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 New England Journal on Criminal and Civil Confinement

Summer, 2006

*32 N.E. J. on Crim. & Civ. Con. 373*

**LENGTH:** 16869 words

**NOTE:** Copyright Law and the Digital Millennium Copyright Act: Do the Penalties Fit the Crime?

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**SUMMARY:**

... As a result of substantial pressure exerted on Congress by the motion picture and recording industries, the Digital Millennium Copyright Act (DMCA) was passed into law in 1998. ... In this case, David LaMacchia, a student at the Massachusetts Institute of Technology (MIT), gained access to the Internet by using MIT's computer network and, using pseudonyms and encrypted addresses, developed an online bulletin board called Cynosure where he encouraged other hackers to upload and download popular software programs and games. ... It was precisely this case, and the loophole created when an infringer's conduct was not done with purposes of financial gain, that led Congress to re-evaluate copyright law and pass the NET Act, which eliminated the requirement for financial gain. ... Among the witnesses were Congresswoman Zoe Lofgren from California and Marybeth Peters, the Register of Copyrights, who discussed various ways that the DMCA limits fair use of consumer products, such as the fact that some files can be legally downloaded but not placed on the user's MP3 (digital music) player. ... For example, at UC Berkeley, students will "be warned [that] they can lose their Internet access or get slapped with a costly copyright infringement lawsuit if they aren't careful about uploading and downloading files using" peer-to-peer network programs. ...

**TEXT:**

[\*373]

I. Introduction

As a result of substantial pressure exerted on Congress by the motion picture and recording industries, the Digital Millennium Copyright Act (DMCA) was passed into law in 1998. n1 While enactment of the DMCA was applauded by these industries, there were several attempts to prevent its passage. n2 For example, several law professors sent written statements to Congress opposing enactment of the DMCA, and several others joined in an amici curiae brief in the Second Circuit stating that enactment of the DMCA would violate the Copyright Clause of the United States Constitution. n3 The primary purposes of the Act's passage were to protect copyright holders' rights in their material, prevent illegal copying and distribution of this material, and to bring the copyright laws in the United States into alignment with the World Intellectual Property Organization (WIPO) Copyright Treaty. n4 Violations of the DMCA carry strict penalties, [\*374] including a fine of up to \$ 500,000 and/or a jail sentence of up to five years for the first offense. n5 Subsequent offenses carry a fine of up to \$ 1 million and/or a jail sentence of up to ten years. n6 While criminal prosecutions pursuant to the DMCA have been relatively limited in number, the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA) have utilized the DMCA to file several lawsuits against copyright infringers. n7

Using the broad subpoena power granted to copyright holders by the DMCA, the RIAA filed, as of the writing of this Note, at least 3000 lawsuits and/or subpoenas against parties they deemed to be potential copyright infringers. n8 The RIAA has been widely criticized because some of those lawsuits were filed against grandmothers as old as sixty-six and children as young as twelve. n9 Critics of the DMCA have even argued that the subpoena power granted to copyright holders by the Act is greater than the subpoena power granted in criminal cases or to the government in its [\*375] fight against terrorism. n10 While this comparison is certainly debatable, a quick analysis reveals that it may be correct.

n11 For example, the content that can be requested pursuant to a subpoena issued under the DMCA is substantially similar to the content that the government can subpoena under the USA PATRIOT Act. n12 Additionally, the same safeguards are present, including the fact that a court order is required before a subpoena can be issued for the requested records. n13 One critic of the DMCA noted that the criminal penalties imposed upon copyright infringers by the Act warrant closer examinations by the RIAA before filing lawsuits because their "targets aren't hardened criminals but potential customers for legally obtained music." n14 The author's point was that sending out so many subpoenas without thorough investigations would not only result in poor publicity for copyright holders, such as the RIAA and the MPAA, but could also drive further violations of the DMCA if customers believed that a subpoena could be issued in their name or a lawsuit filed against them whether they abide by relevant copyright laws or not. n15

A new act currently pending before Congress known as the Piracy Deterrence and Education Act (PDEA) would mandate up to three years in prison for digital pirates and certain classes of hackers. n16 While the DMCA, [\*376] PDEA and similar laws may be necessary because perfect digital copies can be made with relatively little expense, n17 the current copyright laws go too far in their penalty provisions and excessively limit individuals in the way in which they can use material they purchased. For instance, the PDEA would make it possible for the Justice Department to prosecute anyone who has at least 1000 songs in a shared folder on their computer. n18 Additionally, the Justice Department's burden of proving that these songs are being uploaded to, or downloaded from peer-to-peer (P2P) networks is removed. n19 This essentially makes anyone with a large CD collection that happens to save their MP3s in the wrong folder (i.e., a folder that they are unknowingly sharing) on their hard drive a criminal, subject to three years in prison even if they are not knowingly sharing these files. n20 Before the DMCA, only those considered to be software pirates were prosecuted for copyright infringement because a pirate was defined as one who intended to profit from the infringement. n21 The DMCA has now made it possible for the Justice Department and copyright holders to sue anyone who shares or otherwise distributes digital media, including people who innocently wish to make back up copies of their expensive digital media. n22

Part II of this Note will provide a brief history of the laws mentioned above, why they led Congress to pass the DMCA, and how the landscape of copyright law has changed since 1976. A brief history of penalties available by statute and common law prior to the passage of the DMCA will also be discussed.

Part III of this Note will discuss the development of the DMCA, [\*377] including Congressional testimony and comments of various groups, such as the comments of the Software & Information Industry Association submitted to the United States Copyright Office. Although it is common for bills to change while still in the discussion/developmental stages in the House of Representatives and the Senate, a brief comparison of the House and Senate versions of the bill reveals that there were some moderate, but important differences between the two versions of the bill. n23 For example, the House version provided more exceptions, such as scientific and research purposes. n24 This Note will show that content providers were able to help write the DMCA by successfully lobbying Congress to include a section making it illegal for end-users to circumvent encryption technologies. n25 While some commentators have argued that the anti-circumvention provisions provide too much protection for copyright holders, others have argued that they do not provide enough. n26

Part IV of this Note analyzes the DMCA and the No Electronic Theft Act of 1996, and will discuss whether there is a need to criminalize copyright infringement. For example, are the Acts excessive in light of other alternatives such as private lawsuits, or are they effective because criminal penalties deter copyright infringement more thoroughly than other alternatives? n27 This Note will discuss some cases that have been filed pursuant to the DMCA that could limit the ways customers can use their copyrighted materials, as well as the broad subpoena power granted to copyright holders under the DMCA. n28 While discussing whether such harsh copyright penalties are required, a brief overview of some of the copyright proposals currently being considered by Congress, such as the PDEA, will [\*378] be provided. n29

Lastly, Part V of this Note concludes that current penalties are excessive because the fair-use doctrines currently in force do not allow customers to use their electronic media in ways that should be considered fair use. n30 The fair-use doctrines dictate that copyrighted materials can be used to make "legitimate, personal copies of music [consumers] have purchased," or for scientific, educational or other non-infringing uses as long as the person invoking the fair-use doctrine does not make a profit from the copyrighted materials. n31 An individual can invoke the fair-use doctrine even if that individual invents a device that can be used for infringing purposes as long as that device has substantially non-infringing uses as well. n32

## II. Historical Background

### A. History of Statutory Copyright Law

Criminal copyright infringement is not a new development. n33 It has been around since 1897, n34 initially focusing on the unauthorized reproduction of performances of plays, music, and certain books and maps. n35 Over time, advances in technology have made it easier to copy music, books, and other original works. n36 Congress eventually expanded the coverage of copyright law in 1909 to protect dramatic works, lectures and sermons, and other works of art. n37 However, conviction required proof of willful conduct and the copyright holder had to prove that the infringer was using the copyrighted work for profit. n38 While it may seem that this law would have allowed copyright infringers to go unpunished, the courts were willing to [\*379] grant copyright holders relief as long as they could show some minimum amount of loss of profits. n39 With the exception of raising the dollar amount that willful-for-profit infringers could be fined, copyright law remained largely unchanged for seventy years. n40 The next major development was the Copyright Act of 1976, which kept profit motive as a necessary element in the prosecution of a copyright infringement case. n41 The Copyright Act of 1976 extended the enforceability of copyrights to last the life of the author plus fifty years thereafter for works created after January 1, 1978. n42 The second major change incorporated into the Copyright Act of 1976 was to increase the amount a willful infringer could be fined to \$ 50,000. n43

Because the Copyright Act of 1976 and other laws in force at the time made it difficult for courts to rule in favor of copyright holders if the infringer did not have commercial motive, Congress passed the No Electronic Theft (NET) Act in 1996. n44 The NET Act was intended to close the so-called "LaMacchia Loophole," which required infringers to have a motivation to profit from their infringing activity. n45 The NET Act went a step further in protecting copyrighted works by providing criminal penalties; however, an infringer's state of mind remains a consideration when deciding whether an infringer willfully violated a copyright. n46 When the NET Act was the primary copyright law under which copyright violators could be prosecuted, an individual knowingly and intentionally had to infringe on another's copyright in order to be successfully prosecuted. n47 While Congress may have intended the NET Act to provide [\*380] for strict liability by supplying a willfulness standard for copyright infringement, the United States Supreme Court in *United States v. Cheek* n48 had already held that willfulness is a subjective standard that must be decided by a jury; cases after the NET Act's passage seemed to reinforce that holding. n49 Specifically, the United States Supreme Court stated that each case is different because every defendant's willfulness, knowledge, and beliefs are questions for the fact finder, and "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." n50

With the advent of digital technologies and the ability to copy easily any work, Congress passed the Copyright Felony Act of 1992. n51 The Copyright Felony Act of 1992 provided stiffer criminal penalties and jail time of up to five years when convicted of making ten or more copies of copyrighted works, as long as the value of those ten copies exceeded \$ 2500 during any six-month period; second-time offenders were subject to ten years in prison. n52 Congress passed the NET Act in 1996 in order to close the so-called "LaMacchia Loophole," which required infringers to be motivated to profit from their infringing activity before courts could subject them to fines and possible imprisonment under the Copyright Felony Act of 1992. n53 Because the NET Act kept the willfulness requirement, the defendant's state of mind in criminal infringement cases remained relevant when determining whether they acted willfully while infringing upon the copyright holder's rights. n54 However, the willfulness requirement has not [\*381] been applied consistently in all courts. n55 The NET Act did, however, serve to strengthen copyright law in several ways. n56 The NET Act changed the definition of financial gain from requiring actual profit to include any expectation of financial gain, whether or not profit was made. n57 The NET Act also reduced the minimum financial gain from \$ 2500 in any six-month period under the Copyright Felony Act of 1992 to \$ 1000 in any 180-day period, and provided for a step system of punishment whereby escalating periods of imprisonment were mandated for each violation of the NET Act. n58 The last major change proscribed by the NET Act was to direct the United States Sentencing Commission to develop sentencing guidelines sufficient to deter copyright infringers from further violations. n59 Prior to passage of the DMCA, this was probably the biggest change in statutory copyright law because it demonstrated that Congress intended to show copyright infringers that their conduct would be punished as severely as the law allowed. n60

### B. Common Law Effects on Statutory Copyright Law

Courts have applied three levels of liability in copyright infringement cases. n61 The first and most obvious, direct infringement liability, requires direct participation by the infringer. n62 The second level of infringement is vicarious liability, where the defendant has the opportunity to infringe and benefits financially by doing so. n63 In order to be held vicariously liable, the defendant must have controlled or supervised a direct infringer. n64 The third and final theory of liability is contributory liability, whereby infringers [\*382] provide the opportunity and may induce others to infringe.

n65 Two cases that have had the greatest impact on common law copyright infringement were Sony Corporation of America, Inc. v. Universal City Studios, Inc. n66 and United States v. LaMacchia. n67

#### 1. Sony Corporation of America, Inc. v. Universal City Studios, Inc.

The Sony case was a major development in copyright law because it established the fair-use doctrine of substantial non-infringing uses, and helped to create a shield for any company that makes a product that can be used for infringing purposes, but has substantially non-infringing uses as well. n68 In Sony, owners of copyrighted television programs sued Sony Corporation under the copyright act because consumers that owned video-cassette recorders (VCRs) re-recorded copyrighted television programs for later viewing, which the Court referred to as time-shifting. n69 The plaintiff/respondent copyright owners alleged that Sony was contributorily liable because they manufactured a product that enabled consumers to break copyright laws. n70 Using a balancing test, the Court stated that the usefulness of any product and its legitimate legal purposes must be balanced against any possible infringing uses. n71 The Court stated that the primary use of VCRs was to time-shift television programs that were broadcast free of charge over the airwaves, and that this should be considered a fair-use exception to the copyright act. n72 This case is important because the Supreme Court held for Sony stating that VCRs had substantially non-infringing uses, including time-shifting programs such as nightly news that the consumer would have missed otherwise. n73 Because [\*383] these practical, non-infringing uses outweighed the possible infringing uses, the United States Supreme Court chose to expand the fair-use doctrine to include substantially non-infringing uses.

#### 2. United States v. LaMacchia

Another major case leading to the development of the Digital Millennium Copyright Act was United States v. LaMacchia. n74 In this case, David LaMacchia, a student at the Massachusetts Institute of Technology (MIT), gained access to the Internet by using MIT's computer network and, using pseudonyms and encrypted addresses, developed an online bulletin board called Cynosure where he encouraged other hackers to upload and download popular software programs and games. n75 Fellow hackers were able to upload and download popular software titles and games as long as they had the password to Cynosure. n76 University and federal authorities eventually discovered the service that Mr. LaMacchia was offering for free, closed down the bulletin boards, and prosecuted him pursuant to the federal wire tapping statute. n77 Authorities were not able to prosecute LaMacchia under the copyright laws in force at the time because existing copyright law required that the defendant's infringement was done "willfully and for purposes of commercial advantage or private financial gain," and Mr. LaMacchia's infringement was not done for either commercial advantage or private financial gain. n78 The court ruled in favor of LaMacchia because, in its determination, the wire fraud statute was not applicable to copyright cases. n79 The absence of willful conduct or the desire to profit from his [\*384] activities, coupled with the inappropriate utilization of the wire fraud statute, left the court with no choice but to rule in favor of Mr. LaMacchia, despite the fact that he was clearly guilty of copyright infringement and should have been punished for the illegal copying and distribution of copyrighted materials. n80 It was precisely this case, and the loophole created when an infringer's conduct was not done with purposes of financial gain, that led Congress to re-evaluate copyright law and pass the NET Act, which eliminated the requirement for financial gain. n81 By refining the definition of financial gain to include copyrighted works received, as opposed to a requirement that there be some form of monetary gain, and removing the need for commercial motive on behalf of the infringer, Congress sought to enable courts to punish future defendants like Mr. LaMacchia and remove the "LaMacchia Loophole." n82 However, while passage of the NET Act removed the monetary gain requirement, the willfulness requirement remained; therefore, courts were still required to consider a defendant's state of mind when reviewing copyright cases. n83 This made it possible for defendants to win copyright infringement cases as long as their conduct was not intentional and left a different loophole in then-existing copyright laws. n84 This new loophole led to development of [\*385] the DMCA. n85

#### III. Development of the DMCA

"The Motion Picture Association of America estimates that 2.6 billion songs, movies and software programs are illegally distributed over the Internet every month." n86 With the development of peer-to-peer networks making it easier for infringers to share electronic content over the Internet, content providers such as the RIAA and the MPAA have been consistently lobbying Congress to strengthen copyright laws. n87 The content industry made the DMCA their highest priority during the 105th Congress, and Hollywood executives and lobbyists exerted tremendous pressure to pass the legislation. n88 Recognizing that intellectual property theft costs United [\*386] States companies approximately \$ 250 billion per year, now former Attorney General John Ashcroft announced that the Justice Department would "expand and strengthen specialist units to fight intellectual property crimes in the United States and in Eastern

Europe and Asia, where many counterfeit goods are made." n89 This expanded Justice Department effort included adding five enforcement units to the thirteen already in operation, ensuring that copyright protections are in all future international treaties, and sending agents to the United States embassies in Hong Kong and Hungary to assist with enforcement in those countries. n90 While content providers such as the RIAA and the MPAA were successful in lobbying Congress to pass the DMCA, leaders in these industries are often quoted as saying that the DMCA does not provide sufficient protections for copyright holders. n91 A brief analysis is in order to examine the differences between the House and Senate versions of the bill and why content providers may feel that the final version does not adequately protect copyright holders.

While the Senate and House versions of the DMCA are virtually identical except for some renumbering, the House version provides for more fair-use exceptions than the Senate version. n92 For example, the House version allows for exceptions when copies are made for scientific, educational, research, or news reporting purposes. n93 While this difference may not seem important, it has proven to be a major point of contention with those opposed to the DMCA. n94 One reason for contention is that the final version of the bill contains limited exemptions for research involving anti-circumvention and security research that aim to make it more difficult for future technologies to be infringed upon. n95 The DMCA's exceptions are [\*387] so limited that the DMCA will have a major chilling effect on scientific and computer research, thereby potentially hurting the United States' chances at fair competition in the international marketplace. n96 For example, in September 2000, a multi-industry trade group known as the Secure Digital Music Initiative (SDMI) issued a press release challenging any researcher or hacker to defeat certain watermarking technologies intended to protect digital music. n97 Edward Felten, a professor at Princeton University, and a team of researchers from Princeton, Rice, and Xerox accepted the challenge and were successful in defeating the technologies. n98 The researchers were going to present their findings at an academic conference, but SDMI sent them and the conference organizers a letter stating that they would be punished under the DMCA if they allowed the results to be published. n99 The threat letter was successful in getting the researchers to withdraw their paper until a later conference where they were allowed to publish portions of the paper after winning a lawsuit they filed against SDMI. n100 Because of this experience, at least one of the researchers involved decided to stop his research in this field. n101 Despite the fact that the DMCA has already hurt this type of scientific research by limiting what researchers can publish, industry trade groups argue that the DMCA and other laws do not adequately protect copyright holders' interests, and that research has not been affected since passage of the DMCA. n102

[\*388] Among the industry trade groups expressing concern about the DMCA was the Software and Information Industry Association (SIIA), which sent a letter in July 1999 to the United States Copyright Office and the National Telecommunications and Information Association, presenting the belief that the DMCA does not provide sufficient protection for copyright holders. n103 They also wrote that research has not been affected since passage of section 1201(g) of the DMCA. n104 The SIIA argued that the major impediment to copyright holders allowing their materials to be published on the Internet is a lack of trust. n105 The SIIA further argued that anti-circumvention laws need to be made stricter so that copyright holders will be able to trust that their materials will not be infringed upon when made available for download via the Internet. n106 The SIIA stated that copyright holders need their interests protected, which can only be done through encryption and other software and/or hardware protections. n107 In its conclusion,

[The] SIIA and its members believe that section 1201(g) should not be altered [because] we are aware of no evidence that section 1201(g) of the DMCA has impacted encryption research or the development of encryption technology. Nor does there appear to be any evidence that section 1201(g) has any impact on the adequacy and effectiveness of technological measures ... . n108

It seems the SIIA never heard of Edward Felten or the SDMI letter discussed above. In response to the uproar by industry trade groups and opponents of the DMCA, as well as a report issued by the Librarian of Congress pursuant to the powers granted to them by section 104 of the DMCA, Congress held a hearing in December 2001 to assess the then-current state of the DMCA and whether it needed to be changed. n109 Section 104 allows the Librarian of Congress to periodically assess current [\*389] copyright law and make recommendations to Congress about how it should be changed based on new and emerging technologies. n110

During the two-day hearing in December 2001, Congress heard testimony from various witnesses and members of Congress arguing for and against certain provisions of the DMCA. n111 Among the witnesses were Congresswoman Zoe Lofgren from California and Marybeth Peters, the Register of Copyrights, who discussed various ways that the

DMCA limits fair use of consumer products, such as the fact that some files can be legally downloaded but not placed on the user's MP3 (digital music) player. n112 Also present were Cary Sherman, senior executive vice president and general counsel for the RIAA, and Emery Simon, counsel for the Business Software Alliance. n113 These witnesses argued that the DMCA is a fair law and that it provides ample fair-use exceptions for individuals and businesses to take advantage of in order to use their copyrighted materials. n114 Additionally, Gary Klein, Vice President of Government and Legal Affairs and General Counsel for the Consumer Electronics Association, an association with 600 members which produces virtually every consumer electronic product in the marketplace, attended the December 2001 Congressional Subcommittee hearing. n115 Mr. Klein testified and provided a letter to Congress written by association members stating that the fair-use doctrine in its current form is too narrow. n116 The association postulated that the fair-use doctrine is too narrow and should be revised and expanded. n117 The association does not believe that consumers should be barred from making archival or digital copies of their electronic media (CDs, DVDs, etc.) - they believe that the current fair-use doctrine should be more closely examined and amended to allow users to make copies of the media they purchased; but consumers should not be allowed to redistribute this media. n118

Opponents of the DMCA would agree with the Consumer Electronics Association's beliefs that consumers should be allowed to make certain copies of the media that they purchase. n119 Like the Consumer Electronics [\*390] Association, these opponents are concerned that consumers will not be able to make archival or backup copies of their media if the DMCA is strictly construed not to allow any electronic copies to be made. n120 Allowing consumers to make backup and archival copies of their digital media would address most concerns about the DMCA, excluding certain research and de-encryption limitations. n121

In light of the background and development of the DMCA, several questions need to be answered in order to analyze the Act properly. Are the criminal and civil penalties imposed upon copyright violators by the DMCA and other copyright laws too harsh? For example, is there justification for imposing such high fines and the possibility of imprisonment? Do the current copyright laws give copyright holders too much power? Lastly, are copyright holders, such as the RIAA, driving Justice Department investigations and prosecutions?

#### IV. Analysis of the DMCA

##### A. Criminal Penalties in Copyright Infringement Cases - Are They an Effective Deterrent?

Many critics of the DMCA have stated that the criminal penalties imposed on copyright violators are overly burdensome, maintaining that private lawsuits will suffice when attempting to prosecute copyright infringement. n122 They further advocate that, even if criminal penalties were included in the DMCA or any other copyright law, copyright lawsuits are hard to prosecute and the government should not be used to enforce the rights of private copyright holders. n123 However, criminal penalty proponents and copyright holders filing civil lawsuits argue that current technologies enable copyright holders to find and prosecute infringers more effectively. n124 Because current and emerging technologies make it easier to prosecute copyright violators, it is argued that filing criminal lawsuits [\*391] against copyright infringers does not waste taxpayer money. n125 Then United States Attorney General John Ashcroft stated that there is a major problem with copyright infringement and that it "represents a hemorrhaging of the work product of American citizens." n126 With views as strong as these, it is no surprise that the government and copyright holders such as the RIAA and the MPAA feel that there is a definite need for criminal penalties in copyright infringement cases. However, has the potential for criminal penalties made any noticeable difference in the world of copyright infringement?

One study showed that the number of illegal downloads may have declined after the RIAA began sending subpoenas to copyright infringers. n127 A closer examination of this study, however, reveals that it is somewhat misleading. n128 While the raw numbers reveal that the number of downloaders declined over the period of the study, the number of downloads per user actually rose in that same period. n129 Perhaps the subpoenas only had a deterring affect on those people who did not download copyrighted files on a regular basis - keeping the honest people honest. Additionally, this study focused on the effects of civil subpoenas sent to copyright infringers by the RIAA and did not include any data on criminal investigations and/or lawsuits. n130 Part of the reason for the lack of success these tactics have experienced is that a majority of the current illegal file downloaders are teenagers who do not believe that they are doing anything morally wrong because they feel that they are not hurting millionaire artists by downloading a couple of their songs, or large software companies by making one copy of that company's software, n131 which, from the students' perspective, sells for hundreds of unaffordable dollars per copy. While copyright holders' rights should be protected, the subpoena power granted to the RIAA and other copyright holders under the DMCA [\*392] is too broad. Copyright holders such as the RIAA and MPAA should not be empowered to force the Justice Department to act. Addi-

tionally, copyright holders should not be allowed to send out thousands of subpoenas in a desperate attempt to find anyone that might be infringing on their work.

## B. Sample Post-DMCA Cases

### 1. UMG Recordings, Inc. v. MP3.com, Inc.

One can see the problems that the DMCA has caused when looking at a sample of cases filed pursuant to the Act. n132 In *UMG Recordings, Inc. v. MP3.com*, UMG filed suit against MP3.com because MP3.com's website allowed users to listen to music over the Internet. n133 UMG Recordings was able to force MP3.com to stop offering this service even though users of the service had to prove they owned the music before they could listen to it over the Internet. This is significant because it severely limits the fair-use doctrine in that users would be forced to buy multiple copies of music - for example, one CD for the office, one for the car, and one for home listening, rather than one CD copied onto some central server (or an MP3 player), where they can listen to that music wherever they are. Before allowing users to listen to any music on the MP3.com website, users first had to prove that they owned the music that they wanted to listen to. n134 After creating an account with MP3.com, and proving that they owned the music that they wished to listen to over the Internet, MP3.com allowed the users to listen to the music from any computer connected to the Internet. n135 UMG sued MP3.com claiming that the MP3.com website allowed users to listen to unauthorized copies of the copyright holders' works. n136 Ruling that the electronic copies were different from the CD copies that users already owned, and a separate license was required to be purchased in order to listen to the electronic copy, the court held that MP3.com was enabling its users to infringe upon the copyright holders' works. n137 The problem with this ruling is that it seems to ignore the fact that the users of the MP3.com website already owned the content they were listening to; rulings like this essentially force the users to purchase the same music multiple times [\*393] depending upon which medium they wish to take advantage of when listening to their music. Further, this ruling threatens to erode the fair-use doctrine, which enables original purchasers "to make legitimate, personal copies of music they have purchased." n138

### 2. Universal City Studios, Inc. v. Reimerdes

*Universal City Studios, Inc. v. Reimerdes* has the potential to limit the fair-use doctrine as it pertains to scientific and educational research because the defendants were forced to remove their research findings from a website where they shared their knowledge of how to break the encryption found on DVDs. n139 Utilizing the DMCA and its anti-circumvention provisions, Universal sought an injunction to stop the defendants from publishing the code on their websites. n140 The defendants argued that they could publish their findings based on certain exceptions under the DMCA, including research exceptions. n141 The defendants alternatively argued that they should have been allowed to break the encryption code found on DVDs because they intended to use the findings of their research for personal reasons. n142 Ruling in favor of Universal, the court reasoned that the defendants did not intend to use the de-encryption code for any personal non-infringing uses and that barring them from dissemination of the code does not abridge their First Amendment rights of free expression because there is no expression in computer code. n143 While the court left the door open for private non-infringing uses of the de-encryption code, and this case was probably rightly decided in favor of Universal, the case is still somewhat troubling because the court decided not to extend the First Amendment right of free speech to computer code. n144 Further, the court never actually stated that users could not break the encryption code as long as they only intended to use it for private purposes, such as to enable a DVD to play on different DVD players or computers that they already owned. n145 This is troubling because many programmers work extremely hard to develop software and each programmer's style may be slightly different, thereby opening up the possibility of expression through slight variations in computer code, such as [\*394] as when a programmer inserts comments or Easter eggs (undocumented mini programs for the end-user to discover). n146

### 3. 321 Studios v. MGM Studios, Inc.

This case illustrates that any company that makes software, which enables users to make legitimate backup or archival copies of media that they pay for, is a potential defendant if that software could also be used for copyright infringement purposes. In *321 Studios v. MGM Studios, Inc.*, MGM Studios brought suit against 321 Studios because 321 made and distributed software that allowed users to make perfect backups of their DVD movies. n147 321 Studios argued that their software was sold so users could make backups and archival copies of their DVDs in order to protect their investments. n148 They further argued that the software only worked on commercial DVDs that the users already owned and the software would not work in order to make a copy of a copy. n149 MGM Studios argued that the software did not have any commercially reasonable uses and was distributed for the sole purpose of breaking the encryption found on

DVDs, which is required by DVD players in order to access the content of those DVDs. n150 Reasoning that MGM Studios was correct in arguing that 321 Studios' software had substantially infringing uses and that its main purpose was to evade the encryption found on DVDs, the court ruled in favor of MGM Studios, thus rejecting 321 Studios' arguments that issuing an injunction barring them from distributing this software would substantially impair the fair use rights of its customers. n151 This ruling is problematic because it means that consumers may be breaking the law if they make backup copies of their expensive DVD collections.

While there may have been some legitimate reasons to rule the way these courts did, these cases show the potential court abuses by copyright holders if the DMCA is not more fairly worded in order to allow end users fair-use exceptions to make copies of content that they already paid for. n152 Further, forcing users to pay multiple times for the same content simply because they wish to listen to, watch, or otherwise use that content on a [\*395] different medium or in a different place will ultimately hurt the copyright holders because users will have less disposable income to spend on new copyrighted materials, such as their favorite musician's next hit CD.

#### C. How Effective Has the DMCA Really Been?

Despite its tough anti-circumvention provisions and stiff penalties, the DMCA has not been as effective as lawmakers hoped it would be when they passed the bill into law. n153 While there have been some small gains in the copyright infringement battle, n154 there have been relatively few major wins. n155 One advance that the RIAA and MPAA have made in their fight against copyright infringers is getting colleges and universities to warn students about the potential penalties for copyright infringement. n156 Due to the increasing number of subpoenas issued to universities, many university campuses have begun to hold mandatory sessions where they train students about copyright law and advise them of the penalties that can be imposed on them under the DMCA and other current copyright laws. n157 For example, at UC Berkeley, students will "be warned [that] they can lose their Internet access or get slapped with a costly copyright infringement lawsuit if they aren't careful about uploading and downloading files using" peer-to-peer network programs. n158 Additionally, at the writing of this Note, the RIAA and the MPAA issued over 3000 subpoenas and settled hundreds of lawsuits with copyright infringers. n159 However, these relatively minor advances in an environment of copyright infringement referred to as a "cancerous growth" have not made a significant dent in the number of downloads that are still occurring on a daily basis. n160

[\*396] In fact, the number of copyright infringement cases has continued to increase n161 and there does not seem to be an end in sight. While some may argue that the number of copyright cases has grown because the DMCA makes it easier to prosecute copyright infringers, n162 it is apparent that the number of cases has actually grown because the DMCA has not been effective in deterring persistent infringers. n163 The Computer and Communications Industry Association n164 (CCIA) noted that the DMCA is an ineffectively designed law. n165 College students, arguably the group that is the most persistent in their endeavor to download for free, n166 have determined that they can avoid litigation as long as they download less than their peers do. n167 The number of downloads may be declining due to the DMCA, but the number of infringers has not substantially decreased because people have realized that downloading less than the next guy will keep them off the RIAA's or MPAA's lawsuit radar screen. n168 The RIAA's subpoena power was dealt a major blow, despite its best efforts to keep the growing number of subpoenas and lawsuits against infringers in the media to scare potential infringers, when the United States Court of Appeals for the District of Columbia overturned a lower court decision forcing ISPs to automatically comply with RIAA demands to turn over the names of [\*397] infringers simply because they connected to the Internet. n169 The court stated that ISPs need not comply with these requests because no judicial review of the subpoenas was required and requiring ISPs to provide names of their customers simply because they provide Internet access to those users "borders on silly." n170 Industry experts were quoted as saying that the decision made "Internet users ... the winners." n171 Additionally, when decisions like the one in *Universal City Studios v. Reimerdes* leave the possibility that it might be possible to break circumvention technologies as long as one does not intend to publish or profit from one's results, it is clear that the DMCA is not as effective as lawmakers originally hoped it would be. n172 Lastly, artists may not necessarily want the RIAA and MPAA to file all of the lawsuits they have been filing. n173 One recent survey showed that many artists believe that file sharing actually helps them make more money because it helps get their work out to more people. n174 Many artists believe that the Internet actually helps them "exercise their imaginations and sell their creations." n175 The ever-increasing number of RIAA and MPAA lawsuits, coupled with the current sentiment among teenagers, as well as decisions like those mentioned above, serve to highlight the weaknesses of the DMCA. n176

#### D. Proposed Legislation to Further Limit Copyright Infringement

While the DMCA is already attempting to limit copyright infringement, there are more potentially dangerous proposals before Congress that would further hurt consumers' fair use of their legally obtained copyrighted materials. n177 Although both of these bills have been either temporarily dropped from consideration or tabled for further review, bills like the Privacy and Deterrence Education Act (PDEA) and the Inducing Infringements of Copyright Act (INDUCE) would mean more possible [\*398] punishment for seemingly innocent behavior. n178 The PDEA would mandate fines up to \$ 250,000 for anyone that has at least 1000 songs in a shared file folder on their computer. n179 This bill would also "switch the onus of prosecuting file-swappers from Big Music and Hollywood to the U.S. government. So instead of filing suit themselves, these huge media companies would have your tax dollars pay the freight." n180 There are obvious dangers in such a copyright law because it removes the burden of proof and deems anyone with this many songs on their computer to be a digital pirate. n181 The potential infringer would have to spend hard-earned money on attorney's fees in order to prove that they actually own all of those songs in some other medium, such as CDs, and that their sharing the files was an accident. n182 The PDEA is also dangerous because it is so vague that its "ambiguous language extends to legally downloaded songs, like the ones that artists offer for free on their Web sites, or even those you buy from iTunes, if you were to either burn songs for friends or use the site's sharing feature to stream songs over a network." n183 While the PDEA focuses on consumers, the INDUCE Act would focus primarily on technology companies. n184

The INDUCE Act would make any technology company a potential criminal by making them liable for technology they manufacture that could be used to copy digital content. n185 The bill was introduced by Senators Hatch (R-Utah) and Leahy (D-Vermont) and immediately gained support from the RIAA and MPAA for obvious reasons. n186 Technology companies oppose the bill because it "would kill innovation and potentially outlaw some of the most popular devices, including Apple's iPod." n187 Despite these Senators' strong desires to push this bill through Congress, the technology industry is strongly opposed to it in its current form because [\*399] they say that no technology company would be willing to innovate or bring products to market without first checking with Hollywood; and this type of Hollywood approval would not be good for any business model. n188 This law could undermine the Sony Betamax decision, which held that any technology that people use for legal purposes would be legal - even if the device could be used for illegal purposes, such as content piracy. n189 The INDUCE Act would take an objective standard and replace it with a subjective one which allows a copyright holder to try to determine the intent of a company that produces a product, essentially placing the entertainment industry in charge of technological innovation if this law were passed. n190 Passage of the INDUCE Act would kill innovation. n191

#### E. Alternatives to the DMCA and a Model Electronic Statute: *18 U.S.C. 1030* - The Computer Fraud Statute

Determining whether the fines imposed by the DMCA are fair requires a review of other electronic-related statutes. For example, *18 U.S.C. 1030* provides for certain punishments based on fraud or other crimes related to computers. n192 This statute covers such crimes as computer bank fraud, accessing remote computers without authorization, and sending foreign code or instructions to a remote computer. n193 The statute provides for a range of five to twenty years in prison, depending upon which part of the statute is violated, as well as an unspecified monetary penalty. n194 Although the code does not specify the amount of damages to be recovered, it does provide guidelines for when to assess these penalties. n195 In order to assess damages, the computer fraud must have been performed for purposes of commercial advantage or private financial gain, the act must have been committed in furtherance of any tortious or criminal act in violation of the laws of the United States or the United States Constitution, or the amount of damages caused must exceed five thousand dollars. n196 Two cases where this Act was utilized were *United States v. Morris* and *United States v. Middleton*, where each defendant's punishment was prescribed according [\*400] to the amount of damage that was caused by his tortious acts. n197

##### 1. *United States v. Morris*

In *United States v. Morris*, the defendant began working on a computer program in October 1988 that would later be known as a "worm" or a "virus." n198 The purpose of this program was to "demonstrate the inadequacies of current security measures on computer networks by exploiting the security defects that Morris had discovered." n199 Morris was a graduate student at Cornell, but chose to release the worm on November 2, 1988 into the Internet through a computer at MIT to avoid detection. n200 In order to prevent infected computers from crashing or otherwise suffering damage, Morris designed the program only to attack one out of every seven computers it came in contact with and to destroy itself once a computer was shut down. n201 He chose these and other safeguards because he did not want the program to be easily detected and "killed" from the systems it infected. n202 The program was more successful than Morris imagined and infected many machines across the country causing them to be unresponsive and ultimately "catatonic."

n203 Morris contacted a friend at Harvard and the two sent a message over the Internet with instructions on how to kill the program, but the message got through too late because so many computers were already infected with Morris's program. n204 The program ended up infecting leading universities' computers, military computers, and medical research facilities with a cost ranging from \$ 200 to \$ 53,000 to remove the virus from each infected site. n205 Morris was found guilty of violating *18 U.S.C. 1030* (a)(5)(A) after a jury trial and was sentenced to three years probation, 400 hours of community service and fined \$ 10,050 and the cost of his supervision. n206

[\*401]

## 2. United States v. Middleton

In *United States v. Middleton*, the defendant once worked for Slip.net as a computer and network repair technician and administrator. n207 He was fired from his former employer, but allowed to keep an e-mail address as a private customer since Slip.net was an Internet service provider to paying consumers. n208 Due to his previous position within the company, Middleton had access to employee passwords and used this knowledge to gain access to the company's computer system from an outside computer. n209 Middleton used his password to change various features of existing employee e-mail accounts on the system. n210 After the first unauthorized log in, Slip.net's President discovered Middleton's acts through a computer password-tracking program and immediately terminated Middleton's personal e-mail account with the company. n211 Later, however, Middleton was able to gain access to the company's main computer system and change all administrative passwords, alter the computer's registry, which controls how the computer performs, delete the company's new billing system, and delete two internal databases. n212 Upon discovering the damage the next day, the President and computer administrator began fixing the problems that Middleton caused. n213 Company employees spent a total of approximately 154 hours cleaning up the problems, hired an outside consulting firm for technical support, and bought new software to replace the software that Middleton deleted. n214 Middleton was charged with violating *18 U.S.C. 1030* and was found guilty after a jury trial. n215 He was sentenced to three years of probation, subject to the condition that he serve 180 days in community confinement and was ordered to pay \$ 9147 in restitution to the company. n216

In applying the sentencing structure of *18 U.S.C. 1030*, both the [\*402] Morris and Middleton courts looked at the legislative intent and wording of the statute to determine that each case required the court to look at the defendant's specific conduct when deciding on an appropriate punishment. n217 Additionally, because the statute provides for a fine, but does not specify an amount to be assessed, both courts examined each defendant's specific actions and the damages that were caused by those actions when deciding the damage award. n218 These cases reveal that a well-drafted statute will cause the courts to assess each defendant's actions on an individual basis and impose penalties accordingly, n219 unlike the DMCA, which arbitrarily assigns damages based on the number of times a defendant violated the statute. n220 Further, with the realization that many artists believe that the Internet and file sharing may actually help them more effectively distribute their content without hurting them financially, the legislature should closely examine whether private lawsuits would be a better alternative to allowing the RIAA and MPAA to sue users each time there is any potential infringement. n221 The DMCA would be more fair and effective if it were structured like the computer fraud statute, which enables judges and juries to assess damages on a case-by-case basis.

## V. Conclusion

Copyright infringement is a serious problem. Therefore, copyright holders need to be protected from those who will essentially steal money from their hands by stealing electronic content. However, the public, especially teenagers, have come to view the taking of electronic files as acceptable even though it is the equivalent of stealing merchandise from a bricks-and-mortar store. n222 The legislature must find a balance where consumers will be able to make copies of their own materials as long as they do not intend to profit from those copies because no consumer should have to pay multiple times for materials they legally obtained. n223 The DMCA goes too far in protecting the rights of copyright owners and does not allow consumers to use goods they purchased in legal ways. For example, the DMCA

prevents consumers from making back-up copies of DVDs they own in [\*403] order to protect them from scratches and loss ... . MP3 players can be found in 23% of American homes, but the DMCA makes it a crime to provide a music fan with software that helps him get his music from a copy-protected CD into his iPod; and a garage door opener company has invoked the DMCA to prevent a competitor from selling interoperable replacement garage door "clickers." n224

In order to properly strike the balance between copyright protection and consumer use, the definition of "fair use" needs to be improved, either through case law or legislation so consumers have a better understanding of what they can and cannot do with their digital media. "Fair use" needs to be defined to mean that consumers can make as many copies they want of their legally obtained copyrighted content, as long as they do not attempt to distribute those copies in any way. This solution would be the only way to eliminate the current restrictions on how consumers can use digital media that they have already paid for. For the above stated reasons, the current provisions of the DMCA are too strict and a more clearly defined law with better alternatives for penalties is required, such as the Computer Fraud Statute that allows for individual consideration of harm in each case. n225

### Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law  
Criminal Offenses  
Copyright Infringement Actions  
Copyright Law  
Criminal Offenses  
General Overview  
Copyright Law  
Foreign & International Protections  
General Overview

### FOOTNOTES:

n1. See James H. Morris, *Tales of Technology: Who Stole My Internet?*, Pittsburgh Post-Gazette, June 1, 2003, at C10; Bruce G. Joseph & Scott E. Bain, *Copyright Office Determines that FCC-Licensed Broadcasters Are Not Exempt from Copyright Liability for Streaming Their Broadcast Programming over the Internet - Eligible Broadcasters May Obtain Compulsory License*, Metropolitan Corp. Couns., Apr. 2001, <http://www.wrf.com/docs/publications/11479.pdf>; see also *United States v. LaMacchia*, 871 F. Supp. 535, 539-40 (D. Mass. 1994) (noting that, "after lobbying by the Motion Picture Association and the Recording Industry Association, Congress increased the penalties for criminal infringement in 1982." (citing Piracy and Counterfeiting Amendments Act of May 24, 1982, Pub. L. No. 97-180, 96 Stat. 91 (1982))).

n2. See Charles S. Sims, *The Digital Millennium Copyright Act: Technological Protection, Fears and Risks of Lockup, Fair Use, and Free Speech*, 2 Sedona Conf. J. 19, 19 (2001); Lewis A. Kaplan, *Apple v. Franklin, 20 Years Later*, 22 *Temp. Envtl. L. & Tech. J.* 1, 6 (2003) (discussing content providers resorting to encryption technologies in order to protect their work from infringement and stating that content providers "lobbied Congress to proscribe the circumvention of these access control technologies").

n3. Sims, *supra* note 2, at 19.

n4. See, e.g., Aaron M. Bailey, *Comment, A Nation of Felons?: Napster, the NET Act, and the Criminal Prosecution of File-Sharing*, 50 *Am. U. L. Rev.* 473, 502 (2000) (stating that the Digital Millennium Copyright Act was passed in order to bring U.S. copyright law in compliance with the World Intellectual Property Organization treaties, as well as to address "challenges of digital technology"); Gale R. Peterson, *Understanding the Intellectual Property License 2003, Overview of Intellectual Property*, 762 *PLI/Pat* 11, 94-96 (2003) (stating that the Digital Millennium Copyright Act was passed in order to bring copyright law in compliance with World Intellectual Property Organization treaties, prevent circumvention of technological measures, and prevent unauthorized access to copyrighted materials).

n5. 17 *U.S.C.* 1204(a)(1) (2000).

n6. *Id.* 1204(a)(2).

n7. See *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004) (summary judgment granted to Metro Goldwyn Mayer Studios, Inc., because 321 Studios distributed software that allowed people to break copyright protection found on DVDs); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (finding that MP3.com breached copyright laws by allowing users to stream music from CDs they already owned); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (ruling that the defendants violated copyright laws when they broke the encryption code found on DVDs and posted it to the Internet and that the defendants still violated copyright law even if they broke the code for personal uses); see also Editorial, *Tone Deaf Enforcement*, Boston Globe, Oct. 6, 2003, at A10; Brian Boyd, *No Beating the Copyright Rap*, Irish Times, Nov. 1, 2003, at 52.

n8. Editorial, *File Sharers: Don't Crow Yet; The Recent Court Ruling Isn't the Latest Word on Digital Copying. Congress Will have to Weigh in*, Los Angeles Times, Jan. 3, 2004, at B20 [hereinafter *File Sharers: Don't Crow Yet*]; *RIAA Continues Download Lawsuits*, eWeek, May 24, 2004, [http://www.findarticles.com/p/articles/mi\\_zdewk/is\\_2004\\_05/ai\\_n9520240](http://www.findarticles.com/p/articles/mi_zdewk/is_2004_05/ai_n9520240) ("The latest round of lawsuits raised to nearly 3,000 the number of people who have been sued nationwide by recording companies.").

n9. *Tone Deaf Enforcement*, supra note 7, at A10; Boyd, supra note 7, at 52.

n10. See, e.g., Peter Shinkle, *Charter Gives Customer Names to Music Industry*, St. Louis Post-Dispatch, Nov. 22, 2003, at Business1; Drew Clark, *Will You Subpoena Me Now?*, Nat'l J., Oct. 11, 2003; David McGuire, *Song-Swap Networks Unveil Code of Conduct*, Washington Post, Sept. 29, 2003, [http://www.findarticles.com/p/articles/mi\\_m\\_0NTQ/is\\_2003\\_Sept\\_29/ai\\_108290802](http://www.findarticles.com/p/articles/mi_m_0NTQ/is_2003_Sept_29/ai_108290802).

n11. Compare Digital Millennium Copyright Act, 17 U.S.C. 512(h) (2000), with USA PATRIOT Act, Pub. L. No. 107-56, 210-212 (2001). The relevant sections of these Acts grant similarly broad subpoena power in order to accomplish their goals. 17 U.S.C. 512(h); Pub. L. No. 107-56, 210-12; see also John Berlau, *A New Tune May Bolster the GOP; The Controversy About Trading Music Files over the Internet Raises an Opportunity for Republicans to Show Their Commitment to Privacy and Limited Government, While Scoring Points with Democrat Constituencies*, Insight on the News, Sept. 15, 2003, at 18; Dugie Standeford, *RIAA Subpoena Campaign Is Worrisome and Confusing, ISPs Say*, Washington Internet Daily, Aug. 12, 2003.

n12. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001). Compare Digital Millennium Copyright Act, 17 U.S.C. 512(h), with USA PATRIOT Act, Pub. L. No. 107-56, 210-12, and 18 U.S.C.A. 2703 (West 2004) (describing the subpoena power of the USA PATRIOT Act).

n13. 18 U.S.C.A. 2703.

n14. *Tone Deaf Enforcement*, supra note 7.

n15. *Id.*

n16. *Piracy Deterrence in Education Act of 2004*, H.R. 4077, 108th Cong.; *House Panel OKs Copyright, Spyware Bills: Hackers, Music Swappers May Face up to Three Years in Prison*, MSNBC, Sept. 8, 2004, <http://msnbc.msn.com/id/5945126> [hereinafter *House Panel OKs Copyright, Spyware Bills*].

n17. For example, at the time of writing this Note, any person that owns a computer with a CD-R/CD-RW drive, which comes standard on most computers, can choose to copy their newly purchased compact disk (CD) onto their hard drive using free programs such as Real Networks' Real Player, Microsoft Windows' Media Player, or several other programs that can be found and downloaded free of charge utilizing simple searches on Google. Moreover, that same user can purchase blank CDs from most retailers for less than \$ .50 per CD and copy songs from several CDs onto one homemade mix CD. This also holds true for any computer with a disk drive that can write to digital video disks (DVDs).

n18. See Piracy Deterrence in Education Act of 2004, H.R. 4077, 108th Cong. (2004); House Panel OKs Copyright, Spyware Bills, *supra* note 16.

n19. Brooks Boliek, Legislation Includes Indecency Fines for Performers, *Hollywood Reporter Online*, Sept. 9, 2004, [http://www.hollywoodreporter.com/thr/television/brief\\_display.jsp?vnu\\_content\\_id=1000641349](http://www.hollywoodreporter.com/thr/television/brief_display.jsp?vnu_content_id=1000641349); Declan McCullagh, House Votes to Target P2P Pirates, *CNET News*, Sept. 28, 2004, [http://ecoustics-cnet.com.com/House+votes+to+target+P2P+pirates/2100-1028\\_3-5387682.html](http://ecoustics-cnet.com.com/House+votes+to+target+P2P+pirates/2100-1028_3-5387682.html).

n20. McCullagh, *supra* note 19.

n21. Peter Moore, Steal this Disk: Copy Protection, Consumer Rights, and the Digital Millennium Copyright Act, *97 Nw. U.L. Rev.* 1437, 1467 (Spring 2003).

n22. See, e.g., *17 U.S.C.A. 501* (2004); *UMG Recordings, Inc. v. MP3.com, Inc.*, *92 F. Supp. 2d* 349 (S.D.N.Y. 2000); Boyd, *supra* note 7, at 52.

n23. Compare H.R. 2281, 105th Cong. (1998), with S. 2037, 105th Cong. (1998).

n24. Compare H.R. 2281, with S. 2037.

n25. See Memorandum from the Software & Information Industry Association to the U.S. Copyright Office and National Telecommunications and Information Administration (July 26, 1999), [http://www.eff.org/IP/DMCA/?f=19990726\\_SIIA\\_comments.html](http://www.eff.org/IP/DMCA/?f=19990726_SIIA_comments.html) [herein-after Memorandum]; *Morris*, *supra* note 1, at C10; Joseph & Bain, *supra* note 1.

n26. See Memorandum, *supra* note 25; Electronic Frontier Foundation, Unintended Consequences: Five Years Under the DMCA (Sept. 24, 2003), [http://www.eff.org/IP/DMCA/unintended\\_consequences.pdf](http://www.eff.org/IP/DMCA/unintended_consequences.pdf).

n27. Eric Goldman, A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement, *82 Or. L. Rev.* 369, 377-78 (2003) (discussing a Department of Justice announcement that copyright cases are hard to prosecute because there is not a centralized agency that handles copyright infringement cases).

n28. See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000); Letter from The Electronic Frontier Foundation to Mr. David O. Carson, Office of the General Counsel, Copyright Office GC/I&R (Feb. 17, 2000), [http://www.eff.org/IP/DMCA/?f=20000217\\_eff\\_dmca\\_comments.html](http://www.eff.org/IP/DMCA/?f=20000217_eff_dmca_comments.html) (discussing exemption to prohibition on circumvention of copyright protection systems for access control technologies).

n29. Piracy Deterrence in Education Act of 2004, H.R. Rep. No. 108-700 (2004).

n30. See, e.g., Fred Von Lohmann, Electronic Frontier Foundation, *The DMCA Revisited: What's Fair* (June 23, 2004), <http://www.eff.org/IP/DMCA/dmcarevisited.pdf>.

n31. Electronic Frontier Foundation, *supra* note 26, at 1.

n32. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

n33. I. Trotter Hardy, *Criminal Copyright Infringement*, 11 *Wm. & Mary Bill Rts. J.* 305, 315 (2002).

n34. *Id.* at 315 (noting that the first criminal provisions for copyright infringement were passed in 1897).

n35. See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *Stan. L. Rev.* 1, 38 (2001). Books, maps and charts were protected for fourteen years with one renewal period of fourteen years provided. *Id.* (citing Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124); Hardy, *supra* note 33, at 315.

n36. Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 *Stan. L. Rev.* 531, 543-44 (2003) (discussing that technology has enabled people to more easily copy protected works).

n37. Hardy, *supra* note 33, at 315; Copyright Act of 1909, 35 Stat. 1075 (1909).

n38. Hardy, *supra* note 33, at 315; 35 Stat. 1075.

n39. See *West Pub. Co. v. Edward Thompson Co.*, 176 F. 833, 838-39 (2d Cir. 1910) (awarding profits and equity relief to plaintiff even though plaintiff waited sixteen years from the time they first found out that the defendant was paraphrasing their copyrighted work and the court thought that the plaintiffs must have found this to be fair use of the plaintiff's work); Hardy, *supra* note 33, at 316.

n40. See Bailey, *supra* note 4, at 490; Copyright Act of 1976, 17 U.S.C. 101-810.

n41. 17 U.S.C. 101-810; Bailey, *supra* note 4, at 490.

n42. 17 U.S.C. 302(a).

n43. *Id.* 504(c)(2).

n44. NET Act of 1996, Pub. L. No. 105-147, 111 Stat. 2678 (codified as amended in scattered sections of titles 17 and 18 U.S.C. (2000)); see Bailey, *supra* note 4, at 502.

n45. *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). The "LaMacchia Loophole" was created by the Copyright Felony Act of 1992, which required infringers to be motivated to profit from their infringing activity before courts could subject them to fines and possible imprisonment. NET Act, Pub. L. No. 105-147, 111 Stat. 2678 (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.); see Bailey, *supra* note 4, at 502.

n46. Bailey, *supra* note 4, at 502; see *Martin v. City of Indianapolis*, 4 F. Supp. 2d 808, 809-10 (S.D. Ind. 1998) ("Intentional conduct does not seem to be enough to support a finding of willfulness; there must be intentional infringement.").

n47. See *United States v. Moran*, 757 F. Supp. 1046, 1050 (D. Neb. 1991).

There is nothing in the text of the criminal copyright statute, the overall scheme of the copyright laws, or the legislative history to suggest that Congress intended the word "willful," when used in the criminal statute, to mean simply, as the government suggests, an intent to copy. Rather, since Congress used "willful" in the civil damage copyright context to mean that the infringement must take place with the defendant being knowledgeable that his/her conduct constituted copyright infringement, there is no compelling reason to adopt a less stringent requirement in the criminal copyright context.

*Id.*; see *Martin*, 4 F. Supp. 2d at 809-10.

n48. 498 U.S. 192, 203 (1991).

n49. See *id.*

n50. *Id.*

n51. Bailey, *supra* note 4, at 491-92 (discussing the enactment of the Copyright Felony Act of 1992).

n52. *Id.* (citing Pub. L. No. 102-561, 106 Stat. 4233 (1992) (codified as amended at 18 U.S.C. 2319 (1994 & Supp. V 1999)) (discussing the enactment of the Copyright Felony Act of 1992).

n53. *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994); NET Act of 1996, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.); see also Bailey, *supra* note 4, at 502.

n54. Bailey, *supra* note 4, at 502; see, e.g., *Martin v. City of Indianapolis*, 4 F. Supp. 2d 808, 810 (S.D. Ind. 1998).

n55. Mary Jane Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 *Denv. U. L. Rev.* 671, 688 (1994) (discussing criminal copyright infringement and inconsistency of the courts in applying the willfulness requirement).

n56. Goldman, *supra* note 27, at 373-74 (discussing major changes in the No Electronic Theft Act).

n57. NET Act of 1996, Pub. L. No. 105-147, 111 Stat. 2678, 2(a) (1997) (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.).

n58. *Id.* 2(b), (d).

n59. *Id.* 2(g).

n60. Compare Digital Millennium Copyright Act, 17 U.S.C. 1204(a)(1), (2) (2000), with Copyright Act of 1909 25, 35 Stat. 1075 (1909), and NET Act of 1996, 2(g).

n61. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435-59 (1984); *Playboy Enters. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512 (N.D. Ohio 1997); *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

n62. See, e.g., *Playboy Enters.*, 982 F. Supp. at 512 (recognizing that direct liability requires the infringer to engage in activities that are reserved for copyright holders).

n63. *Sony Corp. of Am.*, 464 U.S. at 435 (discussing that, in order to be found vicariously liable, Sony must have sold the product with constructive knowledge that its customers were going to break copyright laws - knowledge Sony did not have).

n64. See Bailey, *supra* note 4, at 494-95.

n65. See *id.* at 495.

n66. *Sony Corp. of Am.*, 464 U.S. 417. See generally John H. Mutchler, *Circumvention of Copyright Protection Systems; Will the Digital Millennium Copyright Act Stunt Global Electronic Commerce?*, *Intell. Prop. Today*, Oct. 2000, at 12; Benjamin Cohen, *And the Band Played on; The Law Could Silence Napster, the Popular Music Sharing Utility. The Dispute Continues Next Week in Court*, *Fulton County Daily Rep. (Atlanta)*, Sept. 29, 2000.

n67. *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). See generally Mutchler, *supra* note 66, at 12; Cohen, *supra* note 66.

n68. See Bailey, *supra* note 4, at 497 n.152 (noting that the substantial non-infringing use doctrine was applied for the first time in the Sony case); Cohen, *supra* note 66.

n69. *Sony Corp. of Am.*, 464 U.S. 417.

n70. *Id.*

n71. *Id.*

n72. *Id. at 454-56.*

n73. *Id. at 455-56.* Specifically, the court stated that:

In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The [VCR] is, therefore, capable of substantial noninfringing uses. Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights.

*Id. at 456.*

n74. *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

n75. *Id. at 536.*

n76. *Id.*

n77. *Id.*

n78. *Id. at 539, 542-43* (quoting 17 U.S.C. 506 (a)) (internal quotation marks omitted); see June M. Besek, Legal Protection for Databases: Recent Developments, 574 PLI/Pat 439, 459 (1999) (noting that the government prosecuted LaMacchia under the wire tapping statute "presumably because there was no evidence that the infringement was done "willfully and for purposes of commercial advantage or private financial gain," which is required for criminal copyright infringement under 17 U.S.C. 506 (a).").

n79. *LaMacchia*, 871 F. Supp. at 543-45. Specifically, the court stated that:

The suggestion that the felony provisions of the wire fraud statute were enacted with the punishment of copyright infringement in mind is somewhat difficult to accept when one remembers that in 1952 the Copyright Act authorized only misdemeanor prosecutions, a circumstance that continued until 1982. Equally difficult to accept is the idea that Congress has in some fashion acquiesced by silence to the utilization of mail and wire fraud as copyright enforcement tools. One need only contrast the infrequent and, with exception of the Congressional reaction to McNally, technical amendments to the mail and wire fraud statutes with Congress' exhaustive attention to developments affecting copyright law.

*Id.* at 543 n.13 (citations omitted).

n80. *Id.* at 543-45.

n81. Bailey, *supra* note 4, at 491-92; NET Act, 17 U.S.C. 101 (2000) (stating that "'financial gain' includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.").

n82. See Copyright Piracy, and H.R. 2265, and the No Electronic Theft (NET) Act: Hearing Before the Subcomm. on Courts and Intellectual Property, House Judiciary Comm., 105th Cong. 148 (1997) (statement of Cary H. Sherman, Senior Executive Vice President and General Counsel, Recording Industry Association of America) (noting that the Recording Industry Association of America supports the passage of the NET Act and opposes any addition to the dollar amount required for prosecution because, in Mr. Sherman's view, "by doubling the threshold requirement, the Bill has effectively doubled the work required before an Assistant U.S. Attorney can prosecute the case").

n83. Bailey, *supra* note 4, at 502; see *Martin v. City of Indianapolis*, 4 F. Supp. 2d 808, 809-10 (S.D. Ind. 1998).

n84. See *Martin*, 4 F. Supp. 2d at 809-10; *MJ Int'l, Inc. v. Hwangpo*, No. 8:01CV201, 2002 U.S. Dist. LEXIS 11079, at 7-8 (D. Neb. Mar. 13, 2002).

One who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not "willful" for these purposes... . This analysis is "subject to the corollary that reckless disregard of the copyright holder's rights (rather than actual knowledge of infringement) suffices to warrant award of the enhanced damages."

*MJ Int'l, Inc.*, 2002 U.S. Dist. LEXIS 11079, at 7-8 (citing *RCA/Ariola Int'l v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988)).

n85. See Memorandum, *supra* note 25; Electronic Frontier Foundation, *supra* note 26, at 1 (the anti-circumvention provisions of the DMCA make it apparent that Congress sought to remove the requirement that breaches of copyright be intentional).

n86. Jill Serjeant, U.S. Declares War on Intellectual Property Theft, Entertainment News, Oct. 12, 2004, <http://www.entertainment-news.org/breaking/9758/us-declares-war-on-intellectual-property-theft.htm>.

n87. See Online Pornography: Closing the Door on Pervasive Smut: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 108th Cong. 60-62

(2004) (statement of Martin C. Lafferty, Chief Executive Officer, Distributed Computing Industry Association) (stating that the entertainment industry has been lobbying Congress with claims that file sharing is perilous to children and that peer-to-peer companies, though they have no control over user actions, should be responsible for the content of files some users independently share); Pamela Samuelson, *Anticircumvention Rules: Threat to Science*, 293 *Science* 2028, Sept. 14, 2001 ("Copyright industry lobbyists persuaded Congress to adopt [the DMCA] to reassure rights-holders that ... pirates could not simply ... undo the encryption to facilitate copyright infringements.").

n88. See *Piracy Prevention and the Broadcast Flag: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 49 (2003) (statement of Edward J. Black, President and Chief Exec. Officer, Computer and Communications Industry); F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 *Rutgers Computer & Tech. L.J.* 293, 306 (2001) (writing about the DMCA, the author wrote that "under strong lobbying pressure from [content providers], Congress, in 1998, accepted the pay-per-access vision of the future and agreed to shore up copyright law to deal with the nuances of the digital environment.").

n89. Serjeant, *supra* note 86.

n90. *Id.*

n91. See, e.g., Memorandum, *supra* note 25.

n92. Compare H.R. 2281, 105th Cong. (1998), with S. 2037, 105th Cong. (1998).

n93. H.R. 2281, 1303.

n94. See, e.g., Electronic Frontier Foundation, *supra* note 26 (detailing ways that the DMCA has inadvertently chilled scientific research and technological competition in the marketplace).

n95. Digital Millennium Copyright Act, 17 *U.S.C.* 1201 (2000); Electronic Frontier Foundation, *supra* note 26, at 2. Discussing the limitations on research, the Electronic Frontier Foundation noted:

Bowing to DMCA liability fears, online service providers and bulletin board operators have begun to censor discussions of copy-protection systems, programmers have removed computer security programs from their websites, and students, scientists and security experts have stopped publishing details of their research on existing security protocols. Foreign scientists are increasingly uneasy about traveling to the United States out of fear of possible DMCA liability, and certain technical conferences have begun to relocate overseas. These developments will ultimately result in weakened security for all computer users (including, ironically, for copyright owners counting on technical measures to protect their works), as security researchers shy away from research that might run afoul of section 1201.

Electronic Frontier Foundation, *supra* note 26, at 2.

n96. Electronic Frontier Foundation, *supra* note 26, at 2 ("White House Cyber Security Chief Richard Clarke called for DMCA reform, noting his concern that the DMCA had been used to chill legitimate computer

security research."); Hiawatha Bray, *Cyber Chief Speaks on Data Network Security*, Boston Globe, Oct. 17, 2002, at C2. (quoting White House Cyber Security Chief Richard Clarke, who said, "I think a lot of people didn't realize that it would have this potential chilling effect on vulnerability research.").

n97. Electronic Frontier Foundation, *supra* note 26, at 2; Samuelson, *supra* note 87, at 2028.

n98. Electronic Frontier Foundation, *supra* note 26, at 2; Samuelson, *supra* note 87, at 2028.

n99. Electronic Frontier Foundation, *supra* note 26, at 2; Samuelson, *supra* note 87, at 2028.

n100. Electronic Frontier Foundation, *supra* note 26, at 2; Samuelson, *supra* note 87, at 2028.

n101. Electronic Frontier Foundation, *supra* note 26, at 2; Samuelson, *supra* note 87, at 2028.

n102. See Sims, *supra* note 2, at 19 (noting that several law professors filed amici curiae briefs attempting to thwart passage of the DMCA); Memorandum, *supra* note 25 (stating that the anti-circumvention laws need to be strengthened); See generally Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. (2001) [hereinafter Digital Millennium Copyright Act Section 104 Report] (testimony of various witnesses stating that penalties for breaking anti-circumvention technologies are not sufficient to deter infringers).

n103. Memorandum, *supra* note 25 (responding to a "Request for Comments on Section 1201(g) of the Digital Millennium Copyright Act published in the Federal Register of May 27, 1999 by the National Telecommunications and Information Administration.").

n104. *Id.*

n105. *Id.*

n106. *Id.*

n107. *Id.*

n108. *Id.*

n109. See generally Digital Millennium Copyright Act Section 104 Report, *supra* note 102.

n110. Digital Millennium Copyright Act, 17 U.S.C. 104 (2000).

n111. See Digital Millennium Copyright Act Section 104 Report, *supra* note 102, at 2.

n112. Id. at 6, 8.

n113. Id. at 24, 45.

n114. Id. at 25, 45-47.

n115. Id. at 73.

n116. Id. at 122-24.

n117. Id. at 124, 126, 129.

n118. Id. at 129.

n119. See Letter from Am. Library Ass'n, Ass'n of Research Libraries, Computer & Communications Indus. Ass'n, Digital Future Coal., Elec. Frontier Found., Home Recording Rights Coal., to Howard Coble, Chairman, House Intellectual Prop. Subcomm. (Sept. 28, 2001), [http://www.eff.org/IP/DMCA/?f=20010928\\_joint\\_coble\\_dmca\\_letter.html](http://www.eff.org/IP/DMCA/?f=20010928_joint_coble_dmca_letter.html).

n120. Id.

n121. See *id.*; Electronic Frontier Foundation, *supra* note 26, at 2 (detailing ways that the DMCA has inadvertently chilled scientific research and technological competition in the marketplace); Von Lohmann, *supra* note 30.

n122. See, e.g., Tone Deaf Enforcement, *supra* note 7, at A10; Boyd, *supra* note 7, at 52; Electronic Frontier Foundation, *supra* note 26.

n123. See Goldman, *supra* note 27, at 377-78.

n124. See, e.g., David McGuire, Patents Pressed Against File-Sharing Networks, *Washington Post*, Jan. 13, 2005, at E05 (discussing lawsuits filed against the RIAA based on the RIAA's ability to track downloads over a peer-to-peer network).

n125. See Serjeant, *supra* note 86.

n126. Id. (quoting then Attorney General John Ashcroft) (internal quotation marks omitted).

n127. Brooks Boliek & Carolyn Horwitz, RIAA Makes Its Case, *Billboard*, Aug. 30, 2003, at 10.

n128. See, e.g., *id.*

n129. *Id.*

n130. *Id.*

n131. See *id.*; David Becker, Congressional Leaders Promise Action on Tech, *CNET News*, Jan. 10, 2004, [http://news.com.com/Congressional+leaders+promise+action+on+tech/2100-1028\\_3-5138908.html](http://news.com.com/Congressional+leaders+promise+action+on+tech/2100-1028_3-5138908.html) (commenting on the fact that the current wave of lawsuits against copyright infringers is not working and that the DMCA was never intended to give such broad subpoena power to private copyright holders such as the MPAA and the RIAA). Representative Joe Barton of Texas stated, "'I don't agree you're going to get teenagers and young people to believe they're doing something immoral' in file swapping ... ." *Id.*

n132. See, e.g., *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000).

n133. *MP3.com, Inc.*, 92 F. Supp. 2d at 350-51.

n134. *Id.*

n135. *Id.*

n136. *Id.*

n137. *Id.* at 351-52.

n138. Electronic Frontier Foundation, *supra* note 26, at 1.

n139. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 214-15 (S.D.N.Y. 2000).

n140. *Id.*

n141. *Id.* at 218-19.

n142. *Id.* at 219.

n143. *Id.* at 222-24.

n144. *Id.*

n145. *Id.* at 214.

n146. See, e.g., G. Keith Roberts, DeCSS Code on the Internet: Is It Protected Speech?, *Computer & Internet Law.*, Dec. 2004, at 1, 1.

n147. *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1088-89 (N.D. Cal. 2004).

n148. *Id.* at 1096.

n149. *Id.*

n150. *Id.*

n151. *Id.* at 1094-1107.

n152. See *id.* at 1085; *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

n153. See, e.g., Mark Hachman, Tech, Studio Heavyweights Back New DRM Scheme; Two Major Studios and a Handful of Tech's Biggest Names Are Standing Behind a New Digital Rights Management Scheme for Next-Generation Content, *eWeek*, June 14, 2004, <http://www.eweek.com/article2/0,1895,1623747,00.asp>; Barton Vows July Markup of Boucher Fair Use Bill, *Consumer Electronics Daily*, June 24, 2004; Leticia Williams, Court Deals Blow to Recording Industry Subpoena Power, *CBS MarketWatch*, Dec. 19, 2003, <http://www.marketwatch.com/News/Story/Story.aspx?dist=newsfinder&siteid=mktw&guid=%7B4416F06C-79E1-48BC-B088-DF74FE55FB1E%7D&link=&keyword=leticia%20williams>.

n154. See, e.g., Benny Evangelista, Download Warning 101; Freshman Orientation this Fall to Include Record Industry Warnings Against File Sharing, *San Francisco Chronicle*, Aug. 11, 2003, at E1.

n155. See, e.g., Hachman, *supra* note 153; Barton Vows July Markup of Boucher Fair Use Bill, *supra* note 153; Williams, *supra* note 153.

n156. See, e.g., Evangelista, *supra* note 154.

n157. *Id.*

n158. *Id.*

n159. RIAA Continues Download Lawsuits, *supra* note 8; Williams, *supra* note 153.

n160. File Sharers: Don't Crow Yet, *supra* note 8; Marjorie Hodges Shaw & Brian B. Shaw, Copyright In the Age of Photocopiers, Word Processors, and the Internet, *Change Magazine*, Nov. 1, 2003, at 20.

n161. See, e.g., Hachman, *supra* note 153; Williams, *supra* note 153; RIAA Continues Download Lawsuits, *supra* note 8.

n162. File Sharers: Don't Crow Yet, *supra* note 8.

n163. Hachman, *supra* note 153; Barton Vows July Markup of Boucher Fair Use Bill, *supra* note 153; Williams, *supra* note 153; RIAA Continues Download Lawsuits, *supra* note 8.

n164. The CCIA's website states that

CCIA is a nonprofit membership organization for a wide range of companies in the computer, Internet, information technology, and telecommunications industries, represented by their senior executives. Created over three decades ago, CCIA promotes open markets, open systems, open networks, and full, fair, and open competition. CCIA serves as an additional, and sometimes the only, eyes, ears, and voice, in Washington for our members. Our goal is to proactively protect and promote their legitimate interests, and to advance the broad common interests of our industries.

Computer and Communications Industry Association, <http://www.ccianet.org> (follow "About CCIA" hyperlink) (last visited Apr. 24, 2006).

n165. Standeford, *supra* note 11.

n166. Boliek & Horwitz, *supra* note 127; Becker, *supra* note 131.

n167. Hodges & Shaw, *supra* note 160.

n168. Boliek & Horwitz, *supra* note 127 (discussing a study that showed the number of infringers versus the number of downloads).

n169. Williams, *supra* note 153.

n170. *Id.*

n171. *Id.*

n172. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000).

n173. File Sharing Doesn't Hurt Most Artists; Survey: Internet Helps Make More Money from Their Work, MSNBC, Dec. 6, 2004, <http://www.msnbc.msn.com/id/6659072> [hereinafter File Sharing Doesn't Hurt Most Artists].

n174. Id.

n175. Id.

n176. See Williams, *supra* note 153; Boliek and Horwitz, *supra* note 127; Becker, *supra* note 131; *Reimerdes*, 82 F. Supp. 2d at 211.

n177. See, e.g., Piracy Deterrence in Education Act of 2004, H.R. 4077, 108th Cong.; Katie Dean, Techies Blast Induce Act, *Wired*, July 23, 2004, [http://www.wired.com/news/politics/0,1283,64315,00.html?tw=wn\\_tophead\\_2](http://www.wired.com/news/politics/0,1283,64315,00.html?tw=wn_tophead_2) [hereinafter Techies Blast Induce Act].

n178. Jason Bracelin et al., Double-Flushers: We List this Year's Real Stinkers, Get Some Critical Advice from the Folks and Look at Some Scary New Downloading Laws, *Riverfront Times*, Dec. 29, 2004, <http://www.riverfronttimes.com/Issues/2004-12-29/music/bsides.html>; Techies Blast Induce Act, *supra* note 177; Katie Dean, Copyright Bill to Kill Tech?, *Wired*, July 22, 2004, <http://www.wired.com/news/politics/0,1283,64297,00.html>.

n179. Bracelin et al., *supra* note 178; House Panel OKs Copyright, Spyware Bills, *supra* note 16.

n180. Bracelin et al., *supra* note 178.

n181. Id.; House Panel OKs Copyright, Spyware Bills, *supra* note 16.

n182. House Panel OKs Copyright, Spyware Bills, *supra* note 16.

n183. Bracelin et al., *supra* note 178.

n184. Techies Blast Induce Act, *supra* note 177; Bracelin et al., *supra* note 178.

n185. Techies Blast Induce Act, *supra* note 177; Bracelin et al., *supra* note 178.

n186. Techies Blast Induce Act, *supra* note 177; Bracelin et al., *supra* note 178.

n187. Techies Blast Induce Act, supra note 177.

n188. Id.

n189. Id.; see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

n190. Bracelin et al., supra note 178.

n191. Id.

n192. 18 U.S.C. 1030 (2004).

n193. Id. 1030 (a)(1)-(6).

n194. Id. 1030 (c)(1)-(4).

n195. Id.

n196. Id. 1030 (c)(2)(B)(i)-(iii).

n197. *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991); *United States v. Middleton*, 231 F.3d 1207 (9th Cir. 2000).

n198. *Morris*, 928 F.2d at 505.

n199. Id.

n200. Id.

n201. Id.

n202. Id.

n203. *Id.* at 506.

n204. Id.

n205. Id.

n206. Id. Specifically, Morris was found guilty of violating *18 U.S.C. 1030 (a)(5)(A)*, which defines intent for someone who

(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage ... .

*18 U.S.C. 1030 (a)(5)(A)* (2000).

n207. *United States v. Middleton*, 231 F.3d 1207, 1208 (9th Cir. 2000).

n208. Id.

n209. Id.

n210. Id.

n211. *Id. at 1209*.

n212. Id.

n213. Id.

n214. Id.

n215. Id.

n216. Id.

n217. Id.; *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991).

n218. *18 U.S.C. 1030* (2000); *Morris*, 928 F.2d 504; *Middleton*, 231 F.3d 1207.

n219. *Morris*, 928 F.2d 504; *Middleton*, 231 F.3d 1207.

n220. Digital Millennium Copyright Act, 17 U.S.C. 1204(a)(1)-(2) (2000).

n221. File Sharing Doesn't Hurt Most Artists, *supra* note 173.

n222. See Boliek & Horwitz, *supra* note 127.

n223. See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (opening up the possibility of having to pay for a CD and then pay again if you wish to listen to electronically streamed copies of that same music).

n224. See Von Lohmann, *supra* note 30.

n225. 18 U.S.C. 1030 (2000).