The Digital Millennium Copyright Act and the European Union Copyright Directive: Next Steps

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INTRODUCTION

The development of digital media and digital communication technologies has fostered a revolution in the manner that we seek entertainment, communicate with others, and otherwise express ourselves. Because of the obvious problems created by the fact that digital content is easily reproduced and distributed, revisions to the law have been necessary to clarify the scope and substance of protection of intellectual property rights, particular the copyright, in the digital age. Industry has also responded with self-help measures, including digital rights management technologies, to further protect its interests.[1] This has led in turn to a first wave of legislation to protect this protection, most notably in the form of "anti-circumvention" statutes that prohibit tampering with digital media or devices in order to gain access to or otherwise make unauthorized use of the protected digital content.

A second wave of legislation, aimed at extending even further the protections for digital media and culminating with the passage of the European Union's Enforcement Directive and the failure of the INDUCE Act in the United States, has recently concluded. But additional proposals directed at enhancing digital copyright protection are still under

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[1] See Mike Godwin, *What Every Citizen Should Know About DRM, a.k.a. "Digital Rights Management*, Public Knowledge, *at* http://www.publicknowledge.org/pdf/citizens_guide_to_drm.pdf (last visited November 16, 2004), for a helpful primer on digital rights management technology.

discussion. At the same time, opposing proposals, premised on the notion that we have already gone too far in protecting digital copyright, have begun to emerge.

This paper begins by reviewing the first wave, the anti-circumvention provisions of the Digital Millennium Copyright Act in the United States and similar provisions in the European Union Copyright Directive. I then discuss the second wave: efforts embodied in the European Union's Enforcement Directive and the United States' proposed INDUCE Act to provide even more protection for owners of digital copyrights. After discussing the proper balancing of interests between copyright holders and the public, and suggesting that the first and second waves are based on a fundamental misunderstanding of the proper balancing of interests, I review some of the possible next steps, highlighting the emerging movement opposed to enhanced digital copyright protection.

THE FIRST WAVE

A. The DMCA

The passage of the Digital Millennium Copyright Act[2] (the "DMCA") in 1998 ended a round of fractious debates and negotiations that had extended at least since the creation of the Information Infrastructure Task Force by President Clinton in 1994.[3] The results, characterized by one commentator as the "most sweeping revisions ever to the

[2] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. § 1201 et. seq.).

[3] JESSICA LITMAN, DIGITAL COPYRIGHT 143 (2001).

Copyright Act of 1976,"[4] spanned fifty pages and consumed almost thirty thousand words.[5]

[4] David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 674 (2000).

[5] LITMAN, *supra* note 3, at 143.

1. Anti-circumvention provisions

The most controversial aspects of the DMCA are its anti-circumvention provisions, ultimately incorporated into 17 U.S.C. § 1201. Section 1201 first defines a basic prohibition against circumventing acts: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."[6] Next follow two distinct, but almost identically worded provisions banning the "trafficking" of products or services that are intended to either (i) "circumvent[] a technological measure that effectively *controls access* to a work"[7] or (ii) "circumvent[] protection afforded by a technological measure that effectively *protects a right* of a copyright owner."[8] The first of these two anti-trafficking provisions corresponds directly to the anti-circumvention provision of Section 1201(a)(1), which prohibits the *act* of circumventing technology that *controls access* to a work. However, there is no corresponding provision to the anti-trafficking provision, so acts of circumventing technology that *protects a right* of a copyright owner are not expressly prohibited.[9]

2. Exceptions and exemptions

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[6] 17 U.S.C. § 1201(a)(1)(A) (2004).

[7] 17 U.S.C. § 1201(a)(2) (emphasis added).

[8] 17 U.S.C.A. § 1201(b)(1) (emphasis added).

[9] Of course, if a person circumvented a technological measure protecting a right of copyright holder and then proceeded to violate that right, then he could be liable for that infringement. But, circumventing that same measure to make fair use of the underlying copyrighted material would presumably not trigger liability. However, this may be more easily said than done: since trafficking of devices or services to facilitate such circumvention is prohibited, the would-be fair user must be able to circumvent the technology on his own.

The DMCA contains a number of complicated "exemptions" to one or more of its restrictions. Several of these exceptions appear to be effectively meaningless. For example, while exceptions are provided for libraries (but only for the purpose of previewing a work before making a purchase decision) and for individuals seeking to disable technology that collects personal information (e.g. "cookies"), the exception in each case applies only to the *act* of circumvention. Since the trafficking of products or services to facilitate these circumventions is still prohibited, only a very technologically adept librarian or computer user is likely to benefit from these exemptions. Other exemptions, including exemptions for law enforcement, intelligence gathering, and encryption technology research are somewhat more meaningful, in that the exemptions include at least partial exceptions to both the anti-trafficking bans and the anti-circumvention prohibition.[10]

In addition to these exemptions, Congress also provided what it called a "fail-safe" mechanism: a rule-making proceeding under which the Librarian of Congress may exempt from the anti-circumvention ban a "particular class of copyrighted works" if he concludes that users are "adversely affected . . . in their ability to make noninfringing uses" of those works. This rule making is to occur every 3 years (after an initial 2-year period ending in 2000), and the resulting exemptions are effective for the succeeding 3-year period.[11] In the results of the first rule-making procedure, the Librarian explained in

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[10] Nimmer, *supra* note 4, at 701. One might question how meaningful the exemption for encryption research is in practice, however, given the reluctance of several computer security experts to publish their results or to travel to the United States. *See* Electronic Frontier Foundation, *Unintended Consequences: Five Years Under the DMCA*, *v.2.1* (Jan. 9, 2003), pp. 2-5, *at* http://www.eff.org/IP/DMCA/20030103_dmca_consequences.pdf.

[11] 17 U.S.C. § 1201(a)(1)(C).

detail the rationale and procedure behind the rule making, and announced the two categories of works exempted for the following 3 years. Both were narrow categories; the first covered encrypted lists of websites blocked by commercial filtering software, while the second included digital works protected by access control mechanisms that either fail or become obsolete.[12] In 2003 (in a much shorter report), the Librarian renewed the exemption related to website filtering software (although the exemption was slightly narrowed) and announced an exemption addressed to obsolete or malfunctioning access controls, this time limited to hardware locks, or "dongles." Two completely new categories were also announced, one relating to computer programs and video games that are effectively locked to obsolete hardware, and the other covering "e-books" that completely disable features offered by e-book hardware or software to facilitate use by the blind or visually impaired.[13]

A few features of the rule-making procedure are worth noting. First, any resulting exemption must target a "particular class" of works, not a category of users or category of uses.[14] In the latest rulemaking, the Librarian rejected several proposals because they failed to define a proper class. Rather, these proposals attempted to define a class by its use, such as "fair use works," "per se educational fair use works," or "any work to which the user had lawful initial access."[15] Second, the exemption applies only prospectively,

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[12] Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies, 65 Fed. Reg. 64556 (Oct. 27, 2000).

[13] Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies, 68 Fed. Reg. 62011 (Oct. 31, 2003) (to be codified at 37 C.F.R. pt. 201).

[14] *Id*. at 62012.

[15] *Id*. at 62014-15.

and is only certain to last 3 years – an exemption might expire if evidence of an adverse effect of the DMCA on a particular category of works is not presented during each 3-year rule-making period.[16] Finally, and perhaps most significantly, the exemption applies only to the anti-circumvention ban, *not* to the anti-trafficking bans. So, distribution of products or services to help a user access an exempted category of works is prohibited.[17]

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[16] Note that each category approved in the first rulemaking was narrowed. *Cf*. Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies, *supra* note 12. Note also that the evidentiary requirements of the rule-making proceeding make prophylactic exemptions extremely unlikely. It appears that only specific evidence of actual adverse consequences is likely to meet the burden of proof placed upon the proponent of the exemption. *See* Seth Finkelstein, *How to Win (DMCA) Exemptions and Influence Policy*, *at* http://www.eff.org/IP/DMCA/finkelstein_on_dmca.html (last visited Nov. 14, 2004).

[17] *See* Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies (Notice of Inquiry), 67 Fed. Reg. 63578, 63579 (Oct. 15, 2002) ("The Librarian has no authority to limit either of the anti-trafficking provisions contained in subsections 1201(a)(2) or 1201(b).").

3. Fair use

Congress intended that the DMCA exceptions, and especially the rulemaking procedure for creating additional exemptions, provide a "fail-safe mechanism" to ensure that access to copyrighted works for non-infringing purposes, such as fair use, remains available.[18] Given the extremely limited scope of the exceptions, as well as the fact that in most cases exceptions to the anti-trafficking bans are unavailable, the DMCA appears to provide scant comfort for those seeking to make fair use of digitally protected material.

Despite David Nimmer's claim that "Congress evinced great solicitude for the role played by judicious application of the fair use doctrine,"[19] the rulemaking procedure, in particular, turns the traditional approach to fair use on its head. Under the traditional approach to fair use, a user might make what he considers a fair use until a copyright owner successfully challenges him in court. This approach encourages flexibility and experimentation with new uses in a couple of ways. First, a use of copyrighted material in a manner that causes little or no financial harm to the copyright owner is likely to continue unabated, since the owner has little economic incentive to bring a costly lawsuit. Second, the fair use doctrine, and its statutory support in the Copyright Act of 1976,[20] encourage flexibility: rather than treating exceptions to the exclusive rights of copyright

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[18] Nimmer, *supra* note 4, at 692-93. The Librarian of Congress approaches the "fail-safe" mechanism somewhat differently, citing a Commerce Committee report to demonstrate that the mechanism was intended to "prevent a diminution in the availability to individual users of a particular category of copyrighted materials." Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies, *supra* note 12, at 64558. Given this focus on categories of copyrighted materials, rather than on the uses of those materials, this rationale for the rulemaking procedure would appear to have little to do with fair use.

[19] Nimmer, *supra* note 4, at 692.

[20] 17 U.S.C. §107.

owners as an exhaustive list, courts are required to analyze each case on an individual basis, weighing economic harm to the copyright holder against the public benefits of the new use.[21] Finally, unlike the outcome of the DMCA's rule-making procedure, once a particular use is determined by a court to be fair, it is presumptively fair; it is not subject to expiration every 3 years.

In contrast, under the DMCA circumvention for any purpose other than the narrowly defined exemptions is not only presumptively disallowed, but is explicitly illegal. A proponent of a new exemption bears the burden of showing actual adverse impact, not with respect to his ability to make fair use, but with his ability to access the material at all. To sustain this burden, he must show a "substantial adverse impact"; "mere inconveniences, or individual cases" will not suffice.[22] Accordingly, the analysis of exemptions under the DMCA rule-making procedure is quite different from the individualized analysis available to a defendant under a judicial fair-use determination. As a result, the DMCA is likely to discourage experimentation, since the very first circumvention for an unlisted purpose is explicitly illegal, *even if that purpose is later determined to warrant an exemption*. Further, because even a granted exemption does not apply to the anti-trafficking bans, it also seems clear that new fair uses that depend on circumvention of digital protection measures are unlikely to be very useful to any except a very small number of particularly sophisticated users.

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[21] *See*, *e.g.*, Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (finding "time-shifting" of broadcasted video material to be fair use).

[22] Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies, *supra*, note 12, at 64558.

One consequence of the DMCA's focus on access rather than fair use is that courts are likely to regard fair use analysis as largely irrelevant to interpreting the DMCA and its exemptions. The United States Court of Appeals for the Second Circuit took exactly this approach in Universal Studios, Inc. v. Corley, calling Corley's fair use challenge "extravagant," and noting that "the Supreme Court has never held that fair use is constitutionally required. . ."[23] The court implied that so long as a user could make fair use of the material by *some* technique (in this case, dealing with digital video, perhaps by "pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie") then fair use concerns were irrelevant to a DMCA claim.[24]

B. The EUCD

Unlike the DMCA, with its complex proscriptions and exhaustively detailed exceptions, the European Union Copyright Directive (the "EUCD") addresses its anti-circumvention measures in just a few paragraphs.[25] Like the DMCA, acts of circumvention must be prohibited:

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[23] Universal Studios, Inc. v. Corley, 273 F.3d 429, 458 (2d Cir. 2001).

[24] *Id.* at 459. Opponents of the DMCA can take some comfort from the Federal Circuit's recent decision in Chamberlain Group, Inc. v. Skylink Technologies, Inc., 381 F.3d 1178 (Fed. Cir. 2004). In sweeping language, the court rejected raised grave concerns about the effect of the DMCA on fair use: "It would therefore allow any copyright owner, through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work—or even selected copies of that copyrighted work." *Id.* at 1202. However, the court's decision rested primarily on whether the defendant's garage-door opener device "accessed" the plaintiff's copyrighted software under the meaning of the DMCA – the court's discussion of fair use can likely be regarded as dicta. In any event, the facts underlying most fair use challenges can easily be distinguished from those in *Skylink*.

[25] Directive 2001/29EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, May 22, 2001 [hereinafter Copyright Directive]. However, the EUCD begins with 61 recitals, several of which explain the rationale and some details of the anti-circumvention bans. The EUCD itself is not binding on individual actors, rather it requires member countries of the European Union to enact consistent legislation.

> Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.[26]

The EUCD defines "effective technological measures" as any technology that "in the normal course of its operation" restricts acts unauthorized by the copyright holder.[27]

Similarly, the EUCD's prohibition of trafficking in anti-circumvention devices is relatively brief:

> Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
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> (a) are promoted, advertised or marketed for the purposes of circumvention of, or
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> (b) have only a limited commercially significant purpose or use other than to circumvent, or
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> (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.[28]

One key difference between the anti-circumvention provisions of the EUCD and those of the DMCA is that the EUCD does not distinguish technologies that control access to copyrighted works from those that protect other rights of the copyright owner. In fact, the prohibited acts can presumably be *any* acts not authorized by the copyright owner, regardless of whether they relate to rights held by the copyright holder.[29]

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[26] Copyright Directive, *supra* note 25, art. 6(1).

[27] *Id.*

[28] *Id*., art. 6(2).

[29] Foundation for Information Policy Research, *Implementing the EU Copyright Directive* 16, *at* http://www.fipr.org/copyright/guide/eucd-guide.pdf (last visited Nov. 14, 2004). A few countries appear to have interpreted this provision slightly differently; Norway's draft implementation prohibited circumvention only when it resulted in the infringement of copyright. *Id.* at 20. At the very least, the EUCD's wording *permits* member countries to prohibit any unauthorized acts, subject to a very few mandatory exclusions.

Accordingly, only a single anti-trafficking provision is required – member states may prohibit even technologies that solely permit circumvention for non-infringing uses.

Like the DMCA, the EUCD contains a built-in "fail-safe" mechanism to mitigate abuse by overzealous copyright owners whose technology prevents the exercise of various exceptions to the copyright. Rather than mandating an administrative procedure for creating exceptions to the anti-circumvention ban, the EUCD encourages "voluntary measures" on the part of copyright holders, providing that in the absence of such voluntary measures, "Member States shall take appropriate measures to ensure that rightsholders make available . . . means of benefiting" from exceptions or limitations.[30] Although the EUCD leaves the exact means for implementing this requirement to the individual states, this provision permits a state to *mandate* that a protection technology be modified to permit a copyright exception to be exercised by consumers.[31]

C. Reaction to the First Wave

Both the DMCA and the EUCD have provoked strong criticism. In the United States, the Electronic Frontier Foundation has documented a number of examples of over-reaching by copyright owners, as well as several cases where the DMCA appears to have

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[30] Copyright Directive, *supra* note 25, art. 6(4).

[31] So far as I am aware, this has not happened yet. I would expect industry to be extremely reluctant to provide technological "holes" in digital rights management schemes to facilitate enjoyment of exceptions to copyright protections, since unauthorized exploitation of these holes could completely undermine the effectiveness of the DRM protection. Indeed, since most of the exceptions enumerated in the EUCD are optional (and thus often not included in member states' implementing legislation, *see infra* note 83) and narrow in scope, copyright owners might decide to deal with exceptions on an individual case-by-case basis.

chilled legitimate scientific activity, such as research in cryptographic techniques.[32] In Europe, Bernt Hugenholtz has gone so far as to suggest that the EUCD might be invalid, since (in his view) it fails completely to achieve its stated goal of promoting competition, while undermining "essential user freedoms."[33]

Criticism of the DMCA and EUCD largely emphasizes two objections: first, that these measures threaten free speech (and, especially in the United States, fair use), and second, that these measures chill competition and technological innovation. With their narrow focus on protection, the DMCA and EUCD tend to eliminate much of the "breathing room" traditionally provided under copyright law. This breathing room is critical to both artistic creativity and technological innovation, since creativity depends on a healthy, *accessible* supply of raw material from which to create new works. As we shall see, the second wave of digital copyright legislation poses an even greater threat to this supply.

THE SECOND WAVE

With the passage of the DMCA and the EUCD, copyright holders possess substantial new protections, against circumvention of copy protection and access-control schemes. But from the perspective of copyright holders, is this enough? Do the DMCA and the EUCD provide enough protection to stimulate the creation and dissemination of

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[32] Electronic Frontier Foundation, *Unintended Consequences: Five Years Under the DMCA*, *v.2.1* (Jan. 9, 2003), *at* http://www.eff.org/IP/DMCA/20030103_dmca_consequences.pdf.

[33] Bernt Hugenholtz, *Why the Copyright Directive is Unimportant, and Possibly Invalid*, European Intellectual Property Review 22(11), pp. 499-505 (2000), *available at* http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html (last visited Nov. 27, 2004).

new digital works? Judging from recent legislative responses in both the United States and Europe, the answer appears to be no. In the United States, this response appeared in the proposed legislation known as the "INDUCE Act."[34] In Europe, the recently enacted Enforcement Directive[35] likewise purports to fill critical gaps in protection of digital works.

A. The INDUCE Act

The "Inducing Infringement of Copyright Infringement Act" (the "INDUCE Act") was introduced in Congress in 2004. Although the bill has apparently "died,"[36] the proposed language provides clues as to persisting gaps in the protection of digital works, at least as perceived by some copyright owners, and clearly indicates the next battleground between proponents and opponents of enhanced protection for digital works.

According to at least one commentator, the INDUCE Act was intended to correct a federal court decision in *MGM v. Grokster*.[37] In that case, the court refused to impose liability on the distributor of a peer-to-peer file-sharing program because liability for contributory copyright infringement requires that the defendant "[have] specific knowledge of infringement at a time at which the defendant contribute[s] to the

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[34] Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2d Sess. 2004) [hereinafter "INDUCE Act"]. Several versions of this proposed legislation exist. Another version is entitled the "Discouraging Online Networked Trafficking Inducement Act of 2004."

[35] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004: On the Enforcement of Intellectual Property Rights [hereinafter Enforcement Directive].

[36] Public Knowledge, *The Inducing Infringement of Copyrights Act of 2004 (formerly known as the INDUCE Act)*, *at* http://www.publicknowledge.org/issues/s2560 (last visited November 7, 2004).

[37] *Id.* (referring to MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004)).

infringement and fail[s] to act upon that information."[38] Against that backdrop, the goal of the INDUCE Act appears clear: to impose liability on the distributors of technology that facilitate copyright infringement, even in the absence of elements that might otherwise prove contributory infringement. While nominally focused only on extending liability for copyright infringement, a traditional and justifiable aim of copyright law, the INDUCE Act's potential impact on technology extends beyond that of the DMCA. Under the INDUCE Act, developers of new technology could find themselves liable for infringing activities of users of their technology, even if the technology has beneficial non-infringing uses.

The INDUCE Act proposes that anyone who "intentionally induces" infringement of a copyright shall be civilly liable.[39] "Induces" is defined as "aids, abets, induces, or procures" – a somewhat circular definition. The bill bases the standard for intent on the "reasonable person" – "[I]ntent may be shown by acts from which a reasonable person would find intent to induce infringement. . ." A key factor for this "reasonable person" to consider is "whether the activity relies on infringement for its commercial viability."[40] In a different version, the bill explains that intentional infringement does not require *actual* knowledge of infringement, or even an *actual* awareness that infringement is likely, rather the fact that a "reasonable person would expect" widespread violations is sufficient.[41]

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[38] MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1162.

[39] INDUCE Act, *supra* note 34, §2.

[40] *Id*.

[41] *Id.*

This definition of intentional inducement creates a serious dilemma for developers of technology. Even if the technology in question has important non-infringing uses,[42] the developer must determine up front whether the technology *might* be used for illicit purposes, and thus expose the developer to a finding (after the fact) that a "reasonable person" should have expected the illicit use.[43]

B. The Enforcement Directive

Enacted in April of 2004[44], the Enforcement Directive is generally targeted at enhancing the civil remedies available to injured copyright holders, rather than at expanding the scope of potential liability. The Enforcement Directive addresses three key areas: the persons entitled to seek relief, the scope of evidence that may be sought in a civil action, and the availability of extraordinary remedies, including preliminary injunctions, seizures, and mandatory recalls.

Like the EUCD, the Enforcement Directive justifies its provisions with a lengthy series of recitals. The baseline proposition is simple: "[W]ithout effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. . . [T]he means of enforcing intellectual property rights are of

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[42] *See, e.g.,* Gigi B. Sohn, *Piracy of Intellectual Property on Peer-to-Peer Networks*, testimony before the House Judiciary Committee Subcommittee on Courts, the Internet and Intellectual Property, September 26, 2002 (testifying to the importance of peer-to-peer technology in non-infringing applications).

[43] Public Knowledge, *PK's Testimony on the Intentional Inducement of Copyrights Act of 2004*, *at* http://www.publicknowledge.org/news/testimony/tesinduce (last visited November 7, 2004).

[44] The Enforcement Directive was passed by the European Parliament in April, 2004, but remains to be implemented by member nations. (The deadline for implementation is April 29, 2006. Enforcement Directive, *supra* note 35, Article 20(1).) Accordingly, the ultimate impact of the directive remains to be seen.

paramount importance. . .”[45] Similarly: “The current disparities [in European Community law] also lead to a weakening of the substantive law on intellectual property and . . . a consequent reduction in investment in innovation and creativity.”[46] Thus, the drafters of the Enforcement Directive assume that without an enhanced scheme for enforcing copyrights, the creative sector will produce less. The EUCD says nothing about whether too much protection could have an adverse impact on creativity and technological innovation.

The first problem addressed by the Directive is a standing issue: who may seek remedies for alleged infringement of intellectual property rights? In addition to the obvious parties, i.e. the holders of the rights, Article 4 adds several others: “all other persons authorised to use those rights” (i.e. licensees); “intellectual property collective rights-management bodies” (i.e. collecting societies); and “professional defence bodies.”[47] Accordingly, individual authors can depend on other parties to enforce their rights; indeed, even a publisher can rely on collection societies or “professional defence bodies” to pursue legal remedies on its behalf.

Next, the Enforcement Directive mandates broad discovery provisions, extending to “banking, financial or commercial documents under the control of the opposing party.”[48] Under the heading “Right of Information,” the Directive specifies that information related to the distribution of allegedly infringing material may also be subject to court-ordered

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[45] Enforcement Directive, *supra* note 35, recital (3).

[46] Enforcement Directive, *supra* note 35, recital (9).

[47] Enforcement Directive, *supra* note 35, art. 4.

[48] *Id.*, art. 6. Article 7, “Measures for Preserving Evidence,” goes on to mandate that member countries permit the seizure of evidence, including allegedly infringing goods, on the basis of an ex parte hearing.

production, including the names and addresses of each entity that may have handled the infringing material. This right to production of information is applicable against third parties, although the complaining party must demonstrate that the third party was involved with the infringing goods or services on "a commercial scale."[49] However, a person who "was found to be providing on a commercial scale services used in infringing activities" may also be subject to court-ordered production;[50] this clause would appear to apply to internet service providers.

Finally, the Enforcement Directive mandates that member countries make available a number of remedies in addition to damages, including preliminary injunctions,[51] seizure of allegedly infringing goods,[52] seizure of financial assets,[53] recall of goods found to be infringing,[54] and permanent injunctions.[55] "Precautionary" measures (including preliminary injunctions and seizure of both allegedly infringing goods and financial assets) may be ordered on the basis of an ex parte proceeding.[56] Coupled with the ability to subpoena information possessed by internet service providers and the right of collection societies to enforce their intellectual property rights, copyright holders appear to have available a broad set of tools to enforce their rights and prevent further harm to

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[49] *Id*., art. 8.

[50] *Id.*

[51] *Id.*, art. 9(1)(a).

[52] *Id.*, art. 9(1)(b).

[53] *Id.*, art. 9(2).

[54] *Id.*, art. 10.

[55] *Id.*, art. 11.

[56] *Id.*, art. 9(4).

their interests. Indeed, the availability of preliminary remedies allows copyright holders to interrupt an allegedly infringing activity early and quickly, provided only that it is occurring on "a commercial scale."

THE BALANCING ACT

Congress and the European Parliament clearly believe that the threat of digital piracy justifies, and even requires, drastic new measures to protect the rights of copyright owners. Each also apparently believes that these measures are properly balanced against the general public interest.[57] However, the results, along with the supporting rhetoric, suggest that both Congress and the European Parliament perceive the public interest much too narrowly. In Europe, the public interest is addressed by providing narrow exceptions to promote specific social goals, such as access to copyrighted materials by the blind. In the United States, where copyright has traditionally been viewed as a generally undesirable monopoly, but nonetheless necessary to provide incentives to authors and artists, Congress has focused simply on whether consumers can view copyrighted material, rather than whether the consumer can manipulate it, modify it, and re-use it in ways traditionally protected by the fair use doctrine.

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[57] *See, e.g., Id.*, recital 2 ("The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his/her invention or creation. . . At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.") *Also see* Remarks of Rep. Bliley, 144 CONG. REC. H7074, H7094 ("Copyright law is not just about protecting information. It's just as much about affording reasonable access to it as a means of keeping our democracy healthy and doing what the Constitution says copyright law is all about: promoting 'Progress in Science and the useful Arts.' If this bill ceases to strike that balance, it will no longer deserve Congress' or the public's support.")

This approach to the balance of interests has the practical effect of largely equating the public's interest with that of the incumbent copyright holders and ignores the essential tension between the copyright monopoly and creativity. Augmented with technology-focused prohibitions, the copyright monopoly now threatens not only the creative endeavors of the author and artist, but also the technological innovation that has provided important new ways to communicate and share creativity. In short, these shortsighted efforts to enhance digital copyright protections have shortchanged the public, and threaten to undermine the primary purpose of copyright.

A. Balance in the DMCA

In the United States, Congress is authorized to grant copyrights under the powers granted by the Copyright Clause of the United States Constitution: ". . . 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."[58] Historically, the United States Supreme Court has seen the Copyright Clause as both an authorization and a limitation on Congressional power; i.e. Congress may exercise this power only to the extent that its actions "promote the progress of Science and useful

[58] U.S. CONST. art. I, § 8.

Arts."[59] Thus, Congress must balance the rights granted to copyright holders against the public's interest in a thriving scientific and creative culture.[60]

In addition to the limitation on Congressional power implicit in the Copyright Clause, the courts have recognized a tension between the granting of copyrights and the First Amendment's guarantee of free speech. According to the Supreme Court, "copyright law contains built-in First Amendment accommodations."[61] The first of these is the idea/ expression dichotomy: ideas and facts are not protected by copyright; only the author's "expression" is protected. Second is the fair use doctrine: under certain circumstances, the public may use even the author's expression for some purposes, "such as criticism, comment, news reporting, teaching. . ."[62] These limitations on the copyright enable both free expression and the "progress of Science": the free exchange of ideas, the ability to build upon prior expression, and the existence of a healthy public domain are essential to the development of new intellectual creations.

Neither the DMCA nor the proposed INDUCE Act properly reflect the balance between the public interest and the rights of the copyright holder. Despite the rhetorical flourishes that accompany it, the DMCA's attempts to preserve fair use fall short of providing any meaningful protection. The overwhelming effect of the statute is simply to provide copyright holders a near-absolute right to erect formidable technological barriers

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[59] *See* Graham v. John Deere Co., 383 U.S. 1, 5 (1996) ("The clause is both a grant of power and a limitation."). *Also see* Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 506 U.S. 984 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and the useful Arts.'")

[60] *See, generally*, Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L.J. 535 (2000).

[61] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[62] *Id.* at 219-20.

to the actual exercise of fair use; exceptions to the anti-circumvention ban are limited, narrow, and inflexible, especially when compared to the courts' approach to fair use as requiring a case-by-case analysis.[63] The statutory triennial review, the "fail-safe" mechanism supposedly intended to protect fair use, instead requires that granted exemptions must apply to a "class of works," and must *not* focus on the intended use.[64]

Congress clearly expressed concern about the potential impact of the DMCA on fair use, but even in its expressions of concern it apparently misconstrued the balancing act required by the tension between the Copyright Act and the First Amendment. According to the Library of Congress, Congress' primary concern was that *access* to certain copyrighted materials might be diminished by strong digital rights management tools. But fair use means much more than mere access – the Copyright Act explicitly states that fair use can include "use by *reproduction in copies* …"[65] More importantly the Copyright Act makes clear that fair use is to be judged by its *purpose*, "such as criticism, criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[66] Thus the DMCA's focus on exemptions based on "categories" of copyrighted materials misapprehends and undercuts the fair use doctrine as articulated by the courts and codified by Congress in the Copyright Act.

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[63] *See, eg.,* Campbell v. Acuff-Rose Music, 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

[64] Exemption to Prohibition on Circumvention of Copyright Protection for Access Control Technologies, *supra* note 12 at 64560.

[65] 17 U.S.C.S. §107 (emphasis added).

[66] *Id.*

On its face, the INDUCE Act would seem to require no consideration of fair use principles at all. According to its co-sponsor, Senator Patrick Leahy, the bill "simply clarifies and codifies [the] long-standing doctrine of secondary [copyright infringement] liability."[67] By its very structure, the bill focuses not on the users of copyrighted work, but instead only on "the bad actors who are encouraging others to steal."[68] However, perhaps surprisingly, Senator Leahy explicitly addressed the issue of fair use, asserting that: "This legislation is also carefully crafted to preserve the doctrine of 'fair use.' Indeed[,] by targeting the illegal conduct of those who have hijacked promising technologies, we can hope that consumers in the future have more outlets to purchase creative works in a convenient, portable digital format."[69] Not apparent from Mr. Leahy's statement is exactly how an expanded opportunity to purchase creative works relates to fair use.

The INDUCE Act's potential impact on fair use is serious. New fair uses have traditionally developed as a direct consequence of emerging technology, such as the piano roll, the jukebox, and the videocassette recorder ("VCR").[70] Because these technologies, and the resulting new methods of communicating and consuming information, were unforeseen by the drafters of copyright legislation, thriving markets sprang up to exploit

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[67] 150 CONG. REC. S7193 (daily ed. June 22, 2004).

[68] *Id.* The bill's sponsors apparently believe that the targets of these "inducers" are overwhelmingly children. The Congressional Record documenting the introduction of the INDUCE Act is replete with references to children, including a statement by Senator Hatch: "Tragically, some corporations now seem to think that they can legally profit by inducing children to steal – that they can legally lure children and others with false promises of 'free music.'" *Id.* at S7189.

[69] *Id.* at S7193.

[70] *See* LITMAN, *supra* note 3, at 35-63.

the resulting "gaps" in the copyright law.[71] Naturally, in each event certain producers of information were threatened, and demanded corrective legislation. In some cases, Congress responded with new rights to protect the producers. However, in each case a new fair use was born, such as the right to "time-shift" television programs using a VCR.[72]

The INDUCE Act threatens the development of new fair uses by potentially pre-empting the development of information technology in the first place. The developers of the VCR, faced with the INDUCE Act, would have been forced to consider whether the VCR, a device certainly capable of significant non-infringing uses, might have the *potential* to cause widespread violations of the Copyright Act. Even if "time-shifting" were already recognized as a fair use, and therefore non-infringing, the VCR developers would be required to consider other potential infringing uses, such as the unauthorized manufacture and commercial distribution of copies of copyrighted material. Had the INDUCE Act already been in place, would the VCR's developers have withheld it from the market for fear of liability, thus forestalling the development of a major market in home entertainment?[73]

B. Balance in the EUCD

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[71] *Id.* at 106.

[72] *See* Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984) (holding "time-shifting" of television broadcasts through the use of a videocassette recorder to be fair use).

[73] A market, by the way, which has resulted in huge (unforeseen) benefits to the entertainment industry. .

Although less explicit than in the United States, a tension between copyright and free expression is also apparent in the European Union. The European Convention on Human Rights, Article 10, states that:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

However, this statement mentions only interference "by public authority," reflecting a greater willingness to accept restraints on free expression imposed by private actors.[74] According to one commentator, "the potential conflict between copyright and free speech has long been ignored in European law."[75]

The EUCD takes note of the freedom of expression as well as a more general public interest in its preamble,[76] but clearly focuses on the importance of strong protection for copyrighted works, especially with respect to digital works. This focus is justified by the need for ensuring proper incentives for the creation of works:

> Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers culture, industry and the public at large.[77]

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[74] P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, p.2, *at* http://www.ivir.nl/publications/hugenholtz/PBH-Engelberg.doc (last visited Nov. 28, 2004).

[75] *Id.* at 7. Hugenholtz goes on to explain that some commentators put forward the same argument frequently heard in the United States, namely that the balance between copyright and free expression is already properly accommodated within the various copyright laws among the European states, through, among other things, the idea/expression dichotomy, limitations on the term of copyright, and express limitations and exceptions to the copyright.

[76] Copyright Directive, *supra* note 25, recital 3 refers to "compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest." With its use of the phrase "especially of property," the EUCD apparently elevates the property right above freedom of expression, without explanation.

[77] *Id.*, Recital 9.

Thus, freedom of expression is trumped by a perceived need for strong copyright protection; indeed, the drafters of the EUCD appear to be completely unaware that stronger intellectual property rights pose any significant threat to the public interest.

The EUCD grudgingly acknowledges that some member countries might perceive a need for some limitations on intellectual property rights, in the (narrowly defined) public interest:

> The Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.[78]

However, it is worth noting that the EUCD addresses the public interest in this case by *permitting* exceptions or limitations, while emphasizing that the granting of rights to copyright owners *must* begin with a "high level of protection." The EUCD attempts to circumscribe exceptions even more tightly, by noting that "certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works . . .,"[79] thus exhibiting an inherent bias against creative new uses for copyrighted works made possible by new technology.

Like the EUCD, the Enforcement Directive acknowledges the right of free expression.[80] But a single, brief reference to this right is overwhelmed by repeated declarations of the pressing need to aggressively enforce strong intellectual property

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[78] *Id.*, Recital 14.

[79] *Id.*, Recital 44.

[80] Enforcement Directive, *supra* note 35, Recital 2: "[The protection of intellectual property] should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet."

rights in order to ensure incentives for producers.[81] As with the INDUCE Act in the United States, proponents can reasonably argue that concern for free expression is unnecessary in the Enforcement Directive, since the Enforcement Directive does not purport to affect the *substantive* law of copyrights. Instead, it simply provides means for enforcing the law and discouraging acts that are already illegal. However, while it is true that the Enforcement Directive does not *directly* affect the substantive law of copyright, it certainly strengthens the *effect* of that substantive law, by creating powerful new tools for the enforcement of copyrights.

One tendency of the Enforcement Directive is to exacerbate an existing trend in European copyright law towards increased protectionism coupled with narrower limitations. This trend begins with the EUCD's declaration that harmonization of copyright law must start with a "high level of protection."[82] The natural starting point is at or near the highest level of protection available in any of the EU states. Next, the EUCD requires only a single mandatory limitation on this right, while providing an *exhaustive* (and relatively short) list of exceptions and limitations that member states are

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[81] *See, e.g., id*., Recital 3: "[W]ithout effective means of enforcing intellectual property rights, innovation and creativity are discouraged . . ."; Recital 8: "[D]isparities . . . are prejudicial to the proper functioning of the Internal Market . . ."; Article 9: "The current disparities also lead to a weakening of the substantive law on intellectual property . . ."; Recital 28: "[C]riminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights."

[82] Copyright Directive, *supra* note 25, Recital 9. Arguably the trend began with the WIPO Treaty, which provides the justification for the European Union's harmonization of copyright law. However, the WIPO Treaty's requirements leave much more scope for flexibility in implementation than the EUCD. *See* WIPO Copyright Treaty, Dec. 23, 1996, CRNR/DC/94.

permitted, *but not required*, to implement.[83] Finally, the Enforcement Directive strengthens the substantive rights required under the EUCD by adding (in countries where they do not already exist) new remedies and enforcement procedures, while permitting even *more* aggressive enforcement measures.[84] Accordingly, harmonization in European law necessarily centers on strong property rights, extremely limited exceptions, and broad-ranging enforcement mechanisms, with little room for flexibility or gaps in protection.

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[83] Copyright Directive, *supra* note 25, art. 5. The mandatory exception relates to transient reproductions of copyrighted material as it is passes through an electronic distribution network, e.g. the Internet. Note that the EUCD's bias towards limited exceptions is further exacerbated by the fact that in some countries, such as the United Kingdom, implementation of European legislation is accomplished through accelerated procedures that allow only mandatory elements of the legislation; implementation of optional limitations thus requires separate introduce through the country's normal legislative process. *See* Foundation for Information Policy Research, *Implementation of the EU Copyright Directive*, p. 121, *at* http://www.fipr.org/copyright/guide/eucd-guide.pdf (last viewed November 12, 2004).

[84] Enforcement Directive, *supra* note 35, art. 2(1) ("Without prejudice to the means which are or may be provided for in Community or national legislation, *in so far as those means may be more favourable for rightsholders . . .*") (emphasis added).

NEXT STEPS

So, what happens next? The passage of the Enforcement Directive and the death of the INDUCE Act can be viewed as the end of the second wave of digital copyright legislation. So is the recent movement towards increased copyright protection and restricted fair use at its end? Or are there gaps remaining that need filling? Alternatively, will we decide that we have moved too far, too fast, and that we must re-think our approach to copyright protection in the digital age? The answers at this point seem equivocal. Proposed legislation in the United States represents a variety of "solutions" to the problem, some addressed at aggressively closing further gaps in digital copyright protection, others premised on the notion that existing legislation has gone too far. Clues to next steps in Europe are less visible, although a movement opposed to enhanced digital copyright protection is emerging.

The Consumer Broadband and Digital Television Promotion Act, introduced in the United States Senate in 2002, purports to address a reluctance on the part of content providers to distribute high-quality, broadband digital works absent additional assurances that their rights will be protected. In this bill, the proposed solution is a mandatory digital rights management scheme for digital television, created by industry cooperation under the oversight of the Federal Communications Commission.[85] Other bills introduced in Congress propose to make unauthorized "offering for distribution" of copyrighted materials a criminal offense and to authorize the United States Justice Department to file

[85] Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2d Sess. 2002). Less than two years old at this writing, the proposed bill provides a justification that seems almost quaint given the rapid growth in the digital television market: "The lack of high quality digital content continues to hinder consumer adoption of broadband Internet service and digital television products." *Id*. at § 2(1).

direct civil actions against alleged infringers.[86] These measures reflect a more-protection-is-better mentality, and continue to ignore any possible threat to artistic and technological creativity.

On the other hand, there is a counter-movement even within the United States Congress. The Digital Choice and Freedom Act of 2002, introduced in the House of Representatives, seeks to make the anti-circumvention provisions of the DMCA inapplicable against individuals who wish to make non-infringing uses of lawfully acquired material. The bill also proposes that "platform-shifting," the transfer of a digital work from one piece of electronic hardware to another, be permitted for non-public uses, even if the transfer requires making a copy of the original work.[87] Similarly, the Digital Media Consumers' Rights Act of 2003 proposes that activities undertaken to exercise fair use of copyrighted material be exempted from both the anti-circumvention and anti-trafficking prohibitions.[88] The Consumer Technology Bill of Rights, introduced as a Joint Resolution in the Senate, advocates a much bigger step back, suggesting that Congress formally recognize that such activities as time-shifting, space-shifting, platform-shifting and digital format translation are important consumer rights.[89]

In Europe, the shape of the next wave is less apparent. The European Commission has recently published a working paper "on the review of the EC legal

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[86] H.R. 4077, Piracy Deterrence in Education Act, and S. 2237, Protecting Intellectual Rights Against Theft and Appropriation (PIRATE) Act, summarized at Public Knowledge, *The Intellectual Property Protection Act (H.R. 2391)*, *at* http://www.publicknowledge.org/issues/hr2391 (last visited November 13, 2004).

[87] Digital Choice and Freedom Act of 2002, H.R. 5522, 107th Cong. (2d Sess. 2002).

[88] Digital Media Consumers' Rights Act of 2003, H.R. 107, 108th Cong. (2003).

[89] Consumer Technology Bill of Rights, S.J. Res. 51, 107th Cong. (2d Sess. 2002).

framework in the field of copyright and related rights," which purports to assess whether there is any "harmful impact on the fair balance of rights and other interests."[90] However, the paper takes a very technical approach to the issue, focusing primarily on the potential for "inconsistencies" within Community legislation, and does not address the apparently un-related rights of free expression and communication at all. Similarly, a fact sheet titled "Intellectual Property Rights and Digital Rights Management Systems," published by the European Commission Information Society, mentions a "balance between the interests of rights holders and users," but concern for the public interest is addressed only by a statement that "DRM must not be allowed to become a commercial or technology licensing control point."[91] From the European Commission's point of view, the primary concerns at this point appear to be internal consistency and an inchoate threat of potential unfair competition. Again, concern for the public interest is limited to consumers' expectations as to access; any potential threat to innovation itself is ignored.

However, as in the United States, a counter-movement suggests that copyright law should be re-examined, with more attention given to the public interest. One response to the Commission's working paper proposes a "Digital Rights Directive" to address specifically the balance between intellectual property rights and other public interests,

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[90] Commission of the European Community, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, July 19, 2004.

[91] European Commission Information Society, Intellectual Property Rights and Digital Rights Management Systems, Fact Sheet 020, September 2004, *available at* http://europa.eu.int/information_society/doc/factsheets/020-ipr_drm-october04.pdf (last visited November 13, 2004).

including consumers' abilities to "enforce their fair-use or fair-dealing rights."[92] Curiously, this response includes no mention of the right to free expression.

CONCLUSIONS

The harmonization effort in Europe and the DMCA in the United States react primarily to the perceived threat, largely to the existing entertainment industry, of rampant piracy and unauthorized exploitation of copyrighted works. In reacting, legislators have either ignored or misunderstood the delicate balance required between copyright protection and the right of free expression. The outcome presents a significant threat to innovation. This threat appears not just with respect to new information technology, but also to the creative efforts of individuals not aligned with the traditional entertainment industry, since artistic creativity depends critically upon a thriving public domain as well as a flexible approach to fair use. Further, any stifling of new technological innovation presents an extra threat to creativity, as technological development has historically fostered radically new methods for communication and expression.[93]

To respond appropriately to these threats requires a pragmatic approach. Digital rights management schemes are here to stay. These schemes can be effective, at least in

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[92] European Digital Rights *et al*, *Response to EU consultation on review of copyright law*, 31 October 2004, *at* http://www.edri.org/campaigns/copyright (last visited November 13, 2004).

[93] While the threat I attribute to the DMCA, EUCD, and the Enforcement Directive remains largely to be seen (and is in any case difficult to measure, as it assumes that certain things will *not* come to pass), the same is arguably true with respect to the beneficial impacts of these measures with respect to any added incentives for producers of creative works. Reduced piracy and/or an increase in judgments against infringers, should either be demonstrated, may increase profits for the entertainment industry, which presumably would increase someone's incentive. Whether that increase in incentive is substantial enough to offset the corresponding social costs is another question entirely.

discouraging small-scale piracy, and they create opportunities for creative new ways to distribute and price digital content. And the stakes, as viewed by the entertainment industry, are tremendous: the Motion Picture Association of America, for example, estimates that "Internet piracy" costs the motion picture industry alone more than three billion dollars annually.[94]

One critical problem for opponents of strong protection for digital rights management technology is how precisely to articulate the problem that these technologies, coupled with robust enforcement mechanisms, present for the public. The issue is not simply that the entertainment industry has gone too far in its offensive against young pirates; rather the issue is whether the current regulatory scheme neglects the balance between intellectual property rights and a thriving creative sector. We *should* be concerned when consumers' expectations as to time-shifting and space-shifting are frustrated. But we should be *more* concerned about whether the DMCA, the EUCD, and their progeny threaten our ability to express ourselves in creative new ways, and indeed whether the threat extends to our ability to create new technologies and media for doing so.

Articulating the threat to the public has been more difficult than explaining the dangers of rampant piracy to the entertainment industry. But at bottom, the claim that piracy presents a risk of reduced incentive for creativity is no more inherently plausible than an assertion that increased restrictions on fair use and threats to technological innovation endanger the public interest. Most would agree that since stronger protection

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[94] Motion Picture Association of America (MPAA), *Anti-Piracy*, *at* http://www.mpaa.org/anti-piracy/index.htm (last visited November 13, 2004).

promises greater profits to the entertainment industry, *some* increased incentive to produce is likely. Exactly how much, however, is another matter. Likewise, to the extent that this increased protection places even slightly greater restrictions on public use, *some* reduction in creativity and innovation is inevitable. Again, the question is precisely how much. Legislators have chosen to ignore these questions.

For so long as legislators (and the public) instead believe that the "balance" that must be struck is between threats to the entertainment industry and frustrations of consumer expectations, remedial efforts are likely to be limited to ineffective tinkering at the edges of the current law. Needed instead is a general recognition that the threats to the public good, while difficult to grasp, compel an analysis of copyright law in the context of the proper balance: between the need for intellectual property rights to encourage artistic creation and the need for a creative, expressive and innovative society. Only with this proper balance in mind can we expect to create copyright law that will truly "promote the progress of Science and the useful Arts" and protect our "freedom to hold opinions and to receive and impart information and ideas."