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## From the Writer

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I chose to write this essay about the implications of copyright law on free speech because of its relevance to modern society. The question of how to best enforce copyright restrictions has become a key issue in our increasingly digital world, where highly advanced, easy to use methods of copyright infringement are readily available. While writing this essay, I was constantly confronted with varying ideas of where the copyright line should be drawn. These were interesting to me because I have to deal with issues such as illegally downloading music, decryption of DVDs and CDs, and use of copyrighted materials in an educational setting. Studying these topics, I found myself not only writing a paper, but looking at my own thoughts on the subject and how I treat it in my life. The arguments on both sides of the debate did more than just contribute to my paper. They also gave me new insight into a deep and complex issue, and I can now utilize this knowledge in my everyday life.

When it comes to revisions I would make if I were to write another draft, the first thing I would do is more research. There is a vast amount of further information on the subject available, especially in the realm of music downloading through programs such as Limewire, which I did not have the opportunity to really address. In addition, I feel that I could have gone further in developing the arguments of how the DMCA has worked correctly to protect free speech. There was a lot more about the two cases I mention that could have been said and discussed to further the argument for the value of the DMCA. The last major revision I would make is expanding on the examples of the music industry using the DMCA to obstruct technological advancement. Due to time limitations, I was able to find several examples and briefly summarize them, but further development of these incidents would strengthen my arguments.

— Benjamin Cohen

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## **PROTECTING SPEECH OR COPYRIGHT: A QUESTION OF BALANCE**

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Over the last fifteen years, the world has seen vast expansions and improvements in the realm of technology. Computers and the internet have become a prevalent part of society in modern America. Along with the internet, many other technological developments have changed the world we live in, such as DVRs and iPods. As technology and the internet have evolved, however, the law has had to evolve as well, and often this has led to complex issues, such as how to control internet piracy of copyrighted works. In response to this issue, Congress passed the Digital Millennium Copyright Act (DMCA) of 1998, which made it illegal to circumvent digital rights management (DRM) systems or create or sell technology capable of circumventing DRM systems (United States Copyright Office 3–4). Through this law, the courts have ruled that internet distributors of online file transfer programs can be held liable for the copyright infringement performed with their software (*Metro-Goldwyn-Meyer Studios v. Grokster*). However, scholars, researchers, teachers, and programmers have argued against the act, claiming that the restrictions against the creation of DRM-circumventing technology put overbroad restrictions on freedom of speech by constricting the fair use doctrine for digital media, discouraging intellectual and educational progress and discussion, and stifling further technological advances (Schaffner 145). These rights to speech cannot be discarded simply for the benefit of copyright owners and their works.

The debate over whether the DMCA places overbroad restrictions on free speech begins with the question of how copyright protection relates to speech. Historically, American law has contained provisions for copyright protection as a way of promoting artistic and intellectual prog-

ress by protecting authors' rights to their work (Brannan 249). This protection ensures authors the ability to distribute, utilize, and profit from their intellectual works as they see fit. Additionally, as technology advanced and new media were introduced, such as movies or television, copyright law was updated to follow suit (Brannan 247).

The DMCA was designed to supplement previous copyright law by protecting the interests of copyright owners in the internet age. Copyright protection is used to defend the right of those who create intellectual works from having others proliferate and profit from the work without permission from the author (Schaffner 146). The need for the additional protections contained in the DMCA came about as a response to the increasing ease with which individuals could upload copyrighted digital media, such as music or video files, and share them online (Schaffner 147).

The protections offered by the DMCA, however, have come with concerns over the possible detrimental effects it could have on free speech, in particular the right to fair use of copyrighted materials. The fair use doctrine protects the public interest of using minor portions of copyrighted materials for uses such as criticism, reporting, teaching, or research without procuring permission from the copyright owner (Brannan 252). When judging whether or not an instance of copyright infringement qualifies as fair use, four major factors must be taken into account: for what purpose the work is used, the method of its use, the amount of the work as compared to its entirety, and the possible commercial effect the use could have on the original work (*UMG Recordings v. MP3.com* 5). All come together to determine the viability of a fair use defense. For example, making copies of a DVD movie and then selling it would not be fair use, but posting a clip of a war movie in a presentation on World War II would be defensible.

The scholar Derek J. Schaffner believes that the DMCA has given copyright owners of digital media increased power at the expense of the public's right to fair use (151–152). Because the DMCA has made it illegal to circumvent encrypting technology, scholars, professors, students, and other members of the general public cannot legally access many forms of protected digital media for fair use purposes, even if they have legitimately purchased the rights to said media (Schaffner 151). For instance, say a biology teacher wanted to feature a clip from a nature documentary in a presentation to her class. She has the documentary on DVD, and she

uses a program freely available on the internet to upload the DVD to her computer and then inserts the clip into her Power Point for the next day. Technically, under the DMCA, she has committed a crime because “the act of circumventing a technological measure in order to gain access is prohibited” (United States Copyright Office 4). Before the introduction of the DMCA, this kind of use could be defended with the fair use doctrine as an educational tool, but the restriction against the use of copyright-circumventing technology prevents her from uploading the DVD no matter what her intentions.

The fact that the DMCA can make what can legitimately be defended as fair use completely illegal means that it has the power to regulate speech potentially in an overbroad manner (Schaffner 148). This important issue entered the judicial realm in the New York District Court case of *Universal v. Reimerdes*, where several studios sued Eric Corley for providing on his website internet links that allowed users to download a program called DeCSS (303). DeCSS is a program designed to circumvent a DVD encryption known as CSS and was meant to allow users of the Linux operating system to play DVDs on their computers (Brannan 263). Linux is an open-source system developed by users, and does not have the license required for a build in CSS decryption key. In response, DeCSS was made so that users who had legally purchased DVDs could simply play them on their computers, but when the creator released his program on the internet so that other Linux users could also utilize it, people began to use the program to upload DVDs to their computers and share them online (Schaffner 155–156). When Corley linked his site to places to download DeCSS, he was sued under the DMCA for providing access to copyright circumvention technology in direct violation of the prohibition against this (*Universal v. Reimerdes* 305). Corley defended DeCSS, claiming that it would be used for fair use purposes and that the DMCA was unconstitutional because people had the right to circumvent copyright encryptions under certain circumstances (*Universal v. Reimerdes* 304).

While Corley’s actions were found to violate the DMCA’s restriction against the trafficking of copyright-circumventing materials, a great deal of debate was put forth over the constitutionality of the DMCA in regard to the fair use argument. In fact, in the opinion for *Universal v. Reimerdes*, Judge Kaplan acknowledged that “the use of technological means of

controlling access to a copyrighted work may affect the ability to make fair uses of the work” (322). However, despite admitting this potential restriction of fair use, the courts decided that the value of the DMCA in preventing internet piracy balanced out the damage done to free speech (322), and thus maintained the legitimacy of the DMCA.

The reason that this decision is so important in the realm of technology and copyright infringement is because it seems to go against the precedent set by the Supreme Court in the 1984 case of *Sony Corp v. Universal City Studios*. The court in this case determined that the selling of a technology that allegedly could be used for copyright infringement purposes on the basis that its primary functions qualified as fair use (420–421). Sony had recently developed the Betamax, a videotape recording device that allowed users to record a television program and replay it at a later time. Universal sued Sony, claiming that the Betamax would allow for and encourage copyright infringement through users recording and selling television shows. Sony countered that the taping of shows was fair use, as the general user would simply utilize the Betamax to “time-shift” the program, or view the show at a later, more convenient time, and then copy over the recording to tape another show (*Sony Corp v. Universal City Studios* 421). In this view, the Betamax owner may be recording the entire television show, but he or she would in no way infringe upon the copyright owner’s market for their work (425–426). The court, in a close 5–4 decision, decided in favor of Sony, with the understanding that “the sale of copying equipment . . . does not constitute contributory [copyright] infringement if the product is widely used for legitimate, unobjectionable purposes” (442), purposes which they determined the Betamax fulfilled. In writing the majority opinion supporting the Betamax’s positive uses, Justice Stevens cited the results of surveys which showed that 80% of Betamax owners watched the same amount of television as they did before buying the system and that many used the technology to tape programs such as sports games occurring when they were not home (424).

The Betamax ruling poses an interesting problem with DMCA’s take on technology and copyright infringement: if the development of the VCR in the 1980s has protection because it fulfills the legitimate purpose of time-shifting, why does a program such as DeCSS not have the same protection when it too offers legitimate, fair use options? According to the

court in the *Reimerdes* case, the *Sony* case did not have any bearing because “the DMCA fundamentally altered the landscape” of copyright law (323). The reasoning behind the separation of pre- and post-DMCA copyright lies in the potential of the technology to perform copyright infringement that goes beyond fair use (Schaffner 156). In the *Reimerdes* case, the fear was that with the combination of DeCSS and other technology available on the internet, a user could create and share an unlimited amount of copies of a single copyrighted work with extreme ease and optimal quality (313–315). In contrast, when making recordings using the Betamax, each recording lost significant quality, and the making and distribution of copies was far more difficult without the data-transmitting properties of the internet. As such, in writing the DMCA, Congress determined that the dangers associated with copyright circumvention and the internet posed far greater risks than what the Supreme Court confronted in *Sony v. Universal*.

The restrictions on free speech do not end with obstruction of fair use. Another major free speech issue lies in the realm of intellectual and scientific development. In 2001, a presentation by a Russian software company in Las Vegas led to the arrest of one of the company’s employees for violating the DMCA (Schaffner 157). The product under display by the company was a program that could decrypt eBooks sold by Adobe so that users could download purchased eBooks onto multiple devices. Without this program, users could only download an eBook to one machine. The software company, ElcomSoft, claimed that the DMCA was unconstitutional because it placed restrictions on content-based speech in addition to restricting the right to fair use. However, the courts disagreed, believing that the governmental interests in preventing internet piracy and copyright infringement were necessary and outweighed the restrictions placed upon speech by the act (Schaffner 157).

While the legal charges against ElcomSoft were eventually dropped as a result of the arrest and trial, scientists and programmers have refused to come to the United States for programming conferences for fear that their work may incidentally violate the DMCA, and Russia has explicitly warned programmers against travelling to America (Schaffner 158). The information that these individuals could offer towards technological development could prove invaluable, but because of the speech restrictions of

the DMCA, their ideas, research, and discoveries will remain absent from the American marketplace of ideas, which also has the effect of reducing the speech available.

In addition to discouraging the input of foreign researchers, the Recording Industry Association of America (RIAA) and other groups have used the DMCA to dissuade native research as well (Schaffner 159). In one particular incident, the Secure Digital Music Initiative challenged programmers to crack DRM technologies. However, when Edward Felten and his team of researchers succeeded and wrote up their work documenting how they did it, the RIAA threatened to sue Felten under the DMCA. Felten refrained from releasing his work for fear of being found liable for the dissemination of programming that could feasibly be used to circumvent DRM-protected media (Schaffner 159).

Despite the variety of ways in which the DMCA potentially violates the first amendment's guarantee of free speech, it has been used in a number of court cases to defend legitimately against internet copyright infringement. In 2000, the case *UMG Recordings v. MP3.com* went to a New York district court to determine whether MP3.com had violated the DMCA (*UMG Recordings v. MP3.com* 2). MP3.com ran an internet service which enabled subscribers to access their music library from any location with internet access. It provided this service by purchasing and uploading thousands of CDs to its servers and granting access to the files to users who could prove ownership of the songs (*UMG Recordings v. MP3.com* 3). They were sued for copyright infringement because they uploaded the CDs without first obtaining permission. The court found that MP3.com had indeed committed copyright infringement and that their fair use defense failed because they were using the songs for commercial gain, using the entire songs, and that their system was a subset of a possible market that the copyright owners had first right to (*UMG Recordings v. MP3.com* 7–10).

A second case in the fight against internet piracy is *A&M Records, Inc. v. Napster*. This 2001 Ninth Circuit case featured Napster, a company that offered a freely downloadable program that allowed users to share music files on their hard drives with other users and download music files from other users via search tools that come with the program (*A&M Records, Inc. v. Napster* 5). Despite evidence that showed a significant

amount of the files downloaded through Napster were copyrighted, Napster defended its program with fair use by claiming its users are simply engaging in space-shifting of already legally owned music files, in addition to the fact that several artists had given permission for their works to be shared on Napster (*A&M Records, Inc. v. Napster* 21). The court found that Napster's defense failed all four aspects of fair use (23–37) and that there was requisite evidence to show that Napster had significant knowledge of the copyright infringement that users had engaged in without making efforts to curb this infringement, which meant they were liable for contributory infringement (57). This kind of contributory infringement by companies offering software capable of circumventing copyright and distributing protected material over the internet is exactly the kind of abuse that the DMCA was designed to fight against (Brannan 254).

While the Digital Millennium Copyright Act of 1998 has a commendable purpose and has been effectively used in cases to protect the rights of copyright owners, it has also been the subject of much conflict over its restrictions in the areas of fair use and free speech. As technology advances, it is necessary for copyright law to advance with it in order to defend properly both the rights of the copyright owners and those of the consumer public. In order to ensure the protection of the public's rights to the legal use of copyright works, Congress must revisit the area of copyright law and attempt to correct the deficiencies of the current DMCA. While the arguments against the DMCA may not be enough to overturn it as unconstitutional, this does not imply that its restrictive effects on free speech are right.



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