provisions of the Digital Millennium Copyright Act, must pass judicial scrutiny under the free speech requirements of the First Amendment. Although, there is a broad societal *right* to limited use of material that is otherwise protected by copyright, the doctrine is raised as a *defense* when the use is challenged. The burden of proof falls on the party claiming fair use.[11]

The relationship between fair use and the First Amendment was examined recently by the Supreme Court in *Eldred v. Ashcroft.*[12] This decision upheld the constitutionality of the Sony Bono Copyright Term Extension Act which added twenty years to the term of copyright.[13] The Court rejected the argument that a law extending the term of copyright is in fact a regulation of speech which violates the First Amendment. The Court reasoned that because the Copyright Clause and the First Amendment were adopted in close proximity, the Framers viewed copyright's limited monopoly as being compatible with free speech principles. Copyright itself is "an engine of free expression" because it supplies the economic incentive to create and disseminate ideas.

There will rarely be a direct conflict between the copyright monopoly and the First Amendment because the Constitution's copyright scheme "incorporates its own

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[9]Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994)(Congress intended that courts continue the common law tradition of fair use adjudication and section 107 permits and requires courts to avoid rigid application of the copyright statute, when on occasion, it would stifle the very creativity which that law is designed to foster.)

[10]Sega Enterprises Ltd. v. Accolade, 977 F.2d 1510 (9th Cir. 1993).

[11]American Geophysical Union v. Texaco, 60 F.3d 913 (2d Cir. 1994).

[12]123 S. Ct. 769 (2003).

[13]P.L.105-298.

speech-protective purposes and safeguards."[14] These safeguards are the "idea/expression dichotomy" and fair use. The former insures that ideas are *not* copyrightable, only the creative expression of them.[15] The latter ensures that the public may use – not only the facts and ideas encompassed within a copyrighted work – but, within the limits of fair use, the creative expression as well. But, the First Amendment does not protect the public right to use the *creative* expression of others.

Fair Use, New Technology, and the Internet. The history of copyright law is the history of law adjusting to new technology. As copyright law has adjusted, so has the doctrine of fair use. Over the years, both Congress and the courts have addressed the introduction of piano rolls, computers and software, sound recordings, and digital transmissions, to name only a few subjects. With respect to the Internet, courts have considered, among other things, copying, browsing, framing, linking, electronic bulletin boards, and streaming.[16] Each activity is assessed, in context, to determine whether an infringement has occurred. When the legitimacy of an unauthorized use is examined, fair use may be raised as a defense.

Two examples of the fair use doctrine being successfully invoked with respect to newer technologies are reverse engineering and the reproduction and display of a copyrighted thumbnail image on the Internet. In the early 1990s, several courts of appeals held that the disassembly of a copyrighted computer program through reverse engineering in order to gain an understanding of the unprotected functional elements of a computer program is a fair use.[17] The courts separate a computer program into manageable components to filter unprotectible aspects, *e.g.*, expression dictated by external factors such as a computer's mechanical specifications, from protectible creative expression. Because the Copyright Act permits someone in lawful possession to undertake the steps necessary to understand a work's ideas, processes, and methods of operation, reverse engineering of object code to discern unprotectible ideas is a fair use.[18]

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[14]123 S. Ct. at 788.

[15]17 U.S.C. § 102(b) provides that "[I]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

[16]For more detail on fair use on the Internet, *see* CRS Report RL31423, *Fair Use on the Internet*, by Christopher Jennings (May 21, 2002).

[17]Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1993).

[18]Atari Games Corp. v. Nintendo, 975 F.2d 832, 843 (Fed. Cir. 1992): "[T]he legislative history of section 107 suggests that courts should adapt the fair use exception to accommodate new technological innovations." *See also* Bowers v. Baystate Technologies, Inc., 2003 U.S. App. LEXIS 1423 (Fed. Cir. 2003); Sony Computer Entertainment v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000).

Likewise, in *Kelly v. Arriba Soft Corp.*, the court applied copyright law to "the vast world of the internet and internet search engines." [19] The court considered the importation and display of a copyrighted photograph into Arriba's search engine data base. The photograph was displayed both as a large image and as a small, low-resolution "thumbnail" image. Employing a traditional fair use analysis, the court concluded that the creation and use of thumbnails in the search engine is a fair use, but that the display of the larger image was a violation of the copyright holder's exclusive right to display his work.

Congress does not rely solely on fair use to reconcile copyright law with new technology. In the sphere of music alone, prior to the 1976 Copyright Act, Congress enacted the Sound Recording Act of 1971.[20] Since 1976, the Act has been amended by the Record Rental Amendment of 1984;[21] the Audio Home Recording Act of 1992;[22] the Digital Performance Right in Sound Recordings Act of 1995;[23] and, the Digital Millennium Copyright Act of 1998, discussed below. In many instances, these laws were intended to offer copyright holders greater protection against the threats of technology-driven and technology-enabled piracy.

Fair Use, Digital Transmission, and Digital Rights Management. In 1998, Congress passed the Digital Millennium Copyright Act (DMCA).[24] The Act is wide-reaching and addresses many copyright-related issues. Title I implements two 1996 World Intellectual Property Organization (WIPO) treaties, both of which contain language obligating member states to prevent circumvention of technological measures designed to protect copyrighted works and to prevent tampering with the integrity of copyright management information.[25] To this end, the Act adds a new chapter 12 to the U.S. Copyright Act, 17 U.S.C. §§ 1201 - 1205, entitled "Copyright Protection and Management Systems." Section 1201(a)(1) prohibits any person from circumventing a technological measure that effectively controls access to a copyrighted work, while the anti-trafficking provisions of §1201(a)(2) and (b)(1) cover those who traffic in technologies designed to circumvent access control devices protecting copyrighted material from unauthorized copying or use. Civil remedies and criminal penalties are established.[26]

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[19] 280 F.3d 934, 237 (9th Cir. 2002).

[20] P.L. 92-140 (including sound recordings among works eligible for copyright protection).

[21] P.L. 98-450 (amending the "first sale" doctrine, 107 U.S.C. § 109, to prohibit rental of phonorecords to the public for commercial advantage).

[22] P.L. 102-563 (implementing a royalty payment system and a serial copyright management system for consumer electronics that copy sound recordings).

[23] P.L. 104-39 (granting public performance rights for digital transmission of a sound recording).

[24] P.L. 105-304.

[25] The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary, 3 (Dec. 1998).

[26] 17 U.S.C. §§ 1203, 1204.

Since enactment, the copyright protection and management provisions, *i.e.,* the "anticircumvention" provisions, have proven controversial. While proponents assert that these provisions are essential to protect against massive piracy of copyrighted works, critics argue that the DMCA has a chilling effect on rights of free speech and that its implementation will thwart the public's right of legitimate access to copyrighted works in order to exercise fair use. To date, however, the courts have not been receptive to these challenges, and those that have considered the anticircumvention provisions of the DMCA, including its potential effect on fair use, have upheld it.

Access versus Fair Use. The DMCA prohibits unauthorized *circumvention* of measures which control *access* to a protected work, which is activity separate and apart from copyright infringement. Although fair use is *not* a defense to prohibited circumvention, the Act expressly states that fair use as a defense to copyright infringement is not affected by it.[27] Nevertheless, there is a relationship between access to and utilization of a protected work which is not clearly addressed under the DMCA.[28] Defendants who have been charged with violating § 1201 have *not* been successful in asserting that access via unauthorized circumvention is necessary to permit the exercise of fair use. In reaching this conclusion, the courts have considered the relationship between access and fair use.

In *Universal Studios v. Corley,*[29] plaintiff motion picture studios sued defendant Eric Corley and others for violation of 17 U.S.C. § 1201.[30] The studios distributed motion pictures for home use on digital versatile discs (DVD s) and protected them from being copied using an encryption system called the Content Scramble System (CSS). The encrypted DVDs could only be viewed – not copied – on players and computer drives equipped with the licensed decryption technology.

In September 1999, a fifteen-year-old Norwegian, Jon Johansen, and two other individuals reverse engineered a licensed DVD player and discovered the CSS encryption algorithm and keys. Based on this information, they created DeCSS, a program capable of decrypting or "ripping" encrypted DVDs. Defendants posted the DeCSS code on their website. The studios filed suit to enjoin the defendants from

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[27]17 U.S.C. § 1201(c) provides in relevant part: "[N]othing in this section [1201] shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."

[28]The legislative history to the DMCA indicates that Congress acknowledged that fair use is"critical to advancing the personal interests of consumers," and sought to "extend into the digital environment the bedrock principle of 'balance' in American intellectual property law for the benefit of both copyright owners and users." H. Rept.105-551, Part 2, 105th Cong., 2d Sess.26 (1998).

[29]273 F.3d 429 (2d Cir. 2001). *See also* Realnetworks, Inc. v. Streambox, Inc., 2000WL 127311 (W.D.Wa. 2000)(an action under the DMCA in which the court enjoined sale of Streambox's VCR, a device designed to bypass Realnetwork's security control measures to prevent listeners from downloading digitally streamed content).

[30]For more background, *see* CRS Report RL31257, *Anticircumvention under the Digital Millennium Copyright Act: Universal Studios v. Corley,* by Robin Jeweler and Christopher Jennings (January 23, 2002).

posting DeCSS and to prevent them from electronically "linking" their site to others that post it.

The court reviewed the development of CSS – a means to control access to the plaintiff's copyrighted work – and determined that DeCSS is "clearly a means of circumventing" it. DeCSS' creators explained that the program was *not* developed to pirate copyrighted movies but to further development of a DVD player that would run under a Linux, as opposed to a Windows, operating system. The district court ruled in favor of the plaintiffs and issued a permanent injunction against the posting of DeCss.[31]

On appeal, defendants/appellants argued that the DMCA unconstitutionally eliminates fair use. The court rejected this as an "extravagant claim."[32] Reviewing Supreme Court dicta, the Court of Appeals noted that "the Supreme Court has never held that fair use is constitutionally required... ."[33] But the court declined to examine further the relationship between fair use and the constitution, because fair use was not at issue. The defendants did not claim to be engaged in fair use; they were being enjoined from *trafficking* in a decryption code that enabled unauthorized *access* to copyrighted materials. The lower court had noted that there was scant evidence to determine the extent to which the anti-trafficking provisions of the DMCA prevents others from copying DVD movies in order to make fair use of them.

Finally, addressing the relationship between access and fair use, the appellate court found that fair 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:

> Appellants have provided no support for their premise that fair use of DVD movies is constitutionally required to be made by copying the original work in its original format. ...*We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original.* ... [T]he DMCA does 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. The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use.[34]

As examples, the court suggested that a constitutionally-based assertion of fair use permits neither the film critic to use a movie camera in a theater to review a film, nor the art student to make fair use of a painting by photographing it in a museum.

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[31]Universal Studios v. Reimerdes, 111 F. Supp.2d 294 (S.D.N.Y. 2000).

[32]273 F.3d at 73.

[33]*Id.*

[34]*Id.* at 76-77 (footnotes omitted; emphasis supplied).

Another court, the U.S. District Court for the Northern District of California, considered the validity of the DMCA's anticircumvention provisions and concurred with the Second Circuit in *Corley*. In the first criminal prosecution for trafficking in violation of the Act, a Russian computer programer, Dimitri Sklyarov, was arrested in July 2001 in Las Vegas where he was attending a computer "hacker" convention.[35] He was subsequently indicted. Mr. Sklyarov was alleged to have developed a software program that unlocked Adobe System's "eBook Reader." The eBook reader program protects the copyright holder's interest in an electronic book by limiting computer access to the encrypted eBook. But the program, "Advanced eBook Processor," developed by Mr. Sklyarov, and marketed by Elcomsoft Company in Moscow through its website, enabled consumers who purchase an encrypted eBook from an online bookseller to "unlock" it. Advanced eBook Processor decrypts an eBook so that it can be opened in any Portable Document Format (PDF) viewer, such as Adobe Acrobat reader. Once converted, the PDF file has no effective protections against copying, editing, or printing of the eBook.

In December 2001, the U.S. Attorney's Office announced that in exchange for Mr. Sklyarov's cooperation in its suit against Elcomsoft, the Government would drop charges against him.[36] Subsequently, defendant Elcomsoft moved to dismiss the indictment on constitutional grounds. In an order denying the motion, the court, in *United States v. Elcom, Ltd.,*[37] examined the relationship between the DMCA's anti-circumvention provisions and fair use. The court concurred with the Second Circuit's conclusion that there is no legal authority "which guarantees a fair user the right to the most technologically convenient way to engage in fair use."[38] Hence, the anticircumvention rules do not "eliminate" fair use by virtue of making it more difficult.

Indeed, the court observed that the crafting of the anticircumvention rules expressly protects the exercise of fair use. The DMCA bans both the act of circumventing and trafficking in devices that circumvent *access controls* to a copyrighted work. But, with respect to *use restrictions* on protected works, the Act bans:

> only the trafficking in and marketing of devices primarily designed to circumvent the use restriction protective technologies. *Congress did not prohibit the act of circumvention because it sought to preserve the fair use rights of persons who had lawfully acquired a work. See* H.R. Rep. 105-551, pt. 1, at 18 (1998). ... In fact, Congress expressly disclaimed any intent to impair any person's rights of

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[35]U.S. Dept. of Justice, Press Release, *Russian Man Charged in California under Digital Millennium Copyright Act with Circumventing Adobe eBook Reader*, July 17, 2001 at [http://www.usdoj.gov/criminal/cybercime/Sklyarov.htm].

[36]U.S. Dept. of Justice, Press Release, *Russian National Enters Into Agreement with the United States on First Digital Millennium Copyright Act Case,* Dec. 13, 1001 at [http://www.usdoj.gov/criminal/cybercime/sklyarovAgee.htm].

[37]203 F. Supp.2d 1111 (N.D.Ca. 2002). Defendant Elcomsoft was subsequently acquitted of criminal charges. Matt Richtel, *Russian Company Cleared of Illegal Software Sales,* N.Y. TIMES, Dec. 18, 2002, at C4.

[38]203 F. Supp.2d at 1131.

> fair use[.] ... Thus, circumventing use restrictions is not unlawful, but in order to protect the rights of copyright owners while maintaining fair use, Congress banned trafficking in devices that are primarily designed for the purpose of circumventing any technological measure that "effectively protects a right of a copyright owner," or that have limited commercially significant purposes other than circumventing use restrictions, or that are marketed for use in circumventing the use restrictions.[39]

The distinctions are subtle but legally significant to the court's fair use analysis. The anticircumvention rules prohibit acts and trafficking in devices intended to circumvent access controls; they also prohibit trafficking in devices – but not acts – intended to bypass use controls, even if the devices would bypass use restrictions in order to enable a fair use as opposed to an infringing one. Thus, "it is not unlawful to circumvent for the purpose of engaging in fair use, it is unlawful to traffic in tools that allow fair use circumvention."[40]

Again, distinguishing between access and fair use, the court concluded:

> [T]he DMCA does not eliminate fair use or substantially impair the fair use rights of anyone. Congress has not banned or eliminated fair use and nothing in the DMCA prevents anyone from quoting from a work or comparing texts for the purpose of study or criticism. The fair user may find it more difficult to engage in certain fair uses with regard to electronic books, but nevertheless, fair use is still available.[41]

Fair Use and "Personal Use". Although not explicit in the Copyright Act's list of fair use factors, there is judicial precedent for the assertion that a consumer's private, noncommercial use of copyright- protected material is embodied in the fair use doctrine. Much of this authority is attributable to the oft-cited U.S. Supreme Court decision sanctioning "time shifting" in *Sony Corp. v. Universal City Studios, Inc.*[42] The Court found that the sale of the Betamax video tape recorder (VTR) did not constitute contributory copyright infringement because the device was capable of a substantial noninfringing use. The VTR allowed private viewers to tape free broadcast television to replay at their convenience, *i.e.,* time shift. Integral to the Court's decision was its finding that substantial numbers of copyright holders who licensed their work for broadcast did not object to having their broadcasts time shifted by private viewers, and there was no evidence of nonminimal harm to the potential market for, or value of, their copyrighted works.

Congress can and has enacted express "personal use" limitations to the copyright monopoly. The Audio Home Recording Act (AHRA)[43] added a new 17 U.S.C. § 1008 which prohibits infringement actions based on the manufacture, sale,

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[39]*Id.* at 1120-21 (footnote and citations omitted)(emphasis supplied).

[40]*Id.* at 1125.

[41]*Id.* at 1134-35.

[42]464 U.S. 417 (1984).

[43]P.L. 102-563 (1992).

or use of an audio recording device.[44] The Act also requires that audio recording devices employ a Serial Copyright Management System (SCMS) that sends, receives and acts upon copyright information in the files it plays. Manufacturers and importers of audio recording devices pay royalties on the devices which are distributed to copyright holders.

In *Recording Industry Assoc. of America v. Diamond Multimedia Systems,*[45] a court of appeals held that the Rio, a hand-held device capable of storing and re-playing a digital audio file stored on the hard drive of a personal computer, did not come within the ambit of the AHRA. In its analysis, the court noted that the purpose of the AHRA was to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.[46] The Rio could not make duplicates of any digital audio files it stored, nor could it upload such a file; its sole output was an analog audio signal sent to a user by headphones. Although the Rio player did not come within the AHRA and therefore did not need to incorporate the SCMS, the court did note:

> [T]he Rio's operation is entirely consistent with the Act's main purpose– the facilitation of personal use. ...The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive.[47]

Although *Sony* and *Diamond Multimedia* are frequently cited as authority for the assertion that time shifting and space shifting are personal uses that constitute legitimate fair uses, the courts have been unwilling to expand these holdings to other contexts. This is particularly so with digital media when the purported fair use threatens to erode or undermine the copyright holder's ability to maintain exclusive control over the protected property.

In *UMG Recordings, Inc. v. MP3.Com, Inc.,*[48] the U.S. District Court for the Southern District of New York granted a partial summary judgment finding that defendant MP3.com infringed the copyrights of plaintiff recording companies. The defendant, MP3.com, operated a service called "My.MP3.com," which was advertised as permitting subscribers "to store, customize and listen to the recordings contained on their CDs from any place where they have an Internet connection."[49] The defendant purchased thousands of CDs in which the plaintiffs held copyrights,

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[44]Specifically, 17 U.S.C. § 1008 provides "No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings."

[45] 180 F.3d 1072 (9th Cir. 1999).

[46]*Id.* at 1079, citing S. Rep. 102-294 at 86.

[47]*Id.*

[48]92 F. Supp.2d 346 (S.D.N.Y. 2000).

[49]*Id.* at 350.

and without authorization, copied the recordings onto its computer server. Subscribers, upon initial proof of ownership of the CD, could then access it via the Internet from any computer anywhere.

MP3.com argued that its service was the functional equivalent of "space shifting," or storing the subscriber's CD, and was analogous to the "time shifting" permitted by the U.S. Supreme Court in *Sony Corp. of America, supra.* But the court disagreed, finding a presumptive case of copyright infringement because MP3.com was in fact utilizing its unauthorized copy of the CD for the subscriber. Nor did the court find any other basis to support the defendant's assertion that its use of the plaintiffs' recordings constituted fair use.

The court in *Elcom, supra* considered the impact of the DMCA on the ability of content users to make "back up" copies, another type of personal use:

> Defendant makes much of the right to make a back-up copy of digital media for personal use, holding this right up as an example of how the DMCA eliminates fair use. Defendant relies heavily on *Recording Industry Association of America v. Diamond Multimedia Systems,* for the assertion that the right to make a copy of electronic media for personal, noncommercial use, is a paradigmatic fair use consistent with the Copyright Act. But, defendant overstates the significance and holding of that decision. The Ninth Circuit was not presented with, and did not hold, that the right to make a copy for personal use is protected as a fair use right or protected as a right guaranteed by the Constitution. Rather, the Ninth Circuit was discussing the Audio Home Recording Act. ... The court held that copying for personal, noncommercial use was consistent with the Audio Home Recording Act's main purpose of facilitating personal use.[50]

The court expressly declined to find a "right" to make back-up copies, and although it acknowledged that making a back up copy of an eBook would in all likelihood be a fair use, it distinguished it from another statutory grant under the Copyright Act – to make back-up copies of computer programs for archival purposes.[51] But, a limited right to make a back up computer program for archival purposes does not encompass a broader right to make a back-up program to facilitate decryption:

> Courts have been receptive to the making of an archival copy of electronic media in order to safeguard against mechanical or electronic failure. *See Vault Corp. v. Quaid Software Ltd.,* 847 F.2d 255, 267 (5th Cir.1988). Making a back-up copy of an eBook, for personal noncommercial use would likely be upheld as a non-infringing fair use. But the right to make a back-up copy of "computer programs" is a statutory right, expressly enacted by Congress in Section 117(a), and there is as yet no generally recognized right to make a copy of a protected work, regardless of its format, for personal noncommercial use. There has certainly been no generally recognized First Amendment right to make back-up copies of electronic works.[52]

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[50]203 F. Supp.2d at 1135 (citations omitted.)

[51]17 U.S.C. § 117.

[52]203 F. Supp.2d at 1135.

Courts, to date, have also been consistent in rejecting fair use defenses to excuse contributory or vicariously infringing activities in connection with Internet file sharing services that facilitate copyright infringement. *Napster*[53] was the first well-publicized case addressing the legality of Internet peer-to-peer file-sharing. The trial court in *Napster* rejected virtually every assertion that the peer-to-peer file sharing service, or its users, were engaged in a fair use of copyright protected material and found that its users did not meet any of the statutory parameters establishing fair use:

- *Purpose and character of use.* While acknowledging that users downloading from Napster are not engaging in "paradigmatic commercial activity," neither are they engaged in personal use in the "traditional sense," *i.e.,* copying occurring within the household which does not confer any financial benefits on the user. The court concluded that the vast scale of Napster use among anonymous individuals does not constitute personal use because a "host user cannot be said to engage in a personal use when distributing that file to an anonymous requester."[54]

- *Nature of the work.* The court found that the sound recordings constitute entertainment, not educational material.

- *Amount and substantiality of the portion used in relation to the whole.* The court found it to be "undisputed" that the copying of MP3 music files involves copying the entirety of the work, which is inconsistent with fair use.

- *The effect of the use upon the potential market for the copyrighted work.* The record companies produced evidence demonstrating that Napster use reduces CD sales among college students and raises barriers to the companies' entry into the market for digital downloading of music. Napster users receive for free something that they would otherwise purchase, which may adversely affect the potential market for the copyrighted work.

The court also decisively rejected "sampling," "space shifting," and "time shifting" of music as *potential* fair uses of the Napster service. Copyright owners earn royalties from streamed song samples on retail web sites. Even if music sampling by Napster users *did* lead to enhanced CD sales, unauthorized downloading deprives music publishers of royalties for individual songs and would not constitute fair use. And, the district court had no trouble distinguishing consumers' use of Napster from the practice of time shifting upheld in *Sony Corp. of America, supra*:

> [W]hile "time shifting [TV broadcasts] merely enables a viewer to see ... a work which he ha[s] been invited to witness in its entirety free of charge," plaintiffs

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[53]A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D.Ca. 2000), *aff'd in part, rev'd in part,* 239 F.3d 1004 (9th Cir. 2001).

[54]114 F. Supp.2d at 912.

in this action almost always charge for their music – even if it is downloaded song-by-song.[55]

In subsequent cases, courts examining Internet websites or services that facilitate infringing downloading of musical recordings have also rejected fair use defenses. In a motion granting a preliminary injunction against Aimster, the court dismissed the defendant's contention that Aimster's end users were engaging in protected personal use as "specious."[56]

Conclusion. The foregoing cases illustrate that when the potential to infringe is great, as it almost always will be in a digital environment, the courts will not expand fair use to encompass subsidiary uses such as time shifting, space shifting, or personal noncommercial use. While many consumer advocates may wish to broaden the contours of fair use for digital entertainment media in a consumer context, more precisely defined limitations on the copyright holder's monopoly may be advisable. Whether fair use is properly characterized as a "right" or a "defense," the courts appear to be unwilling to employ the doctrine to trump the copyright holder's interest in exclusive control of protected work.

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[55]2000 WL 1182467, *13 (quoting from *Sony, supra.*)

[56]In re Aimster Copyright Litigation, 2002 WL 31006142, *10 (N.D. Ill. 2002). *See also,* Arista Records, Inc. V. MP3Board, 2002 WL 1997918 (S.D.N.Y. 2002).