

January 2002

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Recommended Citation

Dexter M. Campbell III, *Internet Law - Surfing without a Board? A Look at Copyright Infringement on the Internet and Article I of the Digital Millennium Copyright Act*, 24 CAMPBELL L. REV. 279 (2002).

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COMMENTS

INTERNET LAW—SURFING WITHOUT A BOARD? A LOOK AT COPYRIGHT INFRINGEMENT ON THE INTERNET AND ARTICLE I OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

I. INTRODUCTION

The Internet is my second favorite thing next to television. This is a bold statement coming from someone who grew up watching television and today schedules his life around various shows. So when I say the Internet is my second favorite thing, this is a bold personal testament to how significant the Internet is in my life. It also seems that as I grow more familiar with the Internet it becomes even more important in my daily life. About five years ago, I exclusively used the Internet for email and maybe some research; today, I use the Internet for almost everything. Here's a list of ways that I used the Internet during the first week of September 2001 : I emailed two to three times a day, used on-line banking to transfer money and print out a statement, bought contacts on-line at www.1800contacts.com, helped my girlfriend sell a PalmPilot on www.ebay.com, traded Jerome Bettis for Steve McNair on my fantasy football team, did some research for this comment on www.lexis.com, ordered a pair of pants, checked the news on various web sites like www.cnn.com, www.espn.com, and www.goheels.com, looked at stocks I wish I had, made a calendar, played video games, found an assignment for class on TWEN, and browsed www.martindale.com and www.findlaw.com for a summer job.

Needless to say I use the Internet for a number of things, just like a rapidly growing number of the population.¹ I feel like I basically know what I am doing on the Internet, but in truth I am uncertain about a lot of things I can and cannot do on the Internet. The laws geared toward the Internet seem largely undeveloped; this needs to change. The growth and the undeniable popularity of the Internet demands a corresponding development in the laws and guidelines so

1. Eric C. Newburger, *Home Computers and the Internet in the United States: August 2000*, United States Census Bureau, at <<http://www.census.gov>>.

that some of the uncertainties in the Internet community can be alleviated.

This comment first includes a brief history of the Internet, its growth, and how the population is using the Internet in daily life.² Second, this comment will give some basic definitions of copyright infringement and key Internet terms. Third, the comment will address cases in the area of copyright infringement on the Internet to demonstrate both the uncertainty and unpredictability of the law on the Internet. Fourth, this comment will focus on Congress' attempt to address some of the uncertainties through the Digital Millennium Copyright Act (DMCA).³ Finally, the conclusion will address some recent criticism of the DMCA.

II. THE HISTORY OF THE INTERNET

In 1969, the United States Department of Defense created the network ARPANET.⁴ ARPANET was originally created as a network to link computers owned by the military, defense contractors and university laboratories to conduct defense-related research.⁵ Through the use of ARPANET, researchers could access very large and powerful supercomputers located at a few universities.⁶ In the 1970s, large universities began using ARPANET and in 1972 connections outside of America were opened.⁷

ARPANET's general idea of sharing information with others formed the basis of the Internet.⁸ This idea opened up the door for other significant developments that paved the way for the Internet as we know it today. First came the development of the concept of domain names and the Server in the mid 1980s.⁹ Next was the invention of the World Wide Web in 1989 by Tim Berners-Lee, a physicist working in a European laboratory.¹⁰ Last was the creation of the graphical interface.¹¹ "The graphical interface opened up the Internet

2. *Id.*

3. 17 U.S.C. §§ 1201-1202 (1998).

4. Stephen White, *A Brief History of Computing*, at <<http://www.ox.compsoc.net/~swhite/history.html>> (last visited Mar. 18, 2002).

5. Needham J. Boddie, II, *et al.*, *A Review of Copyright and the Internet*, 20 *Campbell L. Rev.* 193, 272 (1998).

6. *Id.*

7. White, *supra* note 4.

8. *Id.*

9. *Id.*

10. *Id.* "The world wide web is a collection of hyperlinked pages of information distributed over the Internet via a protocol called http (hyper-text-transfer-protocol)."

11. *Id.*

to novice users and in 1993 its use exploded as people were allowed to 'dial-in' to the Internet using their connection to this (now huge) network."¹²

III. RECENT GROWTH OF THE INTERNET

Although the Internet has a short history, the growth and importance of the use of the Internet is nothing short of astounding. The following statistics demonstrate the importance of the Internet. According to the latest census from August 2000, forty million households, or fifty-one percent, had one or more computers.¹³ This is an increase of five hundred percent from 1984, the first time the Census reflected computer ownership.¹⁴ The Census also reported that forty-four million households, or more than two out of five households, have at least one member that uses the Internet.¹⁵ This is up twenty-six percent from 1998 and two hundred percent from 1997.¹⁶ A news release from the Census in September of 2001 indicates the use of the Internet is in no hurry to slow down, reporting nine out of ten school age children had access to a computer in 2000.¹⁷

IV. WHAT SURFERS ARE DOING ON THE INTERNET

The Census reported: "more home Internet users, both adults and children, sent or received e-mail in 2000 than did any other online activity."¹⁸ Of the total United States population, about one in three used e-mail from home in 2000.¹⁹ On-line research was the second most popular use of the Internet as of August 2000.²⁰ "Among adults, nearly one in five used the Internet at home to check the news, weather or sports. Nearly one in four adults used the Internet for other sorts of information searches, such as information about businesses, health practices, or government services."²¹ The report also found that "one adult in eight used the Internet to perform job-related tasks using a home Internet connection. Twenty-one percent of children used the

12. *Id.* Before the graphical interface was developed the only computers connected were at major universities and other large organizations that could connect to cables between one another to share data.

13. Newburger, *supra* note 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Internet to perform school-related tasks, such as research for assignments or taking courses on-line.”²²

V. COMPUTER DEFINITIONS: BBS, DOWNLOADING AND UPLOADING

Since this comment's focus is on the tort of copyright infringement on the Internet, the following definitions serve as a basis for some of the key terms.

A bulletin board system, or BBS, offers home computer owners a method for obtaining information from a central source by use of a modem.²³ Remote computers access the central service through telephone lines.²⁴ Files of information are stored in the central system, and subscribers may either “download” information into their home units, or “upload” information from their home units into the central files.²⁵ The owner of the service controls the terms by which remote computer owners will be able to access the system, and typically will control the conditions under which information may be downloaded or uploaded.²⁶

Essentially, whenever one uses the Internet they are visiting a BBS. BBS's provide electronic mail, chat rooms and Internet access to the World Wide Web.²⁷ Some familiar BBSs are America On-Line and CompuServe.²⁸

Uploading and downloading is what users commonly do while visiting a BBS on the Internet. When users visit a website and transfer an image from a bulletin board to their personal computers, they are downloading. When users transfer an image from their personal computer to a bulletin board, they are uploading.

VI. THE ABCs OF COPYRIGHT INFRINGEMENT

What is copyright infringement? This section should give the reader some guidance in understanding the basics of copyright infringement. Although there are many issues within these definitions, this section is only designed to serve as a basic guide to understanding the key elements of copyright infringement.

22. *Id.*

23. *Playboy Enter., Inc. v. Harbenburg, Inc.*, 982 F. Supp. 503, 505 (N.D. Ohio 1997).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

Basically, “[i]nfringement consists of the unauthorized exercise of one of the exclusive rights of the copyright holder.”²⁹ These rights of the copyright holder include “the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies to the public, and the right to publicly display the work.”³⁰

Today, copyrighted materials are protected by three theories of liability: direct, contributory and vicarious copyright infringement.³¹

A defendant is directly liable for copyright infringement if the plaintiff proves the following: ownership of a valid copyright of the work, infringement of the copyright, and that defendant copied the work.³² Direct infringement is a strict liability offense, of which intent or knowledge is not an element.³³ The innocence of the infringement is considered only in an award for damages.³⁴

The second theory of copyright liability is contributory infringement.³⁵ Though there is no statutory language defining contributory infringement, case law has consistently held that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”³⁶

Lastly, a defendant is liable for vicarious infringement when the defendant “(1) has the right and ability to control the infringer’s acts and (2) receives a direct financial benefit from the infringement.”³⁷ Unlike contributory infringement, there is no knowledge requirement for vicarious liability.³⁸

VII. LIABILITY OF BBS OPERATORS FOR COPYRIGHT INFRINGEMENT

The following cases address the liability of BBS operators on the theory of copyright infringement. These decisions show the courts’ struggle in defining clear guidelines for laws governing copyright infringement on the Internet.

29. *Religious Tech. Ctr. v. Netcom On-Line Communications Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Calif. 1995).

30. *Id.* (citing 17 U.S.C. §§ 106(1)-(3), (5)).

31. *Id.*

32. *Harbenburg*, 982 F. Supp. at 503.

33. *Religious Tech. Ctr.*, 907 F. Supp. at 1367.

34. *Id.*

35. *Id.*

36. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

37. *Religious Tech. Ctr.*, 907 F. Supp. at 1367.

38. *Id.*

In *Playboy Enterprises, Inc. v. Frena*, the defendant, George Frena, operated a subscription BBS that was accessible through any personal computer on the World Wide Web.³⁹ Among the features on Mr. Frena's sites were images of "adult content matter."⁴⁰ The attraction to Mr. Frena's subscribers was that they could easily upload and download the classy pictures found on his site.⁴¹ Unfortunately, for Mr. Frena, one of his subscribers uploaded onto his BBS one hundred seventy images that were copyrighted by Playboy Enterprises, Inc.⁴² Now the protected images were easily available to anyone who visited Mr. Frena's BBS.⁴³

Playboy Enterprises, Inc. was not as excited about the new one hundred seventy pictures that could be found on Mr. Frena's site as say, one of Mr. Frena's subscribers. In fact, Playboy Enterprises, Inc. was so unhappy that it brought suit for copyright infringement against Mr. Frena because of its protected images displayed on Frena's BBS.⁴⁴

Both before and during trial, Mr. Frena admitted that the one hundred seventy images were displayed on his BBS, and that he never gained consent from Playboy Enterprises, Inc., to display the images on his site.⁴⁵ However, Mr. Frena contended he never uploaded any of Playboy Enterprises' images, nor did he even know they had been posted on his web site.⁴⁶ Nonetheless, the court stated, "[t]here is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies [him]self."⁴⁷ The court ultimately held that Mr. Frena, even as a passive owner of BBS, was liable for direct copyright infringement.⁴⁸

The significance of *Playboy Enterprises, Inc. v. Frena* is its holding that passive BBS operators can be held liable for direct copyright infringement regardless of fault.⁴⁹ This should raise concerns with every BBS operator. Imagine setting up a webpage (maybe a little

39. *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

40. *Id.* at 1554.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* In Frena's affidavit he stated that he became aware for the first time of the photos when he was served with a summons.

47. *Id.* at 1156.

48. *Id.* Since Frena was found guilty for direct copyright infringement, there was no need to examine contributory or vicarious liability.

49. *Id.*

classier than Mr. Frena's site), like a nature gallery site. Then one day you get a knock on the door . . . and surprise! You've been subpoenaed because, unbeknownst to you, one of your users uploaded pictures from the National Geographic on to your website and now National Geographic is suing you for copyright infringement. Although this seems ridiculous, this hypothetical was based on the actual holding of *Playboy Enterprises, Inc. v. Frena*.⁵⁰

In a second Playboy case, *Playboy Enterprises, Inc. v. Webworld, Inc.*, the defendant operated an "adult-oriented" web page where subscribers could view, download, and upload images.⁵¹ The court cited *Frena's* strict liability application and found that the website operator was liable for direct copyright infringement for copying, displaying and reproducing Playboy's images.⁵² Although the court determined Webworld's liability based on a strict liability theory, the court noted that Webworld took affirmative steps in causing the copying and displaying of the pictures.⁵³ Nonetheless, in *Webworld* like in *Frena*, there was no showing of defendant's intent or knowledge that the pictures were going to be posted on his website.⁵⁴

A third Playboy case also discusses the liability of a BBS operator for copyright infringement.⁵⁵ In *Playboy Enterprises, Inc. v. Hardenburg, Inc.*, the defendants were held liable for both direct and contributory copyright infringement when four hundred twelve of Playboy's images were posted onto their website.⁵⁶ In holding the defendants liable for direct copyright infringement, the court again applied the strict liability standard.⁵⁷ However, unlike *Playboy Enterprises, Inc. v. Frena*, the court stated: "a finding of direct copyright infringement requires some element of direct action or participation."⁵⁸

50. *Id.*

51. 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd*, 168 F.3d 486 (1999).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Playboy Enterprises, Inc. v. Harbenburg, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997).

56. *Id.* at 505. The images on the website are commonly referred to as "GIFs." A GIF is created by scanning a photograph "to create a digital data that can be run through a computer."

57. *Id.* at 503.

58. *Id.* at 512. The court found that the defendant had an incentive-based system to upload pictures on to their website and that employees of the defendant screened images that were uploaded on the sight. This was enough for the court to take the defendants outside the category of passive BBS operators.

VIII. THE SEGA CASE

In *Sega Enterprises LTD v. Maphia*, hackers infringed upon plaintiffs' copyrighted software games by uploading and downloading the Sega Video games to various BBS sites.⁵⁹ Plaintiffs allegedly received an anonymous tip that Sherman, an operator of a BBS site called MAPHIA, was controlling a BBS which allowed its users to download unauthorized copies of Sega's video games.⁶⁰

Plaintiffs brought suit against multiple BBS defendants on theories of copyright infringement.⁶¹ The plaintiffs alleged defendants were liable for copyright infringement under the theories of direct, contributory, and vicarious liability theories.⁶² Like *Playboy Enterprises, Inc. v. Frena*, the court found plaintiffs did not show that defendant himself uploaded or downloaded the pirated Sega files or directly caused such uploading or downloading to occur.⁶³ The court stated, "the most Sega has shown is that Sherman operated his BBS, that he knew infringing activity was occurring, and that he solicited others to upload games."⁶⁴ The court held in order to establish direct copyright infringement Sega must show "that Sherman himself uploaded or downloaded the files, or directly caused such uploading or downloading to occur."⁶⁵ This statement seems to move direct copyright infringement further away from strict liability.

IX. THE NETCOM DECISION: STEERING AWAY FROM STRICT LIABILITY

Religious Technology Center v. Netcom On-Line Communications Services, Inc. departed even further from the application of strict liability exemplified in *Playboy v. Frena*.⁶⁶ The plaintiffs, Religious Technology Center and Bridge Publication, Inc., held copyrights in unpublished and published works of L. Ron Hubbard.⁶⁷ The court held that defendants were not liable for direct copyright infringement.⁶⁸ The court emphasized that neither defendant took any affirm-

59. *Sega Enterprises, Ltd. v. Maphia*, 948 F. Supp. 923 (N.D. Ca. 1996).

60. *Id.* at 927.

61. *Id.* at 923.

62. *Id.* at 931.

63. *Id.* at 932.

64. *Id.*

65. *Id.*

66. *Religious Tech. Ctr. v. Netcom On-Line Comm. Services, Inc.*, 907 F. Supp. 1361 (N.D. Ca. 1995).

67. *Id.* at 1365.

68. *Id.* at 1373.

ative steps to facilitate the copying.⁶⁹ The court stated: "it does not make sense to adopt a rule [of strict liability like that in *Frena*] that could lead to the liability of countless parties whose role in infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet."⁷⁰

After granting defendant's motions for summary judgment, the court then addressed whether the defendants could be held liable on the basis of contributory or vicarious liability.⁷¹ The court stated, "Netcom is not free from liability just because it did not directly infringe plaintiffs' works."⁷² On the issue of whether the defendants were liable for contributory infringement, the court denied Netcom's motion for summary judgment because there existed a material fact as to whether Netcom was aware of the infringing activity.⁷³ The court further stated "[w]here a defendant has knowledge of the primary infringer's infringing activities, it will be liable if it induces, causes or materially contributes to the infringing of the primary infringer."⁷⁴ The court found that failure to cancel the infringing message to stop the infringing copy from being distributed worldwide was substantial performance and would result in contributory infringement if the knowledge element was satisfied.⁷⁵ As for vicarious liability, the court found that Netcom may have had sufficient control over the subscriber's activities, but denied vicarious liability because it insisted that Netcom had to receive a financial incentive.⁷⁶

Although the copyright cases concerning the operation of a BBS seem to be properly moving away from strict liability, these cases demonstrate both the struggle and the need for more guidance in the law of the Internet.⁷⁷ Even though the liability of BBS operators has been discussed in many cases, there still remains uncertainty regarding when a BBS operator will be liable and under what theory. Obviously, the legislature needs to address these uncertainties. One possible answer has come with Congress' enactment of the Digital Millennium Copyright Act.⁷⁸ The role of the Digital Millennium Copy-

69. *Id.*

70. *Id.* at 1372.

71. *Id.* at 1373, 1375.

72. *Id.* at 1373.

73. *Id.* at 1375.

74. *Id.*

75. *Id.* at 1374.

76. *Id.* at 1377.

77. Although the cases do indeed show a trend of moving away from the strict liability found in *Playboy v. Frena*, *Frena* remains good law.

78. 17 U.S.C. §§ 1201-1202 (1998).

right and its effectiveness is the subject of the next part of this comment.

X. THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

President Clinton signed the DMCA into law in 1998.⁷⁹ This legislation addresses many areas of copyright law.⁸⁰ This section of the comment will focus particularly on Title I, the "WIPA Copyright and Performance and Phonograms Treatises Implementation Act of 1998."⁸¹

The language of Title I of the DMCA reads in part:

The DMCA prohibits the manufacture, import, offer to the public, or trafficking in any technology, product, service, device, component, or part thereof that:

(1) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a copyrighted work or 'protects a right of a copyright owner;'

(2) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under the Copyright Act; or

(3) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under the Copyright Act.⁸²

This is the anti-circumvention, or anti-trafficking section⁸³ that was enacted to go after the people who facilitate the copyright infringement on the Internet, rather than the infringers themselves.⁸⁴ Perhaps going after the infringers themselves could alleviate some of the uncertainty in enforcing Internet copyright infringement.⁸⁵ The following two cases apply the DMCA's anti-circumvention provision.

XI. *REALNETWORKS, INC. v. STREAMBOX, INC.*

The first application of the DMCA's anti-circumvention section came in the case of *RealNetworks, Inc. v. Streambox, Inc.*⁸⁶ Plaintiff,

79. *Id.*

80. *Id.*

81. *Id.*

82. 17 U.S.C. §§ 1201(b)(a) - (c) (1998).

83. *Universal Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

84. 17 U.S.C. §§ 1201-1202 (1998) (Prior to the DMCA the focus was on the infringers themselves).

85. *See Reimerdes*, 111 F. Supp. 2d 294.

86. *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. Lexis 1889 (W.D. Wa. 2000).

RealNetworks, is a company based in Seattle that develops and markets software products designed to enable owners of audio, video and other multimedia to send their contents to users of personal computers over the Internet.⁸⁷ RealNetworks offers products that allow users of personal computers to distribute, retrieve, and play digital audio and video over the Internet.⁸⁸ The system works as follows:

Owners of audio or video content may choose to use a RealNetworks product to encode their digital content into RealNetworks' format. Once encoded in that format, the media files are called Real Audio or Real Video (collectively "RealMedia") files. After a content owner has encoded its content into the RealMedia format, it may decide to use a "Real Server" to send that content to consumers. A RealServer is [a] software program that resides on a content owner's computer that holds RealMedia files and "serves" them to consumers through streaming. To download streaming content distributed by a RealServer, however, a consumer must employ a "RealPlayer." The RealPlayer is a software program that resides on an end-user's computer and must be used to access and play streaming RealMedia file that is sent from RealServer.⁸⁹

In order to protect its valuable software from copyright infringement, RealNetworks developed a number of security measures.⁹⁰ One security measure, "called the 'Secret Handshake' by RealNetworks, ensures that files hosted on a RealServer will only be sent to a RealPlayer. The Secret Handshake is an authentication sequence which only RealServers and RealPlayers know."⁹¹ The second security measure they developed was the "Copy Switch."⁹² It was designed so RealMedia files hosted on a RealServer are streamed only to RealPlayers.⁹³ "The Copy Switch is a piece of data in all RealMedia files that contains the content owner's preference regarding whether or not the stream may be copied by end-users. RealPlayers are designed to read this Copy Switch and obey the content owner's wishes."⁹⁴ Through these two security measures, RealNetworks attempted to prevent unauthorized copying.⁹⁵

87. *Id.*

88. *Id.*

89. *Id.* at 6.

90. *Id.*

91. *Id.* at 6.

92. *Id.*

93. *Id.*

94. *Id.* at 6.

95. *Id.*

Although RealNetworks' materials were protected by the Copy Switch and the Secret Handshake, the defendant, Streambox, Inc., created various methods to break through RealNetworks' security measures.⁹⁶ The first was the Streambox VCR which enabled end-users to access and download copies of RealMedia files that are streamed over the Internet.⁹⁷ "[T]he Streambox VCR is able to convince the Real-Server into thinking that the VCR is, in fact, a RealPlayer."⁹⁸ The VCR does not have a copy switch and allows end users to download the RealMedia files.⁹⁹ The court analogized the VCR to that of a "blackbox" which descrambles cable or pay-for-view so people can watch television for free.¹⁰⁰ The court also noted that blackboxes steal only access controls while the Streambox VCR steals copy protection measures as well.¹⁰¹

The second method Streambox created to thwart RealNetworks' security measures was the Streambox Ripper.¹⁰² Basically, the Ripper allows users to convert files that have already been created or gathered from one format to another.¹⁰³ Streambox argued the Ripper had legitimate uses, because it allows users to convert files on their hard drives from RealMedia format to other formats like .WAV and .MP3.¹⁰⁴ "In addition, content which is freely available, such as public domain material and material which users are invited and even encouraged to access and copy, may be converted by the Ripper into a different file format for listening at a location other than the user's computer."¹⁰⁵

RealNetworks sought an injunction to enjoin Streambox's use of the VCR and the Ripper.¹⁰⁶ RealNetworks alleged that Streambox violated the DMCA by distributing and marketing the VCR and the Ripper to thwart RealNetworks' copyrighted materials.¹⁰⁷

The court looked to the statutory language of the DMCA, specifically in parts 1201(a)(2) and 1201(b).¹⁰⁸ The court found that under the DMCA, "the Secret Handshake that must take place between a Real-

96. *Id.* at 10.

97. *Id.*

98. *Id.* at 11.

99. *Id.*

100. *Id.* at 11-12.

101. *Id.* at 12.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 14-15.

106. *Id.* at 15.

107. *Id.*

108. *Id.*

Server and a RealPlayer before the RealServer will begin streaming content to an end-user appears to constitute a 'technological measure' that 'effectively controls access' to copyrighted works."¹⁰⁹ RealNetworks' security measure was created for the sole purpose of prohibiting the use of a RealPlayer unless one had the Secret Handshake.¹¹⁰ Streambox VCR ultimately undermined the secret handshake and was in clear violation of the DMCA.¹¹¹ The court also held that "[i]n conjunction with the Secret Handshake, the Copy Switch is a 'technological measure' that effectively protects the right of a copyright owner to control the unauthorized copying of its work."¹¹² The court stressed the importance of the Copy Switch because it guarded RealNetworks' interest in not having its copyrighted materials reproduced and distributed.¹¹³ The court stated: "[u]nder the DMCA, a product or part thereof 'circumvents' protections afforded a technological measure by 'avoiding, bypassing, removing, deactivating or otherwise impairing' the operation of that technological measure."¹¹⁴ The court logically stated that given the possibility the VCR will circumvent protected materials, if it violated the statutory test then it would be prohibited.¹¹⁵ The court used the following test of the DMCA: "if the product or a part thereof: (i) is primarily designed to serve this function [of circumvention]; (ii) has only limited commercially significant purposes beyond the circumvention; or (iii) is marketed as a means of circumvention."¹¹⁶ The court enjoined the Streambox VCR because it met at least the first two provisions.¹¹⁷

The court denied the injunction of the Ripper, because unlike the VCR, the court found that it was unlikely to violate the anti-circumvention provisions of the DMCA.¹¹⁸ The court based this holding on two factors.¹¹⁹ First, the court found that the Ripper had other legitimate purposes.¹²⁰ Second, the court did not believe the RealMedia format

109. *Id.* at 18.

110. *Id.*

111. *Id.*

112. *Id.* at 19.

113. *Id.*

114. *Id.* at 19-20.

115. *Id.*

116. *Id.* at 20.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

was one that “constitute[d] a technological measure” that effectively prevented end users from making a copy.¹²¹

The *RealNetworks* decision is significant because it is the first time the DMCA was interpreted at the appellate level. It appears to be a straightforward case and one that seems to correspond well with Congress’s intent in enacting the DMCA.

XII. THE DVD CASE

The second application of the DMCA was in *Universal City Studios, Inc. v. Reimerdes*.¹²² The plaintiffs in this case are eight familiar, major motion picture studios that specialize in producing, manufacturing, and distributing copyrighted materials.¹²³ Typically, motion pictures are transferred onto DVDs after they appear in theaters. DVDs are a valuable aspect of the company and appear to be gaining both popularity and use in the home video world. To protect the copyright of the DVDs, the Content Scramble System or “CSS” was developed.¹²⁴ It has been described as follows:

Content Scramble System . . . is . . . an access control and copy prevention system for DVDs developed by the motion picture companies, including plaintiffs. It is an encryption-based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs.¹²⁵

The CSS system was used by nearly every DVD manufacturer and appeared to be a safeguard against copyright infringement.¹²⁶

However, in October of 1999, an individual or group discovered how to break the CSS security system.¹²⁷ The hackers began offering their discovery DeCSS software on the Internet.¹²⁸ The plaintiffs, acting under the DMCA,¹²⁹ immediately ordered the Internet providers offering the DeCSS software to remove the postings from their web

121. *Id.* at 28.

122. 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

123. *Id.*

124. *Id.*

125. *Id.* at 308.

126. *Id.*

127. *Id.*

128. *Id.*

129. 17 U.S.C. §§ 1201-1202 (1998). The plaintiffs acted under the anti-circumvention section of the DMCA. The court defined circumvent as “descrambling a scrambled work, decrypting an encrypted work, or ‘otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.’”

sites.¹³⁰ Subsequently, the plaintiffs moved for injunctive relief that was granted because the plaintiffs showed both irreparable harm if the defendants' actions were continued and a likelihood of success on the merits.¹³¹ Again, this case is a straightforward application of a well-constructed statute.¹³²

XIII. IS THE DMCA BAD LAW?

Much criticism of the DMCA has come from the arrest of Dmitry Skyarov, a Russian computer programmer who was arrested in July 2001 for copyright infringement based on a violation of the DMCA.¹³³ Skyarov was an employee of a software company called ELCOMSoft.¹³⁴ He helped develop a software program designed to disable security measures that protect the Adobe eBook Reader.¹³⁵ Skyarov's program was made available over the Internet and caused great concern to Adobe.¹³⁶ Subsequently, while visiting Las Vegas, Skyarov was arrested by the FBI.¹³⁷ Some commentators have criticized the DMCA by stating, "the same programs that can be used to pirate content commercially often have legal uses as well. It does not offend someone's copyright to make what is called 'fair use' of proprietary material—such as, for example, quoting passages from texts or playing snippets of music."¹³⁸ One editorial went on to argue, "[s]imply banning the dissemination of such programs, without reference to the purpose of the dissemination, inhibits the use of intellectual property far more broadly than does the copyright law itself." The thrust of the criticism is that the law does not look into the criminal intent of the programmers that create the infringing software.¹³⁹

130. See *Reimerdes*, 111 F. Supp. 2d 294.

131. *Id.*

132. Julie Hilden, *The First Amendment Issues Raised by The Troubling Prosecution of E-Book Hacker Dmitry Sklyro*, at <<http://writ.news.findlaw.com/hilden/20010810.html>> (last visited Mar.19, 2002).

133. *Jailed Under a Bad Law*, THE WASHINGTON POST, Aug. 21, 2001, available at <<http://www.washingtonpost.com/wp-dyn/articles/a38463-2001aug20.html>>.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See Amita Guha, *Fingered by the Movie Cop*, Aug. 23, 2001, available at <<http://www.salon.com/tech/feature/2001/08/23/pirate/index/html>>. This article states that an Internet service provider cut off a man's access to the Internet for a week because the Motion Picture Association of America had accused him of copyright infringement because someone had distributed their material with the same address as his protocol. The Internet Service Provider demanded a promise not to upload any

Although the DMCA may have a few problems, this criticism seems unfounded. It seems obvious that the defendants were hacking into the copyrighted works. A simple solution for these 'fair use' hackers would be to ask the manufacturers like Adobe if they could create a software program that would break their security measures. It seems to be common sense that one would think while creating a program that was designed to basically steal copyrighted work that there may be a problem.

The government has a strong interest in protecting copyrighted materials. What is the economic incentive to create a program that someone may break and then get away with by calling it a fair use? All of the defendants in *RealStream*, *Reimerdes*, and *Skylov* were clearly guilty of violating the anti-circumvention provisions of the DMCA. The language of the statute seems clear. If the courts allowed the fair use defense then the defendants could easily thwart Congress' intent in creating effective laws for the Internet. There is no doubt that more case law will need to be developed in the area of the DMCA, but according to the case law today, the law is effective.

XIV. CONCLUSION

There is no doubt the DMCA has alleviated some of the murky waters of copyright infringement on the Internet. Has it ended the controversy? Surely not. A case will inevitably come along where a defendant may have a better fair use defense than the defendants that have been found liable under the DMCA. However, today the statute does help alleviate some of the problems with the uncertainty of copyright infringement on the Internet. Congress should be applauded for taking a step in the right direction.

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copyrighted material in order to gain access to the Internet. The article argues that this incident "raises serious question about where our society is headed, as corporations whose intellectual property such as movies and popular music get ever more zealous with attempts to prevent unauthorized use."